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Editorial

As the last issue of 2009 is published, a new editorial team, comprising four co-editors, takes the helm of the *African Human Rights Law Journal.* Another change is that the Dean of the Faculty of Law at the University of Pretoria, Professor Christof Heyns, previously serving as co-editor, now chairs the international editorial advisory board. We trust that his appointment to this position will usher in an era of increased involvement of the advisory board in the activities of the *Journal*.

In this issue of the *Journal* a wide range of thematic concerns is covered. Two topics are particularly prominent: the AU and SADC Protocols on women's rights, and the death penalty.

Forere and Stone compare the SADC Protocol on Gender and Development (SADC Women's Protocol) to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). They answer the question as to whether these two treaties create duplications or whether they are mutually reinforcing and thus complementary. Departing from the current situation in which the 27 state parties to the African Women's Protocol have failed to fulfil their reporting obligations under the Protocol, a meeting was co-organised by the African Commission on Human and Peoples' Rights to discuss the need for reporting guidelines under the AU Protocol and to adopt a draft set of guidelines. Biegon anlyses the process that gave rise to the meeting and comments on the resulting draft guidelines.

Although some African states have abolished capital punishment and a number of them are *de facto* abolitionist, the death penalty remains on the statute books in the majority of African states. The potential role of the judiciary in the abolition process has been observed in South Africa. Landmark judicial decisions in two other countries, Tanzania and Uganda, are discussed in this issue.

The decision of the SADC Tribunal in the *Campbell* case, and the subsequent reaction thereto, represent a continuation of the *Journal's* engagement with human rights-related development in sub-regional economic communities in Africa. A few articles in this edition of the *Journal* cover themes not often given exposure in African scholarly writing, particularly those dealing with HIV experimentation and language rights.

The 46th session of the African Commission was held from 11 to 23 November 2009 at the seat of the Secretariat in Banjul, The Gambia. In the months preceding the session it was reported by the media that the Gambian President had threatened to cause harm to members of

civil society critical of his government. His remarks emanated from the criticism of the human rights situation in The Gambia by non-governmental organisations (NGOs), particularly in respect to freedom of expression. The judgment of the Court of Justice of the Economic Community of West African States (ECOWAS) in the case of *Manneh v The Gambia* provided fuel to the fire. In the *Manneh* case the ECOWAS Court found The Gambia responsible for the disappearance of Chief Manneh, a journalist, and ordered the government to investigate his disappearance and to ensure his release. Holding an extraordinary session in October 2009, the African Commission adopted a resolution calling on the AU to intervene to ensure the safety of the African Commission and members of civil society. The Resolution reads as follows:

RESOLUTION ON THE DETERIORATING HUMAN RIGHTS SITUATION IN THE REPUBLIC OF THE GAMBIA

The African Commission on Human and Peoples' Rights (African Commission), meeting at its 7th extraordinary session in Dakar, Senegal, from 5 to 11 October 2009;

Conscious that the African Charter on Human and Peoples' Rights guarantees the basic rights and freedoms enshrined therein, and confers the African Commission with the mandate to monitor, promote and protect human and peoples' rights on the continent;

Recalling its Resolution No. ACHPR/Res 13 (XVI)1994 adopted at its 16th ordinary session held in Banjul, The Gambia, from 25 October to 3 November 1994; Resolution No ACHPR/Res 17(VII) 1995 adopted at its 17th ordinary session held in Lome, Togo, from 13 to 22 March 1995, and Resolution No ACHPR/Res 134(XXXXIV)2008 adopted at its 44th ordinary session held in Abuja, Nigeria, from 10 to 24 November 2008; all of which relate to the human rights situation in the Republic of The Gambia;

Considering that the African Commission has on several occasions brought to the attention of the Government of the Republic of The Gambia, concerns on human rights violations in The Gambia, in particular the right to life and the right to freedom of expression. These concerns relate to the alleged murder, unlawful arrest and detention, harassment, intimidation, prosecutions and disappearances of journalists and human rights defenders deemed to be critical of the government;

Deeply concerned by allegations that on 21 September 2009, HE President Sheikh Professor Alhaji Dr Yahya AJJ Jammeh allegedly stated in a national television broadcast that he would kill anyone, especially human rights defenders and their supporters, whom he considered to be sabotaging or destabilising his government;

Considering that the alleged threats undermine the safety and security of members and staff of the African Commission, and human rights defenders who participate in the activities of the African Commission, including in the 46th ordinary session scheduled to take place from 11 to 25 November 2009 in Banjul, The Gambia, whose agenda will address the human rights situation in Africa;

Convinced that the alleged statement calls into question the commitment of the Republic of The Gambia to the fundamental principles and objectives of the Constitutive Act of the African Union, the African Charter and other regional and international human rights instruments;

Recalling that the Headquarters Agreement between the African Union and the Republic of The Gambia on the establishment of the Headquarters of the African Commission on Human and Peoples' Rights in The

Gambia guarantees the inviolability of the members and staff of the African Commission and participants in the activities organized by the African Commission:

(i) **CALLS** on the African Union to intervene with immediate effect to ensure that HE President Sheikh Professor Alhaji Dr Yahya AJJ Jammeh withdraws the threats made in his statement;

(ii) **FURTHER CALLS** on the African Union to ensure that the Republic of The Gambia guarantees the safety and security of the members and staff of the African Commission, human rights defenders, including journalists in The Gambia, and all participants in the activities of the African Commission taking place in The Gambia;

(iii) **REQUESTS** the African Union to authorise and provide extra-budgetary resources to the African Commission to ensure that the 46th ordinary session is convened and held in Addis Ababa, Ethiopia, or any other member state of the African Union, in the event that His Excellency the President of The Republic of The Gambia does not withdraw his threats and the government cannot guarantee the safety and security of the members and staff of the African Commission and the participants of the 46th ordinary session;

(iv) **REQUESTS** the African Union to consider relocating the Secretariat of the African Commission in the event that the human rights situation in the Republic of The Gambia does not improve;

(v) **URGES** the government of the Republic of The Gambia to implement the recommendations of its previous Resolutions, in particular, Resolution No ACHPR/Res 134(XXXXIV) 2008, adopted during the 44th ordinary session held in Abuja, Nigeria, from 10 to 24 November 2008, and to investigate the disappearance and/or killing of prominent journalists Deyda Hydara and Ebrima Chief Manneh.

It should be noted that the possible relocation of the seat of the African Commission was also raised. This is not an easy step to take as the decision to relocate the seat must be taken by the AU Assembly of Heads of State and Government. Notwithstanding this, in our view the matter should be thoroughly discussed in light of the continuing deterioration of the human rights situation in The Gambia.

We note the election of three members of the African Commission for six-year terms: Commissioner Mohamed Béchir Khalfallah (from Tunisia); Commissioner Mohammed Fayek (from Egypt); and Commissioner Zainabo Kayitesi (from Rwanda) who has already served a two-year term on the Commission in the place of a member who failed to serve his full term.

The publication of this issue of the *Journal* coincides with the 10th anniversary of the LLM (Human Rights and Democratisation in Africa). Since its inception in 2000 this programme has seen close on 300 students graduate. A dynamic network of graduates is working on human rights issues on the continent. The financial assistance of the Raoul Wallenberg Institute, Lund, Sweden, in ensuring the publication of additional copies of this issue and in realising the event is gratefully acknowledged.

The editors convey their appreciation to the following independent reviewers, who so generously assisted in ensuring the high quality of the *Journal*: Aderomola Adeola, Jean Allain, Gina Bekker, Danny Bradlow,

Pieter Cronje, Fernand de Varennes, Erika de Wet, Lilliana Trillo Diaz, Solomon Ebobrah, Babatunde Fagbayibo, Tarikua Getachew, Michelo Hansungule, Jacqui Gallinetti, Magnus Killander, Tshepo Madlingozi, Mtendeweka Mhango, Mmatsie Mooki, Jamil Mujuzi, Godfrey Musila, Charles Ngwena, Mwiza Nkhata, Dejo Olowu, Henry Onoria, Kate O'Regan, Edward Oyewo, Karen Stefiszyn, Mia Swart, Gus Waschefort and Adiam Woldeyohannes.

Errata

The editors have decided that *errata* to articles will in future be published in subsequent editorials.

Errata to Sisay Alemahu Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 273-293:

The published article failed to incorporate later additions by the author to the text on the judicial application of international human rights treaties ratified by Ethiopia (section 3.2) on pages 287 and 288. In explaining the contribution to the general trend of neglect by the non-publication of the full texts of the treaties in the official gazette of the country, the article refers to article 71(2) of the Ethiopian Constitution. According to article 71(2), the President of the country must proclaim international agreements approved by the House of Peoples' Representatives in the Negarit Gazeta. Proclamations stating that a certain international treaty is ratified have accordingly been issued. However, these proclamations do not reproduce the full text of the treaties and, significantly, there is no such proclamation with respect to a number of international human rights treaties, including ICESCR and ICCPR, for which ratification instruments have been deposited between 1991 and 1994. The author argues that article 71(2) of the Constitution applies to treaties ratified after 1995 (the year the Constitution entered into force) and that the Presidential proclamation is a formality that does not affect the applicability and implementation of the treaties in question. In support of the latter argument, the author uses by way of analogy article 57 of the Ethiopian Constitution, which provides that if the nation's President fails to sign a law passed by parliament (and submitted for signature as required by the same article) within 15 days, that law will take effect without his signature. Failure to publish a ratified treaty in the official gazette, it is argued, would have the same effect. The argument that article 71(2) is a formal requirement that does not affect the application of treaties not published in the official gazette is made in support of the position that ratified treaties may be applied by federal courts irrespective of the publication of their full text in the Negarit Gazeta. The requirement of article 2 of the Federal Negarit Gazeta Establishment Proclamation that all laws of the federal government must be published in the gazette and that laws so published will be taken judicial notice of applies to 'federal laws' and not to ratified treaties, which are different.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Prosecuting sexual violence in the Eastern Democratic Republic of Congo: Obstacles for survivors on the road to justice

*Joanna Mansfield**
Pro Bono Lawyer, DLA Phillips Fox, Sydney, Australia

Summary

Sexual violence in eastern Democratic Republic of the Congo (Eastern DRC) has been described as the worst in the world. Despite the introduction of forceful legislative amendments to reduce the violence, the scourge of sexual violence still plagues Eastern DRC. Given that the Congolese state prosecutes very few cases, the paper identifies and explains the obstacles victims face when seeking the prosecution of sexual violence perpetrators in Eastern DRC. Based on interviews conducted in Eastern DRC with various vocational and demographic groups from May to August 2008, the paper reveals the magnitude of sociological, institutional, financial and legal factors hindering the prosecution of sexual offenders. The paper argues that the successful prosecution of sexual offenders in Eastern DRC faces a myriad of obstacles and requires an exceptionally lucky combination of a number of unlikely conditions. To overcome these obstacles, strategists must concentrate on what underlies the sexual violence, namely, insecurity in Eastern DRC, as well as strengthening the capacity of the judicial sector.

1 Introduction

In Eastern Democratic Republic of Congo (DRC), sexual violence is used as an instrument of war, as part of a pattern to destroy 'the spirit, the

* LLB (Hons) (Technology, Sydney); Joanna.obbink@gmail.com. This paper is based on the personal observations and interviews that Joanna Mansfield (née Obbink) conducted as a field researcher in North Kivu and South Kivu in the Democratic Republic of the Congo (DRC). The views expressed here are my own and in no way represent the views of DLA Phillips Fox.

will to live, and life itself'.[1] The violence is systematic and widespread against women and children and perpetrated by armed groups, and increasingly also by civilians. According to a Congolese gynaecologist, Dr Denis Mukwege, 'the word "rape" or "sexual violence" cannot fully translate the horror that hundreds of thousands of women are living with in this part of the world'.[2] His clinic treats rape victims in South Kivu, Panzi Hospital and receives ten new patients every day.[3] In some villages, 90% of the women are survivors of sexual violence by armed men.[4]

The present research paper starts from the proposition that the prosecution of sexual offences should contribute to the reduction of these offences. However, given that, in practice, the Congolese justice system prosecutes only very few cases, the paper identifies and explains the obstacles to the successful and effective prosecution of sexual offenders in Eastern DRC. Based on interviews conducted in Eastern DRC with members (respondents) of a cross-section of vocational and demographic groups within Congolese communities from May to August 2008, the paper reveals the many sociological, institutional, financial and legal factors which hinder the criminal prosecution of sexual violence. The paper shows that the successful prosecution of sexual offences in Eastern DRC necessitates an exceptionally lucky combination of a number of unlikely conditions, which, together, are capable of overcoming the obstacles to prosecutorial action. The paper argues that the most sensible strategy to treat the obstacles to prosecution of sexual offences is to concentrate on the catalyst of most of these obstacles, namely, the insecurity that exists in Eastern DRC. The greatest obstacle to the successful and effective prosecution of sexual offenders is the instability and insecurity in the Great Lakes region of which Eastern DRC is a part.[5] Despite recent joint military operations conducted in the first half of 2009, carried out with Ugandan and Rwandan armies, the Congolese state continues to experience instability, and the security situation remains volatile.[6] Once this insecurity is

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1 *Prosecutor v Akayesu* Case ICTR 96-4-T, judgment 732 (2 September 1998).

2 'Rape as a weapon of war: Accountability for sexual violence in conflict: Hearing before the S Comm on the Judiciary' 110th Cong (2008) (statement of Dr Denis Mukwege, Director, Panzi General Referral Hospital, Bukavu, South Kivu, DRC).

3 'DR Congo doctor is ''top African''' *BBC News* 14 January 2009 http://news.bbc.co.uk/2/hi/africa/7828027.stm (accessed 20 September 2009).

4 'War against women: The use of rape as a weapon in Congo's civil war' *CBS 60 Minute* 17 August 2008).

5 Human Rights Watch 'Renewed crisis in North Kivu' 25 (Human Rights Watch 2007), stating that sexual violence is a regular crime found in situations of armed conflicts in Eastern DRC).

6 MONUC *Twenty-eighth report on the United Nations Organisation Mission in the Democratic Republic of the Congo*, S/2009/335 30 June 2009; IRIN (UN Office for the Co-ordination of Humanitarian Affairs) 'DRC: MONUC sticks to its guns' *Analysis* 22 June 2009 http://www.irinnews.org/report.aspx?ReportID=84943 (accessed 20 September 2009); 'Congo: Fighting Erupts in the East' *New York Times* 19 June 2009 http://www.nytimes.com/2009/06/20/world/africa/20briefs-Congobrf.html?_

addressed, the state will be in a more viable position to strengthen its judicial sector and overcome obstacles to the effective and successful prosecution of rapists in Eastern DRC.

1.1 Terminology

The general terms 'victim', 'survivor' and 'complainant' are used interchangeably in the paper to refer to someone who has suffered sexual violence. Although both men and women experience sexual violence in Eastern DRC,[7] statistics indicate that the overwhelming majority of sexual violence is committed on women and girls by men.[8] For this reason the paper refers to the perpetrators or rapists in the masculine.

'Prosecution' refers to the criminal proceedings that the state institutes against a person who has violated criminal law. In Congolese criminal procedure, violations of criminal law may constitute a civil wrong, which entitles people aggrieved by the infraction (plaintiffs), such as rape victims, to bring claims for damages. A plaintiff can either introduce a civil claim into criminal proceedings or file a separate claim before a civil court independently from criminal proceedings.

In circumstances such as those prevailing in Eastern DRC, the prosecution of sexual violence serves a number of legitimate purposes. Prosecution aims to vindicate victims' rights, avenge offences, inculcate moral values into offenders, prevent further sexual crimes and deter potential sexual offenders, put an end to the culture of impunity, promote the rule of law and stabilise the community.[9]

The definition of sexual violence is taken from that provided by Gay McDougall, who defined sexual violence as meaning 'any violence, physical or psychological, carried out through sexual means or by targeting sexuality', thus including 'both physical and psychological

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r=3&partner=rss&emc= rss (accessed 20 September 2009); 'In pictures: Congo civilians easy prey' *BBC News* 15 June 2009 http://news.bbc.co.uk/2/hi/africa/8100850.stm (accessed 20 September 2009); MONUC 'Security In Eastern DR Congo Province "rapidly deteriorating"' 9 March 2009 http://www.monuc.org/news.aspx?newsID=20200 (accessed 20 September 2009).

7 'Bunia: 66 hommes ont été violés de décembre 2007 à mai 2008', *Radio Okapi* 14 August 2008 http://www.radiookapi.net/index.php?i=53&l=19&c=0&a=19949&da=&hi=0&of=8&s=&m=2&k=0&r=all&sc=19&id_a=0&ar=0&br=qst (accessed 20 September 2009), reporting that female government soldiers had raped 66 men between December 2007 and May 2008 in Bunia, the capital city of the Ituri province in Eastern DRC.

8 Figures indicate that around 99% of victims of recorded rapes are women: United Nations Population Fund 'Données VAS Compilées du Volet Judiciaire Premier Semestre 2008'; United Nations Population Fund 'Fiche de Rapportage SGBV: Volet Medico-Sanitaire Premier Trimestre 2008'.

9 See GE Dix & MM Sharlot *Criminal law: Cases and materials* (2002) 48; International Parliamentary Expert Mission Addressing Impunity for Sexual Crimes in the Democratic Republic of Congo (26 April-3 May 2008), organised by the Swedish Foundation for Human Rights in collaboration with the All-Party Parliamentary Group on the Great Lakes Region of Africa 18.

attacks directed at a person's sexual characteristics'.[10] Sexual violence takes many forms, including rape, and can be committed by civilians or armed individuals during peace time or during armed conflict.

Armed groups in Eastern DRC rape women in a systematic and methodical manner. Dr Denis Mukwege testified that[11]

> [g]enerally the victims are raped by several men at a time. One after another. In public, in front of parents, husbands, children or neighbours. Rape is followed by mutilations or other corporal torture.

The rate at which sexual violence occurs in countries experiencing armed conflict rather than countries experiencing peace is higher. Rape is employed by military forces to destabilise, humiliate and degrade a population. However, due to the pervasive and destructive effects of conflict, rape is committed by both armed groups and civilians. Sexual violence, previously used as a weapon of war, has become indiscriminate during the ongoing conflict in Eastern DRC. There has been an increase in all forms of sexual violence, and the International Crisis Group reported that 'there has been a profound degree of normalisation of violence against women that endangers the basic foundations of social relations in the province'.[12] In this context, the paper understands 'sexual violence' as referring to 'rape as a weapon of war' committed by armed groups, as well as sexual violence perpetrated by civilians.

2 Eastern DRC: A historical background

The legacies of the 1994 genocide in Rwanda, the illegal trade of minerals in Eastern DRC,[13] the fragility of the Congolese state and attacks by the Ugandan terrorist organisation, the Lord's Resistance Army (LRA), are the main contributors to insecurity in the Great Lakes region. The epicentres of the regional insecurity and sexual violence are the eastern provinces of North and South Kivu.

2.1 The repercussions of the 1994 Rwanda genocide in Eastern DRC

The 1994 genocide of Tutsis in Rwanda boiled over to the DRC when the Hutus, who perpetrated the genocide, flooded refugee camps in

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10 Final report submitted by Ms Gay J McDougall, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Systematic rape, sexual slavery and slavery-like practices during armed conflict', E/CN 4/Sub 2/1998/13, 21–22.

11 n 3 above.

12 International Crisis Group 'Congo: Five priorities for a peacebuilding strategy' *(Africa Report 150)* 2009 5.

13 Mahmoud Kassem *Rapport du Groupe d'Experts sur l'Exploitation Illégale des Ressources Naturelles et Autres Richesses de la République Démocratique du Congo*, delivered to the Security Council, UNDoc S/2003/1027 (23 October 2003).

Eastern DRC. Their presence started a civil war in August 1996 which involved many neighbouring countries.[14] The conflict led to massive human rights violations, killings and rapes of girls and women.

Despite peace agreements signed in 2002 and 2008, insecurity and conflict remain.[15]

2.2 The illegal trade of mineral resources in Eastern DRC

The illegal exploitation of mineral resources in North Kivu has provided a fertile ground for a myriad of militias to flourish in Eastern DRC. For some armed groups, the mineral wealth has been fortuitous, a way to sustain themselves while they pursue their political agenda; for others, the goal all along has been to plunder.[16]

Congo's mineral wealth, coupled with its weak border controls,[17] has seduced several armed groups, including the Congolese army (*Forces Armées de la République Démocratique du Congo* or FARDC) and a few United Nations (UN) peacekeepers,[18] to loot its natural resources. Millions of dollars generated from the illegal trade of minerals, such as gold, diamonds, cassiterite (tin ore) and coltan, have enabled many of these armed groups to become self-financing and self-sustaining.[19] It is estimated that 80% of the world's reserves of coltan are found in Eastern DRC.[20]

In 2004, when world demand escalated, cassiterite (tin ore) replaced coltan as one of the most sought-after resources in DRC.[21] DRC produces an estimated 6% to 8% of the world's tin ore, making it the sixth

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14 See H Ngbanda *Crimes Organisés en Afrique Centrale: Révélations sur les Réseaux Rwandais et Occidentaux* (2004), explaining how complex networks of multinational corporations, heads of state and individuals exploited mineral resources and destabilised Eastern DRC.

15 M Tran 'Angolan troops "reinforcing Congo army against rebels"' *Guardian* 7 November 2008 http://www.guardian.co.uk/world/2008/nov/07/congo-angola-support (accessed 20 September 2009).

16 E Pasha *Minerals are the problem, but can they be the solution?* (2009).

17 International Crisis Group *Security reform in the Congo* (2006) 1.

18 See R Crilly 'UN peacekeepers "traded gold, ivory and guns with Congo rebels"' *Times Online*, 28 April 2008 http://www.timesonline.co.uk/tol/news/world/africa/article3834034.ece (accessed 20 September 2009).

19 Chairperson of the Group of Experts, *Report of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo*, delivered to the Security Council, UN Doc S/2008/773 (12 December 2008) 73.

20 C Sourt 'The Congo's blood metals' *Guardian* (UK) 25 December 2008 http://www.guardian.co.uk/commentisfree/2008/dec/25/congo-coltan (noting, however, that estimations suggest that only 1% of the coltan sold on the open market is from DRC).

21 S Sackur 'Mining a mint in Eastern Congo' *BBC Africa* (UK) 2 May 2009 http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/8027367.stm (accessed 20 September 2009).

largest producer.[22] According to *Global Witness*, 'much of the fighting that is still occurring in the east of the country is driven by the desire to control natural resources'.[23] Available evidence reveals that resource-based civil wars often result in higher levels of violence and civilian casualties.[24] Thus, after two civil wars, in August 1996 and August 1998, and more than five million people dead, the Congo is reeling from the worst humanitarian crisis since World War II.[25] Rape is an instrument of terror as armed groups attempt to exercise control over a mine or the transport and taxation of minerals. The Enough Project, an advocacy organisation, concludes that the 'deadly nexus between the worst violence against women in the world and the purchase of electronics products containing conflict minerals from the Congo is direct and undeniable'.[26]

2.3 The fragility of the state in DRC

The army is unable to protect the country's borders from invasion and women from sexual violence in North Kivu. Since 1996, cohorts of armed groups, including the *Forces Démocratiques pour la Libération du Rwanda* (FDLR), a Rwandan rebel group who participated in the 1994 Rwandan genocide, have been opposing the authority of the Congolese state.

On 6 August 1999, the UN Security Council established a peacekeeping mission in the Congo known by its French acronym, MONUC,[27] which assists the state in monitoring peace, protecting civilians and attempting to achieve security in the region.[28] With more than 17 000 troops and an annual budget in excess of one billion US dollars,[29] MONUC is the world's largest and most expensive UN peacekeeping operation. Yet, deployed in a country roughly the size of Western Europe, MONUC is under-resourced, under-budgeted and overstretched. In order to increase the protection of civilians, the UN Security Council authorised 3 000 additional peacekeepers in November 2008. However, more than one year later, they have still not arrived in Eastern

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22 Enough Project *A comprehensive approach to Congo's conflict minerals* (2009) 2.

23 'Global witness: Under-mining peace' *A Report by Global Witness,* June 2005 3.

24 JM Weinstein *Inside rebellion: The politics of insurgent violence* (2007) 7.

25 See International Rescue Committee *Mortality in the Democratic Republic of Congo: An ongoing crisis* (2007).

26 Enough Project John Prendergast *Can you hear Congo now? Cell phones, conflict minerals, and the worst sexual violence in the world* (2009) 8.

27 SC Res 1258, UN Doc S/RES/1258 (6 August 1999).

28 See United Nations Security Council Resolution 1856 (2008) of 22 December 2008.

29 United Nations Missions in DR Congo (MONUC), Budget, http://www.monuc.org/News.aspx? newsID=11533&menuOpened=About%20MONUC (accessed 9 September 2008). The budget for the period from 1 July 2005 to 30 June 2006 was 1 133 672 200. Donor countries, such as the US, Japan and Germany, primarily finance MONUC's budget.

DRC, despite promises from Council members that they would urge a rapid deployment. Helicopters and intelligence support, desperately needed by MONUC, have also not materialised.[30]

2.4 Joint military operations against rebels

In view of the fact that the government and MONUC have been unable to stop armed violence in Eastern DRC, the government in the opening weeks of 2009 invited the Ugandan and South Sudanese armies, and later the Rwandan army, to help quash the Ugandan LRA and the Rwandan Hutu FDLR rebels.

The Rwandan-Congolese military operations, called *umoja wetu* (our unity), aimed to flush out Rwandan Hutu rebels. During this time, the Rwandan authorities arrested Nkunda, and are detaining him pending his possible extradition to the Congolese authorities.[31] During a rapid integration process, at least 12 000 combatants from the CNDP and other rebel groups who agreed to join the military operations were integrated into the Congolese army.[32] Operation *umoja wetu* ended in late February, when Rwandan soldiers left Eastern DRC following an agreement that the Congolese army would continue military operations against the Rwandan militias with support from MONUC. This second phase, known as Kimia II, began in North Kivu in mid-April and expanded the military operations to the South Kivu province.[33]

These operations offer the opportunity to extend the control of the state to ensure lasting peace in the region. Peace is a necessary prerequisite to reduce the rate of sexual violence, as a high concentration of armed men is usually 'directly related to a high frequency of rights violations, including ... sexual violence'.[34] Military operations may increase the safety of the local population and, in so doing, protect women and girls from sexual violence, and ensure that sexual offenders account for their crimes.

However, although the Rwandan-Congolese military operations have allowed the Congolese state to extend its authority to more areas

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30 Human Rights Watch 'DR Congo: 100 000 civilians at risk of attack' 29 April 2009 http://www.hrw.org/en/news/2009/04/29/dr-congo-100000-civilians-risk-attack (accessed 20 September 2009).

31 'Rwandan forces complete pull-out after joint operation' 26 February 2009 http://www.france24.com/en/20090226-rwanda-begins-dr-congo-pull-out-after-joint-operation-hutu-rebels-retaliation (accessed 20 September 2009).

32 Human Rights Watch 'DR Congo: Hold army to account for war crimes' (HRW Press Release) 19 May 2009 http://www.hrw.org/en/news/2009/05/19/dr-congo-hold-army-account-war-crimes (accessed 20 September 2009).

33 As above.

34 IRIN (UN Office for the Co-ordination of Humanitarian Affairs) 'DRC: Waiting for militias to leave the Kivus' 12 March 2009 http://www.irinnews.org/report.aspx?ReportID=83418 (accessed 20 September 2009).

in Eastern DRC,[35] it is widely reported that the operations so far have done little to remove the threat posed by the rebels, who have taken back much of their old ground since the February pull-out.[36] The long-term military gains of these operations, if any, are still unclear.

Regardless of any military achievements, it is nevertheless clear that the joint military operations have had a devastating impact on the civilian population to date. Despite expanded state presence, the humanitarian situation has deteriorated.[37] It is widely reported that the security in Eastern DRC worsened after the launch of the joint military operations,[38] when the FDLR militias committed brutal 'reprisal' attacks in North and South Kivu, deliberately attacking and killing civilians.[39] In addition, the rapid and unstructured integration process is not boding well, with disturbing reports that the 'ramshackle' Congolese army has also been targeting civilians whom it is intended to protect.[40] This is not surprising, given the lack of discipline, training and logistical support within the Congolese ranks.[41] In June 2009, the spokesman for the UN said that Congolese soldiers had not been paid for six months and that the UN was feeding 20 000 of them every day.[42] In this context, civilians continue to be easy prey for armed groups.[43]

In conjunction with military operations, there has been a marked increase in the occurrence of sexual violence in North and South Kivu. As with previous processes of armed group integrations, the number of rapes and other human rights abuses since the rebels were integrated has increased.[44]

It was reported in June 2009 that rape cases in South Kivu were soaring.[45] An increase in the number of sexual violence cases have been reported in the territories of South Kivu where soldiers had been deployed. The soldiers engage in looting and rape during

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35 M Doyle 'DR Congo outsources its military' *BBC News* 27 February 2009 http://news.bbc.co.uk/2/hi/africa/7910081.stm (accessed 20 September 2009).

36 *BBC News* (n 6 above); IRIN (n 6 above).

37 MONUC (n 6 above) 1.

38 See '"Dozens killed'' in DR Congo raids' *BBC News* 13 May 2009 http://news.bbc.co.uk/2/hi/africa/8049105.stm (accessed 20 September 2009); MONUC (n 6 above).

39 Human Rights Watch reported that in early May, around 60 civilians were killed and many others wounded in Walikale territory. Human Rights Watch (n 32 above).

40 As above; IRIN (n 6 above); MONUC (n 6 above) 3.

41 International Parliamentary-Expert Mission (n 9 above); Guardian.co.uk 'Congo army rapes, robs and kills civilians, UN told' *Associated Press* 18 May 2009 http://www.guardian.co.uk/world/2009/may/18/congo-army-rape-civilians-monuc (accessed 20 September 2009).

42 'Mutinous Congo troops fire at UN' *BBC News* 17 June 2009 http://news.bbc.co.uk/2/hi/africa/8104984.stm (accessed 20 September 2009); Guardian.co.uk (n 41 above).

43 As above.

44 Human Rights Watch (n 32 above).

45 *BBC News* (n 6 above).

their foot patrols and are contributing to a new wave of population displacement.[46]

3 Congolese laws against sexual violence

3.1 Constitutional provisions

To combat gender-based and sexual violence against women, the Congolese government has enacted a number of legal provisions. Article 14 of the Constitution expressly enjoins the state to fight all forms of sexual violence against women.[47] Article 15 of the Constitution defines sexual violence as a crime against humanity.[48] Finally, article 16 protects physical integrity and forbids cruel, inhuman or degrading treatment.[49]

3.2 National legislation

In response to the large-scale perpetration of sexual violence in Eastern DRC, the Congolese Parliament amended the 1940 Penal Code and the 1959 Penal Procedure Code (2006 Amendments) in July 2006.[50] Parliament enacted these amendments to combat sexual violence, 'a new widespread form of criminality, often justified by economic, social and political interests'.[51]

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46 IRIN (UN Office for the Co-ordination of Humanitarian Affairs) 'DRC: Attacks against civilians and aid workers increase in the east' 22 May 2009 http://www.irinnews.org/report.aspx?ReportID=84506 (accessed 20 September 2009).

47 '*Les pouvoirs publics veillent à l'élimination de toute forme de discrimination à l'égard de la femme et d'assurer la protection et la promotion de ses droits. Ils prennent dans tous les domaines, notamment dans les domaines civil, politique, économique, social et culturel, toutes les mesures appropriées pour assurer le total épanouissement et la pleine participation de la femme au développement de la nation. Ils prennent des mesures pour lutter contre toute forme de violences faites à la femme dans la vie publique et dans la vie privée.*'

48 '*Les pouvoirs publics veillent à l'élimination des violences sexuelles utilises comme arme de déstabilisation ou de dislocation de la famille. Sans préjudice des traités et accords internationaux, toute violence sexuelle faite sur toute personne, dans l'intention de déstabiliser, de disloquer une famille et de faire disparaître tout un people est érigée en crime contre l'humanité puni par la loi.*'

49 '*La personne humaine est sacrée. L'Etat a l'obligation de la respecter et de la protéger. Toute personne a droit à la vie, à l'intégrité physique ainsi qu'au libre développement de sa personnalité dans le respect de la loi, de l'ordre public, du droit d'autrui et des bonnes mœurs ... Nul ne peut être soumis à un traitement cruel, inhumain ou dégradant.*'

50 Loi 06/018 of 20 July 2006, supplemented by Loi 06/019 of 20 July 2006, modifying and amplifying the Décret of 6 August 1959 concerning the code of penal procedure (2006 Amendments).

51 2006 Amendments, '*exposé des motifs*'. Author's own translation. The original French version reads: *'une nouvelle forme de criminalité à grande échelle justifiée le plus souvent par des intérêts d'ordre économique, social et politique'*.

The amended article 170 of the Penal Code describes and criminalises various forms of rape.[52] In addition to rape, the 2006 Amendments introduced new forms of sexual violence not formerly criminalised into Congolese law.[53] Article 2 lays out the punishment of rape: five to 20 years' imprisonment as well as damages.

Another piece of national legislation are the military codes,[54] relevant when armed perpetrators carry out sexual violence. Title V of the Congolese Military Penal Code provides for genocide, war crimes and crimes against humanity. Article 169 of the Military Penal Code lists rape, sexual slavery and other forms of sexual violence as crimes against humanity punishable, on conviction, by the death penalty.

However, it is worth noting that gender parity has not yet been reflected in all laws governing the status of women. For example, a married woman is still considered to be a minor in the eyes of the law.[55]

3.3 International law

International law is also applicable to the prosecution of sexual offences in the DRC. The legal relevance of regional and international law resides in the fact that regional and international law, by virtue of article 215 of the Congolese Constitution, supersedes municipal law.

It thus appears from the above analysis of the laws relating to sexual violence that an arsenal of legal provisions to combat sexual violence exists through constitutional, criminal, military and international statutes. However, the incidence of rape remains high and prosecutions disproportionately few.

4 Prosecution of sexual violence in Eastern DRC

4.1 Sexual violence and prosecution: The statistics

The official end of the Congolese war in 2003 did not result in a corresponding end of rapes. Armed conflicts and their attendant sexual violence, looting and killings have not ceased in Eastern DRC. While exact numbers are impossible to come by, there is no doubt that rape continues to be a problem in Eastern DRC. Of the total 87 respondents

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52 1940 *Code Pénal*; 2006 Amendments para 2 2.

53 2006 Amendments para 3 1-14, namely the sexual exploitation of minors, acting as a pimp, forced prostitution, sexual harassment, sexual slavery, forced marriage, sexual mutilation, zoophilia, the deliberate transmission of incurable sexually transmitted diseases, child trafficking, forced pregnancy, forced sterilisation, child pornography and child prostitution.

54 *Loi* 023/2002 of 18 November 2002 Portant code judiciaire militaire (Military Code) and Loi 024/2002 of 18 November 2002 Portant Code Penal Militaire (Military Penal Code).

55 Family Code, arts 448 & 450.

who were asked whether sexual violence was a problem in the region, every single respondent replied in the affirmative. In October 2006, the UN Under-Secretary-General for Peacekeeping reported that over 12 000 rapes of women and girls had been reported in the preceding six months in Eastern DRC (North and South Kivu).[56]

MONUC reported in 2009 that around 1 100 rapes were reported each month, with the majority of these being in North and South Kivu.[57] A census of the United Nations Children's Fund (UNICEF) and related medical centres reported treatment of 18 505 persons for sexual violence in the first ten months of 2008 in Eastern DRC.[58] The Congo Advocacy Coalition, a coalition of local and international non-governmental organisations (NGOs), states that over 2 200 cases were registered in June 2008 alone in the province of North Kivu.[59] One local NGO in North Kivu treated almost 3 000 victims of sexual violence in 2007.[60] In South Kivu, 4 500 new cases were recorded in the first six months of 2007.[61] In South Kivu, between January and September 2007, Bukavu's Panzi Hospital registered 2 773 rapes, 2 447 of which were attributed to the FDLR.[62] A group of FDLR deserters, mixed with Congolese militia called Rasta, was identified as primarily responsible for the pattern of rape and genital mutilation against Congolese women.[63]

Given difficulties in obtaining statistics in this area — due to the manner in which victims tend to hide sexual violence as well as poor reporting mechanisms — reported cases represent only a small number of total rapes committed, and are in no way conclusive.[64] However,

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56 Statement by United Nations Under-Secretary-General for Peacekeeping, Jean-Marie Guéhenno (2006).

57 MONUC *Twenty-seventh report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo* S/2009/160 27 March 2009 14.

58 International Crisis Group (n 12 above) 4.

59 Congo Advocacy Coalition *Update on protection of civilians in Eastern Congo's peace process* (2008) 2. North Kivu contains an estimated 40% of the total sexual offence cases of the entire Congo: *Initiative conjointe de prévention des violences sexuelles et de réponses aux droits et besoins des victimes/survivant(e)s, Situation des violences sexuelles au Nord Kivu. Période : Premier semestre 2008 (Rapport préliminaire)* (2008) 4.

60 Heal Africa *Guéris Mon Peuple Deuxième Rapport (janvier–décembre 2007) Assistance Médicale, Psychosociale et Economique pour les Survivants des Violences Sexuelles au Nord Kivu, RD Congo* (2007) 4.

61 Y Ertürk *Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Addendum: Mission to the Democratic Republic of the Congo* (2008) 17.

62 IRIN (UN Office for the Co-ordination of Humanitarian Affairs) 'DRC: Rape cases soar in South Kivu' 3 June 2009 http://www.irinnews.org/report.aspx?ReportID=84685 (accessed 20 September 2009).

63 International Crisis Group (n 12 above) 5.

64 n 9 above.

they are useful in giving a conservative statistical indication of the wide scope of the under-prosecution of sexual offences.

4.1.1 Identity of victims and perpetrators

According to MONUC, 81% of cases of sexual violence are committed by armed perpetrators such as members of armed groups.[65] The medical/psychological sector of UNFPA reports that only 10% of victims are minors, and only 10% of perpetrators are civilians.[66] These figures align roughly with individual numbers provided by Joint Initiative and Heal Africa that show that around 30% of victims are minors, and 20-34% of perpetrators are civilians.[67] A UNFPA-commissioned assessment also indicates that, while the proportion of civilian perpetrators is rising, the majority of rapes continue to be carried out by armed perpetrators.[68] Therefore, armed men or men in uniform perpetrate the majority of rapes against adult women.

4.1.2 Representation of victims and perpetrators in courts

According to the Joint Initiative of Prevention of Sexual Violence and Response of Rights and Needs of Victims/Survivors (Joint Initiative), of the reported 2 288 cases, only 152 cases — representing 7% of perpetrators — were referred to a tribunal.[69] This figure represents a very small percentage of all perpetrators of sexual violence, when it is recalled that many instances of sexual violence are not reported.

Data from the United Nations Population Fund (UNFPA) shows that only 44 civil and 10 military decisions on sexual offences were passed down during the first quarter of 2008 for the entire South Kivu province, a region with hundreds of thousands of inhabitants.[70] These figures correlate with this paper's field research experience in

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65 MONUC (n 57 above) 14.

66 United Nations Population Fund, Fiche de Rapportage SGBV: Volet Medico-Sanitaire Premier Trimestre 2008.

67 Heal Africa (n 60 above).

68 n 9 above, 14.

69 *Initiative conjointe de prévention des violences sexuelles et de réponses aux droits et besoins des victimes/survivant(e)s*, *Initiative conjointe de prévention des violences sexuelles et de réponses aux droits et besoins des victimes/survivant(e)s*, *Situation des violences sexuelles au Nord Kivu. Période: Premier semestre 2008 (Rapport préliminaire)* (2008) 12. Likewise, of the 2 672 victims identified by Heal Africa (a local NGO focusing on ending gender-based violence and providing health care to victims), only 165 prosecutions were initiated, being 6% of total rapes. Heal Africa had no details to show how many, if any, resulted in successful prosecutions; Heal Africa (n 60 above) 12.

70 These statistics exclude the city of Bukavu. United Nations Population Fund, Fiche de Rapportage SGBV: Volet Medico-Sanitaire Premier Trimestre 2008. Interview with Ligongo, UNFPA officer.

four tribunals in North and South Kivu. Each tribunal had reached only between one and 38 decisions during the first half of 2008.[71]

However, prosecution figures pertaining to sexual violence tend to be misleading, because the figures and the reality they should represent do not match.[72] It is necessary to examine the types of rape cases presented before the tribunals. Since the introduction of the new laws on sexual violence in 2006, cases of consensual, statutory rape have inundated tribunals. Some lawyers and judges estimated that a staggering 80% of cases of sexual violence before the tribunals are these types of cases.[73] An increase in sexual crimes committed by minors was observed by NGO members of the provincial sub-commission on sexual violence in Goma, North Kivu, who estimated that 90% of minors in prison had been convicted of rape.[74]

Information from UNFPA also shows the overrepresentation of civilian statutory rape cases, with the effect that the type of case that reaches the courts does not reflect the reality in the DRC. UNFPA's legal sector's statistics suggest that as many as 79% of victims who are before the courts are minors and 87% of perpetrators are civilians.[75]

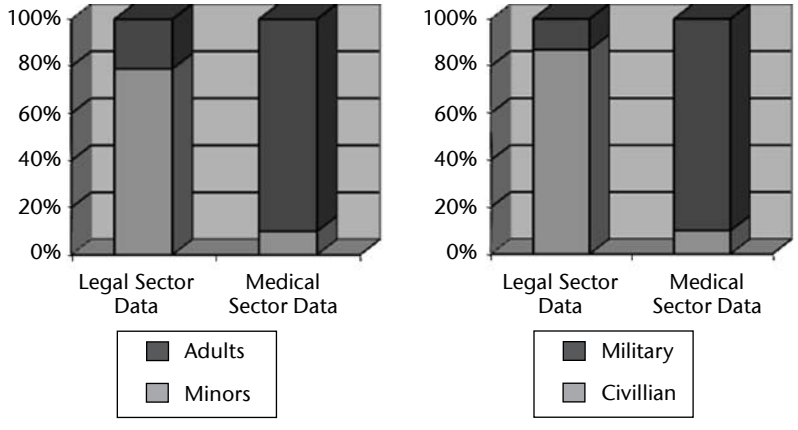

Figure 1: Disparity between statistics of the legal and medical sectors of UNFPA data

71 The Goma *Tribunal de Grande Instance* had reached 38 (interview with Registrar of Goma *Tribunal de Grande Instance*; the Goma military court only two (interview with Registrar of Goma *Tribunal Militaire de Garnison*. The Uvira *Tribunal de Grande Instance* had delivered 11 judgments in 2008 (interview with Mr Samuel, Prosecutor of Uvira *Tribunal de Grande Instance*). The Uvira Military Prosecution (*Auditeur Militarie près le Tribunal Militaire de Garnison*) stated that around 24 judgments are delivered each semester (interview with Prosecutor Francis of the Uvira *Auditeur Militaire du Tribunal Militaire de Garnison*).

72 Interview with Judge Lunanga, President of the Uvira *Tribunal de Grande Instance*.

73 Interview with Mr Samuel, Prosecutor of Uvira *Tribunal de Grande Instance*; interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*.

74 International Crisis Group (n 12 above) 5.

75 United Nations Population Fund, Données VAS Compilées du Volet Judiciaire Premier Semestre 2008.

The majority of victims — adult women violated by armed men — therefore remain drastically underrepresented in the Congolese judicial system. There is a shockingly high number of rapes in Eastern DRC, often committed in horrific ways. However, the Congolese justice system handles only a few of the mildest cases.

In examining the prosecution of sexual violence, it is problematic that Congolese criminal law does not distinguish between the consensual, statutory rape of a young victim and violent rape committed without her consent. In 2006, the age of consent increased from 14 to 18 years of age. Three years ago, 14 year-old girls were legally entitled to have sexual relations and marry. Today those same girls are in the curious position of being below the legal age of consent introduced by the 2006 sexual amendment laws. Most people in the local community expressed difficulty comprehending that a girl under the age of 18 years is not able by law to engage in sexual acts. An overwhelming number of lawyers, judges and the Congolese population alike voiced their criticism that the current laws do not reflect the realities of Congolese life, and are 'more international than national'.[76] Others commented that the law was too strict and was an emotional reaction to the war and associated sexual violence rather than a considered law appropriate to Congolese civil life. The criticism of this aspect of the law is epitomised by a judge who commented in resignation: 'My job is to apply the law, not to judge it.'[77]

Mr Samuel, a prosecutor in Uvira, South Kivu, deplored the invariant nature of sexual violence crimes appearing before tribunals, in view of the unrepresented range of sexual violence that the law recognises and that occurs in communities. He complained that tribunals are overrun with cases involving minors, brought before tribunals solely for profit.[78] It is not infrequent that the parents of a girl, without her consent, bring these cases to court. Judges and lawyers speak frankly of the common problem of parents trying to gain compensation and damages by starting a case against their daughter's boyfriend or fiancé. There are also cases where parents lie about their daughter's age so that she is considered a minor. In this way, prosecutions 'become like a business'.[79]

4.2 Competent courts

The appropriate tribunal in which to present a case of rape is a *Tribunal de Grande Instance* (General Tribunal), a court with wide jurisdiction for civil litigation and for indictable offences, or a *Tribunal Militaire de*

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76 Interview with Mr Aimé, Lawyer with Arche d'Alliance.

77 As above; interview with Colonel Pascale, President of the Military Court of Goma.

78 Interview with Mr Samuel, Prosecutor of Uvira *Tribunal de Grande Instance*.

79 As above. Similar comments were made by Mathieu Ngongo. Interview with Mr Mathieu Ngongo, Director of the American Bar Association.

Garnison (Military Tribunal), in cases where the perpetrator is an armed civilian or a member of an armed force.[80] If the perpetrators are civilians, the 2006 Amendments apply instead of the Military Code. In such an event, the competent court is the General Tribunals and not the Military Tribunals.

5 The obstacles to prosecution

In trying to understand the breadth of the difficulties in the prosecution of sexual violence, this research paper benefited from the responses of 87 Congolese men and women — victims, attorneys, judges, NGO workers, counsellors and doctors, as follows:

GROUP	NUMBER OF RESPONDENTS	NUMBER OF FEMALES	NUMBER OF MALES
Survivors	28	28	0
Lawyers	9	2	7
NGOs	9	3	6
Doctors	5	3	2
Judges	9	0	9
General Population	27	17	10
Total	87	53	34

Figure 2: Breakdown of respondents by group

These respondents were sampled from various locations in North and South Kivu, including Goma, Uvira, Bukavu and Katanga. Their responses were significant, particularly when responding to a consistent question posed: 'What is the biggest obstacle which stops a victim of rape from obtaining a successful prosecution?' With only a few exceptions, all respondents provided more than one obstacle as asked, and instead proceeded to outline at least three or four significant issues, spanning a range of institutional, sociological, financial and legal realms.

This in itself conveys the complexity of the judicial environment in the DRC. It is not possible to simply name one or two problems to solve. Unfortunately — and worryingly — the problems are complex, daunting and plentiful. The following graph depicts the obstacles identified most commonly by respondents.

[80] Military Code, arts 76, 88 & 111; *Code d'Organisation et de Compétence Judiciaires* art 91.

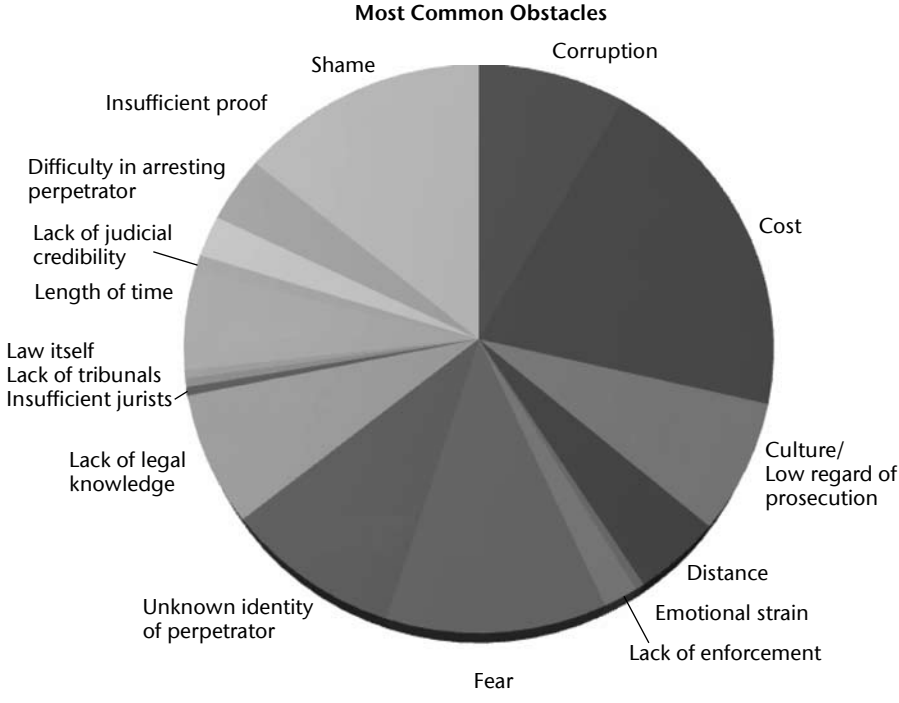

Figure 3: Factors identified most frequently by respondents to be obstacles to prosecution of sexual violence. Sectors are represented as a percentage of total responses.

5.1 Participation of survivors in the prosecution of sexual violence

The obstacles identified above merit close examination in light of how justice is practised in the DRC. It is the state's responsibility to ensure an effective justice system and the role of the state prosecution is to prosecute criminal cases. However, in reality it is the survivor who must initiate and participate closely in the prosecution process, given the state's current failure to assume this responsibility. For example, although legislation provides that the victim is entitled to the assistance of legal counsel during all phases of the judicial procedure, a recent delegation on impunity of sexual crimes 'heard no examples of the Congolese state assuming this responsibility'.[81]

5.1.1 Obstacle 1: The role of prosecution in modern Congolese society

One cogent reason why the prosecution does not fulfil its purpose in Eastern DRC is that justice in its Western prosecutorial form is foreign

81 n 12 above, 19.

to the vast majority of Congolese. In most of Eastern DRC, criminal prosecution does not play the part that it is generally expected to play. As Gégé Katana, Director of SOFAD[82] (an NGO which campaigns against sexual violence and which provides counselling and help to rape survivors), summarised: 'They don't bring prosecution of rapes, because there's no culture of bringing this to justice.'[83] The Congolese do not have a history of defending or pursuing their case before a panel of judges, and therefore often lack the frame of mind to initiate legal proceedings.

Ms Masika, a lawyer in South Kivu, explains that when she arrived in a village to create awareness about criminal prosecutions, the people objected, stating 'that's not our way, not our custom'.[84] Of the 28 victims interviewed, not one was encouraged to initiate a criminal prosecution immediately or soon after the rape. Moreover, only two knew someone who had made an official criminal complaint, indicating the rarity of prosecutions.

The fact that prosecution is a foreign concept to most Congolese means that prosecution is a major obstacle in itself. Prosecution would derive meaning and be universally accepted and employed by Congolese people if the state were to incorporate customary laws and traditions into its definition and application of prosecution. However, any incorporation of customary laws and traditions must include effective safeguards for women, to prevent customary laws being used to discriminate against women or sustain an unequal gender balance.

Customary criminal law exhibits the following features:[85]

- It does not distinguish between public law and civil law from an organic, functional and normative point of view.
- It seeks to achieve the purpose of reparation as opposed to retribution, arbitration as opposed to punishment.[86]
- Its judicial structure is modelled after paternal, familial and tribal social stratifications.
- It is based on ancestral wisdom, passed down from generation to generation through oral tradition by proverbs, sentences, stories, songs, and so forth.

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82 *Solidarité des Femmes Activistes pour la Défense des Droits Humains* (Solidarity of Activist Women for Human Rights).

83 Interview with Gégé Katana, Director of SOFAD.

84 Interview with Ms Masika, Lawyer with AJUSK (Association of Jurists of South Kivu).

85 BM Kampetenga Lusengu *Droit Coutumier Congolais: Notes de Cours à l'Attention des Étudiants de 2e Graduat en Droit* (2006).

86 See M Pieterse 'Traditional African jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004), stating that traditional modes of dispute resolution are often directed at facilitating peaceful solutions to problems which are regarded as possibly having a negative impact on the harmonious co-existence of the community as a whole.

5.1.2 Obstacle 2: Health concerns

Health concerns present another obstacle faced by survivors. With a high level of sexually transmitted infections such as HIV, and a scarcity of affordable treatment, health is a primary concern for many in Congolese society. This is particularly so for women who have fistula as a result of rape. The utility and relevance of legal proceedings are thus put into question. As Helène, a rape survivor, stated, 'You can prosecute someone — but your state of health remains the same.'[87] Without health care, victims are unwilling to pursue the difficult and uncertain effort to get justice.[88] Given the experiences of rape victims, the preoccupation with health concerns is reasonable and widespread, and distracts from a focus on prosecution. Prosecutions cannot restore the health of the victim, and it is clear that there is a lack of faith in the utility of criminal prosecutions.[89]

5.1.3 Obstacle 3: Lack of knowledge of state laws and public law remedies

Most people in the DRC live traditional lifestyles — meaning they largely live in rural areas, they generally survive through subsistence agriculture,[90] and do not attain high levels of formal education. The UNFPA estimates that only 24% of boys and 12% of girls attend secondary school, and that the illiteracy rate for females over the age of 15 is 42%.[91] People are prevented from gaining knowledge of state laws because information and documentation of the judicial system are not readily accessible. For example, the national government gazette, *Journal Officiel*, is expensive, so the laws are not adequately disseminated amongst the various jurisdictions.[92]

As the above figure shows, very few of the general population believe that ignorance of legal procedures and laws is an issue. Yet, of 27 interviewees from the community, only seven said they knew anything about the laws, although from further discussion it was apparent that even these seven, in reality, knew very little.

Similarly, few survivors knew where a case would be heard, and there was a recurrent lack of understanding of the necessity to prove

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87 Interview with Helène, survivor. See also interview with Furaha, survivor. 'I can prosecute ... But this will not bring any result for my health state.'

88 n 12 above, 19.

89 Interview with Vivianne, survivor; interview with Rachelle, survivor.

90 The urban population of the DRC is only about 32,7%: United Nations Population Fund and Population Reference Bureau *Country profiles for population and reproductive health, policy developments and indicators 2005, Overview: Democratic Republic of Congo* (2005) 38.

91 United Nations (n 90 above) 39. The Minister of Justice in 2007 put the figure of female literacy as just 45,9%: Ministere de la Justice *Plan d'Actions Pour la Reforme de la Justice* (2007) 13.

92 Ministere de la Justice (n 91 above) 55.

the wrongdoing of the perpetrator.[93] This lack of knowledge of the law is a problem because it means that women do not know their legal rights and do not know what the law regards as wrong.[94] The Minister of Justice stated in 2007 that ignorance by the population of the laws and law in general — and more so the individual rights and freedoms expressed in the texts — prevents people from accessing justice.[95]

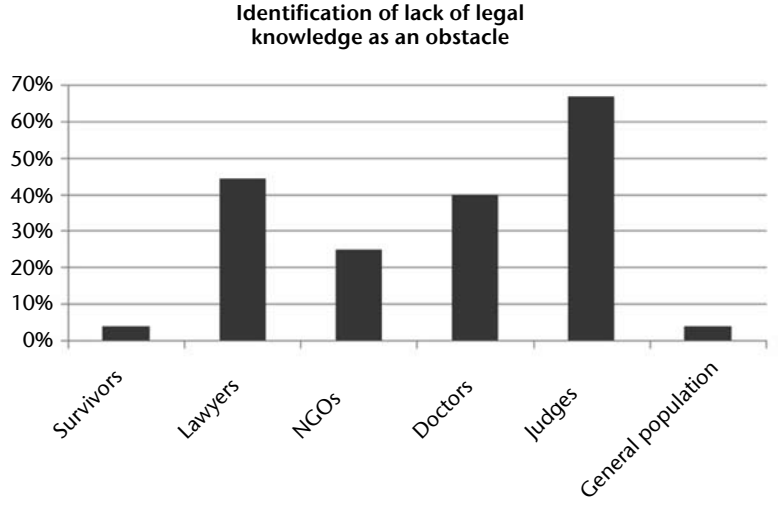

Figure 4: Percentage (by group) of respondents identifying lack of legal knowledge as an obstacle to prosecution

5.1.4 Obstacle 4: Position of women in society

In order to understand the impediments faced by Congolese women in instituting a prosecution, it is necessary to analyse their position and status in society. Professor Kahindo, a Congolese law professor, explains that great gender disparities exist in Congo, and that women have very little independent power.[96] Mr Muhindo from South Kivu concurred with this, adding that the law itself is the first obstacle that women face in prosecution because, according to the law laid out in the *Code de la*

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93 Interview with Nbitse, survivor. See also interview with Ndaina, survivor: 'Would I win the case? I am sure of it. The act is condemnable, I was taken by force.' One exception was 40 year-old Rosetta, who, when asked whether she would win her case before the judges, acknowledged: 'I don't know because I don't know the law, it's up to those who know the law.' Interview with Rosetta, survivor.

94 Interview with Professor Kahindo, Professor of Law at the *Université Libre des Pays de Grand Lacs*.

95 Ministere de la Justice (n 91 above) 30. The original French reads: '*Les entraves à l'accessibilité à la justice restent en effet très grandes en raison de ... l'ignorance par la population de la loi et du droit en général, plus encore les droits et libertés des individus tels qu'exprimés par les textes.*'

96 n 95 above.

Famille (Family Code), a married woman must have authorisation from her husband before she can bring a legal action.[97]

The customary view of women as subordinate to men creates difficulties for the criminal prosecution of sexual violence because it makes it difficult for rape to be recognised as a crime. As Mr Muhindo noted, on some interpretations of custom, 'custom considers that any woman is available — anyone who has the desire, can take her'.[98] Most of the victims agree that women in themselves are not valued or respected in society.[99] One survivor described that 'the husband is the one that can promote the value of a woman. Many women are despised in their own home; it is the duty of men to promote women's value.'[100]

The marital status of women also determines the value of a woman, as expressed by men and women alike across all groups.[101] As husbands often reject their wives following a rape, rape survivors are even more vulnerable to losing their social status. One survivor relayed her story: 'My mother's relatives rejected me, because I was raped, my bladder was torn, I had no value. Families only value a healthy girl, she'll get a dowry.'[102]

The manner in which women respond to rape reflects a gender-based power imbalance. They are forced to accept the situation they are placed in, despite the extent of their suffering. For example, Rosetta, a rape survivor, stated:[103]

> As women, we will always be silent and not able to accuse anything that happens to us ... Just imagine: You are married, your husband is killed, you're raped, you are leaking, your health becomes worse — you are just silent.

5.1.5 Obstacle 5: Shame

The issue of shame is a serious obstacle to prosecution and should by no means be underestimated. In analysing the interviews, shame was the second-most common response to the question as to the main obstacles to prosecution, and was common amongst all the groups interviewed.

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97 *Code de la Famille* art 448: '*La femme doit obtenir l'autorisation de son mari pour tous les actes juridiques dans lesquels elle s'oblige à une prestation qu'elle doit effectuer en personne.' Code de la Famille art 450:'Sauf les exceptions ci-après et celles prévues par le régime matrimonial, la femme ne peut ester en justice en matière civile, acquérir, aliéner ou s'obliger sans l'autorisation de son mari.'*

98 Interview with Mr Muhindo, Lawyer for SOFAD.

99 Interview with Bibige, survivor.

100 Interview with Rosetta, survivor.

101 Interview with Feza, survivor; interview with Rachelle, survivor.

102 Interview with Agues, survivor.

103 Interview with Rosetta, survivor.

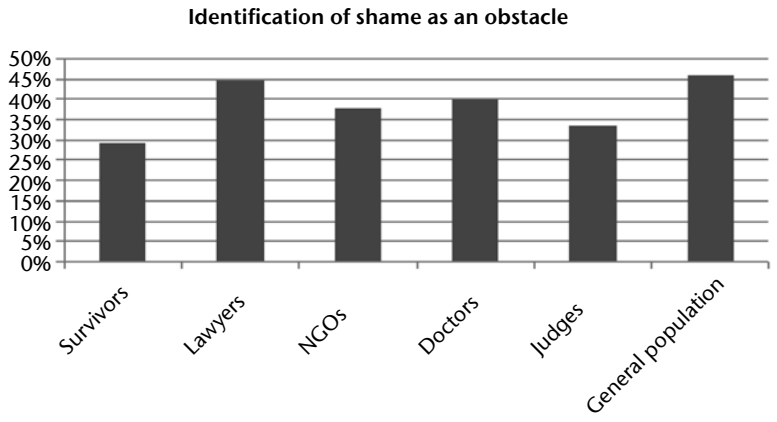

Figure 5: Percentage (by group) of respondents identifying shame as an obstacle

As a result of shame, victims prefer to act as though nothing had happened.[104] Judge Solomon of the Goma *Tribunal Militaire de Garnison* said that this perception of rape is the primary problem blocking criminal prosecutions: 'It's the culture which must be changed', he maintains, 'that says sex is taboo, rape is dishonourable, and that one must hide it.'[105] In *Eliwo Ngoy,* the military tribunal held in passing that:[106]

> Sexual assault is one of the most difficult things to report because of the socio-cultural context [of Congo]. In almost all societies, a woman, a man or a child making allegations of rape, sexual violence or mutilation, has much to lose and risks being the object of tremendous pressure and ostracism on the part of his or her immediate family members and the community in general.

Nbitse, a rape survivor, explained the effect of the shame associated with rape, saying 'if you follow custom, you will hide the rape ... custom says that you did it by will, not by force. It's infidelity according to custom.'[107]

This perception dissuades victims from prosecuting offenders, given that if a woman submits a complaint, she is discredited and humiliated. The community says she wanted it to happen and so arranged a meeting, and men may be unable to comprehend how she could not

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104 Survey response of Noella, resident of Goma.

105 Interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*.

106 Military Tribunal, Mbandaka, 12 April 2006 (DRC). Author's own translation. The original French version reads: '*... l'atteinte sexuelle est l'une des choses les plus difficiles à signaller à cause du contexte socio-culturel. Dans presque toutes les sociétés, une femme, un homme ou un enfant qui porte des allégations des viols, de violence ou d'humiliation sexuelle a beaucoup à perdre et risqué de faire l'objet d'énormes pressions ou d'ostracisme de la part des membres de sa famille immédiate et de la société en general.*'

107 Interview with Nbitse, survivor; interview with Pastor Antoine, pastor of Heal Africa; interview with Ms Masika, lawyer with the Association of Jurists of South Kivu (AJUSK).

refuse.[108] Comments made by the general population and lawyers during interviews support the perception that rape is the result of women's poor clothing and behaviour in exposing themselves to rape.[109]

Members of the population from all generations share this view. Three boys aged 15 to 17 years old from South Kivu all agreed that if they were married and their wives raped, they would not stay with them. One of the boys, Solomon, explained what he would do in that situation:[110]

> I'd tell my wife to take me to the place where she was raped, to see if she could recognise the rapist, and if she could, I'd give my wife to him to stay with her. If she couldn't, then I'd tell her to go back to her family's house.

Rape is seen as so dishonorable, in fact, that many husbands cannot continue living with a raped wife. This shame is not only directed at the wife, but also at the husband. This was elucidated by Sidonie, a psychologist in South Kivu, who explained that following a rape, 'people will say [to the husband]: "You're going to stay with that woman?" and he will also be shamed'.[111]

Women thus often lose their husbands because of the stigma attached to being raped. This loss means that they have even less support than they would otherwise have had. One victim, when asked whether her family would assist her initiate proceedings, replied 'they wouldn't accompany me. They don't love me; they've abandoned me since the rape.'[112] Victims are frequently ostracised in the community.[113]

Police often lack the necessary competence, skills and sensitivity to conduct the crucial initial investigation in a sexual violence case.[114] The justice system of Eastern DRC does not have the means to credibly ensure confidentiality and anonymity. In addition, women may be reluctant to speak of their experiences in front of male officers, yet only 3,5% of military and civil judges and prosecutors across the DRC are female.[115]

5.1.6 Obstacle 6: Religion

Religion can act as either an encouragement or a hindrance to criminal prosecution. Religion has a powerful role in Congolese society. It is estimated that 85% of the Congolese population is Christian

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108 Interview with Gégé Katana, Director of SOFAD.

109 Interview with Mr Aimé, Lawyer with Arche d'Alliance; interview with Vénancie, resident of Goma.

110 Interview with Mupenda, resident of Katana.

111 Interview with Sidonie, psychologist with Panzi Hospital.

112 Interview with Eglesia, survivor.

113 Interview with Agues, survivor.

114 n 9 above, 20.

115 n 9 above, 21.

(55% Roman Catholic and 30% Protestant).[116] Ancestral worship is additionally very prevalent as many Congolese have multiple or mixed religious identities.[117] The failings and injustices of both the Mobutu regime and the current Congolese legal system further strengthen the value given to religious guidance. By contrast, laws can be seen as being arbitrary and unjust, causing a widespread lack of respect for criminal procedures.[118] Nonetheless, some respondents, including pastors, affirmed that religion encouraged criminal prosecution[119] and supported the dichotomy of forgiveness and prosecution. In the words of Feza, a woman who had been raped by twenty militia men in 2002 and who has contracted HIV as a result, 'What do I think of those men now? I want two things: In front of the state, it's violence against women. I must prosecute, they must be judged. In front of God, I want God to pardon them.'[120]

However, other respondents indicated that faith in God was incompatible with criminal prosecution, because the latter is at odds with forgiveness. Rosetta, a survivor of rape, said, when speaking generally of prosecution, that God is the only one who can judge people according to their deeds. She commented that prosecution is an alternative to forgiveness, and she feels she must forgive only, because that is what people are supposed to do.[121] Prosecution is sometimes associated with revenge, which 'only belongs to God'.[122] Pastor Antoine offered insight into the relationship between religion and the law, explaining that there was no biblical conflict between forgiveness and criminal prosecution. However, the proliferation of religions in the DRC means that each church has its own way of construing things, so that ideas that God prefers forgiveness to prosecution circulate.

5.1.7 Obstacle 7: Identifying and arresting the perpetrator

The question as to how much of an obstacle the identification of perpetrators is depends largely upon the type of perpetrator: military or civilian. Although NGOs working in the region reported a worrying increase in the rate of rapes committed by civilians in recent years,[123]

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116 US Department of State, *2008 Report on International Religious Freedom* (19 September 2008) http://www.unhcr.org/refworld/country,,,,DOM,4562d94e2,48d5cc022,0.html (accessed 16 March 2009).

117 AMB Mangu 'Law, religion and human rights in the Democratic Republic of Congo' (2008) 8 *African Human Rights Law Journal* 523.

118 Interview with Pastor Antoine, Pastor of Heal Africa.

119 Interview with Shalukomba, resident of Katana. See similar comments in Interview with Pastor Antoine, Pastor of Heal Africa.

120 Interview with Feza, survivor.

121 Interview with Rosetta, survivor.

122 Interview with Hélène, survivor.

123 R Feeley & C Thomas-Jensen 'Getting serious about ending conflict and sexual violence in Congo' Enough Strategy Paper (2008).

the majority of rapes continue to be committed by the various armed groups still operating in Eastern DRC.[124] Military prosecutions are, however, extremely rare in the Congolese judicial system, in part due to the difficulties associated with securing the arrest of the perpetrators.

In respect to military rapes, women are commonly raped in the night by members of an armed group. The perpetrators come from the bush and retreat there following the rape and the theft of the victim's property. For this type of rape, victims most often cannot identify the perpetrators, and generally can only describe what language they spoke or what armed group they came from. Consequently, many women do not know who to prosecute.[125] As one rape victim, Rosetta, insisted: 'It's not possible to go to court, because they're unknown people. I could not identify them; they just rape you and leave you ... I only knew they were in uniforms.'[126]

It is in addition much more difficult to compel a perpetrator belonging to an armed group to appear before a tribunal. If the perpetrator belongs to a rebel group, he often lives in the bush in the territory which his group controls, and is thus inaccessible to justice. It is therefore effectively pointless to start a prosecution against a soldier from a rebel group such as the FDLR, as they are impervious to the Congolese legal system. Although justice must apply to everyone equally, the execution of justice in the Congo means that not everyone is subject to the law.[127] Commanders of the Congolese army also protect their soldiers,[128] and the International Crisis Group reported that the Congolese national army and the police were both guilty of sexual violence but, unlike civilians, faced no risk of prosecution.[129] Furthermore, it is problematic that no military judge can hear a case in which a superior in rank is an accused, as most high-ranking judges are located in the largest cities.[130]

5.1.8 Obstacle 8: Amicable arrangements

Respondents noted that, in regard to incidents of civilian sexual violence, people prefer to make arrangements according to custom in place of legal proceedings.[131] The families negotiate the terms of what

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[124] Human Rights Watch *DR Congo: Peace accord fails to end killing of civilians* (2008) http://hrw.org/english/docs/2008/07/18/congo19396.htm (accessed 20 September 2009). While military operations in February 2009 caused the CNDP to be integrated into the Congolese army, the security situation in Eastern DRC remains instable due to the many other armed groups currently active, particularly the FDLR and LRA.

[125] Interview with Feza, survivor.

[126] Interview with Rosetta, survivor.

[127] Interview with Dr Faustin, doctor at Panzi Hospital.

[128] n 9 above, 21.

[129] n 12 above, 5.

[130] n 9 above, 27.

[131] Interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*.

is termed in French *arrangements à l'amiable* (amicable arrangements). These are private arrangements, rooted in customary law, whereby, after a rape, the perpetrator or perpetrator's family gives to the victim's family payment in the form of a goat, some fish or a case of beer. Assuming that the families reach such an agreement, the girl then becomes the wife of the perpetrator.[132] Should the victim already be married, then, if her husband wants to stay with her and not give her to the perpetrator, he will receive payment.

The preference for amicable arrangements is not surprising, since customary or tribal law is the second basis of Congolese law.[133] In practice, various customary laws regulate the lives of the majority of Congolese, particularly those who live in rural areas. Customary laws regulate personal status, including marriage, divorce, land tenure and inheritance. Amicable arrangements are often seen as being a more conciliatory approach to the problem, since the matter is dealt with between the two families.[134] Bibige, a victim, stated:[135]

> On the one hand, I'd have a right to prosecute. But on the other hand, there are people from my own community who have a different perspective — because someone from our community is being prosecuted — they'll say 'you could have made an arrangement.' Prosecution raises conflicts that last forever, people would keep pointing fingers at me, it would create insecurity.

MONUC reports that encouragement for amicable arrangements is pervasive throughout the community, and that 'despite reinforcement of the laws punishing sexual violence, military commanders, police investigating officers and magistrates continue to encourage families of rape victims to engage in out-of-court settlements'.[136] Lawyers and NGOs are struggling to bring an end to these amicable arrangements. For instance, *Arche d'Alliance*, a local NGO assisting in the prosecution of cases of sexual violence, reports that in roughly one-third of such cases, a payment through an amicable arrangement has been made.

Amicable arrangements circumvent the procedures of criminal justice, and are made without the participation of the victim. These arrangements therefore do not adequately redress the wrong committed. 'We want to reject the idea that you can give a goat for a rape ...

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132 Interview with Shalukomba, resident of Katana.

133 The two bases of Congolese law are Belgian law and Congolese customary law. See D Zongwe *et al The legal system and research of the Democratic Republic of Congo* (2008) http://www.nyulawglobal.org/globalex/democratic_republic_congo1.htm (accessed 20 September 2009).

134 Interview with Furaha, survivor.

135 Interview with Bibige, survivor.

136 MONUC (n 6 above) 10.

how can you reduce the disgrace of a rape like that?' asks Jean-Paul, a lawyer working with Heal Africa.[137]

Yet, amicable arrangements offer speed, discretion and actual results, which the justice system does not. As long as legal procedures are seen as being less advantageous to victims than amicable arrangements and the judicial system remains replete with problems and challenges, victims will continue to be discouraged from pursuing a prosecution.

5.1.9 Obstacle 9: Cost and Distance

Cost

Access to justice is one of the principal conditions of a democratic society.[138] Yet expense, too, often prevents access to justice.[139] According to the respondents, cost was the single most prevalent obstacle to prosecution.

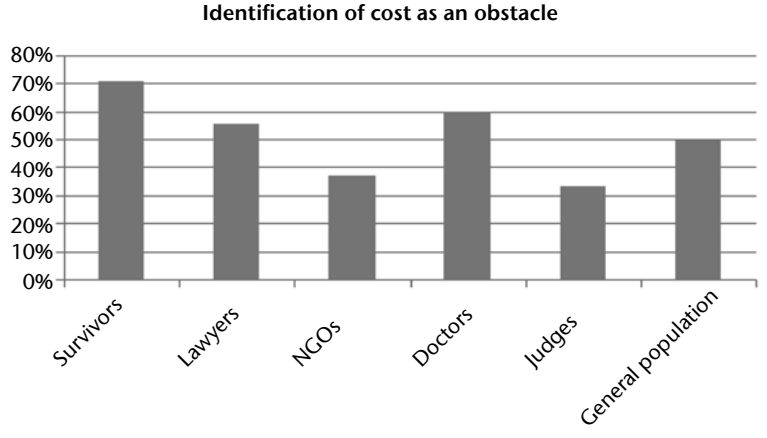

Figure 6: Percentage (by group) of respondents identifying cost as an obstacle

The Minister of Justice recognised this in the Plan of Action for Justice Reform in 2007, stating that, in addition to the expenses of 'official justice', which are burdensome for many litigants to bear due to their low level of income, there are also other more or less official expenses, such as the expense of filing a complaint, printing costs and expenses for the

[137] Interview with Mr Jean-Paul, Lawyer for Heal Africa. Similar comments were made in Focus group discussion with five survivors.

[138] *Ministere de la Justice* (n 91 above) 30.

[139] n 9 above, 19.

bailiffs. The end result of these costs is that justice is made inaccessible to the most destitute, who make up the majority of the population.[140]

Sexual violence laws require items such as doctor's certificates,[141] which cost around US $40.[142] In addition, explained Mr Muhindo, even if a victim is considered indigent, the lawyer must have some money to pay for the running costs of the case.[143] It is these ancillary costs which are beyond the means of many rape victims, the majority of whom are living in extreme poverty, as they are often abandoned following the rape.[144] Most victims opt to pay for health costs instead of continual and undetermined judicial costs.[145] Pastor Antoine sighed that 'you need to pay costs, in each office you go to. You need to have three or four pockets; you need to keep refilling them.'[146]

Cost is the reason why the survivors of rape often prefer amicable arrangements, because that way they can at least hope to get some animals or money,[147] and the need to survive takes precedence over any higher goals of prosecution. A lawyer explained that when she suggested prosecution, women asked her: 'Apart from justice, what are you going to give me? I need a way to survive.'[148]

Distance

The issues of distance and accessibility of the tribunals are closely linked to cost. The DRC is a vast country,[149] and there are few tribunals in Eastern DRC, so victims seeking to initiate prosecutorial proceedings must often travel very far from where they live. The Minister of Justice has stated that the physical distance between people and the judicial system prevents access to justice for all.[150] North and South

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[140] *Ministere de la Justice* (n 91 above) 10. The original French version reads: '*Outre les frais de justice officiels (consignation, frais d'actes, droits proportionnels, etc.) qui sont lourds à supporter par un grand nombre de justiciables à cause du faible niveau des revenus, il y a lieu de relever que le justiciable congolais est soumis à d'autres frais plus ou moins officieux (frais de notification d'actes par les huissiers, frais de dépôt de la plainte, achat d'imprimés pour les procès — verbaux, etc.) qui achèvent de rendre la justice inaccessible pour les plus démunis qui constituent la majorité de la population.*'

[141] 2006 Amendments, art 1: '*... l'Officier du Ministère Public ou le juge requiert d'office un médecin et un psychologue, afin d'apprécier l'état de la victime des violences sexuelles et de déterminer les soins appropriés ainsi que d'évaluer l'importance du préjudice subi par celle-ci et son aggravation ultérieure.*'

[142] Interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*.

[143] Interview with Mr Muhindo, lawyer for SOFAD.

[144] Interview with Ms Masika, lawyer with AJUSK (Association of Jurists of South Kivu).

[145] Interview with Rosetta, survivor.

[146] Interview with Pastor Antoine, pastor of Heal Africa.

[147] Interview with Ms Masika (n 144 above).

[148] As above.

[149] DRC is the third largest country by land area size in Africa after Sudan and Algeria.

[150] *Ministere de la Justice* (n 91 above) 9.

Kivu together cover 48 170 square miles,[151] and there are not enough tribunals accessible to the Kivu population having jurisdiction to adjudicate cases of sexual violence.

For example, the Uvira General Tribunal is responsible for all the territories of South Kivu except for Bukavu city.[152] Just one of these eight territories for which it is responsible, Shabunda, covers over 10 000 square miles,[153] bigger than all of neighbouring Rwanda.[154]

There are supposed to be more than six tribunals in each of the North Kivu and South Kivu provinces, as judges in theory travel around the Kivu territories to various ancillary hearings. But, with no cars and no fuel provided by the state, it is plain to see why they travel across territories so rarely.

This geographical issue poses an immense stumbling block for victims, who do not have the means to pay for transport to the tribunal.[155] This is particularly so, given the high proportion of victims who come from insurgent areas, for whom the main towns are even more inaccessible due to insecurity.[156]

Many victims live in extreme poverty, often as a direct result of the rapes. One survivor, Upole, described how she had been in pain since being raped whilst eight months pregnant, but the nearest hospital where there are specialists and where she can get free treatment is about 28 miles away. While for many in the world this would be a negligible distance, for Upole it is enough to keep her from treatment. It is too far to walk, she has no way of paying for transport, and has no one to care for her children during the time that she will be gone.

Some NGOs help in this regard by transporting victims to tribunals. Yet, there are much too few to meet the scale of need,[157] and travelling away from their communities places the victims in a vulnerable position. As Richard, a NGO worker involved in helping to bring women to the tribunal, commented: 'The problem for women is what to eat. We can't bring them here only to let them die of hunger.'[158]

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151 P Simo *et al Ending Congo's nightmare — What the US can do to promote peace in Central Africa* (2003) 29.

152 The Uvira *Tribunal de Grande Instance* is, however, assisted by two sub-tribunals at Kavumu and Kamituga.

153 C Mampasu 'Shabunda: The "forgotten Kosovo"' (2002) *Humanitarian Exchange Magazine*.

154 Interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*.

155 Interview with Mr Jean-Paul and Ms Cristina, lawyers for Heal Africa; interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*; interview with Mr Alexis, prosecutor of the Goma *Auditeur du Tribunal Militaire de Garnison*.

156 Interview with Mr Alexis (n 155 above).

157 As above.

158 Interview with Richard, member of ASJPD (Association de Secours aux Jumeaux et Leurs Parents en Détresse/Association of Assistance to Twins and their Parents).

5.1.10 Obstacle 10: Fear

Fear of reprisals

In discussing all the institutional and social factors which impede prosecutions, it is easy to overlook psychological factors. Women who have been the victims of sexual violence have undergone traumatic experiences. For the most part, their rapes were violent and brutal: Many women were raped by multiple perpetrators; others were raped on numerous occasions.

The women therefore fear reprisals — that the same thing will happen again, and that next time, they may be killed. Their fear has a direct impact on their willingness to pursue prosecution.[159] Of the victims interviewed, 42% said that fear of reprisals was an obstacle to prosecution, making it the third most common response amongst rape victims. Taking into account the fact that the women may have been reluctant to admit that they were apprehensive of reprisals, that percentage is a conservative estimate.

It is problematic that there is no protection mechanism for victims and witnesses,[160] particularly given that threats and attacks against both groups are widely acknowledged.[161] Mr Aimé, a lawyer from the NGO *Arche d'Alliance*, verified this, regretting that his organisation could only provide legal assistance and not any form of protection for women instituting prosecutions, despite many such requests.[162] One victim, Ndaina, described why fear is an obstacle to prosecution:[163]

> If you make a prosecution, he can send friends to kill you ... Even if I had the means to prosecute, he can give money, and tomorrow he's free, to kill my family, even the children.

Fear of the judicial process

The judicial process is intimidating and frightening for a victim. For example, the Goma Military Tribunal itself is an intimidating place. On the ground are a big tent (the court room), a large army truck, and a building which houses the judges and the prosecutor's offices. This is the place to which a woman must come if she wishes to initiate criminal proceedings. Given the experiences of the women, and the fact that most have been raped by one or more members of an armed group, it is difficult to imagine what it must be like for these women to

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159 Particularly for those, such as Eglesia, who were ordered by the perpetrators after the rape not to tell anyone what they had done to them. Interview with Eglesia, survivor.

160 *Ministere de la Justice* (n 91 above) 30; MONUC Combating Impunity for Cases of Sexual Violence: Concept Note 5.

161 *Ministere de la Justice* (n 91 above) 35.

162 Interview with Mr Aimé, lawyer with *Arche d'Alliance*.

163 Interview with Ndaina, survivor.

enter this place to prosecute a soldier in front of other soldiers, and the fear and intimidation that they must feel.

Appearing before a judge is also intimidating, all the more so given the power disparity between a judge and an uneducated, poor, raped woman. Judges are seen as little gods,[164] and simply to appear and speak before a panel of judges about something as shameful as rape requires an enormous amount of courage.

5.1.11 Obstacle 11: Evidence

Article 14 (*bis*) of the 2006 Amendments requires reports from both a doctor and a psychologist to assist judges when adjudicating a sexual violence case. However, the nature of the required evidence — of a sexual act — creates difficulties, and often there is no evidence beyond the word of the victim.

In Congolese culture, sexual intercourse is a taboo public subject, so it is difficult for evidence to be presented.[165] Sidone, a psychologist in South Kivu, illustrates the modesty associated with sexual matters: 'Women who visit me don't say the word ''vagina'' — they just say it hurts "down there".'[166] Women who hide the rape from their husbands may be reluctant to go to hospital for fear of their husbands finding out.[167] In the case of young girls, parents prefer to flee and leave the place of the crime in order to save the honour of the family.[168]

There are few certified doctors and much fewer psychologists in remote areas and villages.[169] According to prosecutor Alexis, the requirement for psychologists' reports is one area where the law is simply not applied.[170]

Doctors are often unable to produce evidence of the rape. It may take two or three days before a woman reaches the nearest hospital. Most victims live far away, with few roads leading to a hospital, or the victims may be unable to pass through because of insecurity along the way.[171] Doctors commented that often, by the time a medical report is requested, a long period of time has passed and the medical examination cannot provide evidence of rape,[172] particularly in the case of women who have previously had children.[173]

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164 Interview with Pastor Antoine, pastor of Heal Africa.

165 Interview with Judge Lunanga, President of the Uvira *Tribunal de Grande Instance*.

166 Interview with Sidonie, psychologist with Panzi Hospital.

167 Interview with Gégé Katana, Director of SOFAD.

168 Interview with Colonel Pascale, President of the Military Court of Goma.

169 Although there are sufficient health centres, they are not qualified to provide the necessary reports.

170 Interview with Mr Alexis, prosecutor of the Goma *Auditeur du Tribunal Militaire de Garnison*.

171 Interview with Gégé Katana, Director of SOFAD.

172 Interview with Mr Aimé, lawyer with Arche d'Alliance.

173 Interview with D Noella, doctor of Heal Africa; interview with Rosetta, survivor.

Even if evidence of rape is present, the lack of scientific evidence, such as DNA, as well as a rarity of witnesses, mean that it is hard to impute responsibility to the particular perpetrator.[174]

5.1.12 Obstacle 12: Protracted judicial proceedings

It is discouraging to note the small number of successful prosecutions arising from sexual violence cases. Many judgments are not handed down or are 'non-drafted'.[175] From the four tribunals physically visited, the number of judgments handed down varied from one to 38 decisions during the first half of 2008.[176] In South Kivu, UNFPA recorded that, while 107 files in the civilian jurisdiction were opened in the first quarter of 2008, the tribunals only rendered 44 decisions during the same period.[177] Similarly, the prosecution for the Goma General Tribunal received 141 complaints in the first half of 2008, 77 of which were sent on to the tribunal. During this period, the Goma General Tribunal handed down 38 judgments. Therefore, only around 27% of initial complaints reached the judgment stage.[178]

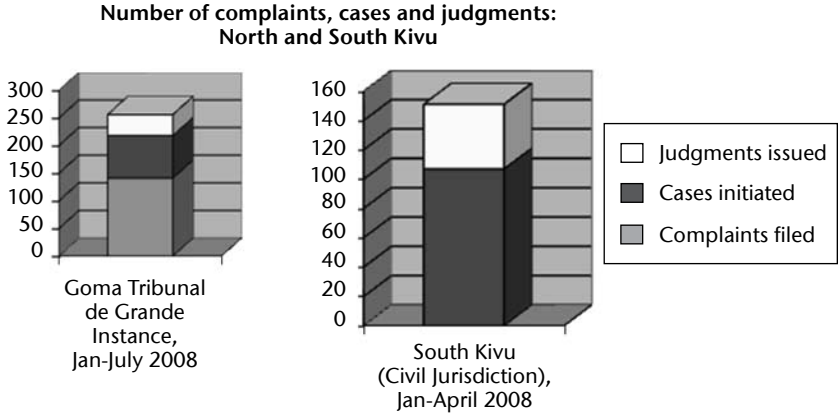

Figure 7: Displaying the number of judgments issued from initial complaints filed or cases initiated

174 Interview with Judge Richard, President of the Goma *Tribunal de Grande Instance*.

175 *Ministere de la Justice* (n 91 above) 30.

176 The Goma *Tribunal de Grande Instance* had made 38 (interview with Registrar of Goma *Tribunal de Grande Instance*. The Goma military court only two: interview with Registrar of Goma *Tribunal Militaire de Garnison*. The Uvira *Tribunal de Grande Instance* had made 11 judgments in 2008: interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*. The Uvira Military Prosecution (*Auditeur Militaire près le Tribunal Militaire de Garnison*) stated that around 24 judgments are made each semester. Interview with prosecutor Francis of the Uvira *Auditeur Militaire du Tribunal Militaire de Garnison*.

177 United Nations Population Fund, Données VAS Compilées du Volet Judiciaire Premier Semestre 2008.

178 This is a conservative percentage, given that it does not take into account the likely scenario that some cases did not arrive at the courts through the prosecution, which would result in more initial complaints.

It is, moreover, discouraging for a victim to learn of the low percentage of successful convictions: The International Parliamentary-Expert Mission Addressing Impunity for Sexual Crimes calculated that in 2007 and 2008, only around 21% of judgments led to a conviction, causing victims to perceive prosecution as hopeless.[179]

In respect of the Goma Military Tribunal, prosecutor Alexis reported that he receives about two or three cases each day, conservatively about 40 per month, although he had no statistics available. Most of these cases reach a military tribunal. This means that, even if he sends only half of the complaints on to the tribunal, there should be about 120 judgments delivered every six months. However, according to the registrar of the tribunal, during this period, the tribunal only delivered four judgments.[180]

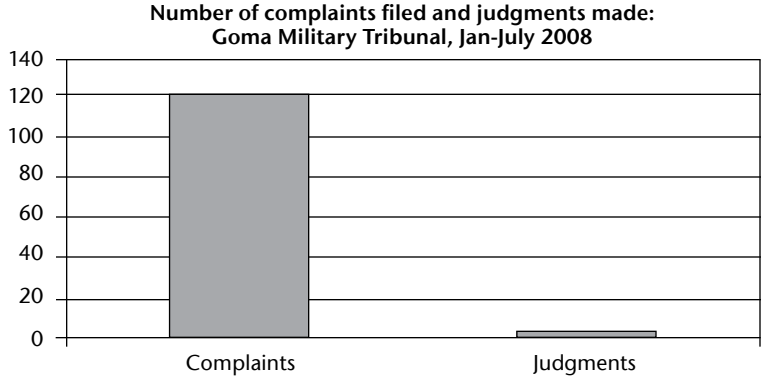

Figure 8: Conservative comparison of complaints filed and judgments delivered

The obvious difference between these figures is troubling, and is accounted for by lengthy delays in the judicial process. According to the law, a case of sexual violence should run from first complaint to judgment in three months.[181] This is simply not the reality in many cases. In the Military Court of Goma, for example, of the 11 cases initiated in 2007, five were still running as of August 2008.[182] For example, MONUC reports that 60% of the cases of sexual violence brought before South Kivu courts are still continuing one year after the complaints were registered.[183] There are several reasons, primarily based on the lack of resources, which account for these extensive delays.

179 n 9 above, 15.

180 Interview with Registrar of Goma *Tribunal Militaire de Garnison*.

181 Art 7 *bis* of the 2006 Amendments.

182 n 180 above.

183 n 9 above, 15.

Without exception, all the regular and military tribunals and courts visited were under-resourced and could not cope with the vastness of the territory over which they assert their jurisdiction. A recurrent complaint of the judiciary is the lack of transport. Judicial officers are required to travel to various ancillary court hearings around the territories, yet they are not provided with adequate means of transport.[184] In addition, the DRC has only around 1 500 civil and military magistrates to cover the entire population.[185] The resulting lengthy delays deter victims of rape from even initiating proceedings,[186] because prosecution consumes time, money and energy.[187]

Moreover, delays are prejudicial to the rights of the accused. According to prosecution records, the police automatically send an accused person to prison in at least half of the complaints filed.[188] In Goma Prison in 2008, inmates charged with rape represent over 10% of the total inmates. However, due to the high prevalence of 'preventative detention', around three-quarters of inmates are criminal defendants awaiting trial.[189] Therefore, if a person is charged with a crime, he is immediately incarcerated in prison, without any hearing, where he must wait an indefinite time for his trial to start.

5.1.13 Obstacle 13: Corruption and enforcement

Corruption

Respondents mentioned corruption as an obstacle to prosecution, which was the third highest obstacle identified by rape survivors and the general population. Ironically, not a single member of the judiciary considered corruption to be a problem. Judges were also the only group of respondents who did not consider corruption to be an obstacle.

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184 Interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*; interview with Colonel Wilfred, President of the Goma *Tribunal Militaire de Garnison*; interview with Dr Anyesi, doctor of Heal Africa.

185 n 9 above, 21.

186 Interview with Dr Noella, doctor of Heal Africa. Similar comments by Gégé Katana. Also iInterview with Dr Anyesi, doctor of Heal Africa.: 'The numbers of lawyers are limited. It takes lots of time — when a victim sees that it takes lots of time, they decide not to lodge a criminal complaint.'

187 Interview with Bibige, survivor. Similar comments in iInterview with Pastor Antoine, pastor of Heal Africa, 30.

188 Eighty-four of 141 complaints recorded that the defendant was imprisoned. Prosecution of the Goma *Tribunal de Grande Instance*, Case Records.

189 While 'preventative detention' is said to be an exceptional measure, there are no additional requirements to be met in order to place someone in detention other than that the defendant is accused of a crime to which a penalty of at least six months' imprisonment attaches: Arts 205 & 209 of the Military Code. Similar figures of non-convicted prisoners have been observed elsewhere: n 9 above, 17.

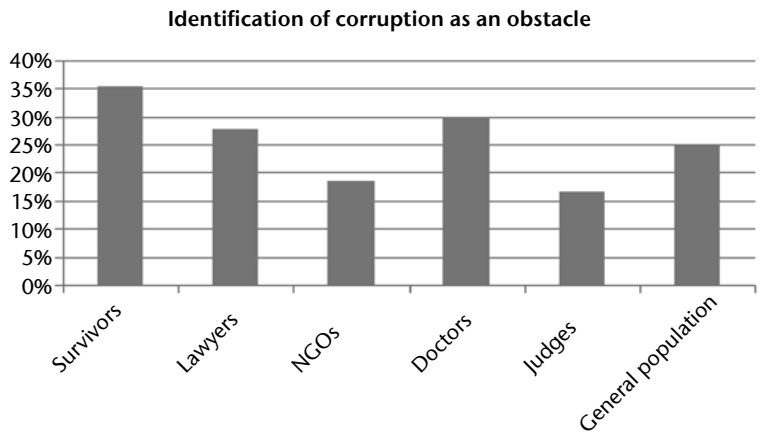

Figure 9: Percentage (by group) of respondents identifying corruption as an obstacle to prosecution

Corruption appears to take two forms: First, litigants must pay court officials merely for the court to hear a case. One NGO worker explained:[190]

> You need money for the folder to progress [through the judicial proceedings] ... How do you apply pressure for this to happen if you have nothing? For someone to listen to the case, he needs to have something in his stomach.

Corruption is a reflection of the failure by the state to adequately pay the judiciary. Mr Lunanga, a judge in Eastern DRC, said that it was common knowledge that the government did not pay judges decent salaries.[191] Mr Pacéré's report for the UN also stated that funds allocated to justice in the 2004 and 2005 budgets were negligible.[192] Monthly salaries range from US $13 for a local magistrate to US$ 30 for senior Supreme Court judges.[193] The report also noted that some judges had to wait for years to receive a small advance, and concluded that '[s]uch working conditions leave them at the mercy of those appearing in court'.[194]

The public perception is that judges create obligatory 'costs' to supplement their income. The complainant must pay these costs, which

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190 Interview with Richard, member of ASJPD (Association de Secours aux Jumeaux et Leurs Parents en Détresse/Association of Assistance to Twins and their Parents).

191 Interview with Judge Lunanga, President of the Uvira *Tribunal de Grande Instance*.

192 TF Pacéré *Report submitted by the independent expert to the Commission on Human Rights on the situation of human rights in the Democratic Republic of the Congo*, 2006 130.

193 The report also notes that, in theory, substantial monthly bonuses ranging from US $350 to US $500 are paid to all judges and magistrates. However, it notes that a distinction must be drawn between impoverished rural magistrates working in extremely difficult conditions and judges in urban areas who have guaranteed salaries.

194 n 192 above, 132-135.

cover everything — even the costs of securing the attendance of the perpetrator.[195] This corruption is prevalent throughout the judicial process, with any involved person — whether judge, doctor or prosecution — susceptible to corruption.[196] For example, several respondents said that it was widely acknowledged that perpetrators often 'disappear' on their way to the tribunal due to corruption.[197]

Second, corruption also influences court decisions. One official from the UNFPA made the disturbing comment that there was no independent justice in the DRC.[198] Shalukoma, a civil servant, likewise confirmed the pandemic existence of corruption within the state system.[199]

Corruption deters prospective litigants from prosecuting criminal defendants.[200] A victim named Munyerenkana eloquently conveyed her feelings about prosecution:[201]

> It is good, if one judges on the basis of right and wrong. But here in Congo, you can be right, but it's as if you're wrong ... if you have no money you are judged as wrong.

It must, however, be borne in mind that corruption cuts both ways, against and in favour of the victim. While victims commonly lack the means to bribe a judicial officer, this is not always the case, and corruption can work injustices both against the complainant and the defendant.

Enforcement

Judgments normally include both a criminal and civil order, meaning that courts commonly sentence perpetrators to certain prison terms and order them to pay damages to the victim[202] in an amount usually in the vicinity of US $2 000.[203] The lack of enforcement is rife in relation to both the criminal and civil court decisions.[204]

Respondents consistently complained that prison penalties were not commonly enforced.[205] They said that, even if prosecuted and found

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195 Interview with Rachelle, survivor.

196 Interview with Mr Muhindo, lawyer for SOFAD.

197 Interview with Ms Masika, lawyer with AJUSK (Association of Jurists of South Kivu).

198 Interview with Celeste, gender-based violence officer with UNFPA.

199 Interview with Shalukomba, resident of Katana. Similar comments in interview with Vénancie, resident of Goma.

200 Interview with Francine, resident of Goma.

201 Interview with Munyerenkana, survivor. Similar comments in interview with Pastor Antoine, pastor of Heal Africa.

202 Arts 77 & 226 of Military Code; art 15 of the Code Penal.

203 This figure is obtained from a review of judgments of the Goma Military Tribunal and the Goma General Tribunal.

204 Ministere de la Justice (n 91 above) 30.

205 Eg Interview with Pastor Antoine, pastor of Heal Africa; interview with Sidonie, psychologist with Panzi Hospital.

guilty, convicted criminals are sometimes released,[206] or escape due to the dilapidated state of the prisons.[207] MONUC also reports incidents of army soldiers being released from prison with the assistance of colleagues.[208] This impunity greatly discourages prospective litigants from prosecuting offenders.[209]

Civil penalties such as damages are enforced even less frequently. When courts order criminal defendants to pay damages, there is rarely, if ever, any enforcement of the monetary award in favour of the victim.[210] Characteristically, the perpetrators have absolutely no means of paying the required damages. If the perpetrator is a government soldier, the state is required to pay the amount along with the perpetrator, but MONUC as well as respondents insisted that payment by the state never happens.[211] Even though they hand down a judgment, the tribunals have no means to coerce the state to enforce it. Damages paid by the state are in fact completely unrealistic, given that the total amount allocated in the national budget in 2008 to payment of damages is around US $5 350 — the amount that would be awarded to just one victim.[212]

Lack of enforcement is the rule, and enforcement the exception. In 2008, *Arche d'Alliance* in Uvira reported that in the past two years it had assisted with 120 cases. Of the decisions eventually rendered, not one single civil penalty had been enforced.[213] The lack of enforcement causes victims to question the utility of prosecutions, given that there is no certainty that perpetrators will be arrested, prosecuted, convicted and punished, nor that the complainants will actually receive any damages.[214]

6 Overcoming the obstacles

6.1 Summary of the obstacles to prosecution

The obstacles that rape survivors face in Eastern DRC are overwhelming. When rape survivors look to prosecutions, mountains of obstacles block their view, making the mere attempt of prosecution seem futile

206 Interview with Vivianne, survivor.

207 Ministere de la Justice (n 91 above) 49; MONUC, *Twenty-eighth report on the United Nations Organisation Mission in the Democratic Republic of the Congo*, S/2009/335 30 June 2009 14.

208 MONUC (n 207 above) 7 10.

209 Interview with Feza, survivor. See also comments in Interview with Eglesia, survivor: 'If you don't have money, he is arrested, then gives money, and he is liberated.' Similar comments by Interview with Mr Aimé, lawyer with *Arche d'Alliance*.

210 Interview with Celeste, gender-based violence officer with UNFPA.

211 n 9 above, 16; Interview with Mr Aimé, lawyer with *Arche d'Alliance*; interview with Celeste, gender-based violence officer with UNFPA.

212 n 9 above, 16.

213 Interview with Mr Aimé, lawyer with *Arche d'Alliance*.

214 Interview with Francine, resident of Goma.

and meaningless. Ultimately, what a successful prosecution necessitates is an exceptionally lucky combination of a number of unlikely conditions.

Following a rape in Eastern DRC, the typical Congolese rape survivor firstly needs the desire to initiate a criminal action against the sexual offender. However, she would have to identify the perpetrator beforehand, which in itself is difficult. She also needs to know how to commence a prosecution and where and in which tribunal to proceed. She needs to be healthy to be able to focus on the criminal proceedings. She has to live in a peaceful region, and perhaps travel a large distance and must be able to compel the perpetrator, through community pressure or other means, to appear before the court. If married, she needs the consent of her husband to be able to bring an action for damages. In any case, she needs to brave the communal shame associated with the publicity about her rape that a criminal trial would entail. Similarly, she needs to brave the fear of reprisals upon herself and her family.

She needs sufficient finances to pay for medical certificates and court costs. She needs to adduce evidence, first, that she was raped and, second, that it was the person that she identifies as the perpetrator who actually raped her. She needs much perseverance to cope with a lengthy judicial process. In most situations, she needs more money to unofficially pay court officials. Finally, if awarded civil damages, she needs to be one of the lucky few in the region who actually receive it.

Successfully overcoming the above conditions is virtually impossible. The problems are profound and numerous, and the probability that the right combination of these conditions, among all the possible combinations, would work for the successful prosecution of a sexual offender is unlikely. Looking at the odds of success, the Eastern DRC woman would never stake money on criminal prosecution; particularly if she is as disadvantaged as the average Eastern DRC woman — she simply cannot afford to gamble.

It is tempting to admit defeat before the Everest of obstacles and to abandon prosecution and public law remedies in favour of amicable arrangements. However, the state bears the duty to prevent, investigate and punish sexual violence.[215] The interests of justice and peace in Eastern DRC, as well as of the countless victims, demand it.

6.2 Recommendations for overcoming these obstacles

6.2.1 Security-related recommendations

How may Congolese, regional and multilateral strategists tackle these obstacles? Through tackling the actual cause: The underlying cause of many of these obstacles is not inherently judicial. Ultimately, the problem with the prosecution of sexual violence is not institutional,

[215] See *Velasquez Rodriguez v Honduras,* 4 Inter Am Ct HR Ser C 4 1988.

legal, sociological or psychological. It is the omnipresence of insecurity in Eastern DRC. It is recognised that the 'conflict in Eastern DRC is a root cause of much of the problem of wide-spread sexual violence, and that ending it would be of enormous value in addressing this problem'.[216] There is a strong correlation between sexual violence and armed conflict,[217] with the presence of multiple armed groups being responsible for much of the sexual violence.[218] However, the persistent insecurity not only facilitates the commission of rapes, but also causes several obstacles to prosecuting sexual violence perpetrators, thus posing a significant obstacle to justice.[219] For example, the ongoing fighting in Eastern DRC has decimated health services for rape victims, diverting their focus away from prosecution. Reform of the security sector has thus been described as the most obvious avenue for action to tackle the underlying conflict and insecurity which feed violence against women.[220]

The Enough Project is of the opinion that[221]

> [m]easures to deal with rape as a weapon of war in isolation will fail and fail miserably. If we truly want to end this scourge we must move from managing conflict symptoms to ending the conflicts themselves.

As of late 2009, security had not yet been achieved in the Kivu territories.[222] In part due to its size, the DRC is the only country in Africa surrounded by nine neighbours such that its peace and stability depend on its regional diplomatic relations.[223] MONUC notes that the ongoing conflict in Eastern DRC and large-scale displacement of the population pose obstacles to the implementation of an effective response to sexual violence.[224]

For that reason, the paper's first recommendation is that the DRC focuses on attaining security throughout Eastern DRC, for example

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216 n 9 above11.

217 Notes from briefing with SRSG DRC Alan Doss, United for Women of All Nations 6 April 2008, http://www.uwan.info/a/Doss.html (accessed 20 September 2009).

218 MONUC 'DRC: Waiting for militias to leave the Kivus' 12 March 2009, http://www.irinnews.org/report.aspx?ReportID=83418 (accessed 20 September 2009).

219 Ministere de la Justice (n 91 above) 22.

220 n 9 above, 29.

221 Enough Project John Prendergast 'Confronting rape and other forms of violence against women in conflict zones — Spotlight: DRC and Sudan' 13 May 2009 http://www.enoughproject.org/publications/confronting-rape-and-other-forms-violence-against-women-conflict-zones%E2%80%94spotlight-drc-an (accessed 20 September 2009).

222 n 6 above.

223 DP Zongwe 'The legal justifications for a people-based approach to the control of mineral resources in the Democratic Republic of the Congo' 26 April 2008 *Cornell Law School LLM Papers Series* Paper 12 http://lsr.nellco.org/cornell/lps/clacp/12 (accessed 20 September 2009) 66.

224 MONUC Comprehensive Strategy on Combating Sexual Violence in DRC, Executive Summary, 18 March 2009 5.

by solidifying regional military co-operation so that, jointly with neighbouring countries, they can flush out rebels and extinguish the remaining pockets of insecurity in Eastern DRC and the entire Great Lakes region.

Further, the Congolese government, the UN and the international community at large must urgently adopt measures to exorcise the DRC's resource curse, seen in the illegal trade of strategic minerals. The Congolese government must increase security around mining areas and the UN must reinforce the military strength and mandate of MONUC.

Accountability for the regulation of multinational corporations must be increased,[225] in order that there are transparent procedures from buyers all along the supply chain — from people buying minerals from the mines to the manufacturers through to retail companies — to ensure that minerals do not originate from armed conflicts.[226]

Finally, the international community must maintain pressure on the former belligerents long enough for the state, the UN and the international community to address the economics of the conflicts in Eastern DRC. Such security reform is essential, not only to reduce the causes of the high level of sexual violence, but also to make available precious Congolese financial and human resources to be spent on the judicial sector.

6.2.2 Prosecution-related recommendations

Combating impunity through judicial means is essential to the restoration of peace.[227] As long as it is unable to arrest, convict and secure perpetrators, the state will not serve the interests of peace and justice. And as long as the law is not applying equally to all, there will be no end to impunity. Security Council Resolution 1820 affirms that 'effective steps to prevent and respond to acts of sexual violence can significantly contribute to the maintenance of international peace and security'.[228]

An ongoing problem is the lack of any overall strategy or co-ordination in international assistance in the field of gender justice.[229] One promising proposal is the establishment of a temporary special international criminal tribunal or, alternatively, mixed criminal chambers,

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[225] See D Renton *et al The Congo: Plunder and resistance* (2007) 210, stating that private and speculative capital and multinationals have frequently provided a reason for the armed groups in the DRC.

[226] See Press Release *Global Witness* 'Resource plunder still driving Eastern Congo conflict' 1 November 2008 http://www.globalwitness.org/media_library_detail.php/678/en/resource_ plunder_still_driving_eastern_congo_conflict (accessed 20 September 2009).

[227] n 192 above,148.

[228] United Nations Security Council Resolution 1820 (2008) of 19 June 2008.

[229] n 9 above, 32.

such as recommended by Mr Pacéré.[230] This would take the form of a new Congolese tribunal or chambers with international support, connected to and building upon the existing court system, which does not have sufficient capacity to deal with all the crimes resulting from the conflict.[231] This institution would be similar in concept to the Special Court for Sierra Leone, and would be responsible for trying persons accused of serious violations of human rights, including sexual violence. Such a model of transitional justice involving special measures for a limited time is necessary to recognise the scale of the crimes committed throughout the conflict in Eastern DRC.[232] This institution would be seated in the Congo and be made up of judicial personnel from the Congo, thus reinforcing and supporting Congo's existing judicial system, in terms of staff, training, equipment and living and working conditions.[233] The tribunal or chambers would be supported by the international community, who thus build the capacity of local courts while allowing them to take ownership of the accountability and peace process.

The state must also carry on with its efforts to upgrade the domestic legal system and local knowledge of state laws and public law remedies. It is important that judicial institutions are strengthened so that the laws on sexual violence are effectively applied. As the Minister of Justice noted, the judicial sector suffers from serious problems that gravely affect the administration of justice and weaken the state.[234] The capacity of the state must be strengthened so that the state can properly assume its responsibility to prosecute criminal cases and thereby relieve the burden on victims.[235]

The state must address its deplorable lack of attention and support for the judiciary in Eastern DRC. Figures from 2007 reveal that an insignificant amount (0,3%) of the national budget was allocated to the justice sector.[236] The DRC must give greater support to both the civil and military judicial systems by, for instance, ensuring the rehabilitation of the prison system and strategic training, awareness raising and capacity-building programmes on sexual violence and its handling for those involved in these cases, such as judges, police and prosecutors.[237] The state can do this regardless of whether or not armed conflict is taking place, and the international community should lend its support to such efforts.

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230 n 227 above.
231 n 9 above, 34.
232 n 9 above, 35.
233 n 192 above, 151.
234 *Ministere de la Justice* (n 91 above) 7.
235 MONUC (n 160 above) 4.
236 n 9 above, 17.
237 n 9 above, 42.

There is an urgent need for trained and specialised investigators to conduct investigations into sexual violence crimes. The state must improve the working conditions of judicial personnel, particularly their remuneration, and put effective sanctions in place so as to combat corruption.[238] Access to justice for victims must be improved so that victims are not prevented from accessing the courts through physical, financial or other barriers, including fear of reprisals.[239] Furthermore, the enforcement of judgments — both in terms of ensuring reparation payments as well as the reliable and secure imprisonment of convicted perpetrators — is necessary to ensure the judiciary is respected.[240]

In addition, the Congolese population must continue to receive training and education on sexual violence laws and the means of prosecuting sexual perpetrators. Such education will lead to better access to justice.[241] It is essential that women's rights and gender equality are promulgated, since sexual violence is one manifestation of an underlying gender imbalance. This may lead to reduced incidents of sexual violence as well as the increased empowerment of victims and the community to be able to reject sexual violence.[242] Crucially, since government intervention in this area has generally been deficient and ineffective, NGOs can assist in training and education, especially by confronting existing mindsets and assisting rape victims to commence criminal prosecutions.[243] There are numerous courageous NGOs supporting even more courageous women. The efforts and progress of these NGOs are instrumental in forcing perpetrators to account for their actions.[244] They can assist the state and local communities to challenge mentalities and behaviours in sexual violence matters, to alleviate the shame too often associated with rape, and to help redress the wrongs committed against rape survivors. It is true that these measures will be difficult for the DRC to achieve alone; they must have the long-term assistance and engagement of international donors.[245]

In addition, it is recommended that Congolese law be amended to draw a distinction between statutory rape and violent rape against minors. The

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238 *Ministere de la Justice* (n 91 above) 10.

239 MONUC (n 160 above) 2.

240 n 9 above, 18.

241 *Ministere de la Justice* (n 91 above) 17.

242 n 9 above, 41.

243 The 1993 Declaration on the Elimination of Violence Against Women (DEVAW) also recognises the role of NGOs in combating sexual violence against women: Declaration on the Elimination of Violence against Women GA Res 48/104 (20 December 1993) art 4.

244 See, eg, the case of Gédéon, Mai Mai militia leader, handed down 5 March 2009, with the assistance of submissions of Human Rights Watch: Human Rights Watch 'DR Congo: Militia leader guilty in landmark trial' 10 March 2009 http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial (accessed 20 September 2009).

245 *Ministere de la Justice* (n 91 above) 22.

equal treatment of these forms of sexual violence inflates official rape prosecution statistics and leads one to an inaccurate perception of the number of violent rape cases handled by the courts. This is dangerous because it affects the assessment of the severity of sexual violence in the DRC, as well as the urgency of measures needed to respond.

6.2.3 Role of customary law

Drawing from experiences in post-conflict countries, the DRC should consider adopting legislative and other measures to empower traditional courts to determine the guilt or innocence of persons accused of perpetrating sexual violence during the armed conflict. In the same vein, the state should encourage traditional chiefs to help former soldiers, rape survivors and some sexual offenders re-integrate into their respective traditional communities. However, the state also has the obligation to protect women's rights, and that implies developing customary laws and circumscribing the criminal jurisdiction of traditional courts as certain aspects of customary laws discriminate against women[246] and rape survivors. If it is to avoid gender injustice, the state must define the limits of the jurisdiction of traditional courts so that these courts comply with gender rights. Incorporating customary law is important, given that the jurisprudential representation of the state as a sovereign with exclusive prosecutorial power in the DRC id a myth, debunked every day as traditional courts take up an overwhelming proportion of cases.

Customary prosecutions can remove many obstacles to the effective and successful prosecution of sexual offences, namely, acceptance by the people of prosecution as an effective remedy, a lack of knowledge of state laws, shame, costs, distance, fear of the judicial process, evidence, long delays, corruption and enforcement.

7 Conclusion

Travelling around North and South Kivu, one cannot help but notice the public advertisement campaign against sexual violence. 'A real man doesn't force a woman to make love. A real man waits', reads one sign. 'Perpetrators of sexual violence? Imprisonment!' exclaims another. Yet, despite the public awareness and international denunciation of sexual violence, the problem and impunity remain widespread.[247] Evidently, the widespread public campaign has not yet resulted in the deterrence of sexual violence. More must be done to assist victims of sexual violence to seek and attain justice.

[246] African Women's Protocol, Preamble.

[247] n 12 above, 5.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The African Union peace and security architecture: Can the Panel of the Wise make a difference?

*Ademola Jegede**
Project Consultant, Negotiation and Conflict Management Group, Nigeria

Summary

This article focuses on the establishment of the Panel of the Wise in the African Union peace and security architecture. It examines the basis, design and role of the Panel, and explores the possibilities that can be employed by the Panel in promoting the internalisation of peace and security in Africa. The writer makes recommendations in respect of the membership, norms and mandate scope of the Panel, and expresses confidence that, if properly designed and operationalised, the Panel will make a difference in the peace and security architecture of the African Union.

1 Introduction

The adoption of the Peace and Security Council (PSC) Protocol in 2002 marked the peace and security architecture of the African Union (AU). Although established to assist the PSC and the Chairperson of the AU Commission in the architecture, the Panel of the Wise (Panel) has received scanty academic attention regarding the basis for its creation, design and role.

Following a brief background, this article examines the necessity for the Panel in the AU peace and security architecture, and criticises its design. The role of the Panel is explored together with the potential of the Panel in promoting the internalisation of peace and security in Africa. The article recommends that an amendment in respect of the membership, norms and mandate of the Panel is required for it to make a difference in the AU peace and security architecture.

* LLB (Hons) (Ife), LLM (Human Rights and Democratisation in Africa (Pretoria), MPH (Ibadan), BL (Nigerian Law School); gad_law@yahoo.com; demola.jegede@ncmggroup.org. This article is based on the author's dissertation submitted in partial compliance with the requirements for the degree LLM (Human Rights and Democratisation in Africa) 2008, Centre for Human Rights, University of Pretoria.

2 Background to the establishment of the Panel of the Wise

At the Lusaka Summit, in July 2001, the Organisation of African Unity (OAU) took a decision to incorporate the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution as one of its organs.[1] This crystallised in 2002 in the adoption of the Protocol on the Establishment of the Peace and Security Council (PSC Protocol).[2] The PSC Protocol provides for a continental architecture for peace and security based on five structures: the Peace and Security Council, the Continental Early Warning System (CEWS), the African Standby Force (ASF), the Peace Fund and the Panel of the Wise.[3]

Subsequently, the AU adopted the Solemn Declaration on a Common African Defence and Security Policy (CADSP), a proactive Declaration based on the notion of human security rather than the narrow approach which perceives security solely as state security. An all-inclusive document, the CADSP reflects the norms which constitute the African peace and security architecture. This is an interventionist policy to security challenges in Africa.[4] Described therefore in terms of its norms and structures relating to averting conflict and war, mediating for peace, and maintaining security in Africa, the African peace and security architecture has emerged.[5] It is against this backdrop that the Panel was inaugurated on 18 December 2007.[6]

The Panel was established to support the PSC and the Chairperson of the AU Commission in their efforts in the areas of conflict prevention, promotion and the maintenance of peace, security and stability in Africa.[7] The members of the Panel, who were elected in January 2007, are respected and distinguished statesmen, namely, Salim Ahmed Salim, former Secretary-General of the OAU (East Africa), Ahmed Ben-

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1 OAU Doc AHG/Decl 1 (XXXVII) adopted by the 37th ordinary session of the Assembly of Heads of State and Government of the OAU, held in Lusaka, Zambia, from 9 to 11 July 2001.

2 Adopted at the 1st ordinary session of the Assembly of the Heads of State, Durban, South Africa, 9 July 2002, Addis Ababa, Ethiopia, 9 July 2002.

3 PSC Protocol arts 1-21.

4 Adopted at the 2nd extraordinary session of the Assembly of Heads of State and Government of the AU held in Sirte, Libya from 27 to 28 February 2004; arts 7, 8(a)-(v) and 9 contain common non-traditional security threats facing Africa. See also T Murithi *The African Union: Pan-Africanism, peacebuilding and development* (2005) 25; M Mwanasali 'Emerging security architecture in Africa' (February 2004) 7 *Centre for Policy Studies Policy Issues and Actors* 4; J Cilliers 'The African standby force: An update on progress' (March 2008) Paper 160 *Institute for Security Studies* 4-6.

5 SA Salim 'The architecture of peace snd Security in Africa' address during the African Development Forum III, 'Defining Priorities for Regional Integration' 3-8 March 2002, Addis Ababa, Ethiopia.

6 PSC Protocol art 11(2).

7 PSC Protocol art 11(1).

Bella, former President of Algeria (North Africa), and Miguel Trovoada, former President of São Tomé and Principe (Central Africa); and respected women who head reputable domestic institutions (Brigalia Bam, Chairperson of the Independent Electoral Commission of South Africa (Southern Africa) and Elisabeth K Pognon, President of the Constitutional Court of Benin (West Africa).[8]

After an initial failure to discuss the modalities as scheduled on 8 August 2007,[9] at the meeting of the Panel on 12 December 2007 the modalities for the Panel were eventually discussed and adopted.[10] Its first meeting was held on 20 February 2008.[11] In the following section, an attempt is made to critically discuss the rationale behind the establishment of the Panel.

3 Probing the need for the Panel of the Wise

For long, in discussing the way out of the myriad problems relating to peace and security in Africa, scholars have suggested an 'African solution to African problems' approach. Their arguments in support of this approach have been premised on the values and practices from different settings of Africa on conflict prevention and resolution.[12] In a similar vein, African leaders have canvassed a renaissance of African values in addressing its contemporary challenges.[13]

This section identifies the concept of the wise as evidence of African values which validates the setting up of the Panel of the Wise in the AU peace and security architecture. In discussing this concept, proverbs from different settings in Africa are cited as a window of insight and corroborated with practices which vest wisdom for conflict prevention and resolution in the elderly and, in more recent times, on distinguished African personalities. In the main, it is argued that the creation of the

8 AU Doc Assembly/AU/Dec 152(VIII).

9 'Panel of the Wise — Operationalising the African Union's mediation framework' *ISS Today* 23 August 2007.

10 Modalities of the Panel of the Wise, adopted by the Peace and Security Council at its 100th meeting held on 12 November 2007.

11 AU Document EX CL/438(XIII) Assembly of the African Union 11th ordinary session 30 June to 1 July 2008.

12 A Mazrui 'Towards containing conflict in Africa: Methods, mechanisms and values' (1995) 2 *East African Journal of Peace and Human Rights* 81-90; J Mallan 'Conflict resolution wisdom from Africa' 1997 ACCORD 9-17; EE Osaghae 'Applying traditional methods to modern conflict: Possibilities and limits' in IW Zartman (ed) *Traditional cures for modern conflicts: African conflict medicine* (2000) 201-230; NA Fadipe *Sociology of the Yoruba* (1970) 106; K Wiredu *Philosophy and an African culture* (1980).

13 In his view, Julius Nyeyere pointed out the need for Africa to start from its 'Africanness' and a belief in its own past to chart solutions for contemporary challenges; JK Nyeyere *Freedom and unity (Uhuru na Umoja): A selection of writings and speeches 1952-65* (1967) 316.

Panel is consistent with the African concept of the wise, and reflects the long-held notion of an African solution to African problems.

In most parts of indigenous Africa, the concept of the wise is embodied in the belief that holds the elderly as custodians of wisdom for conflict prevention and peaceful settlement of disputes.[14] Evidence in support of this world view is found in the proverbs and practices pointing at the attribute of the elderly in relation to wisdom and their unique role in conflict prevention and resolution.

Among the Nembe of the Niger Delta, for instance, there is a saying that 'more days mean more wisdom', while the Ikwerre people from the same region believe that 'what an old man sees seated, a youth does not see standing'.[15] A similar expression in the eastern part of Africa is that 'what old people see seated at the base of the tree, young people cannot see from the branches'.[16] Particularly in Uganda, there is the saying that 'it is the black spot in the eyes of the elders which has vision', meaning that what a young person may not see, elders will.

Practices also exist in the area of conflict prevention and decision making on community security which tapped into the wisdom of the elders.[17] 'Elder meetings' held under trees, public or village assemblies and other gatherings deal with issues of dispute before they mature into full-blown security threatening conflicts. Examples of such meetings include the 'palaver hut' meetings of the Vai and Kpelle people of Liberia,[18] and the Ndendeuli of Tanzania.[19]

Evidence of the involvement of the elders in traditional institutions for conflict prevention and community security exists in the traditional Somali society where elder-headed clans are a social and political unit of organisation and government.[20] Although the clan is cited as a factor in the collapse of Somalia,[21] proof, at least from Somaliland, points to the fact that clan elders are a source of reconciliation and the maintenance of peace.[22] In Somaliland, each clan has its own leaders and a council of elders that is involved in the maintenance of peace and conflict prevention, management and resolution. Even where a breach

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14 K Gyekye *An essay on African philosophical thought: Akan conceptual framework* (1987) 18; Mazrui (n 12 above) 85-86; LP Kimilike 'An African perspective on poverty proverbs in the book of proverbs: An analysis of transformational possibilities' unpublished PhD thesis, University of Pretoria, 2006 95.

15 http://www.ccsu.edu/afstudy/upd1-4.html (accessed 13 September 2008).

16 As above.

17 JL Comaroff & S Roberts *Rules and processes: The cultural logic of dispute in African context* (1981) 109.

18 S Nanda *Cultural anthropology* (1987) 96-98.

19 CJ Witty *Mediation and society: Conflict management in Lebanon* (1980) 6.

20 F Ssereo 'Clan-politics, clan-democracy and conflict regulation in Africa: The experience of Somalia' (2003) 2 *The Global Review of Ethnopolitics* 26.

21 As above.

22 M Bryden *Rebuilding Somaliland: Issues and possibilities* (2003) 6-27.

of security takes place, the elderly fixes the traditional customary conventions on war and crisis situations.[23]

In Uganda, among the Karamojong, the elders resolve disputes by means of discussions and debates before they worsen into conflicts.[24] In Ethiopia, among the Boran, the village council and the *Aba Olla* (village head) had far-reaching political, social, economic and judicial functions, including dispute settlement.[25] Likewise, amongst the Samburu in Kenya, there is evidence of binding mechanisms which engage the elders in dispute resolution and maintenance of peace and order.[26]

However, there are inherent flaws which cast doubt on the possibility for a general application of the indigenous conception of elders' role to the realities in contemporary African states. First, as Appiagyei-Atua argues, old age is not always synonymous with wisdom. Indeed, as shown in the practice of the Akan people, wisdom can be acquired through other sources apart from age.[27] Secondly, as Wiredu argues, in traditional African societies, thoughts and wisdom came from the elderly persons and were imposed on the rest of the community.[28] Largely dominated by the male, the *views* of women were therefore either unheard or altogether excluded in the dispute settlement framework. In Somali, for instance, the clan-based conflict resolution system is led by male clan elders (*Oday*), which severely marginalises women in decision making.[29] Thirdly, dispute management strategies often generated by the elders were localised and could not be generalised beyond local boundaries. These strategies, Osaghe argues, are located in ethnic groups and this, where ethnic conflicts exist, may be seen as a continuation of ethnic domination by one ethnic group of another and so further aggravate conflicts.[30] Finally, with the advent of colonialism, the relevance of the institution of elders itself became dysfunctional through politicisation, corruption and the abuse of traditional structures. The co-option of most elders as agents of the state and their manipulation to serve partisan ends considerably reduced

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23 Bryden (n 22 above) 25.

24 S Dzivenu 'The politics of inclusion and exclusion of traditional authorities in Africa: Chiefs and justice administration in Botswana and Ghana' (2008) 2 *Political Perspectives* 1 7.

25 As above.

26 As above.

27 K Appiagyei-Atua 'A rights-centred critique of African philosophy in the context of African development' (2004) 10 *East African Journal of Peace and Human Rights* 55-56.

28 Wiredu (n 12 above) 2-5.

29 J Gundel *The predicament of the 'Oday': The role of traditional structures in security, rights, law and development in Somalia* (2006) 21 http://siteresources.worldbank.org/INTLAWJUSTINST/ Resources/GundelTheroleoftraditionalstructures_1.doc (accessed 10 September 2008).

30 Osaghe (n 12 above) 214-215.

the reverence and respect commanded and, therefore, their ability to resolve conflicts.[31]

In spite of the foregoing, there are reasons to suggest that the elders' role may be reconceived to creatively address concerns around conflicts in Africa. First, as Afigbo argues, 'reconstructing a usable and problem solving-oriented past' is possible in Africa.[32] Secondly, the imperviousness of the African peace and security concerns to international attentions reinforces the need for an inward search for culturally-applicable solutions.[33] Thirdly, such a conception is consistent with the call for culturally applicable solutions to African problems by international bodies such as the United Nations Educational Security Council (UNESCO).[34]

Indeed, practices exist that suggest that a new concept about elders' role is emerging in the modern approaches at addressing concerns around conflicts in Africa. For instance, post-independence national constitutions of some African states have created advisory roles for elders, not only in governance but in the promotion of peace and security. In Ghana, for instance, the Constitution provides for a Council of State which is composed of a body of distinguished personalities to counsel the President in the performance of his functions.[35] Similar provisions exist in the Constitution of Lesotho which allows for the creation of a Council to assist the King in the discharge of his functions.[36] In the Kingdom of Swaziland, the *Tindvuna* is a constitutional body of headmen which assists in the traditional governance of the country in areas including the hearing of complaints and advising on the tempo of the nation.[37] The Constitution of the self-declared state of Somaliland also establishes the House of Elders and vests it with the power to address issues regarding the security and peace of the country.[38]

Even in some national constitutions where no mention is made about the specific role for elders, institutions have been established which exercise a similar influence on issues of peace and security. Article 61 of the 1995 Constitution of the Federal Republic of Ethiopia, for instance, establishes the House of the Federation, composed of representatives

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31 Osaghe (n 12 above) 215.

32 AE Afigbo *The making of modern Africa* (1986) 30.

33 FO Hampson *Nurturing Peace: Why peace agreements fail or succeed* (1996) 217; IW Zartman 'Introduction: African traditional conflict medicine' in IW Zartman (ed) *Traditional cures for modern conflicts: African conflict medicine* (2000) 2.

34 UNESCO has argued that culture is critical to development and that development must be engaged in the context and through the medium of human cultures. 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 (accessed 9 September 2008).

35 The 1992 Constitution of the Republic of Ghana, art 89(1).

36 The 1993 Constitution of Lesotho, art 95(1).

37 The 2005 Constitution of the Kingdom of Swaziland, sec 235(4).

38 The 1997 Constitution of Somaliland, art 57.

of nations, nationalities and peoples. One significant function of the House is to strive to find solutions to disputes or misunderstandings that may arise between states.[39] In Burundi, the Post-Transition Interim Constitution provides for the National Council of *Bashingantahe*,[40] whose responsibilities include giving advice on essential questions concerning unity, peace and national reconciliation.[41] A similar role is contemplated in the Central African Republic for the National Council for Mediation.[42]

Sub-regional bodies, such as the Economic Community of West-African States (ECOWAS) and the South African Development Community (SADC), have also developed institutions and practices which tap from the concept of the wise in addressing modern-time challenges. The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security of ECOWAS (ECOWAS Protocol) creates the Council of Elders, a body of distinguished personalities.[43] On behalf of ECOWAS, members of the Council can use their good offices and experience to address issues capable of breaching peace and security within the region.[44] The Council has been engaged in handling the crisis arising from the proliferation of small arms in the sub-region.[45] The SADC Protocol on Politics, Defence, and Security Co-operation (SADC Protocol) does not provide for a similar Council.[46] Nevertheless, the SADC Protocol mandates the Organ on Politics, Defence, and Security Cooperation to prevent, manage and resolve conflict by peaceful means.[47] To this end, eminent persons are often engaged by SADC, as shown in the example of Lesotho where they were involved in post-election political concerns.[48]

Most importantly, the recent efforts of African statesmen in mediating conflict situations in Africa show the application of the concept of the wise in more recent times and the relevance of distinguished personalities to conflict resolution. Kofi Anan was, for instance, involved

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39 The 1995 Constitution of the Federal Republic of Ethiopia, art 62(6).

40 In pre-colonial times, the term *Bashingantahe* was used to designate a body of men renowned for their sense of truth, justice and responsibility for the overall good of the community. However, the institution is now composed of both men and women, at community level, who possess the desired attributes of wisdom, calm and a love of truth, entrusting them with the authority to arbitrate in certain disputes; http://daga.dhs.org/urugopeace/Burundi/bashingantahe.htm (accessed 22 October 2008).

41 The 2004 Post-Transition Interim Constitution of the Republic of Burundi, art 269.

42 The 2004 Constitution of the Central Africa Republic, art 104.

43 ECOWAS Protocol, art 20.

44 As above.

45 *The Guardian* 23 May 2008 http://www.guardiannewsngr.com/news/article05//indexn2_html? pdate=230508&ptitle=Obiakor (accessed 9 September 2008).

46 SADC Protocol, art 11(3)(a).

47 As above.

48 SADC News/Press Release http://www.foreign.gov.ls/news/SADC_Eminent_Person_Mission.php (accessed 9 September 2008).

in mediating the electoral crisis in Kenya.[49] The former President of Mozambique, Joachim Chissano, has been involved in the efforts to resolve the crisis in Northern Uganda.[50] Following the tension created over the elections held in Zimbabwe, Mr Thabo Mbeki has also been involved in brokering peace between the two major participants of the election, namely the incumbent President, Mr Robert Mugabe and the opposition leader, Mr Morgan Tsvangirai.[51] This trend accords with Zartman's view that modern Africa does not lack mediators.[52]

It is therefore not surprising that a mechanism bearing the brand 'Panel of the Wise' was established in the African peace and security architecture. It is argued that, in introducing the Panel into the AU peace and security architecture, the African leadership is guided by the African world view on the concept of the wise. Most importantly, it is guided by the thought that distinguished Africans can be engaged in proferring solutions to African problems relating to peace and security.

Having ascertained the basis of the Panel, the next part of the article will offer a close assessment of the features of the Panel. This is with a view to finding out whether the Panel is designed effectively.

4 An assessment of the Panel of the Wise

As Acharya and Johnston argue, the study of international relations has witnessed a shift from the question of why the establishment of peace and security institutions matters to one of how they matter. Acharya and Johnston identify five major features of institutional designs,[53] namely, membership,[54] scope,[55] formal rules,[56] norms[57] and mandate.[58] In the next sub-section, I use these features as a guide to criticise the Panel of the Wise.

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49 'Kenya crisis talks end' *Nation News* 30 July 2008 http://www.nation.co.ke/News/-/1056/445014/-/tj26d7/-/index.html (accessed 9 September 2008).

50 'Uganda: Chissano in Gulu to salvage LRA-Govt peace deal' http://www.irinnews.org/ Report.aspx?ReportId=79868 (accessed 20 October 2008).

51 'Zimbabwe crisis: Thabo Mbeki's role' http://www.guardian.co.uk/news/blog/2008/jun/23/ zimbabwecrisisthabombekisr (accessed 20 October 2008).

52 IW Zartman 'Inter-African negotiations and state renewal' in JW Harbeson & D Rothchild (eds) *Africa in world politics: The African state system in flux* (2000) 142.

53 A Acharya & A Johnston 'Comparing regional institutions' in A Acharya & A Johnston (eds) *Crafting co-operation: Regional Institutions in comparative perspective* (2007) 21-22.

54 This means how inclusive or exclusive is the membership.

55 This refers to how narrow or broad are the issues that the institution is designed to handle.

56 This entails a set of rules or policies governing how decisions are made.

57 This refers to the formal and informal ideology of the institution.

58 This refers to the general purpose of the institution.

4.1 Membership: A Pool or Panel of the Wise?

The Panel is composed of five highly-respected members from various segments of society who have made outstanding contributions to peace, security and development on the African continent.[59] Panel members are selected by the Chairperson of the Commission after consultations with the member states concerned, on the basis of regional representation to serve for a renewable period of three years.[60]

The limit of membership of the Panel is unhelpful considering the level and spontaneity of conflicts and crises in Africa. One questions the rationale behind such prescription on a continent richly endowed with dignified personalities who can make a difference in addressing conflicts and crisis situations. Although the modalities of the Panel allow for support by mediation teams,[61] this does not remove the need for a broader membership of the Panel. This is because, more than any other mechanism in the system, the assets of the Panel and its potential to make a mark in the peace and security architecture lie in the moral force of its respected personalities. Hence, a broad membership of the Panel will offer an opportunity for more influence over conflict and crisis situations in Africa.

Equally, given the distinct feature of the art of mediation which requires disputants' consent on who mediates over their disputes,[62] it is difficult to imagine how a five-member panel can effectively satisfy this requirement within the African conflict context. An example that vividly describes this concern is the Kenya election crisis. The government, in the wake of the crisis, had offered dialogue which was to be facilitated by the Ghanaian President who was also the Chairperson of the AU. Mr Ralia Odinga, the leader of the opposition, however, insisted that he would only agree to a mediation facilitated by international mediators.[63] The impasse was eventually brokered by a team of international mediators headed by the former Secretary-General of the United Nations (UN), Mr Kofi Annan, a non-member of the Panel.[64] The failure of the AU to broker the Kenya crisis has been criticised as

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59 PSC Protocol, art 11(2).

60 As above.

61 n 10 above, para III (1)(f).

62 W Ury *Getting to say yes: Negotiating agreement without giving in* (1991) 20.

63 'Kenya crisis talks end in failure' *BBC News* 10 January 2008 http://news.bbc.co.uk/2/hi/africa/7181184.stm (accessed 8 September 2008).

64 'Kenya crisis could take a year to end' *Skye News* 30 January 2008 http://news.sky.com/ skynews/Home/Sky-News-Archive/Article/20082851302827 (accessed 8 September 2008); 'Kenya crisis talks end' *Nation News* 30 July 2008 http://www.nation.co.ke/News/-/1056/445014/-/tj26d7/-/index.html (accessed 9 September 2008).

exposing the weakness of the system to act as a 'one-stop shop for security issues in Africa'.[65]

It does therefore appear that a Pool of the Wise, composed of reputable personalities from different regions of Africa, may be more fitting in the African context than a five-member panel. The idea of a pool is not strange, particularly in the sub-regional system. An example can be found in the membership of the ECOWAS Council of Elders. The Executive Secretary of ECOWAS is required to annually compile a list of eminent persons from various segments of society, including women, political, traditional and religious leaders. These are persons who, on behalf of ECOWAS, can use their good offices and experience to play the role of mediators, conciliators and facilitators whenever conflicts arise. The Council of Elders is constituted from an approved list to deal with specific conflict situations.[66]

The Council of Elders has been put to use on different issues, such as the pre-election survey in Nigeria.[67] Members of the Council have also been involved in addressing the proliferation of small and light arms in the sub-region.[68] Consequently, the AU may follow the approach of ECOWAS in redesigning the Panel into a more promising Pool of the Wise.

In addition to the above model of ECOWAS, the Pool of the Wise is recommendable for other reasons. First, it will accommodate an increased number of eminent personalities who can engage the mandate of the Panel. Secondly, as credentials and experiences of members may vary, a pool will enable the peace and security structure to easily compose a team around diverse peace and security issues. Thirdly, a large membership of the pool may actually increase wider reach and help elicit co-operation for activities in areas of conflict prevention, peace promotion and decisions compliance.

Finally, a Pool of the Wise will further strengthen the peace and security structure by making accessible a more robust, collective wisdom and intelligence of respected personalities in coping with challenges facing peace and security in Africa.

4.2 Formal rules

The modalities of the Panel set out procedures for the appointment of the Chairperson for meetings and communications, an agenda, a

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65 'Kenya failure breaches African Union ambition' *Reuters* 11 January 2008 http://www.reuters. com/article/worldNews/idUSL1171753120080111 (accessed 10 September 2008).

66 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, art 20.

67 'Gambia President heads ECOWAS mission to Nigeria' *Afrol News* 22 January 2007 http://www.afrol.com/articles/23932 (accessed 20 October 2008).

68 ECOWAS 'Advisory Board for small arms in West Africa' http://www.iansa.org/regions/wafrica/BoardECOWAS.htm (accessed 20 October 2008).

quorum, recommendations and reports.[69] The Panel meets as often as the circumstances may require or at least three times a year.[70] The Panel may also sit at any time at the request of the Council or the Chairperson of the Commission.[71] It is believed that such an impromptu sitting makes good sense considering the spontaneous nature of conflicts, particularly in Africa.

The Panel holds its meetings at the headquarters of the AU or elsewhere after consultation with the Chairperson of the Commission.[72] This meeting arrangement is useful and convenient for the Panel that may wish to meet for urgent intervention in disputes before they worsen into conflict situations. Meetings are held in closed sessions.[73] Resource persons, experts, institutions or individuals may be invited to attend a meeting in order to assist the Panel in its deliberations on specific issues.[74] It is envisaged that the Panel will take advantage of this provision regularly as it will no doubt allow for greater dialogue between the Panel and the other stakeholders in the performance of its mandate. Most importantly, it will enable the Panel to tap from a wide variety of resources.

In accordance with its modalities, the Chairperson of the Panel is required to receive for inclusion in the provisional agenda of a meeting of the Panel proposals on issues of the promotion and maintenance of peace, security and stability in Africa.[75] Such proposals are received from any member of the Panel, the Council and the Chairperson of the Commission, as well as from the Pan-African Parliament, the African Commission on Human and Peoples' Rights (African Commission) and civil society groups in the context of their respective contributions to the promotion and maintenance of peace, security and stability in Africa.[76]

The individual is not included in these modalities for submission of proposals for the Panel's agenda. This is strange, particularly considering the fact that political conflicts often start as disputes between individuals.[77] Most importantly, to permit individuals to submit a proposal is consistent with the principle of participation and could increase the sense of ownership of the mechanism by individuals.

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69 n 10 above, para IV.

70 n 10 above, para IV(3).

71 As above.

72 n 10 above, para IV(4).

73 n 10 above, para IV(5).

74 As above.

75 n 10 above, para IV(8).

76 As above.

77 Examples of these include Kenya's conflict between Rilal Odinga and Kibaki; and Zimbabwe's election crisis between Robert Mugabe and Morgan Tsvangirai.

4.3 Norms

The norms to guide the Panel can be read from article 4 of the PSC Protocol which sets out the institution's guiding principles, which are enshrined in the AU Constitutive Act, the Charter of the UN and the Universal Declaration of Human Rights (Universal Declaration). In particular, the Protocol emphasises 11 principles. Principles (a) through to (i) relate to the peaceful and early settlement of disputes, non-interference, and the recognition of the territorial integrity of its members. Significantly, Principle (d) reiterates the interdependence between socio-economic development and the security of people and states.

Principles (j) and (k) recognise the right of the AU to intervene 'in respect of grave circumstances, namely war crimes, genocide and crimes against humanity', and the right of members to request intervention. Principle (j) rehearses the provision of article 4(h) of the Constitutive Act of the AU.[78] Principle (j) of the PSC Protocol contrasts with the position under the OAU. Traditionally, under the OAU, as Salim Ahmed Salim remarks, the view was held among African leaders that conflicts within states fell within the exclusive competence of the states concerned. Consequently, the OAU had to stand by even where conflicts tore countries apart and caused grave afflictions on innocent people.[79] Principle (j) therefore significantly departs from the inflexible adherence of the OAU to the principle of international sovereignty which seriously undermined the maintenance and promotion of peace and security on the continent. It is therefore expected that the foregoing principles will guide the Panel in fulfilling its mandate.

4.4 Mandate

The general purpose of the Panel is found in the PSC Protocol read with the modalities for the Panel. Articles 11(1), (3) and (4) of the PSC Protocol define the mandate of the Panel. The mandate of the Panel is to be supportive and advisory of the efforts of the Chairperson of the AU Commission and the PSC in the areas of conflict prevention. The Panel is also required to support and advise on the promotion and maintenance of peace, security and stability in Africa.

More specifically, in co-ordination with the PSC and the Chairperson of the Commission, and through the Special Envoys/Representatives and other emissaries, the Panel is required to carry out a number of activities. These activities include the facilitating of the establishment

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78 Protocol on Amendments to the Constitutive Act of the African Union adopted in Maputo, Mozambique on 11 July 2003. As of May 2007, the Protocol had not entered into force. The Protocol amended art 4(h) of the AU Constitutive Act to include intervention in the event of 'a serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council'.

79 A Salim, quoted in C Peck *Sustainable peace: The rule of the UN and regional organisations in preventing conflict* (1998) 160.

of channels of communication engaging parties involved in a dispute with the view of preventing such dispute from escalating into conflict. Another activity is the carrying out of fact-finding missions as a means of conflict prevention.[80] The Panel may also conduct shuttle diplomacy between parties unwilling to engage in formal talks; assist and advise mediation teams engaged in formal negotiations; and develop and recommend ideas and proposals that can contribute to promoting peace, security and stability on the continent.[81]

In its operation, the Panel may issue a press release or a statement, or a communication in any other form it considers appropriate, on any matter under its consideration.[82] Being some of the most viable means through which the public can become aware of the activities of the Panel, it is important that the Panel makes good use of these communication mechanisms. The recent press statement by the Panel indicates a reason to be hopeful. In the statement, the Panel informs of an exchange of views on tensions and crises associated with electoral processes in Africa.[83] More is, however, expected of the Panel in view of its mandate. It is envisaged that the Panel will routinely pronounce on issues of conflict as the moral weight carried by such pronouncements may go a long way in dousing tensions.

Certain ambiguities, however, exist in terms of the Panel's mandate, which require clarification. It is not certain whether the Panel can intervene in the disputes involving states who, though members of the AU, have not ratified the PSC Protocol. Argument can be made in support of the proposition that the Panel can and that such position should be adopted in its manner of operation. A reason for this is that, although article 22 of the PSC provides for ratification by a simple majority of the member states before entering into force, the PSC Protocol seems different from other African Protocols. These other Protocols include the Protocol on Amendments to the Constitutive Act (Amendment Protocol) and the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan–African Parliament.

For instance, while article 13 of the Amendment Protocol makes it clear that to be bound by the Amendment Protocol, state parties to the Constitutive Act have to ratify the Amendment Protocol, the PSC Protocol adopts a different approach. Article 1(i) of the PSC Protocol refers to the 'member states of the African Union' and not to member states of the PSC Protocol only. Article 3(a) of the PSC Protocol goes further to support this uniqueness by stating that the objectives for which PSC is established shall be to 'promote peace, security and stability in Africa' and not in state parties to the Protocol only.

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80 n 10 above,) paras III(1)(a)-(c).

81 n 10 above, para III(1)(d).

82 n 10 above, para VI.

83 Press statement of the Panel of the Wise, 2nd meeting, 17 July 2008, Addis Ababa, Ethiopia.

The foregoing shows that the PSC Protocol must have been intended to bind all AU member states. This means that the Panel is empowered to intervene in disputes involving any member states of the AU even though they have not ratified the PSC Protocol. Indeed, the PSC has in the past intervened by sanctioning countries that have not ratified the PSC Protocol. Examples of such member states include Côte d'Ivoire,[84] Guinea Bissau, and the Democratic Republic of Congo in whose reconciliation processes the PSC is involved.[85]

Consequently, the Protocol appears to differ from the international law of treaties and the principle of *pacta sunt servanda*.[86] The justification for this exception may well be because the PSC Protocol considers the issue of promotion of peace and security as very urgent in Africa. The promotion of peace and security may also be argued as an obligation *erga omnes,* the observance of which all states may have an interest.[87]

4.5 Scope of mandate

There is a potential overlap in the interaction of the Panel and Special Envoys/Representatives with the PSC and the Chairperson of the Commission. Widely regarded as respected, experienced and impartial diplomats,[88] these personalities are dispatched to travel to areas in conflict to help reduce tensions and resolve disputes. At a glance, the functions of the Panel may appear to be a duplication of the responsibilities of these other mechanisms. However, given the unimpressive contributions made by Special Envoys/Representatives mechanisms to conflict prevention in Africa,[89] greater involvement is perhaps more preferable for the Panel in conflict prevention. This preference is premised on the fact that the members of the Panel are non-partisan and independent,[90] and are therefore best placed to perform in such role rather than diplomats as the case with the special envoys.

In all, it would seem from this assessment that an amendment of the membership, norms and mandate scope of the Panel is required.

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84 Côte d'Ivoire ratified the the PSC Protocol on 24 August 2007 http://www.africa-union.org/root/au/Documents/Treaties/List/Peace%20and%20Security%20Protocol.pdf (accessed 13 September 2009).

85 F Viljoen *International human rights law in Africa* (2007) 216.

86 Vienna Convention on the Law of Treaties 1969, art 26.

87 Vienna Convention on the Law of Treaties 1969, art 53.

88 n 10 above, para III(1)(d) of the Modalities and PSC Protocol art 10(2)(b), which place a similar responsibility on the Panel and Special Envoys in their relationship with the Chairperson of the African Commission.

89 Zartman (n 33 above) 2-3.

90 Ambassador Ramtane Lamara, AU's Commissioner for Peace and Security, stamped the Panel with three seals, namely, 'seals of experience, independence and hope' in 'AU's Panel of the Wise gather to discuss conflicts and peace building in Africa' *Sub-Saharan Informer* 22 July 2008 http://www.ssinformer.com/news/africa/african_union/2008/July/18/Aup_18_08_08_001.html (accessed 10 September 2008).

This is in order to enable it to discharge its role more effectively in the African peace and security architecture.

5 The role of the Panel of the Wise

In analysing the mandate of the Panel of the Wise in the preceding section of this article, although reference was made to the purpose of the Panel, this was not discussed. This part of the article explores the potential role of the Panel more closely. For reasons of convenience, the role is discussed under two main heads, namely, peaceful interventions and peace and security promotion.

Although the role of the Panel is generally complementary of the PSC and the Chairperson of the African Commission, in respect of peaceful interventions, identifiable functions of the Panel are in terms of article 6(b) early warning and preventive diplomacy, (c) peace making, including the use of good offices, mediation, conciliation, and enquiry. On the other hand, the mandate on peace and security promotion involves articles 6(a), (d), (e) and (f) of the PSC Protocol, namely, promotion of peace, security and stability in Africa, peace support operations and intervention, peace building and post-conflict reconstruction, and humanitarian action and disaster management.

5.1 Peaceful interventions

Considering that the functions of the Panel in the area of peaceful interventions are only practicable when applied to practical challenges, they are discussed under two sub-heads, pro-democratic and humanitarian interventions. The preference for democratic and humanitarian interventions is informed largely by the challenging developments in those areas which have implications for the mandate of the Panel. In discussing these developments, the main argument here is that the Panel can assume leadership in setting the agenda and tone of action that will help support democratisation and address humanitarian concerns in Africa. Practical examples of what the Panel might do are provided.

5.1.1 Pro-democratic interventions

Defined by Whitehead as a progress 'towards a more rule-based, more consensual and more participatory type of politics',[91] in Africa, democratisation is explained in the form of waves which became almost unstoppable from the mid-1990s.[92] In spite of the excitement

91 L Whitehead *Democratisation — Theory and experience* (2002) 27.

92 See C Legum (ed) *Africa contemporary record* (1996-1998); C Young 'Africa: An interim balance sheet' (1996) 7 *Journal of Democracy* 53 54; SP Hutchington *The third wave of democratisation in the late twentieth century* (1991); J Wiseman *Democracy in black Africa: Survival and revival* (1990).

caused by these waves, commentators observe that the political temperaments of African countries in grasping with democratic challenges are a reason for concern.[93] On this point, Olukoshi notes:[94]

> Elections are held routinely, robust constitutions have been produced, multi-party systems are registered in large numbers, military incursions into formal arena of governance are rare. Nevertheless, the quality of the political systems that are in the making as measured by thier inclusiveness, representatives, and accountability is in serious doubt and the feeling is widespread across the continent that so far, in matters of political reform, *plus ca change, plus c'est la meme-chose*.

Issues around 'inclusiveness, representatives and accountability' are reflected in the reluctant recognition of opposition parties, electoral conflicts and self-determination agitations which have featured prominently on the African political landscape. Addressing these issues is therefore necessary in the interest of democratic consolidation in Africa.

The Panel may be engaged in addressing some of these democratic concerns. The obligation for such pro-democratic interventions is bolstered by article 4(h) of the Constitutive Act of the AU which empowers the AU to intervene in respect of grave circumstances including a serious threat to legitimate order. This position is also accommodated under article 4(j) of the PSC Protocol. Further reinforcing this position are other instruments that prescribe interventions, particularly where there is a serious threat to legitimate order.

Significant examples of such instruments include the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration)[95] and the Charter on Democracy and Unconstitutional Change of Government (Charter on Democracy). For instance, once diplomatic initiatives have failed, article 25(1) of the Charter on Democracy empowers the PSC to suspend the erring party from the exercise of its right to participate in the activities of the region.

Interventions by the PSC to restore constitutional or democratic order have lately taken other shapes. For instance, in 2005 the PSC suspended Togo from participating in the activities of all the organs of the AU 'until such a time when constitutional legality is restored'.[96] Different measures of interventions are also noticeable in Burundi,

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93 M Bratton *et al Public opinion, democracy and market reform in Africa: Regime transitions in comparative perspective* (2005); E Gyimah-Boadi (ed) *Democratic reform in Africa: The quality of progress* (2004); JF Bayart *The state in Africa: The politics of the belly* (1993).

94 A Olukoshi 'Assessing Africa's new governance models' in J Oloka-Onyango & NK Muwanga (eds) *Africa's new governance models: Debating form and substance* (2007) 3-4.

95 Lomé Declaration, AHG/Decl 5 (XXXVI) 2000.

96 AU Doc PSC/PR/Comm(XXV), 25 February 2005, para 3. Communiqué of the 25th meeting of the PSC.

Comoros, Liberia, the Democratic Republic of Congo (DRC), Guinea-Bissau, Sudan and Côte d'Ivoire.[97] In Burundi, the PSC spearheaded the Constitutional Referendum of 25 June 2006 and multi-party elections for the National Assembly in November 2006.[98] The PSC played a crucial role in the elections in the DRC, Mauritania and in the reconciliation process, which contributed to the holding of the April-May presidential elections in the Comoros.[99]

In addition to assisting the PSC and the Chairperson of the African Commission, the Panel can on its own initiative, and as part of its early warning measures, intervene to support Africa's democratic efforts. From time to time, the Panel may engage civil society in setting the tone for good governance in Africa. This could be effected through regular discourse on issues that impact on democratic practice and are capable of giving rise to conflict situations. The Panel could focus on issues such as violence and self-determination, conflict and political participation, as well as elections in Africa.

Although regional discourse is vital in raising awareness and sustaining its tempo, it is unlikely to achieve much without being supported with objective pronouncement by the members of Panel. Consequently, in line with article 11(4) of the PSC Protocol, the Panel can pronounce on such issues as they affect democratic development in Africa. When done consistently on deserving matters, it will help shape political behaviour in Africa. Similarly, in deserving circumstances, the Panel may use good offices, and facilitate mediation as well as conciliation among key actors involved in democracy-threatening issues.

5.1.2 Humanitarian interventions

Traditionally, the term humanitarian intervention describes the threat or use of force by a state or group of states, designed to compel a sovereign to respect fundamental human rights in the exercise of its sovereign powers.[100] The idea of humanitarian intervention has been argued and expanded to cover interventions designed to ensure the safe delivery of humanitarian assistance to a population in dire need, particularly where it is necessary to avert mass starvation or other immediate threats to life.[101]

Through effective early warning mechanisms, the Panel can on its own initiative alert the PSC and the Chairperson of the African Commission to deserving situations in Africa which may degenerate into

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97 AU Doc Assembly/AU/Decl 3(VI), Declaration on the Activities of the Peace and Security Council of the African Union and the State of Peace and Security in Africa.

98 Viljoen (n 85 above) 210.

99 AU Doc Communiqué PSC/PR/Comm (XVII), 20 October 2004.

100 DJ Scheffer 'Toward a modern doctrine of humanitarian intervention' (1992) 23 *University of Toledo Law Review* 264.

101 RE Gordon 'Humanitarian intervention by the United Nations: Iraq, Somalia, and Haiti' (1996) 31 *Texas International Law Journal* 43-44.

humanitarian crises. Similarly, the Panel can intervene in inter-state as well as intra-state tensions before they become full-blown conflicts with its attendant humanitarian crisis. As Kindiki argues, the intervention of the Panel in situations of armed conflicts where massive violations of human rights are taking place may be helpful in reconciling warring parties, given Africans' respect for elders.[102]

In order to enable the Panel to perform the foregoing, a secretariat that engages in a permanent monitoring and collection of information on the security situation in Africa is required.

5.2 Peace and security promotion

The role of the Panel in relation to peace and security promotion is encapsulated in the PSC Protocol and its functions.[103] There are, however, other AU instruments which implicate peace and security promotion, and consequently the potential role of the Panel. The African Charter on Human and Peoples' Rights (African Charter), for instance, provides that 'all peoples shall have the right to national and international peace'.[104] Also in establishing the Conflict Management Mechanism, the OAU Declaration on the establishment of a Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration) enunciates the promotion of peace and security in Africa as a matter of necessity.[105] The UN Secretary-General's report of 1998[106] deals with the promotion of durable peace in Africa. Similarly, as a demonstration of its commitment to peace, security and stability, the OAU Ministers' Grand Bay Declaration of 16 April 1999 acknowledges that the observance of human rights is a key tool for promoting collective security, durable peace and sustainable development.[107]

In terms of its mandate, the AU Constitutive Act requires the AU to promote peace, security and stability on the continent.[108] The right of member states 'to live in peace and security'[109] and the right of every member state to request intervention from the AU in order to restore

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[102] K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Journal* 116.

[103] PSC Protocol, art 6.

[104] Adopted by the OAU in Nairobi, Kenya, on 27 June 1981 and entered into force on 21October 1986, art 23.

[105] Adopted by the 29th ordinary session of the Assembly of Heads of State and Government of the OAU, held in Cairo, Egypt, 28 to 30 June 1993.

[106] UN Secretary-General's Report on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa (1998), adopted by the UN General Assembly on 16 December 1998 Res 53/92) http://www.un.org/ esa/africa/ reports.html (accessed 10 October 2008).

[107] Adopted by the First OAU Ministerial Conference on Human Rights in April 1999, Preamble.

[108] AU Constitutive Act, art 3(f).

[109] AU Constitutive Act, art 4(i).

peace and security are also highlighted in the AU Act.[110] The need for the promotion of peace and security is also a component of the 2003[111] and 2004[112] reports of the Chairperson of the AU Commission and forms part of its strategic programme of action.[113] There are also statements of support for peace and security promotion from other regional bodies, such as the G8[114] and the African Caribbean Pacific Group of States.[115]

Peace and security are, however, not straightforward concepts, as depicted in the Latin maxim, *Si vis pacem para bellum* ('if you want peace, prepare the war').[116] The same contradictions have emerged strongly in Western societies over the past few years, dividing public opinion into two major groups. These are namely those supporting and those against military interventions to enforce or keep peace.[117]

Traditionally, too, national security is defined in terms of the ability of a state to protect its interests from external threats and conflicts.[118] There is, however, a growing debate on the need to expand the traditional notions of security to address non-traditional threats and so develop a more comprehensive approach to security.[119] The trend now

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110 AU Constitutive Act, art 4(j).

111 Reports of the Chairperson of the African Union Commission delivered at the 7th ordinary session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Heads of State and Government Level in Addis Ababa, Ethiopia, 4 February 2003 (Central Organ/MEC/AHG/2 (VII)) paras 28-180.

112 Report of the Chairperson of the Commission on the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa (2004) delivered at the launch of the Peace and Security Council in Addis Ababa, Ethiopia, 25 May 2004 (PSC/AHG/3 (IX)).

113 Commission of the African Union: 2004–2007 Strategic Plan Vol 2 http://www.africa-union.org/AU%20summit%202004/volume%202%20final%20-%20English%20%20June%202004.pdf (accessed 11 September 2008) 13-14.

114 The G8 Summit held in Gleneagles, UK, from 6 to 8 July 2005, renewed its commitment to Africa and support for NEPAD; http:// www.g8.gov.uk/servlete_operations (accessed 20 August 2008).

115 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its member states, of the other part (Cotonou Agreement) (2000) signed in Cotonou, Benin, on 23 June 2000. Art 10(5) emphasises that broadly-based policies to promote peace and to prevent, manage and resolve violence conflicts shall play a prominent role in the dialogue of the partnership; http://europa.eu.int/comm/development/body/cotonou/pdf/agr01_en.pdf#zoom=100 (accessed 12 September 2008).

116 Paraphrased from Vegetius, quoted in M Sarrica & A Contarello 'Peace, war and conflict: Social representations shared by peace activists and non-activists' (2004) 41 5 *Journal of Peace Research* 549.

117 Sarrica & Contarello (n 116 above) 549.

118 K Bajpai 'Human security: concept and measurement' John B Kroc Institute *Occasional Paper* 19 August 2000 http:// www.nd.edu/~krocinst/ocpapers/op_19_1.PDF (accessed 15 October 2008).

119 B Buzan *People, states and fear: An agenda for International security in the post-Cold War era* (1991) 96-107; Human Development Report: New dimensions of human security. http://hdr.undp.org/en/media/hdr_1994_en_overview.pdf (accessed 15 October 2008).

is therefore an expansion of the security paradigm to address rapidly-growing non-traditional threats to security, including 'the struggle for resources embedded in the pursuit of energy, security, and environmental degradation'. Other threats include forced migration, international terrorism, insurgency, ascendancy of non-state actors in drugs, arms, money laundering, and financial crime organisation.[120]

Whether the concept of peace is construed as supporting or against military interventions to enforce or keep peace, there can be little doubt that the Panel should play the role of ensuring that force is employed as a matter of last resort when all peaceful modes have failed. This can be achieved by involving the members of the Panel not only in peacemaking and building efforts, but also in peace enforcement measures. In the latter, the Panel should be interested in likely disputes or agitations that may emerge from the application of force, or the threat of its use, to maintain or restore peace and order.

In addition to involvement in disputes, the Panel should be engaged in addressing, or at the very least pronouncing, on the issues of non-traditional threats to security. This is necessary because non-traditional threats to security have been reported as capable of producing the displacement and mass migration of peoples within and beyond national borders.[121] Even where the displacement or migration of people becomes inevitable, the Panel should play a significant role to negotiate, where appropriate, the proper treatment for mass migrants. Experience in Africa has shown serious violations of the rights of refugees. In time past, Nigeria had expelled refugees from Chad.[122] Kenya and Zimbabwe failed to protect Somali and Mozambiquan refugees, respectively.[123] Senegal did not recognise Mauritanian expellees as refugees.[124] More recently, South Africa's treatment of people fleeing hardship in Zimbabwe is not remarkable.[125] This trend offends the spirit and provision of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).[126]

Article 11(1) of the OAU Refugee Convention enjoins states 'to use their best endeavours ... to receive all refugees'. A major gap in this instrument is that it does not provide for a monitoring mechanism.

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120 D Banerjee 'Security studies in South Asia: Change and challenge' (2000) *Manoha* 50.

121 UN Secretary-General Boutros Boutros-Ghali prepared the ground-breaking 'Agenda for peace' pursuant to the request of the Security Council meeting at the Heads of States and Government level held on 31 January 1992, para 13.

122 Lawyers Committee for Human Rights *African exodus: Refugee crisis, human rights and the 1969 OAU Refugee Convention* (1995) 87-89.

123 n 122 above, 64-71 78-80.

124 n 122 above, 54.

125 'The Zimbabwe situation' http://www.zimbabwesituation.com/oct21a_2008.html (accessed 25 October 2008).

126 OAU Doc CAB/LEG/24.3 adopted 10 September 1969, entered into force 20 June 1974.

In promoting dignified treatment, not only of the refugees but internally displaced persons, the Panel may in this regard leverage on the respectable personalities of its members to intervene by entering into political dialogue with non-co-operative states. This can be achieved by working together with the Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa. This, no doubt, is consistent with the mandate of the Panel which allows it to complement the efforts of other AU emissaries in facilitating political dialogue among parties as a measure of conflict prevention.[127]

With respect to terrorism and the role of the Panel, the relevant normative framework includes the OAU Convention on the Prevention and Combating of Terrorism (Anti-Terrorism Convention), the AU Declaration against Terrorism,[128] and a Plan of Action for the Prevention and Combating of Terrorism.[129] These instruments afford the PSC a wide mandate for combating and preventing terrorism which the Panel in its advisory role may utilise in promoting regional peace and security. The PSC is, for instance, given the mandate to 'co-ordinate and harmonise continental efforts in the prevention and combating of international terrorism'.[130] Its other functions include the monitoring of the implementation of the Anti-Terrorism Convention.[131]

A crucial step to ensure the fulfilment of the above functions was the establishment in 2004 of the African Centre for the Study and Research on Terrorism as a structure of the AU Commission and the PSC to conduct studies and provide training related to terrorism in Africa.[132] It is envisaged that the Centre will provide useful information that the Panel can use in making informed pronouncements in line with its modalities which may guide the application of the Anti-Terrorism Convention.[133]

The Panel may also engage in other non-traditional conflict issues involving age-long violations of rights, particularly socio-economic rights such as land, water and a healthy environment. In line with its mandate, the Panel can conduct fact-finding missions to such nations where violations are rampant.[134] Visits of such a nature will go a long way to complement not only the activities of other AU emissaries. Such visits can also be used to sponsor further discussion and debate; guide the Panel in its pronouncements; and thereby promote peace and security in Africa.

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127 n 10 above, para III(1)(e).

128 M Ewi & K Aning 'Assessing the role of the African Union in preventing and combating terrorism in Africa' (2006) 15 *African Security Review* 32 38.

129 AU Doc Mtg/HLIG/Conv.Terror/Plan (I), 11-14 September 2002.

130 PSC Protocol, art 3(d).

131 PSC Protocol, art 7(1)(i).

132 AU Doc Mtg/HLIG/Conv.Terror/Decl (II)Rev 2, 13-14 October 2004.

133 n 10 above, paras II(3) & VI.

134 n 10 above, para III(1)(c).

In the following sub-section, I identify and discuss the possibilities that may assist the Panel in promoting peace and security in the African region.

5.3 Internalising the promotion of peace and security in Africa: Possibilities for the Panel

The functions of the Panel empower it to develop and recommend ideas and proposals that can contribute to promoting peace, security and stability on the continent.[135] The possibilities which the Panel can exploit to push the internalisation of the promotion of peace and security in Africa are discussed below.

5.3.1 National constitutions and peace education

Promoting a culture of peace at the national level seems to be the real challenge. This is because threats to peace and security often start at the national level. If there are problems with peace at the national level, they will be compounded at the sub-regional and regional levels. While there are significant contributions that the Panel can make to peace promotion, these may remain elusive unless a necessary framework exists for that purpose at the national level. The constitutional framework of states must, therefore, at the very least, reflect the aspiration of states towards peace.

Although most constitutions of African nations do express the general intention of building peaceful and secured societies, these constitutions rarely codify peace as a human right.[136] This does not serve to provide or advance an appropriate framework to encourage peace education as a means of building a culture of peace. Therefore, it is envisaged that, in line with its functions, the Panel will engage in initiatives such as an audit of national constitutions with the view to facilitating an appropriate framework for peace education in the AU member states.[137]

5.3.2 Sub-regional and regional possibilities

Most sub-regional organisations in Africa were established to address economic and social issues. Many of these organisations have, however, revised their mandates to incorporate pervasive challenges facing Africa in the area of peace and security.[138] Evidence of this is to be

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[135] n 10 above, para III(1)(h).

[136] The 2006 Constitution of DRC, art 23, which guarantees the right of people to peace and security, is an example of an exception to the trend.

[137] n 10 above, para IV(8).

[138] The Infrastructure of Peace in Africa Assessing the Peace-Building Capacity of African Institutions *A Report submitted by the Africa Programme of the International Peace Academy to the Ford Foundation* (2002) 23.

found in documents of ECOWAS, the Intergovernmental Authority on Development (IGAD) and SADC.

Article 21 of the ECOWAS Protocol creates the Council of Elders. The IGAD,[139] at least in terms of its principles, support the peaceful settlement of inter- and intra-state conflicts through dialogue; and maintenance of regional peace, stability and security.[140] The mediation of the Zimbabwe crisis under the platform of SADC shows the capacity and interest of that organisation in the promotion of peace, stability and security.

The Panel may either incorporate such personalities at the sub-regional level as part of the Pool of the Wise of the architecture. This is particularly necessary if the AU and the RECs are to form a single security architecture, as envisioned in the PSC Protocol.[141]

In addition to the above, the functions of the Panel envisage a relationship between the Panel and other organs of the AU. These organs are the Assembly, the Pan-African Parliament (PAP) and the African Commission which in their respective ways contribute to the promotion and maintenance of peace, security and stability in Africa.[142] Though not specifically mentioned in the functions, possibilities do also exist for the Panel to relate with other programmes of the AU, such as the African Peer Review Mechanism (APRM).

Upon invitation by the AU Assembly,[143] the Panel may draw the attention of the Assembly to pertinent issues in Africa capable of escalating into conflict and make recommendations on how they can be curtailed. In the exercise of its deliberation and oversight functions, the PAP may embark upon fact-finding missions followed by resolutions and recommendations. In that respect, the Panel may build on such recommendations by following up on issues relating to its mandate or using such issues in setting its agenda.[144] Once the report from the APRM process is tabled in the REC to which the state belongs, the African Commission, the PAP and the PSC,[145] the Panel can use information from the report to inform its programme of action on conflict prevention in respect to a particular state.

When entertaining inter-state communications, the African Commission is mandated 'to reach an amicable settlement'.[146] In the case of individual communications, as Viljoen argues, the African Commission

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139 Adopted by the Assembly of Heads of State and Government in Nairobi, Kenya, 21 March 1996 http://www.igad.org/about/agreement_establishing_igad.pdf (accessed 8 October 2008).

140 IGAD Agreement, arts 6(a) & (c).

141 PSC Protocol, art 16(1).

142 n 10 above, para VII(2); see also PSC Protocol, arts 18 & 19.

143 n 10 above, para VII(2).

144 PSC Protocol, art 18.

145 As above.

146 African Charter, art 52.

only assists in transmitting a reconciliatory response of a state to the complainants.[147] It appears therefore that a window of opportunity exists for a referral from the African Commission to the Panel of serious issues which are consistent with the mandate of the Panel on mediation.

6 Global partnerships

Most international conferences on African development constantly advocate the 'ownership' by African countries of their development processes and 'partnership' by the international community in support of such ownership.[148] The G8 expressed an intention to support Africa's efforts to build a peaceful and stable Africa.[149] Similar sentiments have been expressed by the European Union — African, Caribbean and Pacific Group of States Partnership.[150] In line with the PSC Protocol,[151] the Panel may explore these expressions of goodwill for the development of its capacities and to publish its activities. The latter will not only help in raising the level of awareness of its efforts to the larger world but, most importantly, it will help make its voice a moral force and consequently project the relevance of its involvement in the cause of peace and security promotion in Africa.

7 Conclusions and recommendations

This article set out to investigate whether the Panel of the Wise can make a difference in the African peace and security architecture. Although only recently established, such an investigation cannot be premature. This is in view of the fact that a well-conceived concept is different from a well-designed and implemented concept.

Evidence from different parts of Africa and post-colonial national constitutions demonstrates that the concept of the wise is exemplified in the elders and useful in the areas of conflict prevention and the maintenance of peace and security. Therefore, the notion behind the

147 Viljoen (n 85 above) 330.

148 TICAD Tenth Anniversary Declaration (TICAD III) (2003) adopted at the Third Tokyo International Conference on African Development held in Tokyo, Japan, from 29 September to 1 October 2003 http:// www.ticad.net/decla ration2003.pdf (accessed 20 September 2008).

149 The G8 Summit held in Gleneagles, UK, from 6 to 8 July 2005, renewed its commitment to Africa and support for NEPAD http:// www.g8.gov.uk/servlete_operations/ (accessed 20 September 2008) para 8.

150 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its member states, of the other part (Cotonou Agreement) (2000) art 10(5).

151 See art 17 on the relationship betweeen the PSC and the UN and other international organisations.

introduction of the Panel into the AU peace and security architecture is at the very least a renaissance of the concept of the wise in most indigenous African settings.

In examining the design of the Panel, weaknesses are highlighted in terms of its membership, norms and scope of mandate. Limiting the membership of the Panel to five seems to fly in the face of the spontaneity of conflicts and potential crises in Africa. It also contradicts the vast resource of dignified women and men in Africa who can be engaged in preventing conflicts and promoting peace in Africa. Excluding individuals from submitting proposals to the Panel may not help the ownership of the mechanism by individuals. Also, an overlap of functions may arise in the dealings of the Panel and the Special Envoys/Representatives with the PSC and Chairperson of the Commission.

In terms of the role of the Panel relating to peaceful interventions, two areas which have implications for the mandate of the Panel are identified and discussed, namely, pro-democratic and humanitarian intervention. Also discussed is the role of the Panel in the areas of peace and security promotion, as well as the internalisation of a culture of peace in Africa.

7.1 Recommendations

The Panel of the Wise should be redesigned and operated in a way that will allow it to function as a Pool of the Wise. In designing a Pool of the Wise, lessons can be drawn from the ECOWAS model. The modalities for the operation of the Panel should clearly permit individual persons to submit proposals for inclusion in the agenda of the Panel. A better approach to the potential overlap between the special emissaries, representatives, envoys and the Panel is to depend on the Panel for initiatives on conflict prevention and mediation.

Vast resources to gauge the tempo of peace and security in Africa perhaps exist in the activities of other organs or programmes of the AU. The Secretariat of the Panel should therefore follow up on the activities of organs or programmes such as the PAP, the African Commission and the APRM to inform its agenda. Efforts aimed at encouraging national constitutions to establish an institution and mechanism similar to the Panel are also necessary for peace promotion.

It is necessary for the Panel to be proactive about its pronouncements and publicity. More than anything else, this remains the effective way by which the Panel can make its presence known to the stakeholders whose interests it is meant to serve. The Panel of the Wise is well conceived. If properly designed and operationalised, it will make a difference in the peace and security architecture of the African Union.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights?

*Malebakeng Forere**
Lecturer, University of KwaZulu-Natal, Durban, South Africa

*Lee Stone***
Senior Lecturer, University of KwaZulu-Natal, Durban, South Africa; Attorney of the High Court of South Africa

Summary

This paper is written from the perspective that universal human rights treaties provide minimum standards and that any subsequent regional instruments must not provide for anything less than what was already envisaged in universal treaties. With regard to the protection of women's rights, at the global level, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women. However, this instrument is inadequate when it comes to the protection of women's rights in Africa. Consequently, the African Union adopted the Protocol to the African Charter on the Rights of Women to cater for prejudices peculiar to African women. In 2008, SADC adopted a Protocol on Gender and Development, to some extent duplicating the AU Protocol on the Rights of Women. The paper seeks to ascertain whether the SADC Protocol on Gender and Development complements or duplicates the AU Protocol on the Rights of Women. It is argued that SADC, in its efforts to pursue regional integration and the consolidation of all instruments that protect women,

* BA, LLB (Lesotho), LLM (Essex); Forere@ukzn.ac.za. I am grateful to Ibrahima Kane, for believing in me, for it is through him that I was able to put this article together. My involvement in the drafting of the SADC Gender and Development Protocol, as well as deliberations around the Protocol by delegates from SADC states, indicated to me that there is a misunderstanding or under-estimation of the extent of integration in Africa, and as such prompted me to carry out this work.

** LLB (Free State), LLM (Human Rights and Democratisation in Africa) (Pretoria); Stonel@ukzn.ac.za

duplicated the AU Protocol on the Rights of Women. While the SADC Protocol on Gender and Development does introduce some new rights and state obligations, its overall effect is that these rights and state obligations do not serve to dramatically enhance the regime for the protection of the human rights of women in the SADC sub-region and, in fact, either merely maintain the status quo *or undermine some of the achievements of the AU Protocol and CEDAW. The paper finally suggests that SADC could have adopted a plan of action or adopted robust implementation strategies to give meaningful effect to the imperative of securing the rights of women and the thus far-neglected theme of gender, rather than formulating and adopting a protocol, since the process of adopting a protocol is very costly, especially given the fact that a comprehensive instrument that safeguards the rights of women in Africa already exists.*

1 Introduction

The universality of human rights is indisputable.[1] Simultaneously, however, cultural specificity is also recognised and taken into account.[2] While the United Nations (UN) has adopted many instruments setting out human rights norms to be applied by all UN member states,[3] regional bodies have adopted human rights agreements relative to their cultural context.[4] Although this practice has been widely accepted and has also helped in developing international human rights law, the weight of legal opinion is that regional instruments should

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1 United Nations Charter, 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, 24 October 1945, art 1(3).

2 Vienna Declaration of the World Conference on Human Rights, 1993, in recognising cultural relativism out of universality of human rights provided in its art 5 that '[a]ll human rights are indivisible, universal, independent and interrelated. The international community must treat human rights globally ... While the significance of national and regional particularities and various historical cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

3 See eg Universal Declaration of Human Rights, GA Res 217 (III), UN GAOR , 3rd session, Supp 13, UN Doc A/810 (1948) 71; International Covenant on Civil and Political Rights, 16 December 1976, 993 UNTS 3, 3 January 1976; International Covenant on Economic, Social and Cultural Rights, 16 December 1976, 993 UNTS 3, 3 January 1976.

4 Eg, the African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58, entered into force 21 October 1986; Arab Charter on Human Rights, 22 May 2004, reprinted in (2005) 12 *International Human Rights Reports* 893, entered into force 15 March 2008; European Convention on the Protection of Human Rights and Fundamental Freedoms (ETS No 005) 1950 Strasbourg, entered into force 3 September 1953; Inter-American Convention on Human Rights, OAS Treaty Series 36, 1144 UNTS 123, entered into force 18 July 1978. All these instruments have specifically indicated in their respective preambular paragraphs that they drew their inspiration from the Universal Declaration of Human Rights and other UN human rights documents.

not be contrary to the object and purpose of the UN treaties. Furthermore, provisions of the UN treaties must be applied in good faith, and regional agreements cannot be used as an excuse not to comply with UN treaties.[5] Africa, as a region, has created a human rights system through the African Union (AU) (formerly the Organisation of African Unity (OAU)).[6] The AU's system of human rights protection has three main components. First, it establishes continental standards through the African Charter on Human and Peoples' Rights (African Charter) and other legally-binding treaties and non-binding declarations. Second, it has created bodies to safeguard human rights protection and promotion within the region[7] and, third, it has adopted the mechanism of Special Rapporteurs.[8] Not only is Africa concerned with human rights; it has also paved the way for economic integration in Africa and, as such, it has resorted to the creation of economic sub-regional bodies known as regional economic communities (RECs).

Although the RECs were initially created for economic integration, they have incorporated an element of human rights protection into the treaties establishing them.[9] Most of the treaties establishing the RECs make explicit reference to the promotion and protection of human rights under the African Charter, either as one of their objectives or as their fundamental principle.[10] In so doing, they have created links between them and the African Charter. This, therefore, gives the courts of justice or tribunals in the RECs authority to apply the provisions of

5 Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, entered into force 27 January 1980, arts 19(c), 26 & 27.

6 Constitutive Act of the African Union, accepted in Lomé, Togo, July 2000, entered into force May 2001, art 3(h).

7 These bodies include the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child and the African Court of Justice and Human Rights (which represents the merged African Court on Human and Peoples' Rights and the African Union Court of Justice).

8 Such as the Special Rapporteur on the Rights of Women in Africa.

9 See eg Southern African Development Community Treaty (SADC Treaty) adopted in Windhoek, Namibia, August 1992, as amended in 2001, art 4(c).

10 See eg Treaty Establishing the African Economic Community, signed on 3 June 1999, Abuja, Nigeria, entered into force 12 May 1994, art 6(d); Treaty Establishing the Economic Community of West African States adopted in Cotonou, 24 July 1993, entered into force 1994, art 4(g). SADC is so far the only REC which does not make explicit reference to the African Charter. However, it mentions human rights in the Preamble to its Treaty, namely, '[m]indful of the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law'. The SADC Treaty does not oblige judges of the tribunal to invoke the African Charter in the interpretation and adjudication of disputes. Art 16 of the SADC Treaty provides as follows: 'The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.'

the African Charter.[11] In a nutshell, not only do the RECs adopt their own instruments, but they may also have regard to 'applicable treaties' in the adjudication of disputes. This is understood to entail that the African Charter, for example, may be used as an interpretive source by the RECs. As a result, the question is whether the RECs, in adopting their treaties, complement or duplicate the AU treaties. In this paper, the definition of complementarity in the *Oxford dictionary*, namely, as a process whereby 'two or more different things enhance each other or form a balanced whole', is adopted. In international law this has been construed to mean that, since the instruments at the regional and sub-regional levels vindicate rights, they should apply the same principles, both substantively and procedurally.[12] Duplication is defined by the same dictionary as making an exact copy or to do again unnecessarily. This is how the terms will be used throughout this paper.

Although there are several RECs in Africa, the focus of the article is on the Southern African Development Community (SADC). The decision to establish a more distinct body for Southern Africa came in 1979 at a meeting of the leaders from frontline states in the fight for political liberation from colonial rule in the Southern African region. These leaders regarded the establishment of regional co-operation as a weapon against South Africa's economic domination. This meeting was followed by the summit held in 1980.[13] At this summit, the first legal agreement of the Southern Africa Development Co-ordination Conference (SADCC), in the form of a declaration, was drafted with the objectives of achieving a reduction of economic dependence, particularly on South Africa; creating regional integration; and mobilising resources to promote regional policies as a concerted action to secure economic liberalisation.[14] It was not only the dependence on South Africa which prompted SADCC states to resort to integration of the Southern Africa region, but also the emergence of powerful trading arrangements in other regions of the world that propelled African leaders into finalising their own plans for a pan-African Economic Community (AEC), to evolve from regional economic communities with specific trade liberalisation and market integration targets. SADCC required transformation in order to emerge as the more logical building block for the AEC in Southern Africa, and have a legal identity.[15] As a result,

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11 SF Musungu 'Regional integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 93.

12 See C Ryngaert 'Horizontal complementarity' paper submitted to the Research Conference on the ICC and Complementarity: From theory to practice, Grotius Centre for International Legal Studies, 15-16 September 2009; http://www.grotiuscentre.org/com/doc.asp?DocID=463 (accessed 19 September 2009).

13 C Ng'ong'ola 'Regional integration and trade liberalisation in the Southern Africa Development Community' (2000) 3 *Journal of International Economic Law* 485.

14 African Development Bank, *African Development Report 2000: Regional Integration in Africa* (2000) 152.

15 As above.

the Declaration and Treaty reconstituting the SADCC as the Southern Africa Development Community (SADC) were concluded in Windhoek, Namibia, on 17 August 1992. The ten SADCC member states, joined by Namibia after gaining its independence, adopted the Declaration and SADC Treaty.[16] South Africa was able to secure membership in 1994 after its attainment of democratic rule, and this called for a revision of the objectives of the organisation to amend references to the 'reduction of economic dependence, particularly on the Republic of South Africa'. The core objectives of SADC have now been amended to 'the achievement of development and economic growth, poverty alleviation, enhancement of the standard and quality of life of the peoples of Southern Africa, and support for the socially disadvantaged through regional integration'.[17]

The reason why this paper focuses on SADC is that SADC has adopted a treaty on gender and development,[18] while there is already a treaty on women's rights at the continental level. However, in as much as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[19] is specifically on women's rights and the SADC Protocol on Gender and Development (SADC Gender Protocol) on gender, the contents of those Protocols have triggered the paper. In particular, despite the title of the SADC Protocol 'Gender and Development,' its provisions closely resemble those of the African Women's Protocol. More specifically, six primary objectives of the SADC Gender Protocol are clearly articulated, being the development and implementation of gender responsive legislation, policies and programmes to (i) eliminate discrimination and achieve gender equality;[20] (ii) harmonise and co-ordinate the implementation of the various obligations imposed by the instruments to which SADC member states have subscribed;[21] (iii) address emerging gender issues and concerns and fill gaps where existing treaties are inadequate or insufficient;[22] (iv) set realistic, measurable targets, time frames and indicators for achieving gender equality and equity;[23] (v) strengthen, monitor and evaluate the progress made by the member states towards reaching the targets and goals set out in the Protocol;[24] and (vi) deepen regional integration, attain sustainable development

16 The Declaration and SADC Treaty (n 9 above).

17 n 9 above, art 5.

18 The SADC Protocol on Gender and Development was signed in August 2008 but has yet to enter into force as not a single SADC member state has ratified the Protocol.

19 Adopted by the 2nd session of the AU Assembly, CAB/LEG/66.6 (13 September 2000), entered into force on 25 November 2005.

20 SADC Gender Protocol (n 18 above) art 3(a).

21 SADC Gender Protocol (n 18 above) art 3(b).

22 SADC Gender Protocol (n 18 above) art 3(c).

23 SADC Gender Protocol (n 18 above) art 3(d).

24 SADC Gender Protocol (n 18 above) art 3(e).

and strengthen community building.[25] From a cursory reading it is apparent that a relationship of complementarity was intended between the SADC Gender Protocol and the African Women's Protocol. However, an in-depth analysis of the substantive provisions of the SADC Gender Protocol reveals that the SADC Gender Protocol has not lived up to its expectations in that it can be argued that it has served to negate or weaken some of the obligations imposed by the African Women's Protocol. This assertion is verified in this paper.

The UN, driven by the principle of equality of human beings and non-discrimination, adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979.[26] Despite CEDAW's vast protective coverage of women's rights, it did not specify the prejudices, such as harmful practices suffered by an African woman, and other limitations peculiar to the African context.[27] To this end, the AU adopted the African Women's Protocol. The Women's Protocol was designed to complement CEDAW so that African women could be fully protected. This does not mean that the Women's Protocol substitutes CEDAW; rather, it reinforces CEDAW, in an African context. Both instruments are operational in Africa, and the African Commission on Human and Peoples' Rights (African Commission) can invoke not only provisions of the African Women's Protocol, but also those of CEDAW as interpretive guides.[28] The power to invoke the provisions of other instruments outside the jurisdiction of the AU is derived from the African Charter itself. Specifically, articles 60 and 61, which define the applicable principles of the African Commission, oblige the Commission to:

> draw inspiration from, among other sources, other instruments adopted by the United Nations and by the African countries in the field of human rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations to which the state parties to the Charter are members.

Consequently, the African Commission has relied on articles 60 and 61 in its decisions. For example, in the case of *Civil Liberties Organisation and Others v Nigeria*,[29] the Commission sought aid from General Comment 13 of the UN Human Rights Committee on the Right to a Fair Trial. In the same communication, the Commission relied on the UN Declaration on the Basic Principles on the Independence of Judges.[30]

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25 SADC Gender Protocol (n 18 above) art 3(f).

26 CEDAW was adopted on 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981.

27 Eg, genital mutilation, scarification and inheritance.

28 African Charter, art 60.

29 (2001) AHRLR 75 (ACHPR 2001).

30 AH Jallow *The law of the African (Banjul) Charter on Human and Peoples' Rights* (2007) 93.

Notwithstanding CEDAW and the African Women's Protocol, the SADC states felt a need to adopt the SADC Protocol on Gender and Development. Of course, one wonders whether CEDAW and the African Women's Protocol proved to be insufficient to protect the rights of women in the SADC sub-region to warrant the adoption of another protocol at SADC level. This article therefore seeks to establish whether the SADC Gender Protocol updates the norms to the new realities of the twenty-first century in terms of rights or state obligations or to take into account new legal issues or categories of vulnerable women. (This is a non-exhaustive list, including minorities, indigenous groups, lesbians.) It is on this note that the provisions of the SADC Gender Protocol are considered against the provisions of the African Women's Protocol to establish whether the SADC Gender Protocol introduces new rights or obligations and whether it is likely to serve its stated purpose (despite the slow rate of ratification of the Protocol). The exercise is therefore descriptive since it is not the intention of the authors to compare which of the two instruments is the best; rather, the authors seek to find out whether there are new rights or state obligations enshrined in the SADC Gender Protocol that were not covered by the African Women's Protocol.

2 Assessment of the SADC Protocol on Gender and Development

Described as 'groundbreaking' and as 'the most far-reaching of any sub-regional instrument for achieving gender equality',[31] the SADC Gender Protocol was conceived to meet the aspirations of African women in the SADC sub-region. It is the analysis of its core objectives, identified earlier, as well as an investigation into whether the SADC Gender Protocol has actually established any new rights or obligations that are not contained in the African Women's Protocol that form the crux of this paper. This section therefore takes the form of a comprehensive comparison between the SADC Gender Protocol and the African Women's Protocol. The comparison investigates those rights that are duplicated; those rights that have been omitted from the SADC Gender Protocol, even though the rights appear in the African Women's Protocol; and the rights that have been inserted to fill gaps encountered in the African Women's Protocol.

[31] P Zirima 'SADC Protocol: From commitments to action' *Southern African News Features* 9(4) January 2009, http://www.sardc.net/Editorial/Newsfeature/09040109.htm (accessed 20 September 2009).

2.1 Duplication of rights in the SADC Gender Protocol

The SADC Gender Protocol obliges member states to enshrine gender equality in their constitutions to ensure effective gender equality without being compromised by any law, including religious and customary laws.[32] It further binds member states to eliminate practices that negatively impact on fundamental rights, such as the right to life, health, dignity, education and integrity of women.[33] The African Women's Protocol provides for the same rights.[34] Specifically, article 2(a) of the SADC Gender Protocol constitutionalises gender equality, while article 2(b) provides for the elimination of harmful practices which endanger the general well-being of women.

The SADC Gender Protocol places an obligation upon states to ensure equal access to justice, equal treatment in all judicial processes, equal representation in the justice system, accessible legal services for women, equal legal status and capacity in civil law, thus abolishing the minority status of women.[35] The elimination of gender-based violence is clearly enunciated in the SADC Gender Protocol.[36] The African Women's Protocol has provided sufficiently for equality of men and women before the law and access to justice, including legal aid and equal representation in the justice system.[37] The only comparable provision in the SADC Gender Protocol is found in article 7(g), which provides for affordable legal services for women. However, the vagueness of this provision renders it meaningless.

The SADC Gender Protocol obliges member states to commit to the elimination of detrimental practices to the rights of women and appropriate deterrent sanctions thereto.[38] When read together, articles 2(a) and (b), article 4(g) and article 3(4) respectively provide for equality between men and women; the enactment of laws that prohibit all forms of discrimination, particularly harmful practices endangering the well-being of women; the punishment of detrimental practices to the rights of women; and the protection of women from all forms of violence. When the SADC Protocol is compared to the African Women's Protocol, it is revealed that article 4(1) of the Women's Protocol tends to go further by prohibiting all forms of exploitation, cruel, inhuman or degrading punishment and treatment. Further, the African Women's Protocol requires law enforcement organs to have the capacity to interpret gender equality rights.[39] This discretion to interpret gender

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32 SADC Gender Protocol (n 18 above) art 4(1).

33 SADC Gender Protocol (n 18 above) arts 4 & 5.

34 African Women's Protocol (n 19 above) arts 1(a) & (b).

35 SADC Gender Protocol (n 18 above) arts 6 & 7.

36 SADC Gender Protocol (n 18 above) art 6(d).

37 African Women's Protocol (n 19 above) art 8(a).

38 SADC Gender Protocol (n 18 above) art 6(2)(c).

39 African Women's Protocol (n 19 above) art 8(d).

equality rights can play a significant role in advancing the rights of women. For this reason, it is submitted that the SADC Gender Protocol has ignored a potentially very powerful provision contained in the African Women's Protocol and wasted a valuable opportunity, resulting in an impairment of the effectiveness of the Women's Protocol.

The issue of inheritance is dealt with under article 21(2) of the African Women's Protocol. Most notably, it provides that women and men have the right to inherit, in equitable shares, their parents' properties. It is article 7(b) of the SADC Gender Protocol which replicates the Women's Protocol as far as inheritance is concerned, as it provides that in giving effect to the practical realisation of women's rights, women have a right to equal inheritance. It is inconceivable that the duplication of the right to inheritance without any further qualification in the SADC Gender Protocol can be justified.

The SADC Gender Protocol provides for equal participation of women and men in electoral processes. Thus, it challenges the patriarchal norms and cultures of decision-making structures. Also, it provides for the inclusion of men in all gender-related activities.[40] Equally, the African Women's Protocol makes provision for the equal and effective participation of women in electoral processes,[41] and the modification of gender stereotypes.[42] Over and above participation rights, the SADC Gender Protocol obliges member states to ensure equal representation of women in decision-making positions as well as raising awareness for equal participation and representation of women in decision-making positions.[43] Article 9 of the Women's Protocol provides, in clear terms, for the equal representation and participation of women in decision-making positions, and at all levels. Therefore, the SADC Gender Protocol has not made any innovations in this regard.

Articles 8(a) to (d) of the SADC Gender Protocol require equal enjoyment of equal rights between men and women in marriage as equal partners. Specifically, it requires free consent of parties to the marriage. It sets 18 years as a minimum age for marriage, and it requires that every marriage be registered. It further provides for the retention of the parties' respective surnames or the use of joint surnames, and also that partners should have reciprocal rights and duties towards children, equitable shares of property acquired during marriage, and choice of nationality. In addition, it provides for equality of partners and reciprocal duties and rights towards children.[44] Simultaneously, the African Women's Protocol has succinctly provided for the free consent of parties in a marriage;[45] 18 years as the minimum age for partners to a

40 SADC Gender Protocol (n 18 above) art 15.

41 African Women's Protocol (n 19 above) art 9.

42 African Women's Protocol (n 19 above) art 2(2).

43 SADC Gender Protocol (n 18 above) art 14.

44 SADC Gender Protocol (n 18 above) art 8.

45 African Women's Protocol (n 19 above) art 6(a).

marriage;[46] registration of marriage;[47] retention of maiden names;[48] reciprocal rights and duties towards children;[49] equitable shares of property;[50] and choice of nationality.[51] It is, therefore, evident that the SADC Gender Protocol has duplicated the African Women's Protocol virtually *verbatim*.

The SADC Gender Protocol guarantees that widows are not subjected to inhuman, humiliating or degrading treatment. It ensures that a widow shall automatically become the guardian and custodian of her children, have a right to live in the matrimonial home, have access to employment, the right to inherit property of the joint estate, the right to remarry a person of her choice, and to be protected against all forms of violence and discrimination based on her status.[52] When compared to the African Women's Protocol, it is evident that article 20 through to article 21(1) of the Women's Protocol are almost identical to the SADC Gender Protocol, except that article 21(1) goes further to give a widow the right to live in a matrimonial home after she remarries. Disappointingly, it is clear that the SADC Gender Protocol represents a mere duplication of the Women's Protocol, although it does not extend to the same lengths that the Women's Protocol does.

The SADC Gender Protocol calls for equal access to education as well as the retention of women and girls in primary, secondary, tertiary, vocational and non-formal education.[53] In addition, it provides for the implementation of gender-sensitive educational policies, campaigns against gender-based violence in schools, the eradication of illiteracy among women, and the facilitation of day care centres.[54] Turning to the African Women's Protocol, articles 12(1)(a) and (2) adequately provide for access to education and the retention of women and girls in schools. Article 12(1)(b) provides for the implementation of educational policies, while it goes further to compel state parties to change the syllabus and text books to eliminate gender stereotypes. Article 12(c) not only aims at ending abuse in schools, but seeks to punish perpetrators of such abuse, while article 12(d) even provides for the counselling and rehabilitation of those who suffer abuse in schools. The eradication of illiteracy is provided for under article 12(2)(a) of the African Women's Protocol. This comparison confirms the contention of the authors, which is that the SADC Gender Protocol could quite

46 African Women's Protocol (n 19 above) art 6(b).
47 African Women's Protocol (n 19 above) art 6(d).
48 African Women's Protocol (n 19 above) art 6(f).
49 African Women's Protocol (n 19 above) art 7(c).
50 African Women's Protocol (n 19 above) art 7(d).
51 African Women's Protocol (n 19 above) art 6(g).
52 African Women's Protocol (n 19 above) art 10.
53 SADC Gender Protocol (n 18 above) art 14(1).
54 SADC Gender Protocol (n 18 above) art 16.

appropriately be described as weakening the obligations enshrined in the Women's Protocol.

The SADC Gender Protocol provides for a review of policies to cater for access to, and control of productive resources such as water, property and land.[55] Also, it provides for equal access to credit, capital and mortgages and appropriate technology.[56] As with other provisions, this is not an enhancement, since the African Women's Protocol provides for access to and control over productive resources such as property and land,[57] and further provides for access to credit[58] as well as providing for water rights.[59]

The SADC Gender Protocol obliges member states to ensure equal wages and benefits for equal jobs between men and women; to eradicate occupational segregation and discrimination; to recognise the economic value of persons in domestic work; minimum wages for persons in domestic work; and a prohibition of dismissal or denial of recruitment on the basis of pregnancy or diseases such as HIV and AIDS.[60] Article 13 of the African Women's Protocol provides for exactly the same rights as enshrined. Thus, it provides for equal wages and benefits for equal jobs between men and women; guarantees women's freedom to choose their occupation and protects them from exploitation; recognises the economic value of women in domestic work; and ensures transparency in recruitment, promotion and dismissal. With respect to the above-mentioned provisions, the SADC Gender Protocol and the Women's Protocol are absolutely identical and may thus be described as a needless duplication of efforts.

The SADC Gender Protocol prohibits all forms of gender-based violence, punishes the perpetrators, and provides for comprehensive testing, treatment and care to survivors, which shall include emergency contraception, post-exposure prophylaxis, termination of pregnancy and prevention of sexually-transmitted diseases. Further to that, it provides for the establishment of special courts for cases of gender-based violence. It provides for the rehabilitation of perpetrators of gender-based violence. In addition, it provides for the prevention of human trafficking.[61] In the same manner, article 4(2)(b) of the African Women's Protocol provides for the prevention, punishment and eradication of all forms of violence against women, while article 4(2)(f) provides for the establishment of accessible services for effective information, rehabilitation and reparation for victims of gender-based violence. While the SADC Gender Protocol makes a list of services to be provided to women

55 SADC Gender Protocol (n 18 above) art 18.
56 SADC Gender Protocol (n 18 above) art 20.
57 African Women's Protocol (n 19 above) art 19(c).
58 African Women's Protocol (n 19 above) art 19(d).
59 African Women's Protocol (n 19 above) art 15(a).
60 SADC Gender Protocol (n 18 above) art 21.
61 SADC Gender Protocol (n 18 above) art 20.

who are victims of gender-based violence, the Women's Protocol does not make such a list and leaves flexibility and emerging services that member states can offer to victims of gender-based violence. The only service that the African Women's Protocol pinpoints is the termination of pregnancy,[62] which is necessary because it is criminalised in many states, and therefore it was important for the Women's Protocol to clearly state that the right to choose to terminate a pregnancy consequent upon gender-based violence is a core component of the recognition of women's rights. Further, the Women's Protocol provides for the prevention, prosecution and condemnation of trafficking against women, and the protection of women most at risk.[63]

In its article 26, the SADC Gender Protocol provides that service providers, such as law enforcement machinery and social welfare services, should be given gender education, and that they should provide accessible information on services available to survivors of gender-based violence. Article 14(2)(a) of the African Women's Protocol provides for adequate, affordable and accessible health services, including information and education to women, especially in rural areas. This means that service providers will have been given gender education in order to pass it on to the victims. For all intents and purposes, the provisions of the SADC Gender Protocol and the Women's Protocol are therefore *ad idem*.

The SADC Gender Protocol calls on member states to take measures to ensure that the media refrain from promoting pornography, depicting women as helpless victims of violence, undermining the role of women in society and reinforcing gender oppression and stereotypes.[64] Article 13(m) of the African Women's Protocol prohibits the abuse of women in advertising pornography. Simultaneously, articles 2(2), 4(2)(d) and 12(1)(b) of the Women's Protocol require a commitment to undertake public education, information and communication strategies to eliminate stereotypes on the roles of women, and that the media should promote gender equality. These provisions reinforce the authors' assertion that, for the most part, the SADC Gender Protocol is simply a duplication of the Women's Protocol.

The SADC Gender Protocol calls for the equal participation of men and women in economic policies.[65] Article 13(1) of the African Women's Protocol caters for an equivalent provision. Essentially, the ambit of this provision requires the adoption and enforcement of legislative and other measures to guarantee women's equal opportunities in work and career advancement and other economic opportunities.

With respect to the objective of the harmonisation and implementation of laws, article 2 of the SADC Gender Protocol specifically provides

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62 African Women's Protocol (n 19 above) art 14(c).

63 African Women's Protocol (n 19 above) art 4(g).

64 SADC Gender Protocol (n 18 above) art 33.

65 SADC Gender Protocol (n 18 above) art 15(1).

for harmonisation of policies and strategies relating to gender equality and equity, as well as adopting affirmative action policies and strategies to eliminate the barriers that women had long suffered.[66] It further provides for co-operation among members for the implementation of the Protocol. In addition, the SADC Gender Protocol requires gender mainstreaming across all sectors.[67] The SADC Gender Protocol proclaims that it endeavours to achieve the just and fair distribution of benefits, rewards and opportunities between women, men, girls and boys[68] in light of the fact that gender equality would invariably give rise to sustainable development and democracy.[69] While this is an important provision, it goes no further than article 2(2) of the African Women's Protocol which places an obligation on states to commit themselves to modify the social and cultural patterns of the conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes. The African Women's Protocol quite obviously had in mind the necessity to bring an end to the condemnation of women to an existence of subordination on the African continent, which the SADC Gender Protocol has merely replicated.

With regard to the co-ordination of obligations, both the SADC Gender Protocol and African Women's Protocol provide for an obligation to adopt legislative and other measures to eliminate all practices detrimental to women.[70] In addition, they both oblige member states to provide for appropriate remedies to any woman whose rights or freedoms have been violated, and to ensure that a competent authority determines remedies.[71] It is submitted, therefore, that the SADC Gender Protocol did not create anything other than what was already provided for in the Women's Protocol. The only determining criteria in this regard lie with the effectiveness of remedies at SADC or AU level, and this could be assessed by the jurisprudence surrounding these Protocols, which is not the subject of the present paper.

2.2 Rights omitted from the SADC Gender Protocol

There are a multitude of rights which have been omitted from the SADC Gender Protocol without any defensible reasons, although they appear

66 Art 5 of the SADC Gender Protocol goes further to unequivocally provide for affirmative action measures.

67 SADC Gender Protocol (n 18 above) art 28.

68 SADC Gender Protocol (n 18 above) art 1 (definitions).

69 SADC Gender Protocol (n 18 above) Preamble.

70 African Women's Protocol (n 19 above) Preamble and arts 5 & 6; SADC Gender Protocol (n 18 above) art 3(a).

71 Arrican Women's Protocol (n 19 above) art 25; SADC Gender Protocol (n 18 above) art 32.

in the African Women's Protocol. A brief synopsis of rights which have been omitted include the protection of women against harmful traditional practices; special protection of women in distress, bearing in mind that the large majority of people in distress in Africa are women; special protection of elderly women; the rights of women to choose the number of children they want to have and the decision concerning the spacing between these children;[72] and the protection of asylum-seeking women, refugees, returnees and internally-displaced women, as contained in article 11(3) of the Women's Protocol. In addition, article 12(1)(b) of the Women's Protocol compels state parties to change the syllabus and text books to eliminate gender stereotypes, while article 12(c) does not only aim at ending abuse in schools, but seeks to punish perpetrators of such abuse. Article 12(d) of the Women's Protocol has even gone so far as to provide for counselling and rehabilitation of those who suffer abuse in schools. Article 21(1) goes further to give a widow the right to live in the matrimonial home after she remarries. Further, article 8 of the African Women's Protocol requires law enforcement organs to have the capacity to interpret gender equality rights. In the circumstances, the SADC Gender Protocol is disappointing in that it has not taken cognisance of these rights.

As far as specific omissions from the SADC Gender Protocol are concerned, when it comes to women with disabilities, no advancements have been made by the SADC Gender Protocol as article 9 of the SADC Gender Protocol mirrors the African Women's Protocol in that they both protect women with disabilities, particularly against gender-based violence and ensuring access to reproductive health facilities.[73] What the SADC Gender Protocol has failed to do, however, is to consider the physical, economic and social needs of women with disabilities when it comes to accessing their employment, training and participation in decision making.

The African Women's Protocol further protects women in the informal sector, which in many countries lack protection.[74] In this regard, the SADC Gender Protocol has failed to live up to the weight of expectation that was created in its Preamble, where it declared that SADC states recognise the feminisation of poverty, which is particularly prevalent in the informal sector. For this reason, the SADC Gender Protocol has fatally omitted an extremely important aspect.

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72 African Women's Protocol (n 19 above) arts 5, 24, 22 & 14(b).

73 African Women's Protocol (n 19 above) art 9.

74 The omission of specific protection of women in the informal sector is a huge oversight, given that most women find themselves employed in the informal sector and invariably fall outside the protection of labour laws.

2.3 Rights in the SADC Protocol left out by the African Women's Protocol

At first glance, the SADC Gender Protocol appears to be a clumsily-drafted document that is not likely to achieve its stated purpose. However, upon closer inspection, it is revealed that the SADC Gender Protocol is remarkable for the fact that it has innovatively provided for rights that do not appear in the African Women's Protocol and yet are of vital importance in the pursuit of gender equality.

A notable provision in article 33(1) of the SADC Gender Protocol is the introduction of an obligation which binds all government ministries and departments to have in their budget an allocation to gender equality awareness. On the other hand, the African Women's Protocol calls for governments to cut their spending in the military and invest in women's rights.[75] These two provisions, while similar in intention, are not identical and it is therefore fortunate that SADC have been sufficiently bold to impose specific obligations to make gender-appropriate allocations of budgetary resources. This is markedly different from article 12(3) of the African Women's Protocol and can be regarded as quite an achievement.

The SADC Gender Protocol also protects the rights of the widower as provided for in article 10, which deals with widow's rights. This is of course a new development brought by the SADC Gender Protocol as absolutely no explicit mention is made of the rights of widowers throughout the African Women's Protocol. Having said this, however, the question which arises is whether it is necessary in any event. Had widowers suffered any prejudices before? Widowers had always had their rights protected by African traditional laws and practices to the detriment of widows.

Girl and boy children are also protected under the SADC Gender Protocol. Specifically, article 11 provides for the elimination of discrimination against the girl and boy child to ensure equal access to education and health care, the protection of girls from economic exploitation, trafficking and violence, and to ensure that girl children have access to information on sexual and reproductive health. The African Women's Protocol provides for the protection of the girl child;[76] however, it does not go into details since children have their rights protected under the African Charter on the Rights and Welfare of the Child (African Children's Charter).[77] As such, the SADC Gender Protocol has innovatively brought the obligation to respect the rights of children into the realm of the sub-regional level of human rights protection and can therefore be regarded as an important development emanating from the SADC

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75 African Women's Protocol (n 19 above) art 10(3).

76 African Women's Protocol (n 19 above) arts 12(1)(c) & 13(g).

77 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

Gender Protocol, especially in light of the fact that four[78] out of the 14 SADC member states are not parties to the African Children's Charter.

The SADC Gender Protocol's assertive stance concerning the representation of women in decision-making positions is remarkable: Article 12(1) of the SADC Gender Protocol unequivocally provides for the requirement of 50% representation by women in decision-making positions. The African Women's Protocol only calls for 'increased and effective representation and participation of women at all levels of decision making'.[79] The aspiration towards increased representation in the Women's Protocol arises in the context of political participation and it therefore appears that the SADC Gender Protocol aims to achieve representation of women in all spheres.

Article 15(2) of the SADC Gender Protocol places an injunction on states to ensure gender-sensitive and responsive budgeting at the macro and micro-levels. Absolutely no similar provision is contained in the African Women's Protocol.

If one considers article 27(3)(c) of the SADC Gender Protocol, the SADC Gender Protocol can be regarded as having partially fulfilled its objective of 'filling gaps' when one considers that the SADC Gender Protocol introduces the requirement of the development and implementation of policies and programmes to ensure the appropriate recognition of the work carried out by care givers (usually women) and, further, to provide resources and psychological support for care givers. No similar provision whatsoever exists with respect to the African Women's Protocol.

A novel provision is found in article 17(1) of the SADC Gender Protocol, where it places an obligation on member states to adopt policies to ensure equal access and benefits for women and men in trade and entrepreneurship. No comparative provision exists in the African Women's Protocol. The addition is noteworthy as it represents a radical departure from the mentality that entrepreneurship is regarded as an activity for men and from which women are excluded.

When it comes to access to property, the SADC Gender Protocol provides for the categorical protection of women's property rights (unlike the tangential protection of same in the African Women's Protocol).[80] With regard to resources, the SADC Gender Protocol introduces a new right, being the provision of appropriate technology. In addition, the African Women's Protocol is silent on the aspect of technology and, as such, the SADC Gender Protocol has effectively 'filled a gap'.[81] Furthermore, the SADC Gender Protocol seeks to ensure universal access to information, communication and technology, especially for women and girls. This right could not be more apposite, given the poor level of

78 Angola, Democratic Republic of the Congo, Swaziland and Zimbabwe.

79 African Women's Protocol (n 19 above) art 9(2).

80 SADC Gender Protocol (n 18 above) art 18(1).

81 SADC Gender Protocol (n 18 above) art 18(1)(c).

technological utilisation in Africa.[82] There is no provision to this effect in the Women's Protocol.

It is important to note that the SADC Gender Protocol went further to articulate mechanisms of preventing human trafficking,[83] while the African Women's Protocol left it upon member states to adopt appropriate and updated mechanisms of curbing human trafficking. An indication is therefore made that the SADC is cognisant of the high levels of human trafficking within the sub-region and has elected to take decisive action to curb this scourge.

Article 26(a) of the SADC Gender Protocol obliges state parties to undertake to ensure a reduction in maternal mortality by 75% by 2015.[84] The African Women's Protocol refers in its article 14 to health and reproductive rights, yet makes no reference to maternal mortality, even though this is an extremely pressing concern in the African context.

What is striking and important in the SADC Gender Protocol is the rehabilitation of perpetrators of gender-based violence. This is essential because it works as a preventative strategy for curbing a recurrence of gender-based cases, and thereby making perpetrators better citizens. However, it may be argued for the African Women's Protocol that, since it provides for the prevention of gender-based violence and the identification of causes of violence against women,[85] the rehabilitation of perpetrators could potentially fall within the ambit of preventive mechanisms as enshrined in the Women's Protocol. However, the Women's Protocol is too vague in this regard to reach a conclusion.

It is important to note, even before looking at the content of the provision on health, that there is the SADC Protocol on Health, which adequately covers health issues in the SADC region.[86] Turning to the SADC Gender Protocol, it provides for the adoption of appropriate and affordable quality health care to reduce maternal mortality; addresses sexual and reproductive health needs; develops female-controlled

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82 The statistics show that, with regard to fixed-line telephones and mobile phone subscriptions as of 2000, in every 1 000, Botswana had 396; Democratic Republic of Congo (DRC) had 37; Lesotho had 109; Mozambique had 206; South Africa and Swaziland had no data; Zambia had 34; and Zimbabwe had 55. Regarding the number of people with personal computers, in every 1 000 people, Botswana had 45; there was no data with DRC and Lesotho; and Mauritius had only six people, while Mozambique had 109; South Africa had 82; Swaziland had 32; Zambia had 10; and Zimbabwe had 77. In relation to the number of people who use the internet, in every 1 000 persons, Botswana and Swaziland had 32; DRC had no data; Lesotho with 24 persons; Mauritius with a total of 7; Mozambique had 37; South Africa had 78; Zambia had 20; and Mozambique had 63. These figures are far too low, and need attention, given the usefulness of communication and technology in the world today.

83 SADC Gender Protocol (n 18 above) art 5.

84 SADC Gender Protocol (n 18 above) art 26.

85 SADC Gender Protocol (n 18 above) art 4(c).

86 SADC Protocol on Health, adopted in Maputo, Mozambique, 1999.

methods of contraception, safe abortion and counselling; and ensures the provision of hygiene, sanitary facilities and the nutritional needs of women.[87] While there is general replication of the rights contained in the SADC Protocol(s) in the African Women's Protocol,[88] the reduction of maternal mortality and the development of female-controlled methods of contraception are rights which do not appear in the Women's Protocol and have been comprehensively addressed in the SADC Gender Protocol.[89]

The SADC Gender Protocol calls for member states to adopt and implement policies aimed at the prevention, treatment, care and support of people with HIV and AIDS. Also, it requires member states to provide for universal access to treatment for people infected with HIV and AIDS. In addition, it provides for the adoption of policies that ensure support to care givers.[90] The two provisions on universal access to treatment and support to care givers are very important, and they are not incorporated in either the SADC Protocol on Health or any other SADC treaty. This is a very positive improvement on the African Women's Protocol, to bind members to ensuring universal access to treatment, more so because sub-Saharan Africa is the region hardest hit by the HIV and AIDS pandemic, with 62,5% of 39,4 million people living with HIV and AIDS world-wide. Sadly, women make out 57% of the 62,5 million people living.[91] To this end, the SADC has identified HIV and AIDS as a particularly egregious problem in the sub-region and has consequently adopted a comprehensive approach to the fight against HIV and AIDS.

The SADC Gender Protocol obliges member states to ensure women's representation and participation in key decision-making positions, in conflict resolution and peace-building processes.[92] Likewise, article 10(2)(b) of the African Women's Protocol provides for women's participation in structures and processes for conflict prevention, management and resolution at all levels. While these provisions may seem very similar, the striking difference is that article 3(e) of the SADC Gender Protocol compels member states to strengthen, monitor and evaluate

87 SADC Gender Protocol (n 18 above) art 29.

88 African Women's Protocol (n 19 above) arts14(1)(c) & (b).

89 Art 26(a) of the SADC Gender Protocol sets the very ambitious target of reducing maternal mortality by 75% by 2015. The provision on reducing maternal mortality is extremely vital, particularly because of 529 000 maternal deaths, 95% of this number occurred in Africa and Asia as of the year 2000. More shocking is the fact that, while women in developed countries have a one in 2 800 chance of dying during childbirth, women in Africa have one in 20 chance; therefore, given these statistics, there is nothing as important as aiming to reduce maternal mortality in Southern Africa.

90 SADC Gender Protocol (n 18 above) art 30.

91 UNAIDS, 2007 AIDS epidemic update, accessible at http://www.unaids.org/en/KnowledgeCentre/ HIVData/EpiUpdate/EpiUpdArchive/2007/ (accessed 7 July 2008).

92 SADC Gender Protocol (n 18 above) art 31.

the progress made towards reaching the targets and goals set out in the Protocol.[93]

Article 2(1)(c) of the SADC Gender Protocol brought with it a new issue of co-operation (which is now on the international agenda), that countries should provide international co-operation and assistance for the implementation of human rights, with particular emphasis placed on economic, social and cultural rights.[94] This aspect is not traversed at all in the African Women's Protocol.

3 Implementation of obligations

According to Wandia, provisions on women's human rights in CEDAW and the Beijing Declaration and Platform for Action have not involved a conceptual shift or effected structural changes needed to implement their resolutions.[95] However, the African Women's Protocol — like the SADC Gender Protocol — is intended to domesticate CEDAW and the Beijing Declaration and Platform for Action in the African context. Therefore, the SADC Gender Protocol ensures implementation at national level, and thus makes reference to human and financial resources, which the African Women's Protocol equally provides for.[96] It, however, introduces a new element in providing for the adoption of regional action plans with measureable targets and time frames.[97]

At the very least, one would expect that SADC states would introduce new rights altogether not covered by the African Women's Protocol or could have adopted more robust implementation mechanisms of the Women's Protocol. This point raises the important issue of implementation of women's rights at SADC and AU levels. Under the African Charter and Protocol, the AU provides for a reporting mechanism, individual complaints mechanism and has a Special Rapporteur on the Rights of Women. Turning to the SADC, the Gender Protocol has established another reporting mechanism.[98] However, it is silent on an individual complaints mechanism and does not have procedures such as Special Rapporteurs. Clearly, the SADC Gender Protocol has settled for less than what the AU provides in terms of implementation mechanisms, thus the all-important implementation of rights is undermined in the SADC Gender Protocol, with the result that victims of infringements

93 SADC Gender Protocol (n 18 above) art 3(e).

94 UN Charter (n 1 above) arts 55 & 56; ICCPR (n 3 above) arts 22 & 23; OHCHR General Comment 3 (n 3 above) para 38.

95 M Wandia 'Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: Ethiopia and the Comoros lead the way' http://old.apc.org/english/capacity/policy/mmtk_ictpol_humanrights_African_Charter_protocol.doc (accessed 20 September 2009).

96 African Women's Protocol (n 19 above) arts 26(1) & (2).

97 SADC Gender Protocol (n 18 above) art 3(d).

98 SADC Gender Protocol (n 18 above) art 39(3).

of their rights in the SADC sub-region would have to circumvent the sub-regional mechanisms as they are clearly inadequate, and rely on the AU mechanisms to vindicate their rights.

Even if the SADC Gender Protocol provides an individual complaints mechanism or anything equivalent to that, whereby complaints would be brought before the SADC Tribunal, the question is whether the SADC Tribunal has the capacity to deal with gender or human rights issues as contained in the SADC Gender Protocol. To this end, the SADC Tribunal is established under the SADC Treaty to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.[99] The Treaty provides that judges shall be appointed from nationals of states who possess the qualifications required for appointment to the highest judicial offices of their respective states or who are jurists of recognised competence.[100] Unlike the Protocol on the Statute of the African Court of Justice and Human Rights, judges of the SADC Tribunal do not necessarily bring any specialised human rights competence, although their jurisdiction clearly covers human rights issues.[101] Indeed, while the SADC Tribunal has high-calibre judges in their own respective fields of law, none of the SADC judges has a degree in human rights law, and understandably so because a major objective of the SADC is economic liberation, therefore one expects that judges will mostly have qualifications in commercial law and related fields.[102]

Both the SADC Gender Protocol and the African Women's Protocol oblige member states to periodically submit implementation reports. It is important to note that this, too, amounts to an unnecessary duplication of efforts, because multiple reporting by member states can be unduly onerous and it is definitely not cost-effective. With the ratification of the SADC Gender Protocol, it would mean that SADC states have to prepare three reports on the same subject to be submitted before the CEDAW Committee, the African Commission and the SADC, respectively.

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99 SADC Gender Protocol (n 18 above) art 16(1).

100 SADC Protocol on Tribunal and Rules of Procedure thereof, adopted in Windhoek, Namibia, 7 August 2000, art 3(1).

101 CA Odinkalu 'Complementarity, competition or contradiction: The relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa' 10 http://www.africacourtcoalition.org/content_files/files/ ChidionComplementarity.doc (accessed 12 June 2008).

102 SADC, Biographies of SADC Tribunal Judges, http://www.sadc.int/content/english/tribunal/docs/ Biodata%20for%20SADC%20Tribunal%20Members%20and%20Staff.pdf (accessed 6 July 2008).

4 Complementarity or duplication?

The comparison between the SADC Gender Protocol and the African Women's Protocol carried out above reflects to an overwhelming extent that the large majority of provisions of the SADC Gender Protocol are the exact replica of the Women's Protocol. As such, it amounts to a duplication, with the following minor exceptions: the inclusion of men in gender issues; day care centres; paternity leave; places of shelter for survivors of gender-based violence; universal access to HIV and AIDS treatment, and support to HIV and AIDS care givers; an obligation on all government ministries to have budgets on gender awareness; and time-frames in which the respective articles are to be implemented; traditional courts; and an undertaking to reduce maternal mortality. These are the only areas that the SADC Gender Protocol could be said to be complementing the African Women's Protocol. In the circumstances, could it be said that the above-mentioned provisions needed the adoption of a new Protocol? Surely, means to cater for these provisions could have been deployed other than embarking on the new instrument altogether. This goes back to one of the objectives of the SADC Gender Protocol — to 'fill in the gaps'. Clearly the SADC Gender Protocol was not able to fill in the gaps as far as the African Women's Protocol is concerned. If the SADC Gender Protocol filled in the gaps, as purported in the SADC Gender Protocol itself, by introducing new rights and state obligations, surely it could potentially be a significant instrument at the continental level since it would complement the African Women's Protocol.

The analysis of the provisions of the two Protocols reflects that not only has the SADC replicated the provisions of the Women's Protocol, it has equally omitted some vital provisions and provided some rights to a lesser degree compared to the Women's Protocol. The result of this could entail that SADC member states could rely on the 'less onerous' provisions of the SADC Gender Protocol, while ostensibly upholding the binding obligations that they have voluntarily undertaken at the AU level. While the SADC as an entity has a right to adopt its legal instruments as it pleases, and not be expected to cover every other provision from either the African Women's Protocol or other relevant international treaties, the SADC has emphatically stated that the objective of the Protocol in question is to consolidate all legal instruments that SADC member states are parties to.[103] On this note, it is expected that the SADC, in its efforts to consolidate treaties and declarations, would include all the themes of the treaties it seeks to consolidate. However, contrary to expectations, the comparison carried out between the provisions of the SADC Gender Protocol and the African Women's Protocol has shown that the SADC has weakened the Women's

[103] African Women's Protocol (n 19 above) art 3(a).

Protocol. For instance, it has been indicated in the beginning of this work that regional instruments are adopted to cater for, among others, cultural specificity; yet it is alarming to find the glaring absence of a direct reference to harmful practices that are peculiar to African women while the African Women's Protocol prioritises them.[104] Another missing theme, yet equally important, is the protection of asylum-seeking women, refugees, returnees and internally-displaced women,[105] and this is astonishing because the Protocol was adopted in the wake of the unsettling events in Zimbabwe and Madagascar during July 2008.

Apart from its failure to adequately fulfil its objective of 'filling in the gaps', the SADC Gender Protocol has also failed to meet another objective, namely, 'addressing emerging gender issues', because there is little or no new emerging gender issues in the Protocol. This raises the question of the costs attached to adopting a new Protocol. Clearly, the costs of a new protocol outweigh to a very large extent the duplicitous and complementary provisions referred to above. For SADC to reproduce the provisions of the African Women's Protocol amounts to a duplication of efforts, particularly because, with the exception of Botswana, two member states (Madagascar and Swaziland) are signatories to the African Women's Protocol and the rest (11) have ratified the Women's Protocol.[106] It is also striking to find that Botswana is amongst the countries that have not signed the SADC Gender Protocol. Surely, efforts could have been directed at bringing Botswana on board with regard to being party to the SADC Gender Protocol instead of duplicating efforts. Thus, the duplication of efforts is a waste of resources, which could have been invested elsewhere, specifically in lobbying other SADC member states to ratify the African Women's Protocol and adopting robust mechanisms for protecting women's rights, which would make the the SADC region exemplary. In that way, the SADC region could positively have enhanced (complemented) the African Women's Protocol.

While the SADC Gender Protocol has not succeeded in filling in the gaps in existing agreements and also has not succeeded in addressing emerging gender issues, other than duplicating the already existing treaties, the SADC has nevertheless aimed at 'deepening regional integration' as indicated in its objectives. This is indeed a positive act from the SADC member states, to strive to adopt an instrument that will create a uniform environment in relation to gender issues in the region. However, one wonders whether the SADC or women's groups in the SADC appreciate the full picture of integration in Africa as envisaged by

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104 African Women's Protocol (n 19 above) art 5(b).

105 African Women's Protocol (n 19 above) art 11(3).

106 African Union, Status of Women's Protocol http://www.africaunion.org/root/au/Documents/ Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf (accessed 20 September 2009).

the AU.[107] The idea of integration in SADC and other sub-regional blocks is to eventually merge into a single entity under the broad umbrella of the AU.[108] The Constitutive Act of the AU defines regional integration as one of the anchoring pillars for African unity. The Lagos Plan of Action and the Abuja Treaty establishing the African Economic Community spell out the economic, political and institutional mechanisms for attaining this goal.[109] It would therefore be redundant to compete with the AU instead of implementing the AU agenda, given that there is a clear obligation on member states to move towards continental integration. Indeed, it has been determined that one of the fatal problems facing integration in Africa is that some RECs lack clarity of vision resulting in diffuse activities.[110] Perhaps it is important for organisations and member states to visit the background on the establishment of the SADC, the primary focus or objectives of the SADC, and the bigger picture of integration in Africa. As indicated in the introductory part of this article, clearly the major objective for regional integration in SADC is economic growth, and this is the area where energies should be directed. What SADC states and women's organisations could do is to mainstream gender in all areas of integration in the SADC, especially because the SADC Treaty provides for gender mainstreaming in community building.[111] Ironically, in this regard, it is disturbing to find that all the judges in the SADC Tribunal are men, yet the SADC Treaty provides for gender mainstreaming.

In summary, the idea of fostering regional integration by duplicating the efforts of the AU is not only wasteful, but goes against the idea and spirit of continental integration in Africa. The article therefore indicates that there is a need for the SADC to obtain direction in achieving its mandate before the community loses focus. It is disturbing to find that South Africa has signed a free trade agreement contrary to the SADC Treaty,[112] and this has not been rigorously addressed by SADC member states and, ultimately, the entire idea of integration in SADC is made a mockery of. The SADC is not the only community which is on the verge of losing direction; many are and there is a need for redirection.

The analysis carried out above has indicated that the SADC, in its efforts to fill in the gaps, addresses emerging gender issues and pursues regional integration as reflected in its objectives, has duplicated

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107 Constitutive Act of the African Union, accepted in Lomé, July 2000, entered into force May 2001, arts 3(c) & (l).

108 Constitutive Act of the African Union (n 107 above) art 3(l).

109 The Treaty Establishing the African Economic Community, adopted in Abuja, Nigeria, 3 June 1991, entered into force 12 May 1994, art 4(1).

110 Economic Community for Africa *Assessing regional integration in Africa* (2004) 33.

111 SADC Treaty (n 9 above) art 5(k).

112 Trade, Development and Co-operation between EU and South Africa, OJ L 311, Vol 42, 4 December 1999 http://eur-lex.europa.eu/JOIndex.do?year=1999&serie=L&textfield2= 311&Submit=Search&_submit =Search&ihmlang=en (accessed: 13 October 2009).

and weakened the African Women's Protocol, and has further failed to comprehend the full picture of regional integration in Africa. So, what has the SADC achieved in adopting the SADC Gender Protocol? There is a significant theme in the SADC Gender Protocol, which is new to the African Women's Protocol, and that is 'monitoring and evaluating the goals set out in the Protocol'. Indeed, this is the area most peculiar to the SADC Gender Protocol, but the question is, is it appropriate for the treaty to be framed like the SADC Gender Protocol has been framed? Treaties invariably leave room for individual states to implement its provisions in a manner that best suits the respective states, that is, the treaty only provides a framework within which implementation should be done. On the contrary, the SADC Gender Protocol is very detailed and is not flexible to give the respective states the discretion in implementing it, taking into consideration the individual economic, political, and social situations of individual states. Therefore, the Protocol is not practicable. Secondly, the monitoring and evaluation mechanisms peculiar to the SADC Gender Protocol are alien to the traditional treaty in that the framework of the SADC Gender Protocol resembles a plan of action and not a treaty, and therefore it would have been more appropriate had the document been adopted as a plan of action instead. What is striking is that the last paragraph of the Preamble shows that the SADC had in mind a plan of action and not a treaty, but, for whatever reason, the idea dissipated along the way. The last paragraph of the preamble reads thus:

> COMMITTED to drawing up a Plan of Action setting specific targets and timeframes for achieving gender equality and equity in all areas, as well as effective monitoring and evaluation mechanisms for measuring progress.

5 Conclusion

The protection of women's rights and the importance of the inclusion of women in a dominant role in all spheres of life cannot be overstated in Southern Africa and elsewhere. Also, for purposes of integration, it is very important that a region shows commitment to establishing a similar approach to common issues of interest as the SADC did with women's rights. While it is important to pursue regional integration by adopting treaties that seek to protect women's rights in the SADC region, it can be argued that despite the notable innovative provisions of the Protocol, the Protocol tends to be redundant in light of the degree of duplication between the SADC Gender Protocol and the African Women's Protocol. In this regard, many of the themes in the African Women's Protocol have been replicated in the SADC Gender Protocol, thus amounting to a duplication of efforts and a misdirection of scarce resources which could have been invested elsewhere. Ideally, the SADC should have adopted a plan of action to effectively and uniformly implement the African Women's Protocol. In addition, given

that the SADC has settled for weaker implementation mechanisms in comparison with the mechanisms of the AU, and has further increased the burden on states with regard to reporting, it was indeed inappropriate to adopt a treaty which weakens the already existing treaties that are equally binding on SADC member states. To sum up, instead of directing scarce resources to replicating the African Women's Protocol, the SADC could have resorted to strengthening the protection of women's rights because, no doubt, the promotion of women's rights is at a peak but protection is very low. Thus, conferences have been held; training and awareness campaigns on women's rights have been conducted and they are continuing. National, regional, continental and international laws have been adopted as a result of promotional efforts by women's groups. However, there is still a long way to go in as far as protection is concerned. Evidence for this assertion is gathered from an analysis of jurisprudence concerning women's rights. Regrettably, there are virtually no cases that have been submitted to the sub-regional or regional treaty-monitoring mechanisms aimed at addressing the desperate plight of Africa's women.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Tanzania's death penalty debate: An epilogue on *Republic v Mbushuu*

*Aniceth Gaitan**
Kongwa District Council Solicitor, Tanzania
*Bernhard Kuschnik***
Legal Clerk, Regional Court, Düsseldorf, Germany

Summary

The imposition of the death sentence seems to be a common method of punishing grave offenders in Africa. In Tanzania, the most famous case involving capital punishment is Republic v Mbushuu*, where the accused were convicted of murder and sentenced to death in 1994. Yet, there seems to be a new trend — among other things sparked by developments in international criminal justice — to work towards the abolishment of capital punishment. The article gives insights into legal and interdisciplinary considerations from an African–European perspective and calls for a progressive approach to the death penalty debate that works hand in hand with the legal understanding of the international community.*

1 Introduction

Whereas the death penalty is one of the oldest forms of punishment, the strengthening of human rights law after World War II has lead to a gradual global movement aimed at its abolition.[1] In Africa, the death penalty has until recently been used widely. As at 2007, 13 African

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** LLM (Aberdeen), PhD (Eberhard Karls); B_Kuschnik@gmx.de

1 R Skilbeck 'The death penalty in international law: Tools for abolition' paper presented at the Conference on the Application of the Death Penalty in Commonwealth Africa, Entebbe, Uganda, 10-11 May 2004; see also Amnesty International 'The death penalty worldwide: Developments in 2003' http://www.amnesty.org/en/library/info/ACT50/007/2004/en (accessed 10 November 2009).

countries had decided in favour of its formal abolishment; 19 had abolished it *de facto*, among others Tanzania,[2] and 21 still retained the death penalty. Nonetheless, there seem to be signs that Africa intends to get rid of the death penalty. Rwanda's recent abolition of the death penalty serves as an example.[3] New tendencies in international criminal law policy, particularly the work of the International Criminal Tribunal for Rwanda (ICTR), started a process of thought that considers a stronger integration of norms of the international justice system into national systems as desirable. Yet, according to United Nations (UN) strategy, UN bodies such as the ICTR, or institutions which have affiliations with the UN, such as the Special Court for Sierra Leone (SCSL), are prohibited from using the death penalty when sentencing.[4] In Rwanda, the abolition of capital punishment was particularly influenced — yet not solely dependent upon — the existence of (revised) Rule 11*bis* of the ICTR Rules of Procedure and Evidence (RPE), which regulates the transfer of indicted defendants in ICTR custody to third states.[5] Boctor has recently concluded that, even though Rwanda may have faced pressure from the UN to abolish capital punishment in order to try such persons before local Rwandan courts, the original decision largely rested upon internal and free international considerations.[6] Naturally, opinions on the legality and legitimacy of the death penalty in Africa nevertheless differ. One may point to Liberia's re-introduction of capital punishment legislation in 2008, despite having ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), thus committing itself to work towards the global abolishment of capital punishment.[7] In Uganda, the death penalty was recently declared constitutional if the sentence is not imposed mandatorily, but 'passed by a competent court, in a fair trial and confirmed by the highest appellate court'.[8]

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2 L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 29; K Bojosi 'The death row phenomenon and the prohibition against torture and cruel, inhuman treatment' (2004) 4 *African Human Rights Law Journal* 303 304 n 5.

3 Organic Law 31/2007 of 25 July 2007, Official Gazette Special No of 25 July 2007 (art.2); also see V Johnson 'Ruanda schafft die Todesstrafe ab' *Die Tageszeitung* 23 July 2007.

4 See arts 23 & 77 International Criminal Court (ICC) Statute; art 19 SCSL Statute in conjunction with Rule 101; and ICTR and SCSL Rule 11*bis* RPE.

5 See *Prosecutor v Munyakazi*, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda*, Case ICTR-97-36-R11bis (28 May 2008).

6 A Boctor 'The abolition of the death penalty in Rwanda' (2009) 10 *Human Rights Review* 99 104.

7 UN Human Rights Committee 'Rights panel concerned by clear breach of law in new Liberia Death penalty legislation', press release of 26 August 2008; http://www.unhchr.ch/huricane/ huricane.nsf/view01/61384AE0E6D30F53C12574B10038C986?opendocument (accessed 16 September 2009).

8 See *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 3 of 2006 (21 January 2009), [2009] UGSC 6 (21 January 2009) http://www.saflii.org/ug/cases/UGSC/2009/6.html (accessed 10 November 2009); Uganda ratified the ICC Statute on 14 June 2002.

This article argues that Tanzania should abolish capital punishment in the spirit of protection and promotion of human rights, and should strengthen the trend towards the abolition of this punishment for the rest of the African continent. In order to ascertain to what extent abolition is possible, Tanzanian and other arguments (*pro* and *contra*) are discussed and considered in perspective. A special focus has been on the Tanzanian landmark judgment, *Republic v Mbushuu*,[9] which was rendered by the Court of Appeal in 1994 and which demonstrates an uncertain understanding of the death penalty issue in the Tanzanian legal system.

2 Socio-historical influences

In order to comprehend the arguments brought forward in the Tanzanian death penalty debate, it is necessary to give a short introduction into the history and culture of the country, as the legal understanding of politicised law is highly influenced by social values (mirror theory).[10] Tanzania — due to its colonial history — has two separate, yet uniting cultural heritages, those of Christianity and Islam, traditionalist and modern (liberal) beliefs, all of which influence the debate on the abolition of the death penalty.

Tanzania's mainland (Tanganyika) is a former colony of Germany and Britain. Germany ruled the country from 1884 to 1918; thereafter the

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9 (1994) LRC 349. See also *Mbushuu v Republic* [1995] 1 LRC 216; (1994) TLR 154.

10 The term 'mirror theory' was introduced by W Ewald in his seminal work on comparative jurisprudence. See W Ewald 'Comparative jurisprudence (II): The logic of legal transplants' (1995) 43 *American Journal of Comparative Law* 489 490. In this regard, it is to be made clear that such a thing as the one and only mirror theory does not exist. Instead, there are different types of mirror theories. For greater clarity we shall use a simple example: According to mirror theorists, law is dependent upon a specific (social) value, which we shall call 'X' (X1 = geography, X2 = religion, X3 = '*Weltgeist*', X4 = geography + religion, etc). Furthermore, the connection between law and value 'X' varies in strength according to the respective type of mirror theory. 'Strong mirror theorists', like Legrand, believe that law is always dependent upon 'X', or as Ewald elaborates, 'Law is nothing but X' with the result that 'Given the knowledge of X, it is possible to calculate the rules of law that will hold in the given society' (493). Also see Montesquieu *De l'esprit des lois* (1748) I 3 : '*[...] les lois politiques et civiles de chaque nation [...] doivent être tellement propres au people pour lequel elles sont faites, que c'est un trés grand hazard si celles d'une nation peuvent convenir á une autre.*' 'Weak mirror theorists', on the other hand, emphasise that 'Law and X are closely related' or, a knowledge of X is useful for understanding the rules of law that hold in a given society, but that law is not totally explicable in terms of X. Opponents of mirror theories, among others Watson, claim that law is mostly unconnected to culture as it is foremost applied by (legal) experts. However, Watson also admits that for particular areas of law, such as constitutional law, particularly the bill of rights and criminal law, the view whereby the non-detachment between law and culture exists, seems to be unfounded. See A Watson 'From legal transplants to legal formats' (1995) 43 *American Journal of Comparative Law* 469 470. The latter line of reasoning is *a fortiori* also applicable to death penalty debates.

British took over until 1961 when Tanganyika gained independence.[11] Zanzibar was under an Arab colonial regime and gained independence on 10 December 1963. One month later, on 12 January 1964, a revolution overthrew the sultan governing Zanzibar. The two separate states (Zanzibar and Tanganyika) united on 26 April 1964 after union leaders[12] of the two states met at Karimjee Hall in Dar es Salaam and drafted the 'articles of the Union'. Subsequently thereto, the name of the United Republic of Tanganyika and Zanzibar was changed to the United Republic of Tanzania.[13]

The union of Tanganyika and Zanzibar is considered peculiar in nature, as under the united Government of Tanzania, 'Tanganyika' disappeared while Zanzibar remained and has its own government, judiciary, president, and a house of representatives acting as the parliament of Zanzibar. Legal and policy matters are controlled by the two governments in accordance with its given powers. The government of the United Republic of Tanzania exercises authority over all union matters[14] in the United Republic of Tanzania and all non-union matters on mainland Tanzania. The Revolutionary Government of Zanzibar has authority over all non-union matters on Zanzibar.[15] Therefore, the

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11 Even though the national language of the Republic of Tanzania — until today — is Kiswahili, both Kiswahili and English remain official languages, thus having a direct effect on the interpretation of Tanzanian legal provisions, including the Constitution.

12 Mwalimu Julius Kambarage Nyerere became the first President of the United Republic of Tanzania; Sheikh Abed Aman Karume became the Vice-President of the United Republic of Tanzania. Sheikh Abed Aman Karume stayed in power until 1972 when he was assassinated by a close relative. Mwalimu Julius Kambarage Nyerere led the country until 1985.

13 Act 6, Cap 578.

14 Union matters include the Constitution of the United Republic of Tanzania; Foreign Affairs; Defence and Security; Police; emergency powers; citizenship; immigration; external borrowing and trade; service in the government of the United Republic of Tanzania; income tax payable by individuals and by corporations, customs duty and excise duty on goods manufactured in Tanzania collected by the customs department; harbour matters relating to air transport, posts and telecommunications; all matters concerning coinage currency for the purpose of legal tenders and all banking business; foreign exchange and exchange control; industrial licensing and statistics; higher education; mineral oil resources, including crude oil and natural gas; National Examinations Council of Tanzania and all matters connected with the functions of that Council; civil aviation; research; statistics; the Court of the Appeal of Tanzania; registration of political parties and other matters related to political parties. All these matters are entrusted to the Vice-President's office.

15 See arts 55(1) & 63(1) of the Zanzibar Constitution of 1984, which vest executive and legislative powers 'with respect to all matters in and for Zanzibar other than union matters' in the Revolutionary Government of Zanzibar, and the House of Representatives of Zanzibar respectively. The interaction between both Tanzanian and Zanzibarian governmental bodies is unclear even today, thus strengthening claims for an independent 'government of Tanganyika', even though the government of the United Republic of Tanzania strongly opposes this idea. In a speech representing the Nzega constituency when addressing parliament on 19 August 2008, Lukasi Seleli, member of parliament, categorically argued that, even though most of the Zanzibar

abolishment of the death penalty lies in the hands of the government of the United Republic of Tanzania.

3 The notion 'death penalty' from a Tanzanian perspective

The death penalty is carried out in Tanzania by sentencing the offender to suffer death by hanging. Its origins date back to colonial legislation which was passed to apply section 302 of the Indian Penal Code to the territory. Such legislation was replaced in 1921 by section 2 of the Punishment for Murder Ordinance 28 of the Tanganyika territory.[16] In Tanzania, capital punishment is today imposed for the crime of murder[17] in accordance with section 197 of the Penal Code, and for the crime of treason pursuant to sections 39 and 40. Even though Tanzania adopted the Penal Code that mirrored those of many former British colonies with a mandatory death penalty included as a sentence for heinous crimes such as murder,[18] the (political and social) justification[19] for capital punishment has regularly been linked to the maxim of *jino kwa jino*,[20] which literally means 'a tooth for a tooth' and translates into 'he who kills a man must be put to death'.

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population, including some of the ministers, claim that Zanzibar is known internationally as a complete independent country, Tanzanian 'mainlanders' were the ones to decide over union issues. Accordingly, at the end, Tanzania should go away from a bilateral governmental system (the Union Government and Revolutionary Government of Zanzibar) and resort to a single government (Government of United Republic of Tanzania). The said argument was also supported by Njelu Kasaka, the then member of parliament for Chunya and Lupa and leader of the G 55 Committee who advocated a three-government system in 1994 (Government of Tanganyika, Revolutionary Government of Zanzibar and Union Government). Kasaka contended that commitment is needed in order to keep the union alive, otherwise the beloved and cherished union will 'break irreparably'; *Mtanzania* newspaper, 20 August 2008, *Viongozi wa Zanzibar wamkera Kasaka* 1 4.

16 The United Republic of Tanzania, the Law Reform Commission of Tanzania, *Final report on designated legislation in the Nyalali Commission Report*; ch 3 (ii) 11 (1994).

17 Sec 197 of Penal Act 6 of 2007 stipulates that '[a]ny person convicted of murder shall be sentenced to death'.

18 CM Peter (ed) *Law and justice in Tanzania: Quarter a century of the Court of Appeal* (2007) 69.

19 Given that under the Constitution the President may pardon any offender for any crime; and given that the Court of Appeals in *Mbushuu* linked the legality of the death penalty to its general acceptance within society, political and social justifications play an important role in the determination of the legality of the death penalty; see sec 4.2 below.

20 Law Commission of India 'Consultation paper on mode of execution of death sentence and incidental matters' cited in A Bahati J (Chairperson, Tanzania Law Reform Commission), 'The death penalty debate' (undated) http://www.doj.gov.za/alraesa/conferences/papers/ent_s4_bahati.pdf (accessed 10 November 2009); PH Filikunjombe 'Time to end the burden of waiting to execute death penalty' 18 July 2005; http://kurayangu.com/ipp/guardian/2005/07/18/44713.html (accessed 16 September 2009).

Jino kwa jino, 'an eye for an eye', sets the moral basis for the death penalty in Tanzania.[21] Supporters argue that — even today — the maxim correlates with domestic cultural thinking and forms of civilisation from which it emerges as, in Tanzania, disputes are settled on a threefold basis: either by means of mediation and conciliation, 'drumming the scandal', or 'trial by ordeal'.[22] 'Trial by ordeal', in particular, is connected to *jino kwa jino*, thus providing proof that the death penalty in Tanzania is an established and justified form of punishment dating back to time immemorial, when it was applied to solve murder cases that were 'committed' by the use of witchcraft.[23] In such cases — which appeared before the Tanzanian courts up until 1947 — the suspected offender was forced to take drugs popularly known as *Mwavi*. If the suspect died, the commission of murder was proven; if the suspect survived, he or she was regarded as innocent.[24] Even though the use of *Mwavi* is considered an outdated concept to determine the guilt of the accused, traditional meta-physical beliefs are still deeply rooted in the Tanzanian understanding of criminal justice. In regard thereof, it is held that Christianity and Islam both support *jino kwa jino*. Christ was crucified for what was believed to be blasphemy, and convicted to protect society. In the book of Leviticus 24:17-21, it is *explicitly* stated that '[h]e who kills a man shall be put to death'. Comparable formulations can be found in Genesis 9:6; Exodus 21:12-14; 35:31-31; Matthew 26:52, 35:30-31; and Revelations 13:10. Islamic believers — including Tanzanian state officials — refer to the Holy Koran, particularly Surah 5:36.[25] Due to the principle which *jino kwa jino* embodies — *ius respicit aequitatem*[26] — it is claimed that the provisions of the Penal Code can be regarded as acceptable. If such an approach had been sound, sentencing to death by hanging *in public* would not create conflict either

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21 LP Shaidi 'The death penalty in Tanzania — Law and practice' (undated). 'This penalty [of capital punishment] has received ideological justification from the main religions, in our case Christianity and Islam. Many believers would not wish to question anything which they consider to have been sanctioned by their religion as taught by their religious leaders. In penological terms, capital punishment is a reflection of retributive justice, embodying the ancient maxim of 'an eye for an eye, a tooth for a tooth.' It is based on vengeance channelling public outrage into a legalised form of punishment. It is argued by its proponents that, in its absence, outraged people may be forced to seek vengeance through mob justice or individualised forms of revenge'; http://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdf (accessed 16 September 2009)

22 *Issack s/o Nguvumali v Petro s/o Bikulako* [1972] HCD 139; *Kapasuu v Mwandilemo* [1968] HCD 88.

23 Also see J Narloch *Ritual murder and witchcraft in Southern Africa in relation to Unity Dow's 'The screaming of the innocent'* (2007).

24 *R v Palamba s/o Fundikira* 14 EACA 96 (Tanganyika, 1947).

25 CM Peter & H Kijo-Bisimba *Justice and rule of law in Tanzania: Selected judgments of Justice James L Mwalusanya and commentaries* (2005) 60.

26 Comparably stated in the Holy Bible (*In judiciis non est acceptio personarum habenda*), *Liber sextus* 5:13 12.

as, *inter alia*, crucifixion or stoning is stipulated in section 26(1) of the Holy Bible.

Even though *jino kwa jino* has continued to receive massive support in Tanzania's legal, and particularly political, thinking, the *execution* of death sentences were rather the exception than the rule. There were no hangings in Tanzania between the early 1970s and 1987[27] or between 1994 and the present date (though of course individuals are still regularly sentenced to death).[28] In August 2007, all death sentences in Tanzania — estimated at about 400 at that time[29] — were commuted to life imprisonment.[30] Furthermore, in the majority of cases, the charge of 'murder' is commonly changed by the Tanzanian courts to 'manslaughter', as set forth in section 195 of the Tanzanian Penal Code which does not provide for capital punishment.

The reasons for non-enforcement are unclear.[31] Explanations include pressure from human rights groups, Tanzanian obligations under international law, and the definition of 'malice' in the Tanzanian Penal Code, which includes recklessness, leading to the problem that regularly even unintentional homicide would amount to murder and thus have to be punished by the death sentence.[32]

4 Municipal law regulating the death penalty

In order to comply with international legal instruments, particularly the Universal Declaration of Human Rights of 1948 (Universal Declaration),[33]

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27 Law Reform Commission of Tanzania 'Draft discussion paper on the review of capital punishment, corporal punishment and long term sentences in Tanzania' presented at the workshop held on 27 March 2008 in Dar es Salaam, 65 para 2.12; see also Prisons Headquarters, Ref.HQC.68/XIX/22 of June 2007.

28 Speech delivered by Kofi Annan; contained in Daily Press Briefing by the Office of the Spokesman for the Secretary-General, 20001218, United Nations, 18 December 2000, http://www.un.org/News/briefings/docs/2000/20001218.db121800.doc.html. (accessed 16 September 2009).

29 Until 1 August 2004 Tanzania had 391 prisoners waiting to be hanged; see Amnesty International's website http://www.amnesty.org/deathpenalty (accessed 2009); Amnesty International 2007 Annual Report Tanzania; http://www.amnestyusa.org/annualreport.php?id=ar&yr=2007&c=TZA (accessed 16 September 2009)

30 Amnesty International 2008 Annual Report Tanzania; http://www.amnestyusa.org/annualreport.php? id=ar&yr=2008&c=TZA (accessed 16 September 2009).

31 It was held in *Mbushuu* (n 9 above) 232 that there is no research available on why the death sentences were not carried out. See also International Federation for Human Rights (FIDH), Report 414/2 — April 2005, *Tanzania: The death sentence institutionalised?* (2005) 7.

32 Also note that one of the authors has elaborated on the related issue whether 'murder' — as a crime against humanity — necessarily requires an intentional commission under international criminal law; see B Kuschnik 'The legal findings of crimes against humanity in the Al–Dujail judgments of the Iraqi High Tribunal. A forerunner for the ICC?' (2008) 2 *Chinese Journal of International Law* (2008) 459 476.

33 Adopted by the UN General Assembly through Resolution 217A (III) of the UN, 10 December 1948.

ICCPR[34] and the African Charter on Human and Peoples' Rights of 1981 (African Charter),[35] Tanzania decided to amend its Constitution in 1984 by an eighth constitutional amendment and to introduce a Bill of Rights. Rights mentioned include equality before the law, the right to dignity[36] and the right to life,[37] the latter provided for under article 14 of the Constitution.

In *Mbushuu* there was some argument as to the correct wording of article 14, since the English version of the Constitution held that '[e]very person has a right to life and subject to law, to protection of his life by the society', whereas the Kiswahili version made qualifications that such right may be restricted 'in accordance with the law'. The latter has now been included in the wording of article 14, stating that '[e]very person has a right to life and subject to law, to protection by the state according to the law'.[38]

In contrast, section 196 of the Tanzanian Penal Code holds: 'Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.' Section 197 of the Tanzanian Penal Code reads: 'Any person convicted of murder shall be sentenced to death.' Furthermore, the death sentence may be imposed for treason as set forth in sections 39 and 40, and the misconduct of commanders or any service man in the presence of the enemy in accordance with the First Schedule to the National Defence Act 24 of 1996 (even though the latter provisions have never been applied practically). Unlike the crime of treason, which gives interpretative freedom to impose the death penalty, the phrase 'shall be sentenced to death' within section 197 is taken as mandatory.[39]

Due to the incorporation of a Bill of Rights in the Constitution, one would expect that the law in existence, particularly sections 196 and 197 which allow for taking away the right to life, would have been abolished. This, however, never happened. Therefore, at first sight, Tanzania looks like 'a dog with two tails'; on the one hand ensuring the right to life and acting in accordance with international human rights standards, and on the other hand permitting the death penalty. The

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34 Adopted by the UN General Assembly through Resolution 2200A (XX1) of 16 December 1966, and entered into force on 23 March 1976.

35 Adopted by the Organisation of African National Unity (OAU) Assembly of Heads of State and Government on 27 June 1981 at Banjul in The Gambia.

36 The right to dignity is provided for under arts 9(a) & (f) and 13(6)(d) of the Tanzanian Constitution. It is concerned with the observance of dignity in the execution of a sentence. The right to dignity and the right against cruel, inhuman and degrading punishment are provided for under art 13(6)(e) of the Tanzanian Constitution.

37 Arts 12 to 24 of the Tanzanian Constitution. The Zanzibar Constitution of 1984, through arts 13(1) and 13(2) respectively, states categorically that every person has the right to life and to the protection of his life from the society according to the law.

38 Chenwi (n 2 above) 83 n 131.

39 Shaidi (n 21 above) 2.

question, however, is more complex and connected to the problems of (i) how Tanzanian domestic law — including the Constitution and the Penal Code — is related to and influenced by international law; (ii) whether article 14 of the Constitution has a categorical effect and can be considered as a 'non–derogation clause', thus outlawing any levelling with other potentially contravening domestic law as well as international law; and (iii) whether there is sufficient public support to unequivocally decide on the abolishment of the death penalty in Tanzania. All three issues are discussed below.

4.1 International law and the right to life in relation to Tanzanian domestic law

Tanzania favours a dualist approach for the domestic application of international law, meaning that ratified treaties have to be incorporated into the domestic legal system to be relied upon in domestic courts. In regard to the legitimacy of capital punishment, the High Court and the Court of Appeal of Tanzania considered in *Mbushuu* whether a prohibition under national law existed on the grounds that it may amount to torture under international law, and therefore may violate article 13 of the Constitution of Tanzania, resulting in sections 196 and 197 of the Tanzanian Penal Code being unconstitutional. Article 13(6) reads: 'It is prohibited to torture a person, to subject a person to inhuman punishment or to degrading punishment.' In order to determine whether the death penalty violates article 13(6), the Court of Appeal considered the definition of torture as it is defined in article 1(1) of the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[40] Accordingly, torture means:

1 ... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2 Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Firstly, the Court of Appeal claimed — by relying on *Trop v Dulles*[41] and *Tyrer v UK*[42] — that the concept of torture should be assessed by evolving standards of decency, meaning that it must be interpreted in

[40] Adopted by the UN General Assembly through Resolution 3542, 9 December 1975.
[41] 356 US 86 (1958).
[42] [1978] 2 EHRR 1.

present-day conditions as expressed by international law.[43] The Court of Appeal then concurred with the comprehensive assessment of the High Court that, from the moment a death sentence is pronounced to the date of its execution, the offender may face severe mental pain and suffering. Due to its gravity of inherent cruelty, the Court of Appeal agreed with the High Court that the death penalty contains elements of torture.[44]

Certainly, torture does not include pain or suffering arising from, inherent in or accidental to, lawful functions. Therefore physical or severe pain or suffering brought about by the death penalty may not be unconstitutional. Moreover, the cited Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the wording of article 1(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT) present a limitation on the scope of such terms.[45]

However, even though the 'lawful sanction' restriction makes sense *in abstracto* when subsuming acts under the legal notion of torture, and even though it is disputable whether the imposition of the death penalty *per se* would fall under the aforementioned exception of the 'lawful sanction requirement',[46] it is unclear why the Court of Appeal on the one hand held that the death penalty would amount to torture or cruel and inhuman treatment, yet on the other hand held that it must be legalised on grounds of the exception clause. One may won-

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43 This is a remarkable and highly encouraging line of reasoning by the Tanzanian courts, as it does not leave the decision of the Court blind to present conditions. The United States Supreme Court has taken an opposite view when considering the definition of torture under para 3(b)(1) of the Torture Victims Protection Act in regard to lawsuits under the US Alien Tort Claims Act; *Filartiga v Peña-Irala* 630 F2d (1980), 876 878 with *Sosa v Alvarez — Machian et al*, 542 US (2004) 692 ff.

44 Peter & Kijo-Bisimba (n 25 above) 252: 'The case of *Mbushuu* gave the judiciary an important opportunity to pronounce on this [capital] punishment. At the High Court level, the death penalty was declared to amount to torture, cruel, inhuman and degrading form of punishment and also unconstitutional. The position was not fully supported by the Court of Appeal which, *while agreeing with the High Court that the death penalty contained some elements of torture, cruel, inhuman and degrading punishment* still held that the right to life as contained in article 14 of the Constitution of the United Republic of Tanzania of 1977 was not absolute' (our emphasis). Also see *the Kigula* case in Uganda (n 8 above) 59; and the Bahati Report (n 20 above) 5.

45 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 23 *International Legal Materials* 1027, in modified version (1985) 24 *International Legal Materials* 535. Art 1 defines torture as 'any act which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...] intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions'.

46 In this regard, see A Boulesbaa *The UN Convention on Torture and the prospects for enforcement* (1999) 31.

der how the conclusion of the Court of Appeal, whereby the death penalty was cruel and inhuman, yet not unconstitutional, may be compatible with article 9(f) of the Tanzanian Constitution, which calls for a recourse to the Universal Declaration when interpreting the Bill of Rights. Particularly, in article 5 of the Declaration it is held: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

Moreover, it is unfortunate that the Tanzanian Court of Appeal did not read articles 1 and 2[47] of CAT conjunctively. If the Court had considered a conjunctive reading of both articles, it would then have realised that, pursuant to article 2 of CAT, acts of torture may not be justified *by any means*, not even to prevent political instability, war or any other public act of emergency[48] — let alone to justify it on grounds of 'lawful sanctions'. In this light, there was no room to justify torture, once it was (rightfully) declared that capital punishment would amount to torture or cruel, inhuman treatment. If the death penalty is labelled in such terms, it must amount to 'inhuman and degrading treatment *per se*'.[49]

Separate from the *Mbushuu* case, one may also argue (today) that, whereas it may have been reasonable in 1994 to declare the death penalty a legitimate practice, it is problematic to transfer such opinion to contemporary *opinio juris* in public international law. Even though the death penalty was not prohibited under customary international law in the last century, mostly due to the fact that article 6 of ICCPR and article 4 of the African Charter provided that '[n]o one shall be arbitrarily deprived of his life', but explicitly allowed for the death

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47 Art 2 of CAT reads: '(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (2) *No exceptional circumstances whatsoever*, whether a state of war or a threat or war, internal political instability or any other public emergency, *may be invoked as a justification of torture*. (3) An order from a superior officer or a public authority may not be invoked as a justification of torture' (our emphasis).

48 *Al-Adsani v UK* (judgment of 21 November 2001), ECHR Rep of Judgments and Decisions, 2001-XI, para 59; *Chanhal v UK* (judgment 15 November 1996), 1996-V, 1855, para 79; *Aksoy v Turkey* (judgment 18 December 1996) para 62; *Soering v UK* (judgment 7 July 1989), Series A No 161, 34, para 88; *Filartiga v Peña-Irala* 630 F 2d (1980) 876 882; *Ireland v UK* (judgment 18 January 1978), Series A No 25, 65 para 163; *Pedro Pablo Camargo on behalf of Maria Fanny Suárez de Guerrero v Colombia* (decision 31 March 1982) HRC Committee, Communication No 045/1979.

49 I Oh 'Islam and the reconsideration of human rights' University of Miami Paper Series (2005) 5. '[W]hile human rights norms remain the same across cultures at the core, these norms are blurry at the edges. [...] To illustrate, *few societies, whether formerly colonized or colonising, would contest the right to freedom from torture* (art 5 Universal Declaration), while many find the right to marry without restriction due to religion (art 16 Universal Declaration) disrespectful of traditional customs' (our emphasis); see further M Wagner 'The justification of torture: Some remarks on Alan M Dershowitz's 'Why terrorism works' (2003) 4 *German Law Journal* 5 515; E de Wet 'The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law' (2004) 15 *European Journal of International Law* 97.

penalty in exceptional circumstances,[50] there has been a major shift in state practice and *opinio juris* in the last decade.[51] This can be seen by looking at the *travaux préparatoires* of the Statute of the International Criminal Court (ICC), which — as of 16 September 2009 — has been ratified by 110 countries, and signed by 139 countries. Surely, the fact that the ICC Statute excludes capital punishment may not lead to the presumption that all states that have ratified the ICC Statute would favour the abolition of the death penalty. Article 80 was included in the ICC Statute to counter this assumption. It is notable, however, that during the debate in Rome, *most states opposed capital punishment*, thus giving evidence of an emerging trend in favour of its abolition.[52] One may therefore argue that nowadays there is wide agreement on the international stage that a reliance on article 6 of ICCPR to justify the death penalty has turned out to go foul on grounds of the maxims of *jus posterius derogat priori* and *leges posteriors priores contrarias abrogant*.[53]

Whereas the trend for abolishing the death penalty has recently gained strong international support, such understanding has a long European tradition, *inter alia* in Germany, on grounds of the idea that it violates human dignity. Here, the abolition of capital punishment is based on a 'three step ladder'. Step 1: Articles 1 to 19 of the German Constitution of 1949, covering the German Bill of Rights, explicitly recognise the right to human dignity, the right to life, and the maintenance of human rights. Article 1(1) declares: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Article 1(2) holds: 'The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of

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50 Also see art 6(2) ICCPR and the General Comment of the Human Rights Committee 20(44) UN Doc CCPR/C/21/Rev/1/Add 3, para 6. It has been provided that '[t]he article [6] also refers generally to abolition in terms which strongly suggest (paras 2(2) and (6)) that abolition is desirable. [...] All measures of abolition should be considered as progress in the enjoyment of the right to life.' ICCPR has been ratified by 50 African states, among others, Tanzania. Also see W Schabas *The abolition of death penalty in international law* (2002) 192; Chenwi (n 2 above) 62: '[T]he *trauvaux préparatoires* and subsequent interpretations of article 6 provide strong evidence of a growing trend in favour of the abolishment of the death penalty.'

51 Schabas (n 49 above) 192.

52 See Schabas (n 49 above) where he states: 'Singapore again took the floor to affirm that "the debate in the conference clearly demonstrates that there is no international consensus on abolition of the death penalty". In fact, what the debate in the working group showed is that a relatively small number of states favoured retention of the death penalty and a very large number were opposed. *This is a dramatic development when viewed from an historical perspective'*(258) (our emphasis).

53 Schabas (n 49 above) further argues that '[t]he exclusion of the death penalty from the Rome Statute is a significant benchmark in the unquestionable trend towards universal abolition of capital punishment, although it shows that a few regions of the world continue to resist progress in this respect' (258). Also see European Union Annual Report on Human Rights, EU Memorandum on the Death Penalty, 11317/00 81.

peace and of justice in the world.' Article 2(2) declares: 'Every person shall have the right to life and physical integrity ... These rights may be interfered with only pursuant to law.' Step 2: Article 102 explicitly recognises the abolishment of the death penalty by declaring: 'Capital punishment is abolished.' Step 3: Article 79(3) declares article 1 to be unchangeable by any means (the so-called 'eternity clause') by stating: 'Amendments to ... the principles laid down in articles 1 and 20 shall be inadmissible.'

Due to the 'three steps' of the German Constitution, it is impossible to (re-) introduce the death penalty, even via an amendment of the Constitution. Despite the fact that articles 2 and 102 do not fall under the scope of article 79(3)'s eternity clause, and thus in theory leave open the door to allow for the death penalty, it is general opinion that an introduction would violate human dignity and fundamental human rights and, thus, article 1. Since article 1(2) is protected by the eternity clause and prohibits any levelling with other rights ('Human dignity shall be *inviolable*'), arguments for the introduction of the death penalty cannot be levelled against the preservation of human dignity. In the same light, article 79(3) itself cannot be changed (ie to then change article 1 to introduce capital punishment), as this would lead to *argumentum ad absurdum* of article 79(3)'s *raison d'être*, which has been written to ensure perpetuity. Similarly, the Charter of Fundamental Rights of the European Union declares in its article 1: 'The human dignity is inviolable. It must be respected and protected.'[54] Article 1 of the Universal Declaration should be interpreted from this point of view when stating: 'We, the peoples of the United Nations, determined ... to reaffirm faith in fundamental human rights, *in the dignity* and worth of the human person.'

The approach taken in *Mbushuu* to consider international human rights law when interpreting domestic Tanzanian law should be upheld and strengthened in the Tanzanian courts. Article 9(f) of the Constitution particularly calls for such inclusion by stating that 'human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights'. Article 13(d) of the Constitution declares: 'For the purposes of preserving the right or equality of human beings, *human dignity shall be protected in all activities pertaining to criminal investigations and process*, and in any other matters for which a person is restrained, *or in the execution of a sentence*.' Article 13(e) holds: 'No person shall be subjected to torture or inhuman and degrading punishment or treatment.'

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[54] Charter of Fundamental Rights of the European Union, 2000/C 364/1 (2000). As a matter of fact, the drafting of this provision was mainly influenced by the former German Federal President and President of the Convent drafting the Charter, Roman Herzog. Also see O Schachter 'Human dignity as a normative concept' (1983) 77 *American Journal of International Law* 848.

Regarding the imposition of the death penalty, the Tanzanian Court of Appeal is invited to reconsider its position and declare that the protection of human dignity *categorically*[55] prohibits the imposition of the death penalty.[56] If nevertheless the Tanzanian Court of Appeal claims that the imposition of the death penalty does not violate the dignity of a person *per se*, at least international human rights law requires the punishment to take place in keeping with the fundamental respect for the intrinsic worth of human beings. It is thus illegal to impose capital punishment *via* hangings (*Furman v Georgia*)[57] or shootings. Finally, the death penalty must not be executed against minors,[58] pregnant women[59] and the mentally ill.[60]

4.2 The right to life in Tanzanian constitutional context

In *Mbushuu,* the Court of Appeal ruled that the death penalty would amount to 'torture', finding that the death penalty as provided for under sections 196 and 197 of the Tanzanian Penal Code 'offends' article 13(6) *lit* (a) and (e) of the Constitution as it violates the inherent duty of the state to protect the right to life. Yet sections 196 and 197 were not considered to be unconstitutional due to the overriding principles incorporated in article 30(2) of the Tanzanian Constitution.[61]

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55 It is claimed here that the death penalty in whatever form (ie by hanging, gas chamber, lethal injection, use of electric chairs, etc) is a cruel and morbid method of punishment, and therefore not acceptable in any civilised society. Accordingly, in *Soering v UK* (judgment 7 July 1989), Series A No 161, 31, it was held that the death penalty, according to the evolving standards of Western Europe, was regarded as cruel and inhuman punishment.

56 Also see the position of the High Court in *R v Mbushuu* (n 9 above).

57 [1972] 408 US 238.

58 Compare sec 26 of the Tanzanian Penal Code with *Lubasha Maderenya & Tegai Lebasha v Republic*, High Court Mwanza, Criminal Sessions Case 143 (1977); also see CM Peter *Human rights in Tanzania: Cases and materials* (1997) 30.

59 See sec 197 of the Penal Code stating that 'if a woman convicted of an offence punishable with death is alleged to be pregnant, the court shall inquire into the fact and, if it is proved to the satisfaction of such court that she is pregnant the sentence to be passed shall be a sentence of imprisonment for life instead of a sentence of death'.

60 As stated by FIDH (n 31 above) 24, the issue of insanity and the imposition of the death penalty is rather complicated in Tanzanian law. According to outdated legal provisions, an insane offender may still be sentenced to death, if he cannot show that the illness was a *conditio sine qua non* for the commission of the crime. This reversion of the principle *in dubio pro reo* — coined as 'M'Nagthen Rules' — dates back to the case *Rv M'Naghten* (1843) 10 CL and F, 200. Also see *Saidi Abdallah Mwamwindi v The Republic* HCD No 212 (1972); *Asha Mkwizu Hauli v The Republic*, High Court of Tanzania at Dar es Salaam, Criminal Session Case 3 of (1984); and *DPP v Leganzo Nyanje*, Court of Appeal of Tanzania, Criminal Appeal 68 (1980); *Agnes Doris Liundi v Republic*, 46 TLR (1980). 'It is possible, indeed likely, that our law on the issue of insanity is antiquated and out of date. Parliament, in its wisdom, may wish to amend this particular branch of the law and bring it into line with modern medical knowledge on the subject.'

61 [1995] 1 LRC 216 232. Also see The Republic of Uganda in the Supreme Court of Uganda at Mengo, Constitutional Appeal 3 of 2006 (n 8 above) 35.

It has to be noted that the Tanzanian Constitution indeed allows civil rights to be weighed against public interests. Article 30(2) allows derogation on the following grounds:

> It is hereby declared that no provision contained in this part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for:
> (a) ensuring the rights and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;
> (b) ensuring the interests of defence, the public safety, public order, public morality, public health ...;
> (c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal proceedings ...;
> (d) enabling any other thing to be done which promotes, enhances or protects the national interest generally.

As has been held by Bahati,[62] the Tanzanian courts dealt with the interpretation of article 30(2) in two cases, *Daudi Pete v AG*[63] and *Kukutia Ole Pumbum v AG.*[64] In the latter case it was held:

> The court in Pete's case laid down that a law which seeks to limit or derogate from the basic right of the individual on ground of public interest will be saved by article 30(2) of the Constitution only if it satisfies two essential requirements: First, such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective control against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by article 30(2) of the Constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms to those requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or claw-back clauses of that very same Constitution.

In *Mbushuu*, the Court of Appeal labelled sections 196 and 197 as 'non-arbitrary', and therefore lawful and reasonably necessary in order not to violate the Constitution. Interestingly, the element of 'non-arbitrariness' is also included in article 6 of ICCPR. Despite the fact that article 6 of ICCPR and article 4 of the African Charter allow for the death penalty on a non-arbitrary basis, it seems doubtful whether such reasoning is

62 Bahati (n 20 above) 6.
63 [1993] TLR 22.
64 [1993] TLR 159.

applicable to strict constitutional context,[65] if the *Kukutia* standard is applied seriously.

Clearly, 'arbitrary' can be understood in different ways: If considered in terms of article 6 of ICCPR, 'arbitrary' means 'illegally and unjustly'.[66] From a normative point of view, such interpretation lacks substance. It is hardly imaginable that unjust treatment could be legal nevertheless, as the fulfilment of justice should be the outcome of law. Hence, 'arbitrary', if understood this way, is nothing but 'fairness', yet in this case — due to its vagueness — hardly a justifiable constitutional assessment factor to determine whether the taking away of life may be legitimate.

The Court of Appeal interpreted 'arbitrarily' — by relying on the findings of *Kukutia* and the *Twentieth century dictionary* — to mean 'not bound by rules, despotic, absolute; capricious; arising from accident rather than from rule', or, in more simple words one may say, acts of randomness. From this definition, and due to the fact that a person convicted of murder must have undergone a full trial and then, in practice, an appeal, the Court concluded that the process leading to the imposition of the death penalty can 'never be despotic'.

The Court thereafter noted that if the law does not provide for diminished responsibility and while that 'may be unfortunate', it is 'definitely not arbitrary because the court arrives at its decisions following rules and not accidentally'. The Court then admitted that an innocent person may be executed in error, but even in such a case, it is not a matter of arbitrariness but rather of mistake or fraud. Responding to the defence attorney's concern about the role of the President in deciding whether to accept the recommendation of the Court, the Court of Appeal finally stated that the 'presidential pardon is outside the court process' and his decision whether to accept the recommendations or not 'cannot make matters any worse for the condemned prisoner'. In conclusion, section 197 'cannot be arbitrary because it merely provides punishment to a person convicted under the provisions of law'.

The findings of the Court of Appeal seem to be misleading. Firstly, it is circular to hold that the imposition of the death penalty could be justified by the system that is imposing the punishment. Secondly, there is a difference between the trial procedure and the enforcement of sentences. A trial can be fair in regard to due process and imposition of the verdict, yet unfair in regard to sentencing and execution. Particularly

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65 Also note that, according to art 60 of the African Charter, in the interpretation of the Charter, the African Commission on Human and Peoples Rights shall draw inspiration from international law on human and people's rights. The African Charter also requires that the death penalty should only be imposed where substantive and procedural safeguards and restrictions on the imposition of the penalty are respected. See further M Nowak 'Is the death penalty an inhuman punishment?' in TS Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretative approach* (2000) 42.

66 NS Rodley *The treatment of prisoners under international law* (1999) 220.

the non-imposition of death sentences, and the creation of the 'death row phenomenon', render any link between trial proceedings and execution in regard to the justification of the death penalty valueless. Thirdly, the principle of 'arbitrariness' has been interpreted too narrowly in a constitutional context to conform to the *Kukutia* standard. 'Arbitrary', from a legal perspective, is hardly comparable to a decision based on formal randomness, but represents an infringement of the maxim of 'equal treatment'. In this regard, 'equal treatment' is often described in such terms that the comparable must be treated comparably just as the non-comparable must be treated non-comparably ('*Willkür* [= arbitration] Formula').[67] A mere reliance on the formality of 'legal rules' to determine the randomness of an act — and thus constitutionality — cannot be convincing here, because in a constitutional context, it is questionable if the law *itself* is arbitrary.

The Court of Appeal (by at least formally applying the *Kukutia* standard) also reverted to a 'proportionality test' to assess whether the Constitution had been violated.[68] Yet again, the Court of Appeal came to a rather unusual finding by holding that a violation of human dignity can be levelled against state interests on the basis of common public opinion.[69] The Court of Appeal declared:

> We have already made a finding that the death penalty is cruel, inhuman and degrading ... But the crucial question is whether it is reasonably necessary to protect the right to life. For this we say it is the society which decides. The trial judge acknowledges that presently the society deems the death penalty as reasonably necessary. So, we find that although the death penalty as provided by s[ection] 197 of the Penal Code offends art[icle] 13(6)(a) of the Constitution, it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by art 30(2). Therefore it is not unconstitutional.

Article 30(2) of the Tanzanian Constitution displays the bifurcation structure of every civil right in constitutional context. Surely, no legal provision may contravene *fundamental* values of society, as constitutional civil rights serve as an objective value order (*Objektive Werteordnung*) for the society as a whole, creating indirect horizontal effects (*mittelbare Drittwirkung*) between the citizens throughout the

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67 The *Willkür* Formula is concretised in Germany by the so-called '*Katzenstein* Formula', also called 'New Formula', stating that unequal treatment must be grounded on such form and quality as to justify the inequality; see BVerfGE 88 87 85 191.

68 [1995] TLR 232. The Court said: 'Whether or not legislation which derogates from a basic right of an individual is in public interest depends on first, its lawfulness, that is, it should not be arbitrary and second, on the proportionality test, that is, the limitation imposed should not be more than reasonably.'

69 The Supreme Court of Uganda adopted a similar interpretation in the *Kigula* case (n 8 above). The Court noted at 39 that '[i]n Tanzania the Court of Appeal in the *Mbushuu* [case] (*supra*) saved the death penalty under the general provisions on derogation from fundamental human rights. But in Uganda the Constitution specifically provides for it under a substantive article of the Constitution, ie article 22(1).'

socio-legal system.[70] However, laws are created through legal processes and institutions — particularly parliament. If it was the 'opinion of society' to concretely decide over the constitutionality of a legal provision, one must be aware of the consequences, let alone that *in casu* the Court of Appeal did not cite any authority which would support its finding.[71] In regard thereof, the Court's burden of proof[72] would be vested in the fact that constitutional civil rights in a free society are *predominantly* defensive rights of the citizen against the government, thus requiring the state to base its intrusion on sound legal grounds, or refrain from such actions.[73]

Finally, one might wonder why the Court of Appeal considered international law, but then concluded that Tanzanian opinion should decide the case *in singularis*. Even if article 14 — as it is proclaimed by the Court — should 'lie in between the two sets' of international and domestic law, this is not adequately reflected by the outcome of the judgment as the Court of Appeal did not give sound justifications why the imposition of the death penalty should conform to international human rights law standards.

4.3 Interdisciplinary considerations in favour of the abolition of the death penalty in Tanzania

It is an assumption that the imposition of the death penalty is an effective and adequate measure for the reduction of crime.[74] Firstly, the protection of society does not require the physical elimination of criminals, which makes capital punishment an action that is not necessary and, thus, lacks proportionality and reasonability.

Secondly, it seems questionable if capital punishment is an 'appropriate reward' for the detained as the delay in carrying out the sentences, in conjunction with the conditions under which the detained are incarcerated, is a breach of the right not to be subjected to degrading treatment. Waiting for the execution of the death penalty for long periods of time may amount to torture — even if the 'function' is lawful, as has been held in *Republic v Mbushuu* — due to the inhumanity of

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70 F Selbmann *The drafting of a law against discrimination on the grounds of racial or ethnic origin in Germany — Constraints in constitutional and European community law* (2002) 3 4; J Kokott *The burden of proof in comparative and international human rights law: Civil and common law approaches with special refence to the American and German legal systems* (1997) 82.

71 In the South African case of *S v Makwanyane & Mchunu* 1995 3 SA 391, Chaskalson P, notwithstanding the Court of Appeal's *Mbushuu* decision above that was duly cited; de-emphasised the importance of public opinion in arriving at decisions on constitutional rights.

72 As above.

73 In support of this proposition, see the judgment of the High Court in *Mbushuu* (n 9 above).

74 See J Donohue & JJ Wolfers 'Uses and abuses of empirical evidence in the death penalty debate' (2006) 58 *Stanford Law Review* 791.

form and length while treating the detained (the so-called 'death row phenomenon'[75]). The recent incidents at the (attempted) execution of Romell Broom in the Lucasville Prison in Ohio, USA, have showed that the procedure itself of putting a person to death may amount to horrible suffering.[76]

Thirdly, the ineffectiveness of the death penalty and other cruel punishment has been proven by a number of studies, conducted in different countries, which show that the death penalty does not contribute to a reduction in the crime rate.[77]

In Canada for example, the homicide rate per 100 000 people in 1975 (before the abolition of the death penalty for murder) was 3,09. The study carried out in 1980 after the abolition of death penalty showed that there was a decrease of the homicide rate per 100 000 to 2,41. Also, whereas in 2000, the United States of America had 5,5 homicides per 100 000 people, in Canada there was a rate of 1,8 per 100 000 people.[78] One of the surveys conducted by Hood even concluded that the increase in homicides in those countries that uphold the death penalty, could be reduced by diminishing their reliance upon capital punishment.[79] It is worthwhile to argue here that a criminal does not commit a capital crime by calculating the possible sanction, since the sentence will turn out to be grave, regardless whether the death penalty will be imposed or not. Moreover, many commissions of capital crimes are grounded on base motives, thus hardly dependent upon cool rationale. Due to the fact that the efficiency of the sanction is not yet felt, there is no reason as to why the death penalty should be upheld.

Finally, the political system in Tanzania creates room for abuse of power and arbitrariness, as the executive arm of the state has extreme influence over other organs and branches,[80] including the judiciary.

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75 Bojosi (n 2 above) 303.

76 *Associated Press* 'Execution delayed one week after vein troubles' 15 September 2009 http://www.10tv.com/live/content/onnnews/stories/2009/09/15/execution_scheduled.html?type=rss&cat=&sid=102&title=Execution+Preparations+Halted+Pending+Appeal (accessed 16 September 2009).

77 Donohue & Wolfers (n 73 above); J Choe 'Another look at the deterrent effect of death penalty' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353165 (accessed 16 September 2009).

78 See the survey of research on this subject conducted by Roger Hood for the UN in 1988 and updated in 2002, concluding that 'the statistics ... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty'; R Hood *The death penalty: A worldwide perspective* (2002) 214.

79 FIDH (n 31 above) 5.

80 While art 4 of the United Republic of Tanzania Constitution categorically analyses the power and functions of each organ, the President is empowered to constitute and abolish any office in the service of the government of the United Republic of Tanzania (see art 36(1) of the Constitution of the United Republic of Tanzania). The President of the United Republic of Tanzania and the President of the Revolutionary Government of Zanzibar are also empowered to promote, to remove, to dismiss

The Tanzanian Constitution guarantees the independence of judges. The Preamble of the Constitution calls for a judiciary 'which is independent and dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged'.[81] Also, chapter V of the Constitution displays the functioning of the judicial system in comprehensive terms.

It is interesting to note, however, that the President can influence the judiciary through the persons he appoints. He appoints the following: the principal judge and other judges of the High Court;[82] the Chief Justice of the Court of Appeal[83] and other justices of the Court of Appeal after consultation with the Chief Justice;[84] the Registrar of the Court of Appeal and his or her deputy; and the Registrar of the High Court and his or her deputy.[85] The President also appoints two out of six members of the judicial service commission,[86] which has the power to discipline as well as to remove judicial officers other than the Chief Justice and higher judges,[87] and decides over the confirmation and promotion of such persons serving on the Commission.[88] The President may play a certain role in the removal of judges[89] and can elongate tenure of office of judges of the High Court and justices of the Court of Appeal beyond statutory requirements.[90]

Due to the President's decisive role in the selection and promotion of judges at the High Court and Court of Appeal level, he may put pressure

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and to discipline such person in service of the government (see art 36(2) of the Tanzanian Constitution). The President also influences parliament in the following ways: He is empowered to appoint 10 members of parliament, and is empowered to dissolve parliament under the following circumstances: if the National Assembly refuses to approve a budget proposed by the government; if parliament fails to pass a bill which the President favours or if parliament insists on passing a bill that the President opposes; if parliament refuses to pass a motion considered of fundamental importance to government policies and the President considers that the way out is not to appoint another Prime Minister but to call a general election; having regard to the proportional representation of political parties in the National Assembly, the President considers that it is no longer legitimate for the government in power to continue in office and it is not feasible to form a new government.

81 To ensure independence, any judge is prohibited from joining any political party save only that he shall have the right to vote; art 113A of the Tanzanian Constitution of 1977 (as amended).

82 Art 109(2) of the Tanzanian Constitution of 1977 (as amended).

83 Art 118(2) of the Tanzanian Constitution of 1977 (as amended).

84 Art 118(3) of the Tanzanian Constitution of 1977 (as amended).

85 Art 113(2) of the Tanzanian Constitution of 1977 (as amended).

86 Art 112(1)(e) of the Tanzanian Constitution of 1977 (as amended).

87 Arts 108, 110, 112, 113 & 118 of the Tanzanian Constitution of 1977 (as amended).

88 Art 113(1)(a) of the Tanzanian Constitution of 1977 (as amended).

89 Arts 110(6), (7) & (8) and 120(5) of the Tanzanian Constitution of 1977 (as amended).

90 Arts 110(2) & (3) and 120(2) & (3) of the Tanzanian Constitution of 1977 (as amended).

on judicial independence in crucial issues, such as the constitutionality of the death penalty. It is important to realise that the President may also directly influence the outcome of court decisions, and thus render undesired decisions of the courts void. According to articles 45(1)(a) and (b) of the Constitution, the President may grant pardons to any person convicted by a court of law *of any offence* — including murder and treason — and may grant pardons for the execution of sentences for *any offence* — including capital punishment. Hence, the final question of whether a person must face the death penalty is dependent upon an arbitrary decision of the President,[91] and not based on a fair and impartial process.

The accumulation of power of the President already seemed to have real effects on the independence of the judiciary. There have been occasional allegations that the executive influences the judiciary to press for death penalty indictments against (innocent) people opposing the government, particularly by instituting cases of treason against them. Particularly, there has been a case of this nature in Zanzibar, though the accused were not convicted.[92] Also, the former President of Tanzania, Julius Kambarage Nyerere, expressed his concern that magistrates were giving — in his opinion — lesser sentences than he would like to have seen in relation to systemic criminal actions or civil unrest.

Finally, the issue of corruption has direct implications on the legitimacy of capital punishment. As corruption exists in the Tanzanian government, it hinders the impartial application of due process of the law (even) when the death penalty is to be imposed.[93]

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91 See Shaidi (n 21 above) 3 where he states: 'The whole matter ... hinges on the goodwill of the President.'

92 *SMZ v Machamo Khamisi Ali & 17 Others*, Court of Appeal of Tanzania, Criminal Application 8 of 3 April 2000 (unreported). Machamo *et al* were charged with treason under sec 26 of the Penal Decree (Cap 13) of Zanzibar. The charge alleged that these persons 'by words and actions' intended and plotted to overthrow the government of Zanzibar and to remove from authority the President of the Revolutionary Government of Zanzibar. Before the High Court of Zanzibar, presided over by the then Deputy Chief Justice of Zanzibar, Tumaka, the accused persons raised a number of preliminary issues. One of these, which was the subject-matter of the Court of Appeal's ruling, stated that the offence of treason could not be committed or directed against the government of Zanzibar as it alleged in the indictment, since it is an offence against the Union only, ie United Republic of Tanzania. The Court of Appeal judges concurred with this objection and quashed the decision of the High Court of Zanzibar.

93 Christina John '*Police wanaongoza kwa rushwa Nipashe'*, 2 December 2003. Mrs John, then acting head of the Tanzania Prevention of Corruption Bureau, in the above presentation at the prevention of corruption workshop held in Dar es Salaam, reported that among all government departments, the police had the highest number of corruption allegations compared to the judiciary and the central government.

5 The future

Due to legal and socio-cultural difficulties mentioned, Tanzania still has a long way to go to abolish the death penalty. Yet, Tanzania — despite all its problems — is a stabilising factor in the sub-Saharan region and has made serious efforts in regard to the promotion of human rights. Besides Tanzania's ratification of the African Charter on 10 February 1984, and ICCPR, it was a forerunner on the issue of refugee and diaspora treatment until the 1990s when the 'open door policy' was reversed.

It is argued here that Tanzania should revitalise this spirit by considering abolishing the death penalty. Indeed, after years of a lack of interest and despite current overweighing *opinio juris* that capital punishment should not be lifted,[94] there have been recent efforts, mainly created by non-governmental organisations (NGOs) active in the country. In June 2007, a death penalty report was launched by LHRC-Tanzania, ZLSC-Zanzibar, CARER-Malawi and DITSWANELO-Botswana, aiming at the abolishment of the death penalty in the SADC region through research to examine the legal status and trends of the death penalty in the respective countries and by using the information acquired from the research to determine effective strategies for campaigning. Although the effects of this report are not yet felt by ordinary citizens in Tanzania, the truth is that it remains a remarkable development. After the presentation of the NGO report, the ball was handed back to the government of Tanzania. In 2007, a Law Reform Commission was set up to evaluate changes in the Tanzanian legal system. The outcome was positive: Judge Bahati, the President of the Commission, is in favour of abolishment.[95] Furthermore, in an interview, Tanzania's Minister of Justice, Mary Nagu, declared that she would generally be open to its abolishment, if backed by the opinion of the people.[96] Convincing the public in a country where Albinos are still killed due to their alleged 'magic white powers'[97] will not be easy. However, there are grounds

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94 Speech by Omary Makungu (the then Minister of Constitution, Good Governance and Attorney-General of the Revolutionary Government of Zanzibar) on 1 October 2004; also see Peter (n 57 above) 27.

95 Bahati (n 20 above).

96 Press TV, 20/04/2007. An MP3 of the interview is available at: http://www.voanews.com/english/archive/2007-04/2007-04-30-voa2.cfm (accessed 16 September 2009).

97 From October and mid-December 2007, more than 20 Albinos were killed in Tanzania. Most of these killings took place in Mara, Arusha, Shinyanga, Mwanza and Kagera; see LRHC Newsletter, January 2008. Information obtained by LHRC's information officer in an interview with Mr Samwel Mluge, General Secretary of the Tanzania Albinos Association. The information was reinforced by Vicky Mtetema, BBC reporter, who on 22 July 2008 reproduced a recorded interview with two witchdoctors from Sengerema, Mwanza who allegedly purchased Albino organs for some time, and who verified that human body parts of Albinos such as legs, hair and hands may cost

to believe that the majority of Tanzanians can be persuaded to abolish death penalty sentencing.

During a debate organised on World Day Against the Death Penalty (10 October 2004), almost all speakers except two were in favour of the abolition of capital punishment.[98] A report that was conducted by the Nyalali Commission as long as 13 years ago revealed that a considerable number of Tanzanians did not favour capital punishment.[99] Finally, Tanzanians gave attention to the practice of the ICTR, which has its seat in Arusha, Tanzania, and does not practise death penalty sentencing. It will be up to the Tanzanian government not to shy away from this mandate[100] to carry out impartial research on the subject and to turn words into actions. The High Court could strengthen the movement to abolish to death penalty by (again) declaring it to be unconstitutional. The LHRC, the Tanganyika Law Society, the Tanzania Chapter of the Southern Africa Human Rights NGO Network, and the ZLSC filed a petition in the High Court in October 2008 to have the death penalty declared unconstitutional.[101] As of 16 September 2009, the case awaits a trial date.[102]

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up to 2 million Tanzania shillings. *Mwananchi* newspaper of 16 August 2008 also reported that the business of Albino organ trade in Tanzania is now at the highest level ever as it is conducted across borders. According to this report, one Tanzanian was caught with an Albino's head when travelling from the Democratic Republic of Congo to Tanzania. In his interrogation, the person pointed out that he took the head to Tanzania as it is valued there as a precious and expensive commodity.

98 Speech by Omary Makungu (the former Minister of Constitution, Good Governance and Attorney-General of Revolutionary Government of Zanzibar) on 1 October 2004.

99 Government of the United Republic of Tanzania: *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa,* 1991, Part III.

100 The Tanzanian government declared in November 2008 that the proposal to abolish the death penalty would come at a wrong time, due to the aforementioned killing of Albinos; see http://english.nessunotocchicaino.it/archivio_news/200811.php?iddocumento=10321363&mover=0 (accessed 16 September 2009).

101 See L Philemon 'Rights activists seek end to death penalty' available at http://ip-216-69-164-44.ip.secureserver.net/ipp/guardian/2008/10/11/124311.html (accessed 16 September 2009).

102 See message from the LHRC on 15 September 2009; http://alpha.web2-netshine-hosting.co.uk/~lhrc/index.php?option=com_content&task=view&id=351&Itemid=52 (accessed 16 September 2009).

AFRICAN HUMAN RIGHTS LAW JOURNAL

The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments

*Ann Skelton**
Advocate of the High Court of South Africa; Director of the Centre for Child Law, University of Pretoria, South Africa

Summary

This article charts the development of a child law jurisprudence that is emerging in Eastern and Southern Africa. The article records how judgments are beginning to make reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and even to less prominent instruments such as the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption (1993) and the Hague Convention on Civil Aspects of International Child Abduction. Attention is paid to certain textual differences between the UN Convention and the African Children's Charter, and the extent to which these discrepancies have played a role in the development of a child law jurisprudence that might be described as uniquely African. The article considers judgments in the region that have expressly dealt with the 'best interests' principle. Examples from Botswana, South Africa and Kenya are described. The second area discussed is the imprisonment of children's primary care givers, in relation to which article 30 of the African Children's Charter, dealing with the children of imprisoned mothers, is highlighted. Other examples arise in relation to differences in the wording of the UN Convention and the African Children's Charter regarding inter-country adoption, which is the third area of case law discussed. High-profile cases relating to adoption applications brought by Madonna before the Malawian courts are amongst those examined.

* BA LLB (KwaZulu-Natal), LLD (Pretoria); ann.skelton@up.ac.za

The article concludes that there is evidence of the beginnings of a specifically African jurisprudence in child law. It is noted, however, that more can be done to promote children's legal rights in the region through the ratification by more African countries of the Hague Conventions, and also through courts in the Eastern and Southern African region taking note of each other's jurisprudence.

1 Introduction

A child law jurisprudence is gradually beginning to emerge in Eastern and Southern Africa. An awareness of children's rights has grown on the continent with the advent of the United Nations (UN) Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). This article aims to demonstrate that the jurisprudence in the region has been influenced by these international and regional instruments and other relevant conventions. The article begins with a brief examination of the relevant instruments, and then moves on to explore various judgments from the courts which have utilised these instruments in their judgments. It is argued that a fledgling jurisprudence that reflects a specifically African angle to children's rights (which is at the same time congruent with international standards) is gradually emerging, and can be further developed.

2 Overview of international instruments relating to children

CRC is the most widely ratified convention in the world, and it has been ratified by all African countries other than Somalia. After CRC was adopted by the UN General Assembly in 1989, a view was expressed by some child rights advocates in African countries that CRC did not adequately address certain issues that had specific relevance to Africa.[1] These issues included the situation of children living under apartheid (which no longer exists on the statute books), the disadvantages facing female children, as well as harmful practices such as female genital mutilation. Also of concern were the lack of attention given to socio-economic conditions, the African conception of communitarian responsibilities and duties, the use of child soldiers, the position of children in prison and the imprisonment of mothers. Finally, there was concern about the lack of a broader understanding of the role of family — including extended family — in the upbringing of children and in matters of adoption and fostering. In response, the African Chil-

[1] 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.

dren's Charter was developed, driven initially by civil society. A draft was handed to the Organisation of African Unity, and the Heads of State and Government adopted it at the 26th ordinary session in Addis Ababa, Ethiopia, in 1990.[2] It entered into force in 1999, when it had received the required number of 15 ratifications by AU states. Now, a decade later, the African Children's Charter has received a total of 45 ratifications, with only eight African countries that have yet to ratify the treaty.[3]

Other important international instruments relevant to children's rights have been given much less attention by African states than CRC and the African Children's Charter. The Hague Conference on Private International Law has concluded two very important conventions that encourage co-operation between states in relation to the rights of children. The first of these is the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption (1993).[4] Given the fact that adoption featured as one of the issues that the African children's rights movement identified as being inadequately dealt with in CRC, it is strange that the Hague Convention on inter-country adoption has met with little interest on the continent. Only nine countries in Africa have ratified the Convention.[5] This is paradoxical, because with African countries being 'sending countries' in the context of inter-country adoption, it is very important that mechanisms be set up to avoid poor practices and even baby-selling or trafficking.[6] Perhaps the lack of enthusiasm for the Convention stems from a tendency by some African countries to view inter-country adoption with suspicion, seeing that it is an appropriation of its most

2 A Lloyd 'The African regional system for the protection of children's rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 33.

3 The full list of countries that have ratified (updated 12 February 2009) is available at the African Union website http://www.africa-union.org/root/au/Documents/Treaties/List (accessed 15 September 2009). The eight countries that have not ratified are Central African Republic, Djibouti, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, São Tomé and Principe, Sudan, Swaziland and Tunisia. Of these, the DRC and São Tomé and Principe have neither signed nor ratified, whilst the majority of the other countries signed more than ten years ago. For further information regarding the progress being made by the African Committee, see J Sloth-Nielsen & B Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336; Lloyd (n 2 above).

4 The Convention was unanimously approved at the 17th session of the Hague Conference of Private International Law.

5 Burkina Faso, Burundi, Guinea, Kenya, Madagascar, Mali, Mauritius, Seychelles and South Africa (whilst there are 79 contracting states worldwide); http://www.hcch.net/index_en.php?act= conventions.status (accessed 16 September 2009).

6 V Root 'Angelina and Madonna, why all the fuss? An exploration of the rights of the child and inter-country adoptions within African nations' (2007) 8 *Chicago Journal of International Law* 323.

treasured resources — children — by people from wealthy nations.[7] Nevertheless, it is clear that Hague Convention aims to regulate inter-country adoption, not to facilitate it. The Convention thus is part of the solution to the fears that some may harbour.

The other relevant Hague Convention is the Hague Convention on the Civil Aspects of International Child Abduction.[8] This Convention covers situations where one party, usually a parent, abducts or illegally retains a child in another country. The Convention provides a general rule of peremptory return to the country in which the child was prior to the abduction or illegal retention. Again, it is not entirely clear why this instrument has been ratified by only five African countries,[9] though the reluctance in developing countries across the world to ratify it suggests that there is anxiety about being able to appoint an effective central authority and to comply with all its requirements, including the costs involved in the assessment of children, legal applications and the peremptory return of children.[10] Another reason might be that international child abduction has previously been seen as a middle-class issue, a feature of the Western world with its high divorce rate. However, more children are being moved across borders in Africa, as parents have become more mobile, or where parents have children with partners from other countries.[11] As these Conventions only operate where both countries involved are contracting parties, it is important, particularly for neighbouring countries, to be in a position to co-operate. It is disappointing that so few countries in Africa have ratified the Convention.

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7 For some of the debates about this issues, see generally J Esq 'The good, the bad and the ugly? A new way of looking at the intercountry adoption debate' (2007) 13 *UC Davis Journal of international Law and Policy* 17; M Liu 'International adoptions: An overview' (1994) 8 *Temple International and Comparative Law Journal* 187; Root (n 6 above).

8 This Convention was adopted at the 14th session of the Hague Conference of Private International Law on 24 October 1980.

9 Burkina Faso, Mauritius, Seychelles, South Africa and Zimbabwe; http://www.hcch.net/index_ en.php?act=conventions.status (accessed 16 September 2009).

10 W Duncan 'Regional developments and the Hague Children's Conventions' in J Sloth-Nielsen & Z du Toit (eds) *Trials and tribulations, trends and triumphs* (2008) 58-59 points out that the challenges facing the conventions in the developing world relate to the need for an easy-to-contact central authority, rapid procedures (including appeal procedures), specialised family courts, etc. Countries in the developing world may thus be wary of becoming contracting states because of the financial and administrative burdens that this occasions, which are difficult to manage without fully-fledged systems.

11 See, eg, the Kenyan cases of *Brouwen v Attorney-General* [2007] 1 EA 37 (HCK) and *B v Attorney General* [2004] 1 KLR 431. These cases involve civil abduction of children, but as Kenya has not ratified the Hague Convention on the Civil Aspects of International Child Abduction, it did not apply, and the court had to use principles of common law to reach its finding. The court's judgments would not, however, carry any weight in Belgium (to which two of the children were abducted), whereas the Hague Convention allows for the recognition of orders from the other Hague Convention country.

The ratification of children's rights instruments, in particular CRC and the African Children's Charter, has certainly had positive effects on the African continent. Thirty-four constitutions in African countries mention children's rights.[12] Many African countries have drafted new child laws in recent years, notably Uganda, Ghana, Kenya, Rwanda, Nigeria and South Africa, and there are bills pending in Mozambique, Namibia, Malawi and Lesotho.[13] Law reform in the children's rights field thus appears to be well underway in the region, though progress remains uneven. The drafting of child-friendly laws and constitutions is only part of the endeavour that must be undertaken to ensure a protective legal environment. Laws (both old and new) must be interpreted against the backdrop of constitutional protections as well as against international instruments. The law can thus incrementally develop through the setting of precedents.

The article now turns to a consideration of whether, and to what extent, developments in jurisprudence reveal the influence of relevant regional and international legal instruments. Attention will be paid to certain textual differences between CRC and the African Children's Charter, and the extent to which these discrepancies in wording have played a role in the development of the jurisprudence.

3 Best interests

The 'best interests of the child' is a universal standard which had its origins in family law, but which has now spread to all other areas of the law to be a guiding principle in decisions to be made about children. CRC refers to best interests as being 'a primary consideration' in matters concerning the child. The African Children's Charter uses a subtly different wording: 'the primary consideration'. The difference amounts to only one small word, but it creates a significant difference in how to give weight to the principle. Whilst '*a* primary consideration' leaves best interests competing equally with other rights on the same footing, '*the* primary consideration' suggests that children's best interests must be given a heavier weighting where there are competing rights. South Africa's Constitution, in section 28(2), refers to a child's best interests as being 'of paramount importance' in every matter concerning the child. The South African Constitutional Court, whilst giving careful and deliberate consideration to children's best interests, has made it clear that the paramountcy principle is not an absolute trump *vis-à-vis* other

[12] J Sloth-Nielsen 'Strengthening the promotion, protection and fulfilment of children's rights in the African context' in A Alen *et al* (eds) *The UN Children's Rights Convention: Theory meets practice* (2007); J Sloth-Nielsen 'Domestication of children's rights in national legal systems in African context: Progress and prospects' in Sloth-Nielsen (n 2 above) 53.

[13] African Child Policy Forum *Realising their rights: Harmonisation of law for children in Eastern and Southern Africa* (2007).

rights. The child's best interests rights can be limited (as long as such limitation is reasonable and justifiable) where there is a need to weigh those rights against others.[14]

International and regional instruments have been used in support of the best interests principle in a number of judgments from courts in African countries. By way of example, in the case of *Motlogelwa v Khan,*[15] handed down by the High Court of Lobatse, Botswana, the Court made reference to these instruments in relation to a case where custody was in dispute, and the best interests of the child was considered to be the paramount principle, even in the context of customary law. Molokomme J had the following to say:[16]

> In his well-researched heads of argument, counsel also refers the court to the provisions of various international and regional instruments which adopt the principle of the best interests of the child, such as the 1989 UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Although these instruments have not been specifically incorporated into the Botswana domestic law, this country is a state party to the UNCRC and therefore its provisions have strong persuasive value on the decisions of this court.

In the case of *Bhe and Others v Magistrate, Khayalitsha and Others (Commission for Gender Equality as Amicus Curiae)*,[17] one of the issues that the South African Constitutional Court had to decide was whether the customary law rules that gave rise to differential entitlements of children born within a marriage and those born extra-maritally constituted unfair discrimination on the grounds of birth.

Writing for the majority of the Court, Langa CJ said as follows:[18]

> In interpreting both section 28 and the other rights in the Constitution, the provisions of international law must be considered.[19] South Africa is

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14 *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC) para 20; *Sonderup v Tondelli & Another* 2001 1 SA 1171 (CC) paras 33 & 35; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 1 SA 406 (CC) paras 54-55; *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) paras 12-27.

15 2006 2 BLR147 HC.

16 At 150. The South African High Court has made a similar decision in the case of *Hlope v Mahlalela* 1998 1 SA 449 (T) in which it was decided that the best interests of the child was the main criterion to be utilised in disputes relating to the custody of children, and that this would override any rule of customary law. The Court referred to the best interests principle in the South African Constitution, but did not make direct reference to international law. On the issue of best interests and its application in customary law, see I Maithufi 'The best interests of the child and African customary law' in Davel (n 1 above) 146.

17 2005 1 SA 580 (CC).

18 n 17 above, para 55.

19 Sec 39(1) of the Constitution in relevant part provides: 'When interpreting the Bill of Rights, a court, tribunal or forum — ... (b) must consider international law.'

> a party to a number of international multilateral agreements[20] designed to strengthen the protection of children. The Convention on the Rights of the Child asserts that children, by reason of their 'physical and mental immaturity' need 'special safeguards and care'.[21] Article 2 of the Convention requires signatories to ensure that the rights set forth in the Convention shall be enjoyed regardless of 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.[22]

The Court went on to examine the relevant provisions of the African Children's Charter, noting that[23]

> Article 3 of the African Charter on the Rights and Welfare of the Child provides that children are entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter 'irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, ... birth or other status'.

The Court found that unfair discrimination on the ground of 'birth' should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. The differentiation was thus found to be unfair discrimination. The wording of article 3 appears to have played a significant role in the Court's decision.[24]

Differentiation between children of married or unmarried parents also came under the spotlight in the case of *RM and Another v Attorney-General*.[25] This application was clearly brought as a test case before the High Court in Nairobi in the name of the child, assisted by a children's rights organisation, CRADLE. It concerned the rights of RM, who was a child born out of wedlock. At stake here was not a recognition of the child's rights under customary law, but under section 24(3) of the Children's Act (2001). It was argued by the applicant that by treating children of married and unmarried parents differently, section 24(3) abrogated

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20 South Africa became a party to CRC on 16 July 1995; ICCPR on 10 March 1999; the African [Banjul] Charter on 9 July 1996; and the African Children's Charter on 7 January 2000.

21 See Preamble to the Convention which cites the Declaration of the Rights of the Child which was adopted by the General Assembly in 1959.

22 Art 2 of CRC. Also see art 24 of ICCPR; art 18(3) of the African Charter; arts 3 & 26(3) of the African Children's Charter.

23 *Bhe* (n 17 above) para 55.

24 The judgment has come in for some criticism, most of which aligns itself with the dissenting judgment by Justice Ngcobo. He was of the view that the Court should not have declared the law unconstitutional and found that the answer to resolving the conflict between customary law and the Bill of Rights lies in 'flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case' (para 236). A full discussion of these issues is beyond the scope of this article.

25 The full name of the judgment is *RM (Suing thro' next friend) JK Cradle (The Children Fund) Millie and Gao v the Attorney-General Nairobi* (Nairobi Law Courts) High Court Civil Case 1351 of 2002 (unreported). It is available in Centre for Child Law and Policy Research and Children's Legal Action Network *The law on children: A case digest* (2007).

the child's right to protection from discrimination which is reflected in Kenya's Constitution, in articles 2 and 3 of CRC and articles 2 and 3 of the African Children's Charter. Relying heavily on a General Comment of the UN Human Rights Committee, the Court decided that the section of the Children's Act in question did not offend the principle of equality and non-discrimination. It is worth noting that the Kenyan Constitution does not include 'birth' as one of the grounds of discrimination (although CRC and the African Children's Charter both include it). The Court declared itself to be constrained by a concern that the Children's Act had brought about improvements in this area of the law, and that to strike down the section would be, in the words of the Court, 'a great tragedy'. It is apparent from these comments that Kenyan constitutional law does not have an equivalent mechanism to that found in the South African Constitution that allows for measures that ameliorate the possible negative effects of an immediate declaration of constitutional invalidity, such as a suspension of such a declaration to allow the legislature time to remedy the defect.[26] The case of *RM* showed great promise, and it is evident that the child rights advocates involved in the case were fully aware of the application of the international and regional instruments to the case. However, one is left with the feeling that the Court side-stepped the issue, adroitly using other international sources to support their decision. Thus the case cannot be cited as a good example of the child rights instruments developing positive jurisprudence, despite the best intentions of the litigators.

Thus far reference has been made to CRC and the African Children's Charter jointly, as though they contain very similar protections. It is true that there is much commonality in the provisions, and that in some instances the differences in wording are superficial. However, there are certain aspects where there are substantive differences between CRC and the African Children's Charter.[27] There have been two recent cases in the South African Constitutional Court where specific provisions of the African Children's Charter were cited which are different from CRC, and which appear to indicate the possible emergence of a jurisprudence of children's rights which is linked specifically to the African Children's Charter, which I will describe as a 'fledgling African child law jurisprudence'.

4 Children of imprisoned mothers

The first of these two cases was S *v M (Centre for Child Law as Amicus Curiae)*.[28] The central question in this case was: What are the duties of

[26] See eg sec 172(1)(b)(ii) of the Constitution of South Africa Act 108 of 1996.

[27] For a full discussion of the differences between the two instruments and on the way in which the African Children's Charter provides improved normative standards, see B Mezmur 'The African Children's Charter v the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Public Law* 1.

[28] 2008 3 SA 232 (CC) (*S v M*).

a sentencing court when the person being sentenced is the primary caregiver of minor children, keeping in mind the constitutional protection of the best interests of the child? The appellant in the case was M,[29] the mother of three minor children. She was the sole caregiver of the children, and was also the main provider of financial support for their care. She had raised a bond on a modest home in which the family lived on the income she derived from two small businesses. She was convicted in various counts of fraud and theft and was sentenced initially by the Regional Court to four years' imprisonment.[30] On appeal, the High Court set aside her sentence and replaced it with a sentence that would require her to serve approximately six months in prison before the Commissioner of Correctional Services could consider releasing her on correctional supervision.

The *amicus curiae* submitted that the sentencing court should take cognisance of the rights of the children when sentencing a primary care giver, and provided support from international and regional instruments in this regard. The submissions pointed out that one of the features of the African Children's Charter that distinguishes it from CRC is the fact that it contains a separate and distinct article on 'children of imprisoned mothers', namely article 30, which has no counterpart in CRC.

Article 30 reads thus:

> **Children of imprisoned mothers**
> State parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
> (a) ensure that a non-custodial sentence will always be the first consideration when sentencing such mothers;
> (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
> (c) establish special alternative institutions for the holding of such mothers;
> (d) ensure that a mother shall not be imprisoned with her child;
> (e) ensure that a death sentence shall not be imposed on such mothers;
> (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

The judgment makes reference to international and regional law and, in particular, to article 30 of the African Children's Charter. In the final analysis, the Court pronounced as follows:[31]

> [F]ocused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all

[29] The Constitutional Court issued an order on the day of hearing that the citation of the case name should include only the initial of the applicant's surname in order to protect the identity of her children.

[30] *S v M* (n 28 above) para 3.

[31] *S v M* (n 28 above) para 33.

> the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts.

The result of the judgment in *S v M* is that in each case the sentencing court must give specific attention to the impact the sentence will have on the child or children of a primary care giver. This does not mean that a primary care giver will never, henceforth, be given a custodial sentence. The judgment explains quite clearly that the choice of the sentencing option least damaging to the interests of the children is made 'within the legitimate range of choices in the circumstances available to the court'.[32] In other words, if a non-custodial option is clearly appropriate, the court must set such a sentence, bearing in mind the interests of the children. If there is a range of appropriate sentences under consideration, the likely negative impact of imprisonment on the children of the primary care giver will generally tip the balance in favour of a community-based sentence.

It is significant, in jurisprudential terms, that the Court took note of article 30 of the African Children's Charter, especially as there is no similar article in CRC. The issue of children of imprisoned mothers, we will recall, was one of the issues which the African states that lobbied for a uniquely African children's rights charter felt was missing from CRC. It is thus interesting to see that jurisprudence has already developed relating to this article of the African Children's Charter, giving further weight to the idea of an 'African child rights jurisprudence'.

5 Inter-country adoption

Another recent case in which the African Children's Charter was shown to differ in a small but significant way from CRC was in the case of *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* (*AD* case).[33] This was a matter concerning inter-country adoption. Inter-country adoption came into being in South Africa in 2000, as a result of a ruling of the Constitutional Court, in the matter of *Minister of Welfare and Population Development v Fitzpatrick and Others*.[34] Prior to that case, inter-country adoption was not possible due to a clause in the Child Care Act[35] that prohibited foreign persons from adopting South African children. In the *Fitzpatrick* case, the impugned section was struck down with immediate effect. The decision was based on the central premise of the best interests of the child. The Court determined that the children's courts' powers to hear domestic adoption matters were wide enough

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32 As above.

33 2008 3 SA 183 (CC).

34 2000 3 SA 422 (CC).

35 Sec 18(4)(f) of the Child Care Act 74 of 1983.

to allow them to deal with inter-country adoptions, and that CRC provided sufficient guidance in this respect. At that time, South Africa had not yet ratified the Hague Convention on Inter-Country Adoptions. Perhaps the Court was overly sanguine about how well the children's courts would cope with inter-country adoption in the absence of a comprehensive legal framework, because the *AD* case showed that there were still many difficulties on the ground with regard to inter-country adoption, several years later.[36]

In the *AD* case, an American couple who wanted to adopt an abandoned South African child (referred to by the Court as 'Baby R') approached the High Court for a sole custody and guardianship order, with a view to taking her out of the country and adopting her in America. This was an unusual route for inter-country adoption in South Africa, where there is a children's court at magistrate's court level which hears all domestic adoption matters and has been dealing with inter-country adoptions since the year 2000.[37] The Constitutional Court, hearing an appeal from the Supreme Court of Appeal[38] (where the Court had divided three to two, with four written judgments) had to decide whether the process of applying for a sole custody and guardianship order in the High Court was an acceptable approach, or whether the children's court was the correct forum, where an adoption could be concluded. The majority in the Supreme Court of Appeal had upheld the order of the High Court, in which the couple had been advised that the correct forum to conclude the inter-country adoption was the children's court. A pivotal issue in the matter was the principle of subsidiarity, meaning that inter-country adoption should always be subsidiary to domestic solutions.

The subsidiarity principle is enshrined in article 21(b) of CRC, which provides that 'inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'.

Article 24 of the African Children's Charter includes the principle of subsidiarity, which is similar to CRC, but stronger, because it describes inter-country adoption as 'a last resort'. This is linked to the reality that African countries, being 'sending countries' in the context of inter-

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36 AS Louw 'Intercountry adoption in South Africa: Have the fears become fact?' (2006) 3 *De Jure* 503.

37 Inter-country adoptions became lawful in South Africa in 2000 when the Constitutional Court struck down a section of the Child Care Act 74 of 1983 which prevented foreigners from adopting South African children (*Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC)). The Court found that this law was too restrictive to allow for children's best interests to be realised, and the impugned section was declared invalid with immediate effect. The Court indicated at that time that the Children's Court would deal with such adoptions.

38 *De Gree & Another v Webb & Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA).

country adoption, have to pay special attention to the protection of their children. If children are seen as a communal blessing in African society, then it makes sense that the law should try as far as possible to ensure that children are cared for in families and communities within their countries of origin.

The Constitutional Court considered this aspect very carefully, but decided as follows:[39]

> Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. The starting-off point and overall guiding principle must always be that there are powerful considerations favouring adopted children growing up in the country and community of their birth. At the same time the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.

Whilst recognising the importance of the international law principles relating to inter-country adoption, the Court decided in the end that the best interests of the child principle was paramount. The Court found that it was in the child's best interests to be adopted by the appellants, the court made an order that the adoption be heard in the children's court within one month, and Baby R was duly adopted. The issue of subsidiarity was thus not seen as a bar to inter-country adoption, but as an important principle to be weighed (together with other principles such as the best interests of the child) by the Court making the decision about adoption.

The fact that subsidiarity features so heavily in the majority of the Supreme Court of Appeal, and that it was paid a significant amount of attention in the Constitutional Court judgment, indicates that these courts understood the vigilance that needs to be exercised when making decisions about adoption in 'sending countries'. However, whilst the African Children's Charter renders inter-country adoption a 'last resort' (demonstrating a very high commitment to the subsidiarity principle), the Constitutional Court balked at making a decision that rested on that principle. The best interests of the child principle carried the day, and this is seen as a universal principle, although, as mentioned earlier, the African Children's Charter also views best interests as *the* (rather than *a*) primary consideration.

There are striking similarities between the South African Constitutional Court's reasoning in the *AD* case, and the High Court of Malawi's judgment in the case of *In Re: Adoption of Children Act (Cap.26:01); In re: David Banda.*[40] Inter-country adoption has given rise to a number

[39] *AD* case (n 33 above) para 55.

[40] Adoption Cause 2 of 2006 (2008) *MWCH 3* 28 May 2008.

of cases in the Eastern and Southern African region,[41] but none quite as profound, and certainly none as internationally well known, as the case of David Banda. The Malawi Human Rights Commission and the Malawi Human Rights Consultative Committee applied and were granted leave to be joined as *amici curiae*. Both filed written submissions, and the Malawi Human Rights Commission also presented oral submissions. In addition to the involvement of *amici curiae*, in the *David Banda* case, as in the *AD* case, the best interests of the child were protected by a guardian *ad litem*, who filed reports.

Madonna and Guy Richie presented a petition to the High Court in Lilongwe to adopt David Banda. The Court was satisfied that informed consent had been given, and that the Richies were suitable adoptive parents. The difficulty that the Court faced was that the laws of Malawi did not allow for adoption in the case where the adoptive parents lived in another country, due to a provision in section 3(5) of the Children's Act (Cap 26:01) that '[a]n adoption order shall not be made in favour of any applicant who is not resident in Malawi or in any respect of any infant who is not so resident'.

The Court examined the wider context within which the law fell to be interpreted. Noting section 211 of the Malawian Constitution, Justice Nyirenda observed that Malawi had ratified CRC, and was also a party to the African Children's Charter, and that therefore these Conventions are binding on Malawi by choice. Even if the Conventions were not part of the law, opined the honourable judge, at very least the Court would have a duty to 'interpret and apply our statutory law, so far as the spirit of the statute could allow, so it is in conformity and not in conflict with our established obligations under these Conventions'.[42]

The Court examined article 21 of CRC and article 24 of the African Children's Charter in some detail, noting that the Children's Charter used stronger language, namely that inter-country adoption should be a measure of last resort. The Court then tackled the issue of 'residence' through the lens of the international, regional and constitutional law framework. The Court grappled with whether the 'residence' requirement was an end in itself, or a means to an end, and posed the question: Is residence so paramount that all else collapses without it? Why was residence so important? Examining this question took up much of the Court's time and encompassed what Justice Nyirenda described as 'resounding thoughts'. The first was 'to realise that children are an important asset to any civilised society'. The second was that society

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41 *In the Matter of the Adoption of EC (Infant) Nairobi* (Nairobi Law Courts), High Court Adoption Cause 46 of 2006; *In the Matter of Adoption of BAO (Infant) Nairobi* (Nairobi Law Courts), High Court Adoption Cause 141 of 2003, *In the Matter of AC (A Child), Nairobi* (Nairobi Law Courts) High Court Adoption Cause 25 of 2006. The case is unreported. It is available in Centre for Child Law and Policy Research and Children's Legal Action Network (n 25 above).

42 The court cited *Mwakanwanga v Rep* 1968-1970 5 MLR 14 and *Gondwe v Attorney-General* 1996 MLR 492 in support of this statement.

has an obligation to bring up its own children and that 'the best place for the child to experience love and affection and naturally realise its full potential is the biological family unit'. A third resounding thought was that where it is not possible for children to grow up under the love and care of their natural parents, then an option is to allow for adoption, and the fourth, that the state administration must be satisfied as to the suitability of adoptive parents.

The Court found that the residence requirement was a means to an end, aimed at protecting children. The Court noted that the national policy of Malawi stresses that the best interests of the child is paramount in all matters concerning the child. Furthermore, the Malawian Constitution, which emphasises the development of children, and the international and regional instruments, brought the Court to the conclusion that any cases in the past that had seen residence as an end in itself 'could never survive in our constitutional order'. The *David Banda* judgment found that the principle of the best interests of the child was more weighty than the requirement of residence, in much the same way that the *AD* judgment found that the principle of subsidiarity was itself subsidiary to the best interests of the child. However, both courts still paid heed to the imperatives set by international instruments. The *David Banda* Court stated that '[t]he underlying consideration is that inter-country adoption should indeed be a last resort when all other options of the placement of a child have failed'.

The *AD* Court did not go so far as to say that inter-country adoption is a measure of last resort, but did recognise the importance of comity of states and the need for protection of children. Justice Sachs, writing for a unanimous Court, said as follows:[43]

> [T]his Court had to bear in mind that inter-country adoption has a strong public as well as a private dimension. Both the sending and the receiving states have an obligation to establish appropriate regulatory machinery to minimise the possibilities of abuse. It is not simply the risk of trafficking in children for nefarious purposes, or developing a trade in babies, that needs to be guarded against. The dignity of the sending country can be affected if it appears that it is failing to find appropriate resources to look after its children. Courts need at all times to be sensitive to these matters.

There is an important post-script to the *AD* case. The adoption of Baby R fell through once the child was already in America, and she has been adopted by another family there. Had this been an adoption governed by the Hague Convention,[44] Baby R could have been returned in terms of its provisions, because where an adoption collapses within 140 days after consent being given, the central authority may organise the

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[43] See n 33 above para 59. On the issue of comity between states, see further J Sloth-Nielsen & B Mezmur '(Illicit) transfer by De Gree' (2007) 2 *Law, Democracy and Development* 81 100.

[44] South Africa has ratified the Hague Convention on Intercountry Aoption but it has not been brought into operation as yet. This is expected to happen during 2009, when the long-awaited Children's Act 38 of 2005 is expected to come into operation.

return of the child.[45] Of course, it is impossible for courts to gaze into a crystal ball and predict the future, but this story provides all the more reason for the ratification of the Hague Convention on Inter-country Adoption by countries in Africa.

In early 2009, Madonna Ciccone (using her maiden name after her divorce from Richie), returned to Malawi to adopt a second child. The matter was heard by Chombo J in the High Court of Malawi in the Lilongwe District on 3 April 2009.[46] The child at the heart of this petition for adoption was a three year-old girl who the Court refers to as 'CJ'. The 14 year-old mother of CJ had died shortly after giving birth. Relevant reports about the circumstances of CJ and the suitability of Madonna to adopt had been placed before the Court, and counselling of the extended family members to ensure that they understood the implications of adoption had been undertaken. The Court considered section 3(5) of the Adoption of Children Act which provides that an adoption order shall not be made in favour of any applicant who is not resident in Malawi. The judge examined in detail the meaning of the word 'resident', and after briefly making reference to the decision of the *David Banda* Court with regard to that term, she went on to compare the definition of resident by the superior courts in Papua New Guinea and Fiji. Chombo J recorded that the petitioner 'jetted into the country during the weekend just days prior to the hearing of this application' and she further took note that the last time the petitioner had been in Malawi was for the final adoption order of her son, David Banda. The Court concluded that Madonna was not resident, and that her petition must fail.

In examining why this rule exists in the law of Malawi, the judge opined that it was a safeguard 'to protect Malawian children from "trafficking of children by some unscrupulous individuals"'. The judgment makes reference to article 3(1) of CRC and article 4(1) of the African Children's Charter, which refer to the best interests of the child being the paramount consideration. The judge failed to mention the subtle difference in the wording included in these two articles, which has been discussed earlier in this article. She then went on to set out in full article 24 of the African Children's Charter, and she added her own emphasis by underlining certain words. Notably the words 'may as the last resort', which are the words that appear only in the African Children's Charter and not in CRC, are underlined, as well as the words 'if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be care for in the child's country of origin'. In a controversial move, the Court determined that care in an orphanage conforms with the clause 'in any suitable manner', and that there is

45 Sec 261(6) of the Children's Act 38 of 2005, not in operation at the time of writing.

46 *In Re: Adoption of Children Act CAP. 26:01; In Re: CJ (A Female Infant) of c/o Mr Peter Baneti, Moba (Adoption case 1 of 2009)* [2009] MWHC 3 (3 April 2009) http://www.saflii.org/mw/cases/MWHC /2009/3.html (accessed 14 September 2009).

thus an alternative to inter-country adoption. This decision is controversial from a child rights perspective because it is widely accepted that suitable alternatives to inter-country adoption would include foster care or adoption in the country of adoption, and it is rarely thought to be appropriate to keep a child in residential out-of-home care where there is an option available of placement in a family.[47]

The High Court judgment in the *CJ* case is puzzling, because it flies in the face of the precedent set in the *David Banda* case, in which the Court found that residence was a means to an end, and that rigid adherence to the residence requirement was not in the best interest of children.

An appeal against the High Court decision in the *CJ* case was lodged urgently and was heard by the Malawi Supreme Court of Appeal.[48] A local human rights organisation called the Eye of the Child, as well as the Malawi Human Rights Commission, sought and were granted the opportunity to join the proceedings and be heard as *amici curiae*. The Appeal Court found that the Court had not been bound to follow the judgment of Nyirenda J (as he then was) if she did not agree with it, particularly as she found precedents from other jurisdictions that differed from that judgment. The judgment examines the extent to which international law is binding, and finds that the Malawian courts will look at the Constitution and the domestic laws of Malawi and determine whether they are consistent or in harmony with international law, and the courts will, as far as possible, avoid a clash between the two. Where such a clash is unavoidable it is the Constitution and laws of Malawi that will prevail, and the court provided as its reasoning for this that international agreements are, by their nature, 'products of compromise arising out of hard bargaining by high contracting parties'.

The Supreme Court found that there was no clash or disharmony between international law and the adoption law of Malawi. Returning to the issue of 'residence', the Supreme Court referred to additional judgments that define this term, and concluded that 'residence' simply means that a person must not have arrived in a country by chance (such as when one's aircraft runs out of fuel), but rather by design. The Court concluded that Madonna was in Malawi by design because she had come there specifically for the purpose of this application for adoption. With respect, this interpretation is unduly strained, and the Supreme Court's judgment lacks the wealth of reasoning or logic that underpins the judgment of Nyirenda J (as he then was) in the *David Banda* judgment. He simply found that residence was not an end in

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47 See W Duncan 'The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption 1993: Some issues of special relevance to sending countries' in ED Jaffe (ed) *Intercountry adoptions: Laws and perspectives of 'sending' countries* (1995) 222-223.

48 In Re: The Adoption of Children Act CAP 26:01; In RE CJ A Female Infant of C/o PO Box 30871, Chichiri, Blantyre 3 (Msca Adoption Appeal 28 of 2009) [2009] MWSC 1 (12 June 2009) http:www.saflli.org/mw/cases/MWSC/2009/1.html (accessed 14 September 2009).

itself, and that to interpret it thus would be to infringe the best interests of the child and would be contrary to the Constitution.

Following its concocted interpretation of 'residence', the Supreme Court's judgment went on to say the following: 'We do not think that under the Act inter-country adoption is a last resort alternative.' The Court also made it clear that in its view CJ would be better taken care of by being adopted by a foreign parent rather than for her to grow up in an orphanage where she will have no family life, no love and affection of parents. This aspect of the Supreme Court's judgment sets the record straight regarding the general principle that foster care and adoption in the country of origin, but not residential care in an institution, are suitable alternative options to inter-country adoption. Whilst the tone of the Supreme Court's judgment is very reserved and apparently reluctant to criticise the judgment of the court *a quo*, the Court did find that the judge erred in considering the intention of the legislature and taking account of a bill which had not yet been passed.

In particular, the judge is taken to task for basing her decision on the risk that 'some unscrupulous individuals' might use the precedent of court orders allowing adoption to facilitate child trafficking. The Supreme Court said that these 'imaginary unscrupulous individuals' were not before the Court, and that the Court erred in trying to protect some 'imaginary children'. This part of the Supreme Court's judgment misfires. It *is* necessary for the courts to be vigilant about incorrect practices in inter-country adoption. Whilst Chombo J may have made her point somewhat inelegantly, and perhaps did place too much emphasis on her concerns about trafficking, such concerns are not entirely misplaced. The prevention of trafficking is, in fact, expressly mentioned in the Preamble to the Hague Convention on Inter-Country Adoptions, and the risk of trafficking is one of the motivating factors for the strict regulation in inter-country adoption. It is thus important for the rights of *all* children to be protected. The importance of preventing avenues for incorrect inter-country adoption practice should accordingly not be underestimated. Chombo J's instinct, in this regard, was generally on target. Her error lay more in the fact that she did not sufficiently consider the best interests of the individual child in the case before her, the infant CJ. Her interests would not have best been served by staying in an orphanage rather than being placed in a family.

Evaluating the inter-country adoption jurisprudence from the perspective of international instruments reveals that the courts certainly have paid detailed attention to specific provisions in the instruments. The outcomes of these cases do, however, present an impediment to the theory I am trying to advance, that the emerging child law jurisprudence in the Eastern and Southern African region has a uniquely African character, in that it arises from clauses in the African Children's Charter which are either unique or are different from similar provisions in CRC. In inter-country adoption, the key difference between article 21 of CRC and article 24 of the African Children's Charter is the notion

that inter-country adoption is a 'measure of last resort'. Whilst both instruments reflect the principle of subsidiarity, the last resort clause in article 4 of the African Children's Charter is emphatic. As we have seen, however, the judges in the *AD*, *David Banda* and *CJ* judgments have not bought into the idea that inter-country adoption is a last resort. The only exception was Chombo J, but she was firmly overturned on this point, as the Supreme Court found that the law of Malawi does not view inter-country adoption as a last resort. All three judgments favour the best interests of the child principle over strict adherence to the subsidiarity principle, and this makes the judgments international in nature, rather than having a particularly African slant. Nevertheless, a careful reading of the judgments does leave the reader with a strong sense that these are cases about inter-country adoption written from a 'sending country' perspective, with the concomitant concerns about our children, our national assets, being taken to live in other countries, far away from their families and cultures and languages. The predominance of best interests is also not only the preserve of the international community. It is, after all, *the* primary consideration in all matters concerning the child, according to the African Children's Charter.

6 Conclusion

There are several other judgments from the region that make reference to CRC and the African Children's Charter,[49] including a number of cases concerning the treatment of children in the criminal justice system.[50] To discuss them all in detail is beyond the scope of this article.

The judgments described in this article demonstrate the fact that international and regional child protection instruments have played an important role in the development of child rights jurisprudence in some countries in the Eastern and Southern African region, and that there is evidence of the beginnings of a specifically African jurisprudence. There is much more that can be done to promote a child law jurisprudence on the continent. The fact that so few countries have ratified the Hague Conventions (both the one on adoption and the one on abduction) is a matter of concern. Eight African states have not even ratified the African Children's Charter.[51]

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49 *AF v HA and HI* Meru High Court Civil Appeal 72 of 2004; *Diana Ndele Wambua v Dr Paul Wambua* 2004 eKLR; http://www.kenyalaw.org (accessed 15 September 2009).

50 *Republic v Matano Katana* 2004 e KLR; *Mkunzo & Another v Republic* (2008) 1 KLR (G&F); *Republic v SAO,* Nairobi Criminal Case 236 of 2003; *S v Williams & Others* 1995 7 BCLR 861 (CC); *S v B* 2006 1 SACR 311 SCA; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 3 SA 515 (SCA); *S v N* 2008 3 SA (SCA).

51 See n 3 above.

Another issue that comes to the fore when reading these judgments is that the courts in Eastern and Southern African countries dealing with child law issues rarely look at each other's judgments. American, Canadian, British and even Indian case law is cited, but there is a dearth of references to other African divisions. Given the jurisprudential discourse that has begun in the area of children's rights on the African continent, an opportunity for African countries to learn from each other is clearly evident.

AFRICAN HUMAN RIGHTS LAW JOURNAL

A tale of two federations: Comparing language rights in South Africa and Ethiopia

*Yonatan Tesfaye Fessha**
Postdoctoral Research Fellow, Community Law Centre, University of the Western Cape, South Africa

Summary

The success of a federal arrangement in accommodating ethnic diversity cannot be measured solely on the basis of its language rights regime. However, it is generally agreed that a well-designed language rights regime goes a long way in contributing either to the effective reconciliation, unity and diversity or to the eventual polarisation of cultural communities. This article focuses on the challenges of adopting an inclusive language policy in multi-lingual states. Using two case studies, South Africa and Ethiopia, it examines the different policy alternatives for accommodating linguistic communities.

1 Introduction

As language is often one of the key expressions of ethnic identity, language rights in a federal state are 'invested with a symbolism of its own'.[1] It represents the recognition (or the lack thereof) of the linguistic identities of the state's constituent units. As a result, a language policy often correlates with visions of uniformity or visions of diversity.

Of course, language policies go beyond the symbolic realm of recognition. The recognition and protection of language rights and linguistic identity form an important part of human rights. This assertion may, of course, appear at odds with the individual liberal position

* LLB (Addis Ababa), LLM (Human Rights and Democratisation in Africa) (Pretoria), PhD (Western Cape); yfessha@gmail.com. Special thanks go to Professor Nico Steytler for the incisive comments he gave on earlier versions of this article.

1 P Coulombe 'Federalist language policies: The case of Canada and Spain' in J Tully & A Gagnon (eds) *Multi-national democracies* (2001) 242.

that provides the theoretical foundation for most international human rights instruments, including the United Nations (UN) Charter[2] and the Universal Declaration of Human Rights (Universal Declaration).[3] Major international documents, other than providing for a right against discrimination (based on language), do not mention group-specific rights.[4] The widely-recognised language rights in the context of 'fair trail and the due process of law' are similarly informed by this same individualist philosophy.[5]

Notwithstanding this individualistic orientation, the human rights instruments that impact language rights, either as part of a non-discrimination clause or through other specific rights, affect the power of the state in areas of language policy. In other words, the protection of many of the rights recognised in international human rights instruments has implications for states' language policies. This is because a language policy has the capacity to affect the enjoyment of other rights. A language policy that only promotes a single language group can have the effect of discrimination as it can create barriers to the exercise of voting, education and other rights.[6] As noted by De Varennes:[7]

> If public authorities prevent the use of any language, including minority language, in private activities, this could potentially, depending on the type of intervention, breach a number of rights such as the right to private and family life, freedom of expression, non-discrimination, or the right of persons belonging to a linguistic minority to use their language with other members of their group.

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2 The Charter makes no reference to group-specific rights. It simply recognises individual rights. This individualist outlook is, in fact, made clear in the opening article, art 1(3), which outlines the purpose of the UN. According to this article, one of the purposes of the UN is to encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'. The reference to 'fundamental freedoms for all' is interpreted to mean fundamental freedom for all individuals and not groups.

3 The Universal Declaration declares that 'everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as ... language'.

4 In addition to the UN Charter and the Universal Declaration, art 1 of the UNESCO Convention against Discrimination in Education of 1960, arts 2(1) and 26 of the International Covenant on Civil and Political Rights, art 2(2) of the International Covenant on Economic, Social and Cultural Rights, art 1 of the American Convention on Human Rights, and art 2 of the African Charter on Human and Peoples' Rights provide for the right against discrimination on grounds of language.

5 According to arts 14(3)(a) & (f) of ICCPR, an accused has the right to be 'informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'; and is to have 'the free assistance of an interpreter if he cannot understand or speak the languages used in court'. Similar rights are provided in arts 5(2) and 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and art 8 of the American Convention on Human Rights.

6 R Dunbar 'Minority language rights in international law' (2001) 50 *International and Comparative Law Quarterly* 90-120.

7 F de Varennes 'Linguistic identity and language rights' in M Weller (ed) *Universal minority rights* (2007) 258.

A more controversial category of rights are language rights that mandate the use of different languages by public authorities. These language rights, which are also the major focus of this contribution, provide individuals what the principle of non-discrimination cannot provide, namely, the right to obtain government services through the medium of one's language. It is also these language rights that are relevant to the linguistic identity of minorities. Except for the widely-recognised right to use a minority language when required for the purposes of a fair trail and due process, however, most human rights treaties say very little about the use of language by state authorities. Even article 27 of the International Covenant on Civil and Political Rights (ICCPR), which attempts to address language-related claims, makes reference only to persons belonging to 'such minorities' and not to the groups themselves:

> In those states in which ethnic or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This means that the right recognised by article 27 is an individual right that, in so far as language rights are concerned, only protects the use of a language as between private individuals.[8] The only two instruments that clearly impact on the use of a minority language by state authorities are the Framework Convention on the Protection of National Minorities and the European Charter on Regional and Minority Languages, both of which are regional instruments.[9] These two instruments provide for the so-called 'sliding-scale approach', which requires that[10]

> [w]here public authorities at the national, regional or local level face a sufficiently large number of individuals who use a minority language, authorities must provide an appropriate level of services in this language.

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8 B Bowring 'Multi-cultural citizenship: A more viable framework for minority rights?' in D Fottrell & B Bowring (eds) *Minority and group rights in the new millennium* (1999) 6-9. See also De Varennes (n 7 above) 298.

9 Art 10(2) of the Framework Convention on the Protection of National Minorities provides that '[i]n areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities'. Similar rights are provided in art 10 of the European Charter on Regional and Minority Languages.

10 De Varennes (n 7 above) 298. Other major international instruments that make reference to language rights, though not always in legally-binding form, include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; the UN Declaration on the Rights of Indigenous Peoples; the Vienna Declaration and Programme of Action; the European Charter for Regional and Minority Languages; the Central European Initiative Instrument for the Protection of Minority Rights; and the Framework Convention for the Protection of National Minorities.

The absence of general human rights treaties that contain provisions on the use of language by state authorities begs the issue of states' response to the use of language for the purposes of government. That is exactly what this contribution intends to address. It focuses on the challenges of adopting an inclusive language policy in multi-lingual states. Using two case studies, those of South Africa and Ethiopia, it examines the different policy alternatives for accommodating linguistic communities. It does this in four separate but interrelated parts. First, it discusses the two major language policies that are adopted by countries that are charcterised by linguistic diversity. It then proceeds to examine the South African constitutional approach to language rights. This is followed by an examination of the Ethiopian approach. The article concludes by bringing together the discussion on the experience of the two multi-linguistic states and identifying some of the key lessons, which may also assist other multi-linguistic states that are struggling with the similar challenges of adopting an inclusive language policy.

This contribution is decidedly narrow in its approach as it deals with the specific subject of language use by state authorities. This choice is informed by the purpose of the article, namely examining the relevance of language rights regimes to a state that seeks to respond to the exigencies of linguistic diversity. Issues of discrimination based on language and other aspects of language rights are not the focus of the article. These and other issues, like language in education policy, are discussed only to the extent that they are relevant to make a point to the main thesis of this article.

2 Brief comparative overview of language rights regimes

Multi-ethnic states adopt different language policies. Some adopt a policy modelled on the individualistic approach, or commonly known as the personality principle, to the whole issue of language rights, while others opt for a territorial model of language planning. Under the territorial approach, the rights to exercise language rights are confined within the defined territory of the minority language. Under the personality principle, by contrast, an individual speaker can, by and large, exercise language rights irrespective of his or her geographical location. As noted by Reaume:[11]

> Neither model [of language policy] dictates very precisely a concrete language policy on language, and indeed the literature displays a distinct lack of precision in the use of the two models to illuminate the concrete polices adopted in various jurisdictions.

[11] DG Reaume 'Beyond personality: The territorial and personal principles of language policy reconsidered' in W Kymlicka & A Patten (eds) *Language rights and political theory* (2003) 271.

The aim of this brief comparative overview is, however, simply to place the discussion on language polices in Ethiopia and South Africa in a broader context, by indicating the general trend in countries facing similar challenges. For the purpose of this article, we will stick to the dichotomy of the personality and territorial principle as commonly understood.

2.1 Personality model

According to the personality principle, individuals are entitled to use their mother tongue in every part of the country with few territorial restrictions. This vests individuals with a right in their personal capacity, regardless of where they live. In other words, the linguistic preferences of speakers, wherever they reside, are given a central place in the regulation of language use. An important element of this principle is, however, the criterion 'where numbers warrant', which implies that 'language rights may be granted only when there are [a] sufficient number of particular language speakers to warrant language protection'.

The language policy adopted by Canada represents this approach. Under the Official Languages Act, passed in 1969, both French and English were granted official status for all purposes of the federal government.[12] As a result of these language rights, which were later included in the 1982 constitutionally-entrenched Charter of Rights and Freedoms, Canadian citizens are entitled to federal government services in either official language where there is a significant demand. Furthermore, the Constitution provides all Canadian citizens, where numbers warrant, the right to have their children educated at elementary and secondary levels in either official language. This policy entailed a symmetrical application from coast to coast, whereby French-speaking minorities outside Quebec and the English-speaking minority inside Quebec receive equal constitutional protection.[13]

The language policy adopted by Canada, which is designed as a means to achieve a nation-building objective, aims to separate linguistic differences from the collectivities, territories and institutions which constitute them. Although the predominantly French-speaking Quebec province, like the rest of the provinces in Canada, can adopt its own language policy, the application of the federal official languages policy, which is based on the personality principle, means that Que-

12 GM Balmer 'Does the United States need an official language? The examples of Belgium and Canada' (1992) 2 *Indiana International and Comparative Law Review* 445.

13 Balmer (n 12 above) 446.

bec has achieved only limited territorialism.[14] In fact, as Rubio-Marin indicates[15]

> '[t]he Charter has de-territorialized language rights by attaching them to speakers of both French and English rather than to provinces, recognizing thereby minority status to both the Francophone minorities outside Quebec and the Anglophone minority inside Quebec.

In this regard, the personality approach represents a reluctance to recognise the Francophone community as a territorialised linguistic community.[16] The 'de-territorialisation' role of language rights in promoting a monist vision of the Canadian state and rejecting the idea of a territorialised nation within the state of Canada is also evident in the following remarks of Pierre Trudeau, one of Canada's most influential Prime Ministers, also known for his view of pan-Canadianism:[17]

> If minority language rights are entrenched throughout Canada, then the French-Canadian nation would stretch from Maillardville in BC to the Acadia community on the Atlantic Coast ... Quebec cannot say it alone speaks for French-Canadians.

A common criticism directed against the personality approach is that it has the tendency to perpetuate the dominant position that a historically privileged language group enjoys in the state. It is likely to have the effect of strengthening the pressures for assimilation to the dominant group.[18] This is illustrated by (the fact that the secondary status of French has not changed with the adoption of the policy of official

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14 M Chevrier 'Language policy for a language in exile' in P Larrivee (ed) *Linguistic conflict and language laws: Understanding the Quebec question* (2003) 155.

15 R Rubio-Marin 'Language rights: Exploring the competing rationales' in Kymlicka & Patten (n 11 above) 60.

16 Quebec has continuously been demanding to be recognised as a 'distinct society' in Canada. This was the main agenda in the two rounds of constitutional negotiations: the Meech Lake Accord in 1978 and the Charlottetown Accord in 1990. Recognition of Quebec as a 'distinct society' would have affirmed Quebec's dualist vision of the state, though set out only in the unenforceable paragraphs of a constitutional Preamble. The Quebec government's demand to be recognised as a 'distinct society' has not been successful. See S Tierney *Constitutional law and national pluralism* (2004) 238; see also R Simeon & L Turgeon 'Federalism, nationalism and regionalism in Canada' (2006) 3 *Revista d'Estudis Autonomics I Federals* 12. Gagnon & Herivault argue that the outcome of the Meech Lake debate has made the 'distinct society' compromise obsolete and no longer good enough to a majority of Quebecoise. For them, the only acceptable form of recognition today would be the inclusion of a clause recognising the 'Quebec nation' in the Preamble of the Canadian Constitution; A Gagnon & J Herivault 'The unresolved recognition of Quebec' paper delivered at a colloquium on Separatism in Canada: Past, present and future', Institute of Commonwealth Studies/Institute for the Study of the Americas, University of London, London, 4 November 2005 http//www.cst.ed.ac.ut/document (accessed 20 September 2009).

17 D Karmis & AG Gagnon 'Federalism, federation and collective identities in Canada and Belgium: Different routes, similar fragmentation' in J Tully & A Gagnon (eds) *Multi-national democracies* (2001) 154-155.

18 Karmis & Gagnon (n 17 above) 155.

bilingualism) the secondary status of French in Quebec even long after the adoption of the policy of official bilingualism. In Quebec, the cultural division of labour was such that 'capital spoke English and labour spoke French', thus resulting in English occupying a disproportionate place in Quebec in relation to French,[19] that in a way encouraged people from the other group to assimilate to that language group, thus resulting in providing a disproportionate place to the historically dominant group.[20] Thus, despite the application of the federal policy of bilingualism, English continued to remain as the majority status language with French relegated to a secondary level. That prompted Quebec to embark upon what is often called 'the language normalisation process', the adoption of a series of language policies that are aimed at elevating the status of French within the province by reversing the disproportionate place it occupies in its own province.[21] As noted by Gagnon,[22]

> [t]he decision on the part of the Quebec government to implement a series of laws to redress past practices created bad feelings outside Quebec, since it was felt that the federal policy of bilingualism had responded to Quebec's demands.

As the foregoing discussion shows, the personality approach to language planning follows a non-exclusive approach and allows

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19 See Balmer (n 12 above) 446. See also Coulombe (n 1 above) 248.

20 The Commissioner of Official Languages, in his 1995 Report, noted this fact. The Report concluded that French still had a disproportionate place in relation to English, even in the federal administration where progress in the use and status of French is more visible. The Commissioner concluded that French did not achieve 'a fair status as a language of services and work'. The 1996 Census also revealed that 'the historical pattern of assimilation among francophone minorities has not yet been overcome'; Karmis & Gagnon (n 17 above) 155.

21 The Charter of the French Language in Quebec, which is famously known as Bill 101, is a good example that illustrates this situation. Adopted by the *Parti Quebecois* government in 1977, Bill 101, following the territorial model of language planning, sought to promote the use of French and at the same time restrict the use of English. It obliges both immigrants and Canadians moving to Quebec to send their children to a French school and mandated the display of commercial signs in French only. The court decision abrogated part of this legislation. The Supreme Court in 1979 decided that provisions making French the only official language of legislation and justice violate sec 133 of the British North America Act, 1867, which guarantees legislative and judicial bilingualism in Quebec. Part of the law that restricted the rights to education in English was struck down, entitling not only people who had been educated or whose parents had been educated in English in Quebec, but also those who had been educated in English elsewhere in Canada, to have their children receive education in that language. The Court in 1988 also struck down the rule that imposes French as the only language to be used on commercial signs. See generally K Swinton 'Federalism, the Charter and the courts: Rethinking constitutional dialogue in Canada' in K Knopf *et al* (eds) *Rethinking federalism: Citizens, markets and governments in a changing world* (1995) 294-315. See generally J Tully *Strange multiplicity: Constitutionalism in an age of diversity* (1995) 175.

22 A-G Gagnon 'Manufacturing antagonisms: The move towards uniform federalism in Canada' in B de Villiers *Evaluating federal systems* (1994) 127.

individuals to use the language of their preference across the country. In short, the personality approach emphasises an individualistic orientation of the right. In such a vision, linguistic differences are individual attributes, protected from 'coast to coast' by a central state. The major characteristic of this model of language policy is that it, with its integral coast-to-coast bilingualism, forms part of Canada's failure to extend a symbolical recognition of its multi-national character, presenting a monist vision of the state in the symbolic realm.[23] It regards the state as one bi/multi-lingual nation. Although the personality principle may be feasible in a country like Canada where there are few linguistic communities, the capacity of this approach to give practical effect to the act of recognition in a multi-ethnic context is questionable. As indicated earlier, the tendency of this particular language policy to perpetuate the dominant position of a historically dominant language is also something that must be looked into. Without a deliberate intervention from the state or the constituent government, it is likely that the historically dominant language group will continue to remain as the majority status language with the languages of other groups relegated to a secondary level.

2.2 Territorial model

Other states have responded to the language problem by adopting the territorial model of language planning. Under such systems, the official language would often be that of the majority of the locality. Individuals have a right to services in that language only, regardless of what their mother tongue is. This often has the effect of promoting unilingualism although 'the connection between the territorial dimension of language policy and unilingualism is not a logical one'.

A good example of the territorial model is Belgium, where both French-speaking Flanders and Dutch-speaking Walloon endorse unilingualism with Brussels being the only region that has adopted official bilingualism. Individuals moving into the other parts of Belgium must assimilate. French-speaking Belgians moving to a Flanders territory will have to send their children to Flanders schools and *vice versa*. There is thus a strict policy of both territorial and individual monolingualism, implying that '[t]here are no all Belgian language rights'.[24] Similarly, in Switzerland, language guarantees are provided on the basis of the principle of territoriality. German-speaking Swiss moving to a French-speaking canton has to leave behind any prior claim to language protection.[25]

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23 Simeon & Turgeon (n 16 above) 27. See also Karmis & Gagnon (n 17 above) 152.

24 M Keating *Plurinational democracy: Stateless nations in a post–sovereignty era* (2001) 128.

25 T Fleiner 'Switzerland: Constitution of the Federal State and the Cantons' in L Basta-Fleiner & T Fleiner (eds) *Federalism and multi-ethnic states: The case of Switzerland* (2000) 103-145.

The territorial model of language policy represents a recognition of the linguistic identities of the constituent units. It also provides ample room for a community to develop its language and culture. Of course, the territorial model of language planning is not without problems. One of the palpable consequences of the territorial model in Switzerland is that 'many Swiss do not actually become multilingual'.[26] There is also a concern that this particular approach risks developing isolated communities and scores low in the promotion of inter-group solidarity. That might explain the description of Switzerland as a country composed of three groups that 'stand with their backs to each other'.[27] It must, however, be admitted that, under certain circumstances, such a language policy might be the only way to hold the state together. In the case of Belgium, for example, it is argued that Belgium would not have existed as one state today had such an arrangement not been made.[28] In Switzerland, too, the territoriality principle to language is considered to be instrumental in guaranteeing peace among the different language groups.[29]

A variant of the territorial model of language policy is adopted in Spain. The Castilian language has been the dominant language in Spain for centuries while other national languages were suppressed.[30] The 1978 Constitution made Castilian the official language of the central government, statewide, while making languages of the autonomous communities co-officials in their respective communities. It further imposes a duty on all citizens of Spain to learn Castilian and the right to use it. This limits the use of local languages to the activities of the autonomous communities thus, unlike the Canadian Constitution, denying any official status in relation to central institutions such as the government, congress, the administration and the courts. Although

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26 R Watts 'Language policies and education in Switzerland' in R Watts & J Smolicz (eds) *Cultural democracy and ethnic pluralism: Multi-cultural and multi-lingual policies in education* (1997) 271-30. See also F Grin 'Language policy in multi-lingual Switzerland: Overview and recent developments' paper presented at the *Cicle de confèrencies sobre política lingüística Direcció general de política lingüística*, Barcelona, Spain, 4 December 1998.

27 J Steiner 'Switzerland and the European Union: A puzzle' in M Keating & J McGarry (eds) *Minority nationalism and the changing international order* (2001) 137-154.

28 Balmer (n 12 above) 443.

29 Fleiner (n 25 above) 103-145.

30 Spain, after almost four decades of Franco's highly-centralised and homogenising regime, adopted a new Constitution in 1978. During the Second Spanish Republic (1931-1938), which was considered by many as a progressive government, Catalonia, the Basque country and Galicia were allowed to enjoy some level of autonomy. This was, however, short-lived. The Franco regime, which came to power in 1936, emphasised unity and condemned all forms of cultural diversity. The regime suppressed all regional political institutions and laws. It also prohibited the use of Catalans and Basques (Euskera) languages and all sorts of symbolic elements (flags, anthems) of the Catalan and Basque identities. See M Guibernau 'Between autonomy and secession: The accommodation of minority nationalism in Catalonia' in A Gagnon *et al* (eds) *The conditions for diversity in multi-national democracies* (2004) 122.

the sanction of the Castilian language as co-officials of the autonomous communities have played an important role in promoting national unity, it also has the adverse effect of further entrenching the disproportionate status the local language holds in its own area. As noted by Agranoff, 'the language issue has created the single most protracted policy conflict' in Spain.[31]

3 Comparing language rights regimes in South Africa and Ethiopia

Against the backdrop of the brief comparative observations provided above, the article proceeds to examine the language rights regime both in South Africa and Ethiopia. It commences to do so by looking at South Africa.

3.1 The South African experience

Section 6 of the South African Constitution regulates the use of language. It determines the official language of the Republic as well as the provinces and municipalities. Like the interim Constitution, section 6 of the Constitution recognises 11 languages as the official languages of the Republic. The conferring of official status on all 11 languages sends the message that all linguistic groups are regarded equal by the South African Constitution. Symbolically, it reinforces the normative guide set by the Preamble that 'South Africa belongs to all who live in it'.[32]

Section 6 of the Constitution departs from its counterpart in the interim Constitution in important ways. First, the stipulation of the interim Constitution which mandated the government to 'create conditions for the equal use and enjoyment' of all official languages is, to some extent, qualified in the 1996 Constitution by the introduction of a preferential treatment clause that applies in relation to some of the official languages. The Constitution, under section 6(2), emphasises 'the historically diminished use and status of the indigenous languages' and mandates the government to 'take practical and positive measures to elevate the status and advance the use of these languages'. The special treatment afforded to previously marginalised indigenous languages is further entrenched in the Constitution as it, under section 6(4)(2), subjects the enjoyment of 'parity of esteem and equitable treatment'

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31 R Agranoff 'Asymmetrical and symmetrical federalism in Spain: An examination of intergovernmental policy' in De Villiers (n 22 above) 73.

32 Another language-related clause of the Constitution, though individualistic in its orientation, is sec 9(3) which states that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... language'. In addition, sec 30 provides that '[e]veryone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'.

of all official languages to 'the state's obligation with regard to indigenous languages'. Obviously, 'equitable treatment' in this context does not mean equal treatment. As Currie aptly notes, it is 'a treatment that is just and fair in the circumstances'.[33] This, at least, means that a language policy has to take into account the structural inequalities of the different languages spoken in the country, entailing a special treatment of some of the official languages.

The special treatment of previously marginalised indigenous languages is even symbolically expressed in the manner in which the 11 official languages are listed in section 6(1). Unlike in the interim Constitution, in which the official languages are listed alphabetically, the 1996 Constitution, under section 6(1), lists the 11 official languages, starting with the language that lacks widespread usage and ending with the one that enjoys extensive usage.[34] In other words, usage informs the listing order of the 11 official languages. This symbolic expression can, in fact, serve as a guide for interpretation. Strydom argued that '[t]he purpose of the structure is to change the order preference in a deliberate attempt to give textual prominence to languages lacking widespread usage'.[35]

Second, the language clause of the 1996 Constitution introduces a plethora of considerations that were not included in the interim Constitution and which must now be taken into account when the different spheres of government decide their official languages.[36] The newly added considerations are usage, practicality, expense, regional circumstances, and balancing the needs and preferences of the population. A third point of departure is that the interim Constitution stipulation, which prohibited the downgrading of rights relating to languages and the status of languages existing at the commencement of the interim Constitution, is omitted. That specific clause was of special concern to the Afrikaner community who feared the marginalisation of their language in post-apartheid South Africa.

3.1.1 For the purposes of government

The use of language for the purposes of government is a major manifestation of the officialisation of a language.[37] According to section 6(3),

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33 I Currie 'Official languages' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (2002) 37.1-37.15.

34 HA Strydom 'Minority rights issues in post-apartheid South Africa' (1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 873-914.

35 Strydom (n 34 above) 898.

36 As above.

37 As aptly argued by Strydom, 'officialising a language is meaningless unless that language is used in all or most of the primary tasks of government — legislative, executive and judicial'; HA Strydom *International standards for the protection of minorities and the South African Constitution* http://www.fwdklerk.org.za/download_docs/02_05_Int_Standard_Minorities_Publ_PDF.pdf (accessed 20 March 2007).

which outlines the use of language for the purposes of government, the national and provincial governments can select any of the official languages for the purposes of their administration. It mandates both national and provincial governments to consider the factors listed in section 6(3) and to adopt at least two official languages for the purposes of government.[38] Their decision to use any of the official languages must be based on 'usage, practicality, expense, regional circumstances and the balances of the needs and preferences of the population as a whole or in the province concerned'.[39] In this regard, local governments are spared from the complexities of these considerations as they are only required to take into account language usage and the preferences of their residents. The subsection injects a minimum condition by enjoining the national government and each provincial government to use at least two official languages.[40] In South Africa, where the different ethnic groups are relatively geographically concentrated, the regional preference to language usage provides ample opportunity to promote regional languages and to facilitate the promotion of self-management of ethnic communities.

The 1996 Constitution also maintained the Pan-South African Language Board which was established by the interim Constitution. As stated in the interim Constitution, the Board is mandated to promote and create conditions for the development and use of all official languages.[41] The list of languages which the Board is mandated to promote and develop is, however, amended to include the Khoi, Nama and San languages, as well as sign languages.[42] In addition, the Board is entrusted with the additional task of promoting and ensuring respect for all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu.[43] This duty of the Board is also extended to languages used for religious purposes in South Africa, including Arabic, Hebrew, Sanskrit and other languages.[44] The 1999 South African Language Board Amendments Act added the responsibility of preparing a dictionary for all 11 official languages.

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38 It is not, however, clear if this variant of territorial model automatically applies to national departments operating in the provinces.

39 Sec 6(3) South African Constitution.

40 According to one interpretation, the minimum number of languages to be used for purposes of government is three and not two: English and Afrikaans (as the spirit of the Constitution precludes that their status be diminished) plus at least one African language because the state must, in terms of sec 6(2), take practical positive measures to elevate the status and advance the use of these languages. M Kriel 'Approaches to multi-lingualism in language planning and identity politics — A critique' http://general.rau.ac.za/sociology/kriel.pdf (accessed 20 March 2006).

41 Sec 6(5) South African Constitution.

42 Sec 6(5)(a) South African Constitution.

43 Secs 6(5)(b)(i) South African Constitution.

44 Sec 6(5)(b)(ii) South African Constitution.

The conferring of official status to all 11 languages is criticised by some as counterproductive. They argue that this policy is not practically realisable and may eventually result in unilingualism; they consider the policy as 'impractical egalitarianism'.[45] This fear is compounded by the fact that the Constitution, as mentioned earlier, subjects the equal treatment and use of all 11 languages to a plethora of practical considerations. Although scholars like Alexander concede to the unavoidability of the use of such 'safety clauses', he strongly warns that clauses which are 'allegedly based on technical and economic grounds, are more usually the perfect loopholes for reducing the principle of equal treatment to mere lip service'.[46]

3.1.2 Assessment

The official recognition of all 11 languages as equal at the national level could be considered as a reflection of a state that emphasises national unity by assuring that all language groups have a place in South Africa, while the regional preferences in language usage represent a recognition of the need to provide for regional languages. Theoretically, the Constitution introduces a variant of the territorial model of language planning at a provincial level. Unlike the traditional territorial model, however, it does not simply grant an official status to the language of the majority of the locality and limit the use of other local languages. It rather allows provincial governments to consider the factors listed in section 6(3) from a provincial context and to adopt at least two official languages for the purposes of provincial government.[47] The province of the Western Cape, which is predominantly inhabited by Afrikaans and Xhosa speakers, has, for example, adopted three official languages: Afrikaans, isiXhosa and English. The decision not to advance one particular language but to, at least, recognise two official languages at the provincial level is an important recognition of intra-provincial diversities. Yet, this same aspect of the provincial language policy portrays a state that discourages the identification of a single language with a particular territory and promotes social cohesion and national unity through its language policy. The language clause of the Constitution has thus the dual role of promoting national unity and accommodating ethnic diversity.

It is, however, important to note that a reading of section 6(3) does not reveal which of the considerations listed therein should be given paramount importance when determining an official language. In the absence of such clear guidance, it all depends on the level of

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45 V Sacks 'Multi-culturalism, constitutionalism and the South African Constitution' (1997) *SA Public Law* 683.

46 N Alexander 'Language and the national question' in W James & G Maharaj (eds) *South Africa: Between unity and diversity* (1998) 16.

47 It is not, however, clear if this variant of territorial model automatically applies to national departments operating in the provinces.

importance that policy makers attach to these determining factors. For those that stress practical and economic considerations, the official multilingualism policy serves no purpose beyond 'a symbolic gesture'. A recommendation by the Institute of Chartered Accountants in June 2000 suggested that Afrikaans be abolished and English becomes the sole medium of communication, training and examination. The Institute's annual expenditure of R600 000 on translation, reproduction and printing is cited as the main reason behind the recommendation.[48] From the perspective of ethnic accommodation, on the other hand, practical considerations should not be used as an excuse to trample on the constitutionally-sanctioned official multi-lingualism. This perspective underemphasises the considerations of 'practicality ... and expense' in the use of official languages. It rather stresses the importance of the constitutionally declared official multi-lingualism and the normative guidelines that declare the enjoyment of 'parity of esteem and equitable treatment of all official languages'.[49]

In practice, government seems to have given considerable weight to practical considerations. English has become the *lingua franca* of government administration to the extent that the policy of multi-lingualism adopted by the Constitution has only come to represent a mere symbolic value. English has become the language for internal and external communication in government departments.[50] Even when members of the public communicate with government in a language other than English, government departments invariably respond in English.[51] Both in the National Assembly and the National Council of Provinces, the dominance of English is clear. Major policy documents are often produced only in English. The situation is no different in the courts. The constitutional promises relating to the parity of 11 languages are not given effect to.[52]

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48 Kriel (n 40 above).

49 LT du Plessis & JL Pretorius 'The structure of the official language clause: A framework for its implementation' (2000) 15 *SA Public Law* 505-526.

50 Very recently, the decision of the Western Cape Provincial Police Department that only English be used for all internal, including radio, communication has faced protest from a group Afrikaans-speaking police and also among the wider Afrikaans-speaking community. Some threatened legal action against the province's police language policy. The authorities said that their aim was to improve communication between the province's different language groups by encouraging the use of English. The new policy was later removed; See News24.Com 'FW: Afrikaans is under threat' http://www.news24.com/News24/South_Africa/News/0,9294,2-7-1442_2060508,00.html (accessed 20 March 2007).

51 Strydom (n 34 above).

52 After examining the use of African languages in courts, Hlophe (2001:94) concluded that '[t]he courts continue to lay too much emphasis on practical considerations. Practical considerations in effect are convenience to the presiding judicial officer! The noble goal of language parity will remain elusive as long as the courts continue to adopt this approach, and the legacy of English and Afrikaans as the sole court language will continue ... In the result, indigenous African languages are undermined.' JM Hlophe 'Official languages and the courts' (2001) 11 *South African Law Journal* 690-696.

The establishment of the Pan-South African Language Board has not, as yet, had any significant impact on ensuring the implementation of the official language clause. On many occasions, the Board, after investigating complaints with regard to the violation of language rights, has found that the language policies and practices of the government and state corporations violate the Constitution. The findings and recommendations of the Board, however, often fall on deaf ears. The government is broadly criticised for failing to give adequate attention to the Board. On one occasion, the Board felt compelled to write an open letter to President Nelson Mandela criticising and expressing its concern about the tendency towards monolingualism at all levels of government.[53]

Generally, the discussion on the use of language for the purposes of government reveals a trend that reinforces the suspicion of the critics of the officialisation of all 11 languages. The officialisation of the 11 languages might send the symbolic message that all groups are regarded equally in the public sphere. However, this symbolic message has not been given practical effect. Despite the multi-lingual reality that characterises South African society and a Constitution that declares official multi-lingualism, monolingualsim seems to be the emerging trend.[54]

3.2 Ethiopia's experience

Article 5 of the Ethiopian Constitution, outlining the basic principle of the language policy, declares that all Ethiopian languages shall enjoy equal state recognition. This is further elaborated by article 39 of the Constitution, which states that every ethnic group in Ethiopia 'has the right to speak, to write, and to develop its own languages; to express, to develop and to promote its culture; to preserve its history'. Based on these constitutional principles, the Constitution declares that Amharic shall be the working language of the federal government while allow-

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53 H Giliomee 'The rise and possible demise of Afrikaans language' *PRASEA Occasional Papers 14* (2003).

54 The practice of monolingualism with its promotion of English as the sole language of communication has caused an outcry from communities, especially the Afrikaner community. In an open letter addressed to President Thabo Mbeki, 24 prominent speakers of Afrikaans complained that 'the South African government's commitment to a philosophy of multi-lingualism and cultural pluralism was paying lip service only, as was the commitment to the promotion of the African languages, including Afrikaans' *Insig* 1999:24. English, they claimed, is what is actually being promoted. The dominance of English is, in fact, conceded by the government. The Minister of Arts, Culture, Science and Technology, when establishing a Language Plan Task Group, noted the increasing tendency towards unilingualism despite the multi-lingual reality that characterises South African society and a Constitution that declares official multi-lingualism. See Department of Arts, Culture, Science and Technology 'Towards a national language plan for South Africa' *Final Report of the Language Plan Task Group* http://www.dacst.gov.za/arts_culture/language/ langplan/contents.htm (1996) (accessed 20 April 2006).

ing the states to determine their respective working language.[55] The federal offices that operate in the states employ Amharic as the language of communication.

From the outset, it is important to note that the Constitution, faced with an ocean of linguistic diversity, has opted not to adopt an official language or languages. It has rather opted for a 'working language'. Symbolically, this is obviously designed to avoid the impression that a particular language is favoured above any other at the symbolic level. The Ethiopian system adopted Amharic as the language of government (federal) business without conveying the message that the adopted language is dominant over others. The success of the system in overcoming the dilemma that it tries to circumvent is, of course, something that can be debated. As we shall see in the following paragraphs, there are sections of society that regard the continued use of Amharic at the federal level as a continuation of their marginalisation and the perpetuation of past policies that subordinated all other languages to Amharic.

The constitutional stipulation that allows each regional state to adopt its working language opens a room for the application of a territorial model of language planning, in which case the working language of each member of the federation would be that of the majority of the area.[56] In practice, five of the nine regional states have endorsed unilingualism. This obviously provides ample room for each ethnic community to develop its language and culture. It also represents recognition of the linguistic identities of the constituent units. An important consequence of this policy is that individuals moving into either of these regions must assimilate. That means that Amharic-speaking citizens moving to an Oromifa-speaking region have to leave behind any prior claim to language protection. As we shall see later, this has created a problem in some areas where an important number of minorities are scattered in the midst of regionally-dominant linguistic groups, especially in major urban areas of some of the member states. It is, however, important to note that the ethnically plural regional states have opted to retain Amharic as their working language. To be precise, three of the four multi-ethnic states (ie the SNNPR, Benishangul and Gambela regional states) have decided to retain Amharic as their working language.

3.2.1 Debate on language policy

This language policy has provoked criticism both from centrifugal and centripetal forces. On the one hand, there are sections of society that regard the adoption of Amharic as the working language of the federal government as 'little more than the continued endorsement of the superior position of the language, and the sections of society associated

[55] Art 5 Ethiopian Constitution.

[56] The state-based federal offices use Amharic for government business.

with it, by the Ethiopian state'.[57] For these sections of society, the policy is a threat to their ethnic self-determination rights.[58] It also undermines the constitutional principle that all languages are equal.[59] The Oromo Federal Democratic Movement, for example, has opposed the sole use of Amharic as the working language of the federal government and calls for the adoption of Oromifa as the working language of the federal government.[60]

The more vocal criticism comes from the proponents of the idea of Ethiopian nationhood who want to use language as a unifying factor. They criticise the position of the Constitution on language as an attempt to create 'the biblical tower of Babel' in Ethiopia. If that was not the intention, they argue, the drafters of the Constitution would have opted to encourage the use of Amharic, ultimately developing it as the national language.[61] According to this argument, Amharic could serve 'as an important instrument for the eventual creation of greater cohesion among Ethiopians in language and in a sense of common national destiny as one people'.[62] The case of India is often invoked to support this line of argument. Haile-Selassie remarks that 'the role of English as a common language among the diverse linguistic groups in India has tremendously assisted in the development of a national consciousness in that country'.[63] The proponents of this view recommend the Russian and Spanish model of language planning, where the Russian and Castilian languages are respectively used along the languages of the constituent units.[64] It is similarly contended that non-Amharas, owing to the decreased amount of formal education they receive as a result of

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57 G Cohen 'Identity and opportunity: The implications of using local languages in the primary education system of the Southern Nations, Nationalities and People's Regional State (SNNPR), Ethiopia' unpublished doctoral thesis, University of London, School of Oriental and African Studies, 2000 111.

58 L Smith 'Language choice, ethnic self-determination and national unity in contemporary Ethiopia' paper presented at a panel discussion on 'Ethnicity, identity and the right to self-determination' 26 May 2007, Addis Ababa, Ethiopia.

59 B Haile-Selassie 'Ethiopia: A precarious ethno-federal constitutional order' unpublished doctoral thesis, University of Wisconsin Law School, 2002.

60 Interview with Bulcha Demekesa, Chairperson of the Oromo Federalist Democratic Movement (OFDM) http://www.oduu.com/news/index.php?news_id=4 (accessed 25 February 2009).

61 M Haile 'The new Ethiopian Constitution: Its impact upon unity, human rights and development' (1996) 20 *Suffolk Trans-National Law* Review 1-84.

62 Minase (n 61 above) 37. Ehrlich similarly argues that the language policy has the effect of 'causing a degree of separation between the various groups'. C Ehrlich 'Ethnicity and constitutional reform: The case of Ethiopia' (1999) 6 *ILSA Journal of International and Comparative Law* 51-73.

63 Haile-Selassie (n 59 above) 213.

64 As above.

the language policy, will effectively lose access to the state apparatus, further disconnecting them from a sense of Ethiopian identity.[65]

3.2.2 Assessment

The position of the Constitution on the use of language marks a clean break with the past during which Amharic enjoyed a superior position throughout the country. This is a major departure from the historical pattern in which 'the distribution of the political goods of communication, recognition and autonomy has been highly skewed, benefiting native Amharic-speakers disproportionately'.[66] Of course, the special place of Amharic in the Ethiopian linguistic landscape has not vanished entirely. It is also true that the retention of Amharic as the language of national communication can appear to some as the continuation of the Amharic hegemony. However, even if one cannot deny the symbolic implications of the retention of Amharic as a federal language, its continued use can hardly be associated with deliberate symbolic dominance. The decision to keep Amharic as the federal working language is no more than a reflection of the position that the language has attained as 'an effective means of national communication'.[67] This is also evident from the fact that it is not labelled as an official but rather as a working language of the federal government.

Using Amharic along with the regional languages as co-official language in all regional states might, as some argue, help to promote the relationship between the different linguistic groups. This view, however, belies the structural imbalance that exists between Amharic and the other languages and the effect that this imbalance may have on the development of the latter. As indicated in previous sections, Amharic, to the exclusion of all other languages, has been the language of government business for decades. This provides Amharic with a unique position in terms of language status, which other languages would be hard-pressed to compete with. Even in states where the speakers of other languages are in the majority, there is no guarantee that a policy of co-official languages will manage to avoid the dominance

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65 Ehrlich (n 62 above). Bloor & Tamrat share the same concern. It is often argued that the present language policy in Ethiopia 'will restrict movement across administrative units, thereby disrupting existing patterns of exchange between different areas and contact between different people'. T Bloor & W Tamrat 'Issues in Ethiopian language policy and education' (1996) 17 *Journal of Multi-lingual and Multi-cultural Development* 321-338. See also Cohen (n 57 above) 112.

66 Smith (n 58 above) 5. As pointed out by Fasil, 'state recognition of every Ethiopian language means that efforts for its development — ie the preservation of literature, the provision for a script, where such does not exist; the documentation of its oral literature; and the further study of each language via grammatical, vocabulary and overall publication and enhanced use of the language — will be done with both state blessing and state support to the extent possible'. F Nahum *Constitution for a nation of nations* (1997) 55.

67 Cohen (n 57 above) 111.

of the Amharic language. Without, at least, some kind of 'normalisation of language policy', the regional language will in all likelihood be relegated to a secondary status.

Moreover, even if one accepts the instrumentality of the Amharic language in bringing different ethnic communities together, it is not clear if it has to be given an official status both at the federal and state level. As noted above, Amharic is now the working language of the federal government in which all government business is conducted. Obviously, any communication between the federal government and a member state or between two member states will be conducted in Amharic. Furthermore, with the view to promote the language as the language of national communication, Amharic is being provided as a subject in almost all primary schools throughout the country. It is also important to note that almost all ethnically plural regional states, with the sole exception of Harari, have opted for Amharic as their working language. Generally, Amharic is still given precedence over all other languages.[68] This means Amharic can still serve as a cohesive force by facilitating communication between and among the different ethnic groups.

It is also not clear if those like Haile-Selassie that criticise the present language system based on the Indian model have really grasped the Indian system. Their criticism rather reflects an incorrect appreciation of the Indian system. It is true that the adoption of English as a language of government business (ie associate additional official language) has facilitated communication between the different ethnic groups in India. Underlying the Indian and, as a matter of fact, some African states' decision to adopt English as their official language, is the very fact that English has a unique neutral status compared to that of other local languages. It is this factor that often motivates the use of English and not other local languages as languages of government business. As Schmied observes, this is specifically true in most decolonised states:[69]

> Ethnic languages are normally not accepted as national languages wherever other groups fear 'tribal dominance' and prefer English, which is 'tribally neutral'. Only tribally neutral *lingue franche* have any chance of taking over certain functions from English as national languages.

The decision made by India not to adopt Hindu as a 'working language' of the national government was underlined by the fact that the adoption of Hindu would portray the dominance of the Hindu-speaking group and the relegation of others to a secondary status. It is also important

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[68] What might even be problematic is the dominance of Amharic in the majority of the ethnically-plural regional states. This, one may argue, works against the constitutional commitment to promote linguistic diversity and especially the use of local languages even though the scheme benefits from the culturally neutral status of Amharic in the context of the regional languages.

[69] J Schmied *English in Africa: An introduction* (1991) 27.

to note that the Indian system recognises 22 state languages. Thus, in addition to allowing the constituent units to adopt their own regional languages, the adoption of the Indian model would have resulted in the 'officialisation' of a 'culturally neutral language'. Amharic, obviously, does not enjoy a neutral status among the different ethnic groups in Ethiopia. Yet, despite this fact, a decision has been made to maintain Amharic as the federal working language. Furthermore, as indicated earlier, it is regarded as the language of national communication and, as a result, it is being taught as a subject in primary schools in non-Amharic speaking parts of the country. Generally, if the suggestion for the Ethiopian system is to emulate the Indian model, one can reasonably argue that the present system provides more than what the Indian system has to offer.

Finally, we turn to the argument that non-Amharic speakers will lose access to the state apparatus as a result of the language policy. It is not at all clear how the language policy will have the effect of compromising the capacity of individuals from a non-Amharic-speaking group to access the state, thereby continuing their historical marginalisation. In fact, the reverse seems to be true in present-day Ethiopia. Regional state government as well as administrative units within each regional state are run and staffed by members of the language group that is dominant in the regional or sub-regional government unit. The new dispensation has opened more opportunities for employment 'to sons of the soil'. As we shall see later, this is also the case at the federal level. More than ever, one can easily observe the appointment of individuals from extremely diverse linguistic background in the different institutions of the national government, including the cabinet. In fact, fluency in Amharic does not seem to be an obstacle in assuming higher offices of the federal government. It is not uncommon to come across Ministers for whom Amharic obviously is clearly not their mother tongue.

4 Towards an inclusive language rights regime

A language rights regime that operates within the context of a multi-ethnic federation should represent a recognition of the linguistic identities of the constituent units. This entails the framing of the language rights regime as a concrete expression of the federalist principle and attempting to achieve a delicate balance between unity and diversity.[70] It involves the adoption of a language policy that enables cultural communities to promote their language and cultural identity while at the same time promoting inter-ethnic solidarity.[71] In this regard, the recognition of all languages as equal is an imperative element of any state that seeks to recognise ethnic diversity. Beyond that, however,

[70] Coulombe (n 1 above) 242.

[71] Balmer (n 12 above) 447.

there is no definite answer on determining the official language(s) of the federal as well as subnational governments.

In terms of the federal language, the options are either to promote particular language(s) or, as in the case of South Africa, regard all languages spoken by the different ethnic groups as official languages of the country. The South African option is obviously viable in a country with few linguistic groups. As it is evident from the South African experience, a country with more than at least ten ethnic groups cannot, for example, expect to practically realise the usage of all languages in all or most business of the federal government. Such kind of policy, as again proved by the experience of South Africa, is an 'impractical egalitarianism'.[72] Despite the multilingual reality that characterises South African society and a Constitution that declares official multilingualism, monolingualism is the emerging trend. This shows that the South African approach will result, more often than not, in a situation where a particular language becomes the 'unofficial official language' of the state. In that case, a mere recognition of all the languages spoken in the country as official languages will only have a symbolic value. In addition, the policy is bound to create discontent among some ethnic groups unless the 'unofficially official language' is a culturally neutral language, as English is for most South Africans[73] and decolonised states. This is also the only situation where a state can adopt a particular language as official language without provoking a hostile reaction from other ethnic groups.

Adopting a national language remains, however, a challenge in states such as Ethiopia that do not have the benefit of a culturally neutral language. One option in this context is to select a particular language, which in most cases would be the historically dominant language, as the language of government business without bestowing it with the status of an official language. The Ethiopian approach which recognises Amharic as the working language represents this option. This approach seemingly contrasts with the South African model that recognises all languages as official languages. Like the South African model, however, it is underlined by the same principle that recognises all linguistic groups as equal. The difference lies in the way the two systems give expression to this same principle.

Under the working language approach, the selected language will become the working languages of the federal government in which all tasks of government are conducted. Of course, as in the case of the use of Amharic in Ethiopia, the symbolic implication of adopting

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72 Sacks (n 45 above) 683.

73 This, of course, is not true for Afrikaners for whom issues relating to language historically constitute a central place in their resistance against the British cultural hegemony. This partly explains why the Afrikaners, unlike the other ethnic groups in South Africa, feel so strongly about the dominance of English in today's South Africa.

a particular language or retaining a historically dominant language as the working language of the federal government cannot be easily disregarded. The solution lies in convincing the different ethnic groups that the particular language, as the title suggests, is adopted not to reflect the hegemony of the speakers of that language, but because of the special position that the language has attained as an effective means of national communication. This, however, only becomes practicable when the state demonstrates its commitment to the equality of all languages by adopting some form of territorial model of language planning, expressing regional preferences in language usage.

Unless in a bi-ethnic state where the individual model, which allows citizens to use their language in every part of the country, can serve the same purpose, the territorial approach to language, whereby each region adopts its language(s), is the language planning model that seems to provide effective institutional reality to the act of recognition. Under this model, the subnational units are allowed to adopt regional language(s). This does not necessarily mean promoting unilingualism. As is the case in South Africa, sub-national states that are inhabited by more than one ethnic group can, to the extent possible, recognise intra-substate linguistic diversities by recognising more than one language as working languages of the sub-national government. This would not only represent recognition of intra-substate diversities, but also portray a state that promotes social cohesion and national unity by avoiding the association of a particular territory with a single language. This option may not, however, be appropriate in a situation where a sub-national state is composed of, for example, not less than five ethnic groups. As the experience of ethnically plural sub-national units that adopted Amharic as their working language in Ethiopia suggests, adopting a language that is culturally neutral in the context of the relevant sub-national state is often the only way out. Yet, the system can be used to allow each sub-national state to use its institutional and territorial structure to reflect its linguistic diversity.

Related to this is whether sub-national units should adopt the national official/working language as co-official at the sub-national level. Of course, adopting the national language as co-official promotes social cohesion, especially in countries where there is extensive movement of citizens across internal borders. However, subscribing to this view does not necessarily require the co-officialisation of the national language. The idea of using language as a method of social cohesion can be promoted, for example, by ensuring that children, as in the case of Ethiopia, learn the federal language as a subject in their primary education. The argument for co-officialisation of the federal language at the regional level can have currency only in a situation like in Ethiopia where there are a large number of geographically dispersed ethnic migrants, especially in urban areas, who would be disadvantaged when government business is conducted in the language of the regionally empowered group.

The co-official language policy is not, however, without problems. The problem with this policy is that it has the tendency to promote the hegemonic status that a historically privileged language group enjoys. This is clearly the case in Ethiopia where the adoption of Amharic as co-official language at the regional level would have the effect of maintaining the historically dominant position of that language with the regional language in all likelihood occupying a disproportionate place. This is also supported by the experience of Quebec in Canada where the co-official policy perpetuated the dominant position of English, necessitating the province to embark on what is called 'the language normalisation process'. In a country where the designated federal language is not culturally neutral and where the nationally designated language is a historically dominant language, the co-official policy at the regional level is thus likely to perpetuate the dominant position that the latter enjoys in a state. Without state intervention, the historically dominant language will continue to remain as the majority language status relegating the regional language, albeit numerically dominant, to a secondary level.

In a sub-national state where there are large numbers of ethnic migrants, however, the adoption of the co-official policy seems unavoidable if the system is to accommodate ethnic diversity. The dangers that the co-official policy might pose on the status of the regional language can be mitigated by allowing the sub-national state to adopt what is called 'the language normalisation processes'. As the experience of Quebec in Canada shows, the basic aim of these processes is to restore and maintain the majority status that local languages should assume in their localities. As the experience of Ethiopia suggests, in a country like Ethiopia where there are a large number of ethnic migrants, the absence of a co-official policy easily causes strain on inter-ethnic relationships and runs the risk of alienating particular ethnic groups.

In conclusion, it is true that the success of a federal arrangement in accommodating ethnic diversity cannot be measured solely on the basis of its language rights regime. It is, however, generally agreed that a well-designed language policy goes a long way in contributing either to the effective reconciliation of unity and diversity or to the eventual polarisation of cultural communities and further disintegration of the state.

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The African regional human rights system and HIV-related human experimentation: Implications of *Zimbabwe Human Rights NGO Forum v Zimbabwe*

*Annelize Nienaber**
Associate Professor, Faculty of Law, University of Pretoria, South Africa

Summary

The article investigates the protection by the African regional human rights system of participants in HIV-related human experimentation. It assesses the scope of the protection afforded by the system, and draws upon the jurisprudence of the African Commission on Human and Peoples' Rights in the communication of Zimbabwe Human Rights NGO Forum v Zimbabwe *in order to argue that a failure on the part of African states to act to prevent the abuse of research participants will render those states liable for a finding by the African Commission of a violation of their obligations under regional human rights law.*

1 Introduction

The utility of international and domestic human rights law in the protection of clinical research participants in Africa has been argued elsewhere.[1] Instead of employing clinical research ethics or bioethics

* BA (Hons) (Witwatersrand), LLB LLM LLD (Pretoria); annelize.nienaber@up.ac.za

1 See eg A Nienaber 'The utility of international human rights law on informed consent in the protection of clinical research participants in Africa: "The road less travelled"' (2007) 2 *SA Public Law* 422 (Nienaber (A)); A Nienaber 'The protection of participants in clinical research in Africa: Does domestic human rights law have a role to play?' (2008) 8 *African Human Rights Law Journal* 138 (Nienaber (B)); and AG Nienaber 'Ethics and human rights in HIV-related clinical trials in Africa with specific reference to informed consent in preventative HIV vaccine efficacy trials in South Africa' unpublished LLD thesis, University of Pretoria, 2007 (Nienaber (C)).

to protect the interests of participants in clinical research in the region, it is argued that participants in such research may benefit from the protection afforded them by human rights law.[2] In order to advance this argument, this article draws upon the decision of the African Commission on Human and Peoples' Rights (African Commission) in the communication of *Zimbabwe Human Rights NGO Forum v Zimbabwe*[3] to argue that states which do not put in place measures which protect participants in HIV-related experimentation conducted in Africa from abuse, are in breach of their obligations under the African regional human rights system.

The article begins with an examination of the protection offered by the regional human rights system to participants in HIV-related experimentation in Africa, providing an overview of the protection afforded by the different treaties. In the next two sections, the African Commission's jurisprudence in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe* is explored. The article concludes with a few recommendations regarding the protection of HIV-related clinical research participants in Africa.

It is important to note that, as the article investigates the protection of clinical research participants under the regional human rights system, domestic human rights law is not touched upon here.[4] As well, specific mention is made of *HIV-related* clinical research; however, the observations are true for any type of clinical research conducted in Africa.

2 Specific provisions in African regional human rights law relevant to HIV-related human experimentation

In contrast to non-binding ethical guidelines that are usually utilised in the protection of clinical research participants, human rights treaties are able to provide a legal framework for defining state obligations in

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2 Traditionally, international and domestic clinical research ethics or bioethics documents are relied upon to protect the interests of participants in clinical research. One such document is the Declaration of Helsinki, issued by the World Medical Association (WMA), and is an international code of ethics overseeing biomedical research involving human participants. It was adopted by the WMA's 18th Assembly, held in Helsinki, Finland, in 1964, and has been revised several times, most recently in October 2000. Clinical research ethics or bioethics is criticised for not adequately protecting the interests of research participants — they are non-binding *guidelines* which cannot be enforced effectively other than by professional sanction and a refusal to publish research which is considered to be in violation of the guidelines — see the sources quoted in n 1 above.

3 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).

4 See Nienaber (B) (n 1 above) for an examination of the role of domestic human rights law in the protection of participants in human experimentation in Africa.

protecting human rights and they may serve as a resource for implementing human rights protection for research participants. International human rights law, in the form of binding treaties and conventions, provides participants in HIV-related human experimentation in Africa with recourse to national and international courts and tribunals.

The section below focuses on specific provisions in African regional human rights instruments that can be of use in this regard. Regional instruments such as the African Charter on Human and Peoples' Rights (African Charter),[5] the African Charter on the Rights and Welfare of the Child (African Children's Charter)[6] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[7] are singled out for attention.[8]

Provisions which, primarily, have implications for the position of HIV-related clinical research participants are examined, rather than those that deal with health care or access to health only. The same provisions tend to be included in each of the regional documents discussed below, for example, the right to dignity which is included in various forms in each of the documents. So, to avoid repetition, the discussion will focus on different rights in each document.

2.1 The African Charter on Human and Peoples' Rights

At the outset it is acknowledged that the African Charter was drafted before the first cases of HIV infection were reported, and before the world became aware of an HIV epidemic. It is only in later human rights instruments, such as the African Women's Protocol, that specific reference is made to HIV/AIDS.[9]

The African Charter recognises a number of rights that are relevant in the context of responding to the needs of participants in HIV-related clinical research in Africa. For example, the African Charter recognises the right to respect for life and integrity of the person[10] and the right to human dignity.[11]

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5 OAU Doc OAU/CAB/LEG/67/3/Rev 5.

6 OAU Doc CAB/LEG/153/Rev 2.

7 AHG/Res.240 (XXXI).

8 The Universal or UN system is not discussed here. In this regard, see Nienaber (A) (n 1 above).

9 The [United Nations] Convention on the Rights of the Child (CRC), adopted in November 1989, years after the first HIV cases were reported, makes no mention of HIV/AIDS. See generally in this regard S Gumedze 'HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 181.

10 Art 4 African Charter.

11 Art 5 African Charter.

All clinical research touches upon the participants' right to life and their right to physical integrity. Clinical research tests unproven methods and experimental medicines, so, at worst, participants' lives are threatened and, at best, their physical integrity is put at risk. There are numerous examples in the literature of clinical research participants who have lost their lives, and also of participants who were seriously injured.[12] All the effects of new medications and treatments are not known at the time they are tested upon humans and they thus pose a potential threat.

Participants' right to dignity may be infringed during the clinical research process. Again, there are many examples in the literature of how participants in research were degraded and dehumanised. The experimentation undertaken by doctors during World War II under National Socialism is an obvious example.[13] Any research design which treats participants as mere objects instead of as autonomous human beings, by definition, violates their right to dignity. Even though informed consent to research participation is not mentioned explicitly here, articles 4 and 5 of the African Charter can be used in support of the notion that HIV-related clinical research participants give free and informed consent to research participation. Research without such consent violates not only the dignity, but also the integrity and security of the person.

However, it is not only informed consent that is at issue. Research which harms the person or which is exploitative can also be regarded as violating the integrity and security of the person. It is submitted that research, such as where Pfizer treated children for spinal meningitis in Kano, Nigeria, with the experimental drug Trovan, violates article 5 of the African Charter.[14] At the time the drug was being tested in Nigeria, Trovan had never been tested on children, and earlier that year it had been withdrawn from US markets due to its serious side effects.[15]

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12 See eg the sources referred to in n 14 and n 51 below.

13 No person is treated with dignity if that person is not respected as an individual capable of making his or her own decisions. The right to dignity, therefore, implies autonomy, and the right not to be subjected to clinical research without having given informed consent.

14 For a discussion of the events in Kano, see eg WHO (19 February 1996) Disease Outbreak News http://www.who.int/disease-outbreak-news/n1996/feb/n19feb1996c.html (accessed 31 January 2008); DM Carr 'Pfizer's Trovan trials in Nigeria' (2003) 35 *Case Western Reserve Journal of International Law* 15; J Ford & J Tomossy 'Clinical trials in developing countries: The claimant's challenge' (2004) 1 *Law, Social Justice and Global Development* 4; and see S Bosely 'New drug "illegally tested on children": Pfizer accused of irregularities during clinical trial in Nigeria' *The Guardian* 17 January 2001 19. Parents of the children participating complained that they did not know that the drug that was being given to their children was experimental.

15 See sources referred to in n 14 above.

No matter the urgency, only existing, proven medication should have been used.[16]

Further, the African Charter prohibits discrimination,[17] and guarantees equal protection and equality before the law.[18] Article 2 states:[19]

> Every individual shall be entitled to the enjoyment of the rights and freedoms in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

Research initiatives contrary to these guarantees are prohibited. An example would be instances where research brings a significant benefit, but which excludes a certain class or group of people. Research testing a promising new anti-retroviral, but which excludes people who do not belong to the dominant ethnic group in a specific country, is therefore prohibited.

Article 16 provides that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'.[20] Also, state parties are to 'take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.[21] HIV-related human experimentation, whether state-sponsored or not, is a measure to protect the health of Africa's people and, thus, fulfils the duty assigned by this article. However, it is submitted that research specifically aimed at protecting the health of that particular group of people, and not research which is aimed at meeting the health needs of another country or continent, alone meets the requirement of this article.

The African Commission is responsible for monitoring the implementation of the African Charter by state parties.[22] It must promote

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16 The control group was given the antibiotic Ceftriaxone, a drug already approved for use with children in the United States, and which drug was the existing proven treatment for the illness. During a clinical trial of this nature, the experimental drug (Trovan) is compared to the existing treatment (Ceftriaxone) to see whether the experimental drug is as effective or more effective in treating the disease. However, because they were short-staffed, Pfizer researchers injected Ceftriaxone into the children's buttocks, rather than administering it intravenously. More importantly, they administered only one-third of the regular dose of Ceftriaxone to the children; see F Kelleher 'The pharmaceutical industry's responsibility for protecting human subjects of clinical trials in developing nations' (2004) 38 *Columbia Journal of Law and Social Problems* 68 fn 1.

17 Art 2 African Charter.

18 Art 3 African Charter.

19 Art 2 African Charter.

20 Art 16(1) African Charter.

21 Art 16(2) African Charter.

22 According to art 45(4) of the African Charter, it must also perform any other tasks 'which may be entrusted to it by the Assembly of Heads of State and Government'. See also Gumedze (n 9 above).

human (and peoples') rights in Africa,[23] it must protect these rights,[24] and it must interpret the provisions of the African Charter.[25] As far as its interpretive and protective mandates are concerned, the African Commission has given substance to the right to health in the African Charter by stipulating that the enjoyment of the human right to health 'is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other fundamental human rights and freedoms'.[26] The African Commission considers the right to health to 'include the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind'. [27]

On the impact of the prevailing conditions in Africa on the realisation of the right to health, the Commission states that it is aware that[28]

> [m]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.

The African Commission proceeds to 'read into' article 16 the[29]

> obligation on part of states party to the African Charter to *take concrete and targeted steps, while taking full advantage of its available resources*, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.

HIV-related clinical trials can be viewed as an example of 'concrete and targeted steps' that take 'full advantage of ... available resources'. The results of such trials, if used to improve the condition of the health of Africa's people and if they get access to the products of such research, would advance the right to health in Africa. Conversely, if Africa's people do not get access to the results of such research, the research will be regarded as exploitative.[30]

The African Commission has adopted a number of resolutions and principles of relevance to clinical research in Africa.[31] The 2003 Principles and Guidelines on the Right to a fair Trial and Legal Assistance in

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23 Arts 30 & 45(1) African Charter.

24 Arts 30 & 45(2) African Charter; see paras 3 & 4 below.

25 Art 45(3) African Charter.

26 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 80. The case was brought in regard to the legal and material conditions of detention in a Gambian mental health institution.

27 As above.

28 Para 84.

29 Para 84 (my emphasis).

30 See R Macklin *Double standards in medical research in developing countries* (2004).

31 This is an example of 'soft' law.

Africa[32] (Principles and Guidelines) in paragraph M.7(f) stipulate that 'no detained person shall, even with his or her consent, be subjected to any medical or scientific experimentation which could be detrimental to his or her health'.

Detainees and prisoners constitute easy prey for unscrupulous researchers. Usually an easily accessible population, in an environment where outside factors influencing research results can be controlled, detainees and prisoners have been approached to take part in 'harmless' research, without cognisance of the fact that, in such a setting their consent is probably not 'free' and 'informed'.

The qualifying words in the paragraph are significant: 'even with his or her consent'. The consent of a detained person is not valid: The guidelines protect against instances where consent is obtained by means of coercion and other measures; insisting, in these circumstances, that research is illegal.

The phrase 'which could be detrimental to his or her health' implies that not *all* research is prohibited, only that which could be detrimental to the health of the detainee or prisoner. The drafters of the Principles and Guidelines might have had in mind a measure akin to the 'minimal harm' or 'negligible harm' principle that is often seen in ethical guidelines.

It is submitted that there are a number of problems associated with the phrase 'which could be detrimental to his or her health'. Who is to judge what is detrimental to the prisoner or detainee's health — the prison authorities; the detainee herself; the researcher or research sponsor? The damage a person's health sustains may manifest only after several years. All side effects of a specific drug are not known at the beginning of the research. Research which appears harmless may have unexpected consequences later. All research endeavours carry this risk. However, where there is doubt about the research participant's informed consent as a result of his or her incarceration or detention, no research that has the potential to harm the participant should be allowed.

It is submitted that the drafters of the Principles and Guidelines should not have inserted the qualification, and the guideline should read, 'no detained person shall, even with his or her consent, be subjected to any medical or scientific experimentation'.

2.2 African Union resolutions and declarations

Apart from the provisions of the African Charter and the resolutions by the African Commission, the political organs of the Organisation of African Union (OAU), later the African Union (AU), have adopted

[32] Adopted by the African Commission following the appointment of the Working Group on the Right to a Fair Trial *per* its 1999 Resolution on the Right to a Fair Trial and Legal Assistance. Reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 288.

resolutions relevant to clinical research in Africa. For example, the Grand Bay (Mauritius) Declaration[33] reflects upon the vulnerability and human rights of people living with HIV/AIDS:[34]

> The Conference notes that the rights of people with disability and people living with HIV/AIDS, in particular women and children, are not always observed and urges all African states to work towards ensuring the full respect of these rights.

These reflections require that HIV-related clinical research sponsors have mechanisms in place which ensure the protection of vulnerable research participants, such as those living with HIV/AIDS.[35]

In April 2001, the Heads of State and Government held a special summit to deal with issues specifically related to the challenges of HIV/AIDS, tuberculosis, malaria and other diseases. The meeting adopted the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (Abuja Declaration),[36] and the Abuja Framework for Action for the Fight against HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (Abuja Framework). The latter has as its aim the implementation of the Abuja Declaration.

The Abuja Declaration acknowledges that 'stigma, silence, denial and discrimination against people living with HIV/AIDS increase the impact of the epidemic' and that they constitute 'a major barrier to an effective response to it'.[37] Consequently, the Abuja Framework expresses strategies and activities by means of which states may implement the contents of the Abuja Declaration. Amongst these are relevant legislation to protect the rights of people infected and affected by HIV/AIDS and tuberculosis, strategies to strengthen existing legislation aimed at addressing human rights violations and gender inequalities and to promote a respect for the rights of infected and affected people and assistance to women in taking appropriate decisions to protect themselves against HIV infection.

The Assembly of Heads of State and Government of the OAU at its 32nd ordinary session in Yaounde, Cameroon, from 8 to 10 July 1996, adopted the Resolution on Bioethics (African Bioethics Resolution).[38] The African Bioethics Resolution acknowledges that[39]

> scientific progress benefits the individual human being and is achieved under condition of respect for fundamental human rights, and *stressing* the need for international co-operation in order to enable humanity as a whole

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33 Issued by the First OAU Ministerial Conference on Human Rights, which held a meeting from 12–16 April 1999 in Grand Bay, Mauritius.

34 Para 7 Grand Bay (Mauritius) Declaration.

35 See paras 3 & 4 below.

36 http:/www.onusida-acoc.org/Eng/Abuja%20declaration.htm (accessed 31 January 2008).

37 Para 12 Abuja Declaration.

38 AHG/Res 254 (XXXII) 1996.

39 Para 1 African Bioethics Resolution.

> to benefit from the achievements of the science of life and obviate any use thereof for purposes other than the promotion of humanity's well-being ...

The African Bioethics Resolution endorses the priority placed upon informed consent by the International Covenant on Civil and Political Rights (ICCPR),[40] and stresses the 'obligation to obtain the free and enlightened consent' to research, and 'the definition of rules to protect vulnerable populations, the incapacitated, persons deprived of freedom as well as the sick under emergency conditions'.[41] The African Bioethics Resolution further reaffirms the right to benefit from scientific progress and the application of such progress without discrimination,[42] and the right of everyone, especially children, to protection 'from all forms of trade and exploitation'.[43]

The African Bioethics Resolution pledges to take legislative and other measures to give effect to the Resolution, as well as setting up consultative bodies at all levels to promote the exchange of experience.[44]

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

Article 43(1) of the African Children's Charter compels state parties to submit to the African Committee of Experts on the Rights and Welfare of the Child, through the Chairperson of the Commission of the AU, 'reports on the measures they have adopted to give effect to the provisions of the Children's Charter, as well as the progress made in the enjoyment of the rights guaranteed in the African Children's Charter'. According to the Guidelines for Initial Reports of State Parties under the African Children's Charter, states should indicate the measures that are in place to ensure the safety of children in need of special protection, such as in the case of AIDS orphans.[45]

Article 14 of the African Children's Charter guarantees to every child the 'right to enjoy the best attainable state of physical, mental and spiritual health'.[46] State parties to the African Children's Charter 'shall undertake to pursue the full implementation of this right'.[47] In particular, they shall take measures which include[48] the reduction of the infant and child mortality rate; the provisioning of necessary medical assistance and health care to all children with emphasis on the development of primary health care; and measures ensuring the provision

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40 Para 2 African Bioethics Resolution.

41 Para 3 African Bioethics Resolution.

42 As above.

43 As above.

44 As above.

45 Para 21(g) Guidelines for Initial Reports of State Parties under the African Charter on Rights and Welfare of the Child.

46 Art 14(1) African Children's Charter.

47 As above.

48 Arts 14(2)(a)–(j) African Children's Charter.

of adequate nutrition and safe drinking water, to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology and to ensure appropriate health care for expectant and nursing mothers.[49]

Article 15 of the African Children's Charter deals with child labour. Although participation in HIV-related clinical research cannot be seen as 'labour', the phrasing of article 15 compels state parties to protect children from 'all forms of economic exploitation'.[50] The participation of children in clinical research which is exploitative is thus strictly prohibited by the African Children's Charter. Examples of exploitative treatment of children in clinical research are easily found in the literature. These examples include experiments such as those performed at the Willowbrook State School,[51] the Trovan experiments on children in Nigeria,[52] the testing of medications which will not eventually be available to those children on whom it was tested, the testing of HIV medication which, due to its toxicity, is not suitable for use in children, and the exploitation of children through payment for participation in clinical research in poverty-stricken communities where participation in such research is the only means of income for those children and their families. According to article 15 of the African Children's Charter, state parties are to 'take all appropriate legislative and administrative measures to ensure the full implementation of this article'.[53]

Article 16 deals with the protection of children against child abuse and torture. Sub-section 1 reads as follows:

> State parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental

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49 They have the further task of ensuring the development of preventive health care and family life education and provision of service, the integration of basic health service programmes in national development plans; that all sectors of the society, in particular parents, children, community leaders and community workers, are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents; the meaningful participation of non-governmental organisations, local communities and the beneficiary population in the planning and management of basic service programmes for children; and to support, through technical and financial means, the mobilisation of local community resources in the development of primary health care for children.

50 Art 14(1) African Children's Charter.

51 In the 1950s, an experiment at Willowbrook State School, in which researchers injected the Hepatitis B virus into mentally-retarded children in order to study the natural progression of the disease, aroused public concern. Participants were fed extracts from the stools of infected children, and participants who were 'enrolled' in the trial at an earlier point in time, and who were already ill, received injections of 'purified' virus. The parents of children were only able to have their children admitted to hospital upon their agreeing to the children being part of the research. In this regard, see RJ Levine *Ethics and regulation of clinical research* (1986) 70–72.

52 See para 2.1 above & n 14 above.

53 Art 15(2).

> injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

HIV-related clinical research which exploits children in the ways described above may be considered within the ambit of the prohibition in this sub-section. The duty of state parties to *protect* children, imposed by sub-section 1, is highlighted later in the article.[54]

Harmful social and cultural practices are prohibited in article 21.[55] The relevance of this sub-section to HIV-related research becomes clear when one considers that much research in Africa necessarily takes place within a context in which these practices are present. For example, practices such as female genital mutilation have implications for the transmission of HIV, as do traditional practices which support girl children's and women's subordinate role in African society. Research which supports or turns a blind eye to the existence of these practices is necessarily in violation of the African Children's Charter. HIV-related clinical research cannot be complicit in the perpetration of practices that are harmful.

The African Children's Charter prescribes a standard against which children's participation in HIV-related clinical research can be measured. Article 4(1) reads as follows: '[I]n all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.' HIV-related clinical research which does not have the best interests of the child as its aim is thus prohibited. As in the case of CRC, the singular noun, 'child', indicates that the best interests of the specific child taking part in the research is to be considered, and not the interests of children generally.[56] Therefore, HIV-related research which aims to benefit children generally, but which is of no direct benefit to the specific child, is contrary to the measure laid down in article 4(1). For example, so-called 'non-thera-

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54 See paras 3 & 4 below.

55 The article reads: '1. State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, 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. 2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.'

56 Viljoen points out that the use of '*the* primary consideration' (instead of '*a* primary consideration', as used in CRC) sets a higher level of protection for children under the African Children's Charter than under CRC. See F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18.

peutic'[57] research, such as research to find a vaccine against HIV, does not benefit the individual child directly, and is therefore prohibited by the African Children's Charter.

The African Children's Charter also ascribes responsibilities that children have in relation to their family and society. The child is to 'serve his national community by placing his physical and intellectual abilities at its service'.[58] Children's participation in HIV-related research, if it is not exploitative and is in the best interests of the child, can be viewed as sanctioned by this sub-section of the African Children's Charter. In this view, children are part of a community which may benefit from their participation.

The Tunis Declaration on AIDS and the Child was adopted by the OAU at the Assembly of Heads of State and Government in Tunisia in 1994 (Tunis Declaration).[59] The Declaration embodies Africa's commitment to elaborate 'a national policy framework to guide and support appropriate responses to the needs of [HIV/AIDS] affected children covering social, legal, ethical, medical and human rights issues'.[60] Thus far little has been done to give effect to the Tunis Declaration.[61]

2.4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Article 2 of the African Women's Protocol deals with the elimination of discrimination against women. It prohibits 'all forms of discrimination against women'.[62] State parties must take measures which modify 'social and cultural patterns of conduct of women and men', 'achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men'.[63]

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57 'Non-therapeutic' research aims to benefit people other than the research participant. Such research is aimed at the acquisition of knowledge, and as such may be of no immediate benefit to the participant. 'Therapeutic research' is undertaken to benefit the individual research participant or patient by treating or curing their condition. Therapeutic HIV-related research, eg, is research to develop an effective anti-retroviral agent against HIV infection. Importantly, participants in therapeutic HIV-related research will be living with HIV/AIDS, whereas participants in non-therapeutic HIV-related research will be HIV negative.

58 Art 31(b).

59 AHG/Decl 1 (XXX) 1994.

60 Para 2(1) Tunis Declaration.

61 As evidenced by the fact that at the 32nd ordinary session of the Assembly of Heads of State and Government in 1996, the Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa was adopted. Governments were urged to implement resolutions and declarations of the OAU, especially the Tunis Declaration.

62 Art 2(1) African Women's Protocol.

63 Art 2(2) African Women's Protocol.

HIV-related clinical research that collaborates with harmful cultural practices or stereotyped roles for women is consequently prohibited. For example, in many African cultures, because of the inferior position society assigns to women, it is expected that the researcher first asks 'permission' for a woman's participation in research from the woman's father or husband, sometimes even before the woman herself is approached. Researchers react in two ways to this practice. Firstly, they may follow the cultural norm and approach the woman's father or husband, but make sure that the woman herself also consents. In doing this, they reinforce harmful practices and stereotypical roles of women: They 'buy into' the idea that women's consent of itself is not sufficient, and that someone in a role of authority over her should consent on her behalf as well. Secondly, they may exclude women altogether from their research design because they do not want to enforce such negative cultural practices. Consequently, women are excluded from the benefits attaching to research participation, and are discriminated against indirectly as any knowledge gained from the research will not be applicable to women. Worse still, the results and knowledge gained from the research will be applied to women *despite* the fact that they did not take part in the research, without taking into account the specific differences of the female body.

The dilemma sketched above presents a very difficult choice for researchers, and there is no easy answer. The first alternative presented is marginally better than the second, in the sense that, at least, women are not excluded from the possible benefits of the research. However, research which reinforces society's stereotypical views of women should never be condoned.

Significantly, the African Women's Protocol refers to women's informed consent to participation in clinical research in article 4 which deals with the rights to life, integrity and security of the person. Article 4(2) provides that '[s]tates parties shall take appropriate and effective measures to ... (h) prohibit all medical or scientific experiments on women without their informed consent'. Apart from article 7 of ICCPR, the African Women's Protocol is the only human rights instrument which contains a provision which mentions informed consent explicitly, and which is applicable to the situation of HIV-related research participants in Africa.

The consent aspect of article 4(2) has not been litigated. The African Women's Protocol has not been in effect for long,[64] and it is exceptional to use a human rights instrument to litigate what is widely considered to be an ethical guideline. The fact that so few human rights treaties mention informed consent specifically is symptomatic of a world view

[64] The African Women's Protocol came into effect in November 2005.

which regards informed consent as falling within the realm of bioethics, rather than in the realm of human rights.[65]

Of special importance to the present study are sections in the African Women's Protocol which deal with women's health and reproductive rights. Under section 14 of the Women's Protocol, state parties undertake to ensure that the right to sexual and reproductive health of women is respected and promoted, specifically their right to have 'self-protection and to be protected against sexually-transmitted infections, including HIV/AIDS'.[66]

The implications of this provision of the Women's Protocol for HIV-related clinical research in Africa are clear. The assurances that women are protected against sexually-transmitted diseases, such as HIV, during the duration of the research and, by the nature of the research design, are not exposed to these diseases, are requirements in terms of the Women's Protocol. Women need to be educated, not only by government but also by researchers, about the possibility of contracting sexually-transmitted diseases, including HIV/AIDS, and also about the ways in which they may protect themselves against such diseases. It may also be necessary for research sponsors to provide medication and other treatment for such diseases during the research endeavour.

Women have the right to be informed on their 'health status and the health status of [their] partner, particularly if infected with sexually-transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices'.[67] If a researcher, or a member of the research team, becomes aware of the health status, especially the HIV status, of a woman's sexual partner, the African Women's Protocol places an obligation upon the researcher, 'in accordance with internationally-recognised standards and best practices', to inform her of the health status of the partner, failing which they are in violation of the Women's Protocol. With this provision the drafters of the Women's Protocol make a laudable effort to protect women's health.

However, the matter is not as straightforward as it appears. The situation may arise that the researcher becomes aware of the woman's HIV-positive status. The African Women's Protocol does not place a similar obligation upon the research team to inform her sexual partner (nor can it really be said that such a duty is implied by the Women's Protocol). One could argue that, in some societies, women may be stigmatised, ostracised or even killed if their status becomes known and, therefore, there should be no such obligation to inform her partner. But that begs the question of whether not only women's, but also

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65 A violation of the requirement of informed consent for participation in clinical research is thus seen as a violation of ethical guidelines, instead of a violation of a human rights treaty.

66 Art 14(1)(d) African Women's Protocol.

67 Art 14(1)(e) African Women's Protocol.

men's health surely should be protected, especially in the case of an epidemic as devastating as HIV/AIDS. It is submitted that the impact of this provision of the Women's Protocol, if adhered to by researchers, could have a disproportionately negative impact on men. It is further submitted that, unless there are clear prohibitive indications, such as that it endangers the woman's life or exposes her to harm, researchers should inform a woman's sexual partner of her status. Women should also be informed at the beginning of the research endeavour that the possibility exists that their partners will be told if it becomes clear that they are HIV positive.

Further, state parties must take appropriate measures to 'provide adequate, affordable and accessible health services ...'[68] and 'establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding'.[69] This obligation relates to the duty of state parties to human rights treaties to *fulfil* the human rights of the inhabitants of the country. HIV-related research which assists in this task is in support of the fulfilment of that duty.

Having established in this section that the African regional system provides sufficient substantive sections which may be employed in the protection of participants in HIV-related clinical research in Africa, the next two sections use the jurisprudence of the African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* to further investigate the content of the duty of state parties to the different treaties to *protect* participants form abuse.

However, before I turn to the communication, it is necessary to review the African Commission's finding in an earlier but related matter, that of *Commission Nationale des Droits de l'Homme et des Libertés v Chad*.[70] This communication made allegations against the Chad government relating to the direct and indirect harassment, disappearance, torture and killing of journalists by unidentified individuals during the civil war in that country. The African Commission found serious and massive violations of human rights in Chad and that the government of Chad was in violation of the African Charter for, amongst others, failing to secure the safety of its citizens (which included its failure to investigate murders). The Commission remarked that there had been[71]

> several instances in which the government has failed to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders.

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68 Art 14(2)(a) African Women's Protocol.

69 Art 14(2)(b) African Women's Protocol.

70 (2000) AHRLR 66 (ACHPR 1995).

71 n 70 above, para 22.

The African Commission was thus more than willing to find the existence of the duty on the state to protect inhabitants of a country from human rights abuses in that country. This finding set the stage for the finding in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, to which I now turn.

4 *Zimbabwe Human Rights NGO Forum v Zimbabwe*

The communication was submitted by the Zimbabwe Human Rights NGO Forum, a co-ordinating body and a coalition of 12 Zimbabwean human rights non-governmental organisations (NGOs). The complainant alleged a violation of numerous articles of the African Charter. Only those sections of the communication relevant to my argument are discussed here.

The communication has its origins in the events in Zimbabwe following the constitutional referendum of February 2000, in which the majority of Zimbabweans voted against the new government-drafted Constitution. The complainant alleges that the referendum was followed by political violence, which escalated to farm invasions by 'war veterans' and other landless people and that, during the period between February and June 2000, ZANU (PF) supporters engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties.[72]

The complainant further alleges that, in the two months before the parliamentary elections scheduled for 24 and 25 June 2002, the political violence in Zimbabwe was targeted especially at white farmers and black farm workers, teachers, civil servants and rural villagers believed to be supporting opposition parties. The violence included acts such as dragging farm workers and villagers believed to be supporters of the opposition from their homes at night, forcing them to attend 're-education' sessions and to sing ZANU (PF) songs.[73] The complainant alleges that men, women and children were tortured and raped, that homes and businesses in both urban and rural areas were burnt and looted and opposition members were kidnapped, tortured and killed.[74] As well, the complainant alleges that there were reports of 82 deaths as a result of organised violence between March 2000 and 22 November 2001.[75] The complainant claims that even when human rights abuses were brought before the Harare High Court, witnesses were subjected to political violence and victimisation.[76]

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72 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 3 above) para 3.

73 n 3 above, paras 4- 5.

74 n 3 above, para 4.

75 n 3 above, para 8.

76 n 3 above, paras 10–11.

Of importance for the present discussion, the complainant states that, prior to the June 2000 parliamentary elections, the Zimbabwean police on numerous occasions had turned a blind eye to violence perpetrated against white farmers and MDC supporters.[77] It is alleged that the police forces have generally failed to intervene or investigate the incidents of murder, rape, torture or the destruction of property committed by the war veterans.[78] Furthermore, a general amnesty for politically-motivated crimes, gazetted on 6 October 2000, absolved most of the perpetrators from prosecution.[79] While the amnesty excluded those accused of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms or any offence involving fraud or dishonesty, very few persons accused of these crimes have been prosecuted.[80]

The African Commission was asked to determine, amongst other questions, the extent of the Zimbabwean state's responsibility for these human rights violations or acts committed by non-state actors, and whether Clemency Order 1 of 2000 resulted to a violation of Zimbabwe's obligations under article 1 of the African Charter.

In its finding, the African Commission stresses the significance of article 1 of the African Charter in determining whether a violation of the human rights recognised by the Charter may be imputed to a state party. Article 1 states that state parties have a fundamental duty to 'recognise the rights ... and undertake to adopt legislative or other measures to give effect to them'. The Commission underscores the fact that any impairment of those rights which may be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the state, which assumes responsibility in the terms provided by the African Charter.[81]

Furthermore, in its decision the African Commission emphasises that human rights standards do not merely contain limitations on states' authority or that of organs of state, but that they also[82]

> impose positive obligations on states to prevent and [not] sanction private violations of human rights'; and that 'human rights law imposes obligations on states to protect citizens or individuals under their jurisdiction from the harmful acts of others.

Thus, the Commission finds that an act by a private individual, not directly imputable to a state, can generate responsibility on the part of the state, 'not because of the act itself, but because of "the lack of

77 n 3 above, para 14.
78 As above.
79 As above.
80 Clemency Order 1 of 2000; as above.
81 Para 142.
82 Para 143.

due diligence"[83] to prevent the violation or for not taking the necessary steps to provide the victims with reparation'.[84]

The African Commission quotes from the judgment of the Inter-American Court on Human Rights in the case of *Velásquez Rodríguez*, where one of the most significant assertions of state responsibility for acts by private individuals is articulated. A state 'has failed to comply with [its] duty ... when the state allows "private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention"'.[85]

Further, the African Commission confirms that the case of *Velásquez Rodriguez* 'represents an authoritative interpretation of an international standard on state duty'[86] and that, therefore, the opinion of the Inter-American Court could also

> be applied, by extension, to article 1 of the African Charter of Human and Peoples' Rights, which requires states parties to 'recognize the rights, duties and freedoms enshrined in the Charter and ... undertake to adopt legislative and other measures to give effect to them.

Thus, according to the African Commission, what would otherwise be wholly private conduct is transformed into a constructive act of state 'because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]'.[87] The Commission reiterates that[88]

> an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention [or the African Charter].

The African Commission holds that the[89]

> standard of due diligence in the *Velásquez Rodriguez* case provides a way to measure whether a state has acted with sufficient effort and political will to fulfil its human rights obligations. Under this obligation, states must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law. Moreover, if possible, it must

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83 The Inter-American Court of Human Rights, in looking at the obligations of the state of Honduras under the Inter-American Convention on Human Rights, first articulated this standard — *Velásquez Rodriguez v Honduras* (Ser C) No 4 (1988) 28 ILM (1989) ser C, No 4; *Human Rights Law Journal* 212.

84 n 3 above, para 143.

85 *Velásquez Rodriguez v Honduras* (n 83 above) para 176, quoted by the African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 3 above) para 144.

86 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 3 above) para 144.

87 As above.

88 In n 3 above, para 145, the Commission is quoting from *Velásquez Rodriguez v Honduras* (n 83 above) para 172.

89 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 3 above) para 146.

attempt to restore the right violated and provide appropriate compensation for resulting damage.

In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, therefore, the African Commission explicitly recognises the duty of states to regulate the conduct of non-state actors — states must 'take effective measures to prevent private violations of human rights'.[90] A state's 'failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to state responsibility even if committed by private individuals'.[91]

The obligation to *respect* human rights thus also entails that the state should 'protect right-holders against other subjects by legislation and provision of effective remedies', which entails the creation and maintenance of an atmosphere or framework of an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.[92]

Although, on the facts, the African Commission finds that the respondent state did not fail to comply with its duty under article 1 of the African Charter to '... adopt other measures to give effect to' its citizens' rights, the Commission's finding has important implications for the protection of clinical research participants in Africa. These implications are discussed in the next section.

5 Implications of the African Commission's finding for HIV-related clinical research conducted in Africa

International pharmaceutical corporations increasingly conduct clinical trials in the developing world. Africa, in particular, offers large numbers of treatment-naïve research participants, making it possible to obtain a speedier result which, in turn, leads to the accelerated approval of new drugs.[93] International sponsors of clinical research tend to search out the least expensive, least burdensome regulatory environment with the lowest liability exposure, in order to avoid litigation in the event

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90 Para 147.

91 As above. Also see the jurisprudence of the African Commission in *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) and *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

92 Para 152. In this regard, also see, eg, P Alston (ed) *Non-state actors and human rights* (2005) 3-36 37-89; A Clapham *Human rights obligations of non-state actors* (2006) 25-83; and PT Muchlinski 'Human rights and multi-nationals: Is there a problem?' (2001) 77 *International Affairs* 31.

93 J Ford & G Tomossy (n 14 above) 3.

of injury to participants.[94] In many countries in Africa, there exists little, if any, legislation or even regulation governing clinical trials.[95] Meier writes that 'African nations vie to minimize regulation on the conduct of medical research. They fear that legislation, and resulting lawsuits, could have a chilling effect on beneficial research efforts'.[96] As well, in some host countries, 'corruption often prevents [research ethics committees] from protecting the interests of experimental subjects'.[97]

In many instances, the regulatory frameworks in African countries are inadequate to cope with HIV-related clinical research. Similarly, as pointed out above and elsewhere, international ethical guidelines governing clinical research lack effective enforcement measures.[98] Furthermore, aspects of African economic, social and political contexts, such as poverty, women's inequality, stigmatisation and poor access to health care, increase not only certain communities' vulnerability to HIV infection, thereby accelerating the spread of the disease, but also their vulnerability to exploitation and abuse during HIV-related clinical trials. Because of these factors, the potential exists for the exploitation of participants in research in Africa.

The African Commission's jurisprudence in *Zimbabwe Human Rights NGO Forum v Zimbabwe* confirms that the African Charter imposes positive obligations on states to act to protect individuals and groups against private actors, including international pharmaceutical corporations. Therefore, the African Charter and other regional human rights instruments create obligations on African governments to act to prevent the abuse of participants in HIV-related research, which they can do only if they take proactive measures.

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94 As above; eg Malawi, Tanzania and Zambia lack legally-binding informed consent procedures (see BM Meier ''International protection of persons undergoing medical experimentation: Protecting the right of informed consent' (2002) 20 *Berkeley Journal of International Law* 533 fn 124).

95 Kelleher writes: 'Because their impoverished governments would otherwise be unable to provide medical treatment to their citizens, host countries — African nations in particular — have no legislative protection for subjects of clinical trials. Researchers in such countries, faced with dire medical conditions, understaffed hospitals, language and cultural barriers, and research subjects who would otherwise have no access to medical treatment, thus find it expedient to violate the minimum ethical standards for the protection of human subjects' (Kelleher (n 16 above) 67).

96 Meier (n 94 above) 532.

97 Meier (n 94 above) 533.

98 In this regard, see Nienaber (C) (n 1 above) 168-177. This is true also in the case of Zimbabwe. Apart from non-binding international ethical guidelines governing clinical research relied upon by local university research ethics committees, there exists no binding regulatory framework governing clinical research in Zimbabwe. The development, importation and registration of drugs are governed by the Medicines and Allied Substances Control Act of 1997 (ch 15:03), which also established the Medicines Control Agency of Zimbabwe. However, the Act does not regulate the way in which clinical research is conducted in Zimbabwe. Clinical research participants have to rely on national tort and criminal law to institute claims for research-related injuries. See S Ratanawijitrasin & E Wondemagegnehu *Effective drug regulation: A multicountry study* (2002) 36.

To protect participants in research, in the words of the Commission, 'entails the *creation* and *maintenance* of an atmosphere or framework of *an effective interplay of laws and regulations* so that individuals will be able to freely realize their rights and freedoms'.[99] A failure to create such a framework to govern research practices in Africa, and a failure to effectively enforce such a framework and to punish perpetrators of abuses will contravene article 1 of the African Charter, even if those abuses were committed by private individuals.

6 Conclusion

The article investigates the protection of HIV-related clinical research participants in Africa by the African regional human rights system. The second section of the article assesses specific provisions in regional human rights instruments that are valuable in protecting participants in HIV-related research in Africa from abuse. Human rights instruments, such as the African Children's Charter and the African Women's Protocol, are singled out for attention and examples of 'soft' law are highlighted.

The analysis demonstrates that regional human rights instruments do indeed provide an effective legal framework for the protection of participants in HIV-related clinical research in Africa. Many of the provisions contained in these instruments enunciate rights that are relevant in the context of HIV/AIDS-related clinical research participation in Africa, either through specific reference to clinical research or experimentation,[100] or through more general prohibitions against 'degrading treatment' and violations of physical integrity, privacy and equality.

The traditional view holds that, in principle, international human rights law binds states alone, as states are the parties to international agreements and, therefore, the conduct of other parties is not within the ambit of international human rights law.[101] In the context of the present study, human rights violations in clinical research in Africa will most likely be the result of actions by multi-national or transnational pharmaceutical corporations, international research bodies and other individuals.[102] In keeping with the traditional view of international human rights law, then, the third-party perpetrators of abuses of research par-

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99 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 3 above) para 152 (my emphasis).

100 The consent requirement in the African Women's Protocol.

101 Clapham (n 92 above) 1 — 3. See also sources referred to in n 92 above.

102 Nowak points out that many of these multinational corporations are more powerful and financially stronger than many states. On that ground, it seems to him 'somewhat anachronistic that states should remain the only subjects of international law capable of signing and ratifying treaties under international law' (see M Nowak *Introducing the international human rights regime* (2003) 343).

ticipants will escape prosecution. However, as human rights treaties confer a duty upon state parties to *protect* the human rights enunciated in the treaties, a violation by third parties (both state and non-state actors) in terms of those treaties holds the states accountable for failing to protect the rights of research participants.[103]

The jurisprudence of the African Commission in the communication of *Zimbabwe Human Rights NGO Forum v Zimbabwe* supports the argument that a failure to act to prevent, investigate or punish human rights abuses committed by non-state actors will result in a finding that the state has failed in its international human rights obligations. In order to comply with the spirit of the different human rights instruments discussed in the article, African states will have to establish an appropriate and effective regulatory environment in which HIV-related clinical research may take place, so ensuring the safety of participants.

[103] See generally Clapham (n 92 above).

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Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision

Elijah Adewale Taiwo *
Doctoral candidate, Nelson Mandela Metropolitan University, Port-Elizabeth, South Africa; Lecturer, Faculty of Law, University of Ibadan, Nigeria

Summary

This article explores the scope of standing rules in section 46 of the 1999 Nigerian Constitution. It is observed that the section contains a restrictive and narrow provision on locus standi. *The article finds that this narrow provision has the regressive effect of limiting access to court and it invariably constitutes an impediment or constraint on the enforcement of fundamental human rights in the country. Many common law countries, such as England, Australia, Canada, India and South Africa, have jettisoned this anachronistic position on standing for a more liberal and expansive interpretation. In contrast, the Nigerian Constitution still maintains restrictive and outdated rules of standing. This is inconceivable at a time like this when other common law jurisdictions are enthusiastically adopting a liberal approach to the concept.*

1 Introduction

With the adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948 and the signing of the International Covenant

* LLB, LLM, MPhil (Obafemi Awolowo), BL (NLS); equitabletaiwo@yahoo.com. I appreciate the assistance of two of my colleagues and my former students, Muyiwa Adigun of Chief Afe Babalola, SAN & Co, Ibadan, Nigeria and 'Femi Olaoye of JB Majiyagbe, SAN & Co, Kano for their efforts in supplying me with recent Nigerian cases on the topic.

on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, there has been a consistent global emphasis on human rights. The rights provided for in the International Bill of Rights have equally been reflected in regional human rights treaties and in national constitutions.[1] The 1999 Nigerian Constitution, for instance, provides for fundamental rights which everyone in the country is to enjoy.[2] To guarantee and promote the enjoyment of these rights, the Constitution vests in the courts the power of enforcement and protection. In terms of section 6 of the Constitution, the judicial power of the country is vested in the courts of law established for the federation and the states.[3] The judicial power extends[4]

> to all matters between persons or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto,

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1 See A Govindjee 'Lessons for South African social assistance law from India: Part 1 — The ties that bind: The Indian Constitution and reasons for comparing South Africa with India' (2005) 26 *Obiter* 575-576.

2 In this context, however, fundamental rights refer to civil and political rights (see secs 33-45, ch IV of the 1999 Nigerian Constitution). Economic, social and cultural rights are still non-justiciable under the Constitution. See secs 13-24, ch II of the Constitution, which set out the Fundamental Objective and Directive Principles of State Policy as non-justiciable. Sec 6(6)(c) of the Constitution renders ch II of the Constitution non-justiciable. It provides: 'The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution.' The African Charter on Human and Peoples' Rights provides for civil and political rights and economic, social and cultural rights as justiciable rights. Nigeria has ratified and incorporated the provisions of this Charter as part of her laws through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap 10, Laws of the Federation 1990. With this Act, the human rights provisions of the African Charter are part of Nigerian law and can be enforced through any of the rules of procedure of the courts. See *Ogugu v State* [1996] 6 NWLR (pt 316) 1 30-31, *per* Mohammed JSC. However, the Supreme Court held in *Gani Fawehinmi v General Sani Abacha* [2000] 6 NWLR (pt 660) 228 that the provisions of the African Charter cannot override those of the Constitution. In other words, the provisions of sec 6(6)(c) of the Constitution as to the non-justiciability of those rights remain.

3 See sec 6(1) of the 1999 Nigerian Constitution. Nigeria is a federation of 36 states with each state having separate/different courts but a similar/uniform court system. These separate courts' and states' judicial systems, however, meet at the federal level with appeals from these courts going to the Supreme Court via the Court of Appeal.

4 See sec 6(6)(b) of the Constitution. The Constitution vests judicial powers of the federation in the specific courts as well as other courts as may be established by the National Assembly or House of Assembly. The courts include the Supreme Court, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, a High Court of a state, the Shari'a Court of Appeal of the Federal Capital Territory, Abuja, a Shari'a Court of Appeal of a state, the Customary Court of Appeal of the Federal Capital Territory, Abuja, a Customary Court of Appeal of a state. See sec 6(6)(5) of the Constitution.

> for the determination of any question as to civil rights and obligations of that person.

The judicial power vested in the courts covers every type of action except those specifically excluded by the Constitution itself.[5] In furtherance of this judicial power and in the enforcement of fundamental rights, section 46(1) of the Constitution provides that[6]

> any person who alleges that any of the provisions of this Chapter [Chapter IV] has been or is being or likely to be contravened in any state *in relation to him* may apply to a High Court in that state for redress.

This section reinstates the common law concept of *locus standi* and incorporates it into Nigerian constitutional jurisprudence. The combined provisions of sections 6 and 46 of the Constitution give judicial power to courts of law for the determination of civil rights and obligations of any person in relation to another person, authority or government.[7] Also, by the provisions of these sections, a person has access to court to challenge a violation or imminent violation of his or her rights.[8]

However, procedural rules as well as substantive law may, at times, impose some constraints which may have the effect of limiting a person's access to court. One such constraint is the concept of *locus standi*.[9]

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5 However, judicial power is distinguishable from jurisdiction. Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction to hear and to decide a case. Judicial power is the right to determine actual controversies arising between diverse litigants, duly instituted in a court of proper jurisdiction. See JO Akande *Introduction to the Constitution of the Federal Republic of Nigeria, 1999* (2000) 32; *United States v Arrendondo* 31 US 691 (1832); *Muskrat v United States* 219 US 346 361 (1911).

6 My emphasis.

7 See *Sofekun v Akinpelu & Others* (1981) 1 NCLR 135; *Tony Momoh v Senate* (1981) 1 NCLR 105.

8 See *Shugaba Darman v Minister of Internal Affairs* (1981) 1 NCLR 25; see also *Abdulhamid v Akar* [2006] 13 NWLR (pt 996) 127 149; MMA Akanbi 'Constitutional structure and the position of the judiciary: Fundamental rights' in *1990 Judicial lectures: Continuing education for the judiciary* (1991) 16 21.

9 The term *locus standi* defies precise definition. It is not an easy concept to define since it has been used to refer to different factors that affect a party's right to claim relief from a civil court. It determines the right to sue or seek judicial redress in respect of alleged unlawful action. This requires that a litigant should both be endowed with the necessary capacity to sue and have a legally recognised interest in the relevant action to seek relief. See GE Devenish '*Locus standi* revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution' (2005) 38 *De Jure* 28. Many authors, scholars and jurists have attempted giving working definitions of the term. *Locus standi* is defined as 'the right to be heard in court or other proceedings'. See R Bird Osboorn's *Concise law dictionary* (1983) 209. In *Attorney-General of Kaduna State v Hazzan* [1985] 2 NWLR 483 497, the Nigerian Supreme Court, *per* Oputa JSC, explained that *locus standi* means 'the legal capacity to challenge an order or act. Standing confers on an applicant the right to be heard as distinct from the right to succeed in the action or proceeding for relief.' See also *Inakoju v Adeleke* [2007] 4 NWLR (pt 1025) 43 601-602; *locus standi* denotes the legal right of any person, group of persons, statutory bodies or government, to appear

The doctrine of *locus standi* is designed to adjust conflicts between two aspects of public interest, namely, the desirability of encouraging individual citizens to participate actively in the enforcement of law and the undesirability of encouraging a professional litigant and a meddlesome interloper to invoke the jurisdiction of the courts in matters that may not concern him.[10] This concept, which is fundamental in the judicial process in any country, differentiates between 'stranger' and 'aggrieved person'.[11] Standing is of inordinate importance as far as access to justice is concerned. It determines the justiciability of an action.[12] It also has a great impact on the jurisdiction of the court.[13] *Locus standi* has traditionally been regarded as a preliminary or 'threshold' issue and is usually dealt with *in limine*, before the merits are dealt with.[14]

Locus standi has been an intractable concept for ages and has posed serious problems both to litigants and the courts. In Nigeria, the con-

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before a court, or a tribunal constituted in such a manner as to secure its independence and impartiality and to have grievances adjudicated upon by the court. MAA Dzekhome *The Nigerian law* locus standi (1988) 82. The term *locus standi* denotes the legal capacity to institute proceedings in a court of law or tribunal to enforce a right recognised by law. It is the right to appear before a court to prosecute or defend an action affecting one's legal right. According to Mubangizi, *locus standi* 'deals with the right to approach a court of law to seek a remedy for the infringement of a right'. See JC Mubangizi *The protection of human rights in South Africa (A legal and practical guide)* (2004) 60.

10 See SA de Smith *Judicial review of administrative action* (1980) 409.

11 As above. To be an aggrieved person, the plaintiff must establish his interest in the subject matter in disputes. It is the manifestation of this interest that will confer *locus standi* or standing on the plaintiff to bring an action and invoke the authority of the court. See MI Jegede 'Problem of *locus standi* (standing to sue) in the administration of justice' in TO Elias & MI Jegede (eds) *Nigerian essays in jurisprudence* (1993) 195.

12 It is necessary to note that standing and justiciability are not the same. The latter addresses the issue as to whether a dispute is amenable to resolution by a court of law, whereas the former deals with the question of whether a litigant has sufficient interest to approach the court for relief. See Devenish (n 9 above) 36.

13 Thus, in *A-G Anambra v A-G Federation* [2007] 12 NWLR (pt 1047) 93-94, the Supreme Court of Nigeria, *per* Chuckwuma-Eneh JSC, held as follows: '... *[l]ocus standi* or standing or title to sue ... like the issue of jurisdiction is a threshold action and has to be taken at the earliest ... the issue of *locus standi* is therefore linked with the issue of jurisdiction of a court to entertain a matter. It is a *sine qua non* to the exercise of jurisdiction because judicial powers are constitutionally limited to cases in which the parties have *locus standi*.' If the plaintiff has no legal capacity or standing to institute the action, the court would have no jurisdiction to adjudicate on the matter. See *Mr W Alofoje v Federal Housing Authority & Others* [1996] 6 NWLR (pt 456) 559 567; *Gombe v PW (Nig) Ltd* [1995] 6 NWLR (pt 402) 402. The issue of *locus standi* is an indirect questioning of the jurisdiction of the court to adjudicate on a matter and can be raised at any time in the course of trial, even on appeal. See *Timothy Adeko Adefulu & 12 Others v Bello Oyesile & 5 Others* (1989) 5 NWLR (pt 122) 377 409 418; *Oloriode v Oyebi* (1984) 1 SCNLR 390.

14 Devenish asserts that this, however, may be artificial and problematic in certain cases since an examination of the case law on *locus standi* indicates that, in practice, it is not always dealt with as a preliminary point in regard to the justiciability of the dispute, but the entire matter is scrutinised in order to reach a conclusion. See Devenish (n 9 above) 29.

cept has generated a considerable volume of interesting litigation in the past, and this is likely to continue in the future in view of the narrow and restrictive interpretation accorded the concept under Nigerian law.[15] Determining the standing of a suitor is generally not an easy task. However, following decided cases, Nigerian courts have been able to lay down two tests to help in this regard.[16] One of the tests is that the action must be justiciable, while the second one is that there must be a dispute between the parties.[17] That is, the plaintiff must be able to establish a sufficient interest in the subject matter of a suit before he or she could be accorded standing; otherwise, he would be treated as a stranger and, as such, denied the right to maintain the action in court.[18]

In this article an attempt is made to examine the scope of section 46(1) of the 1999 Nigerian Constitution, which confers standing on citizens for the enforcement of their fundamental rights. Unlike some other constitutions, section 46 provides for a limited category of persons that can approach the courts for enforcement of fundamental rights.[19] A restrictive interpretation of *locus standi* is capable of frustrating the enforcement of fundamental rights, while a liberal interpretation of the concept encourages public interest litigation and also facilitates the development of law in any country. The article therefore aims at

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15 It is asserted that a narrow definition of standing will obstruct access, whereas a wide one will facilitate it. See Devenish (n 9 above) 29.

16 In ascertaining whether the plaintiff in an action has *locus standi*, the pleadings, that is, the statement of claim, must disclose a cause of action vested in the plaintiff and the rights and obligations or interest of the plaintiff which have been violated. See *Inakoju v Adeleke* [2007] 4 NWLR (pt 1025) 601-602; *Adefulu v Oyesile* (n 13 above) 410; *Thomas v Olufosoye* [1986] 1 NWLR (pt 18) 669 686; (1986) 1 ANLR (pt 1) 215; *Momoh v Olotu* (1970) 1 All NLR 117; *Oloriode v Oyebi* (n 13 above). The way to determine whether a plaintiff has the necessary standing to sue is to examine and reflect on the statement of claim and the writ of summons. When a party's standing to sue is made an issue of in a case, what has to be decided is whether that party is a proper party to request adjudication over a particular subject matter. See *Sir Olateru Olagbegi v Oba Ogunnoye II (Olowo of Owo) & Others* [1996] NWLR (pt 448) 332 352; *Sobie Ojimba & Others v Peter Ojimba & Others* [1996] 4 NWLR (pt 440) 32 39.

17 See *Attorney-General Federation v Attorney-General of the 36 States of Nigeria* (2001) 9 SCM 45 59.

18 In other words, the suitor must not be a stranger to the issue which constitutes the cause of action. He must have been aggrieved by the act or he must, one way or the other, be affected by the acts that constitute the cause of action. Anything falls short of this, he is deemed to be a stranger to the suit, a mere busy-body and an interloper who will not be granted *locus standi.* See *Emezi v Osuagwu* [2005] 12 NWLR (pt 939) 240 362; *Thomas v Olufosoye* (n 16 above); *Attorney-General Kaduna State v Hassan* [1985] 2 NWLR (pt 8) 483. See also *Senator Abraham Ade Adesanya v President of the Federal Republic of Nigeria* (1981) 2 NCLR 358, where Idigbe JSC said: 'The judicial power ... is invested in the court for the purpose of determining cases and controversies before it; the cases or controversies, however, must be justiciable.' See also PA Oluyede *Nigerian administrative law* (1988) 504-505.

19 Sec 38 of the 1996 South African Constitution, eg, provides for a liberal view on *locus standi* and it allows a larger category of persons to approach the courts of law on the enforcement of the Bill of Rights guaranteed in the Constitution.

advocating a more expansive interpretation of the concept of standing to ensure the effective enforcement of fundamental rights in Nigeria.

2 *Locus standi* under common law

At common law, a person who approaches a court for relief is required to have an interest in the subject matter of the litigation in the sense of being personally adversely affected by the alleged wrong.[20] The plaintiff or the applicant must allege that his or her rights have been infringed. It is not enough for the plaintiff to allege that the defendant has infringed the rights of someone else, or that the defendant is acting contrary to the law and that it is in the public interest that the court grants relief.[21] Thus, under the common law position, a person could only approach a court of law if he or she has sufficient, direct and personal interest in the matter.[22] A plaintiff must in general show that he or she has some special interest or has sustained some special damage greater than that sustained by an ordinary member of the public.[23] The essence of *locus standi* at common law is to keep away meddlesome busybodies who have no interest whatsoever in the case before the court.[24] However, the common law position on *locus standi* has been criticised as rather restrictive.[25]

The identity of parties to an action is very important to the sustenance of an action. It is a conditions precedent that goes to the root of the case. *Locus standi* is fundamental and it has a lot to do with the competency and jurisdiction of the court to entertain an action. Failure to disclose *locus standi* is fatal; it is comparable to a failure to disclose

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20 See P Vrancken & M Killander 'Human rights litigation' in A Govindjee & P Vrancken (eds) *Introduction to human rights law* (2009) 251 257; I Currie & J de Waal *The Bill of Rights handbook* (2005) 80.

21 See *Massachusetts v Mellon* (1923) 262 US 447 448; Currie & De Waal (n 20 above) 81.

22 Many countries have followed this common law requirement of sufficient interest. Eg, in *Patz v Greene & Co* (1907) TS 427 433, Solomon J held: 'Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent upon the party complaining to allege and prove that the doing of the acts has caused him some special damage — some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the [community] by an infringement of the law.'

23 Devenish (n 9 above) 30.

24 See T Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' 2002 (18) *South African Journal on Human Rights* 590 591.

25 See Mubangizi (n 9 above) 61.

a reasonable cause of action.[26] Thus, the requirement of *locus standi* is mandatory; the consequence of a failure to disclose *locus standi* is that the plaintiff's claim will be dismissed.[27] The issue of *locus standi*, like the issue of jurisdiction, can be raised at any time in the trial, even for the first time on appeal.[28]

3 *Locus standi* under Nigerian law

Locus standi is one of the English common law concepts which were incorporated into Nigerian law during the colonial rule of the country. Nigerian courts still take the restrictive common law approach to standing.[29] Decided cases have followed this position and courts have consistently held that an applicant must have 'sufficient interest' in a matter before he or she could be accorded standing to sue. At the outset, it is necessary to mention that *locus standi* is particularly problematic and Nigerian courts have been inconsistent in their approach on the issue. While the majority of cases, especially from the apex court, have emphasised the requirement of the plaintiff showing sufficient interest, there are, however, other cases which maintain that in the interpretation of laws, the plaintiff need not establish personal interest. Most of the cases in this direction are the decisions of the lower courts and they do not constitute a binding precedent compared to Supreme Court and Court of Appeal decisions on the issue.

The first significant case on *locus standi* in Nigeria is the case of *Olawoyin v Attorney-General of Northern Region of Nigeria*.[30] In this case, the appellant applied to the High Court for redress, alleging that the provisions of the Children and Young Persons' Law, 1958, of Northern Nigeria, which prohibited political activities by juveniles and prescribed penalties for juveniles and others who may be parties to the offences therein specified, were unconstitutional. He maintained that he was a father of children whom he wished to educate politically, and that

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26 See also *Ajao v Sonola* (1973) 5 SC 119; *Okoye v Lagos State Government* [1990] 3 NWLR (pt 136) 125; *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6; *Gambioba & Others v Insesi & Others* (1961) All NLR 584.

27 However, an action dismissed on the ground of *locus standi* may not constitute a *res judicata* in the subsequent trial in the sense that there would have been changes in the parties.

28 See *A-G Anambra v A-G Federation* [2007] 12 NWLR (pt 1047) 4 93-94; *Emezi v Osuagwu* [2005] 12 NWLR (pt 939) 340 347; *Sobiee Ojimba & 4 Others v Peter Ojimba & 4 Others* [1996] 4 NWLR (pt 440) 32 39; *Oredoyin v Arowolo* (1989) 4 NWLR (pt 114) 172; *Obaba v Military Government of Kwara State* (1994) 4 NWLR (pt 336) 26; *Bronik Motors Ltd v Wema Bank Ltd* (1983) 1 SCNLR 303; *Adefulu v Oyesile* [1989] 5 NWLR (pt 122) 377.

29 See the *locus classicus* cases in this regard: *Senator Adesanya v President of the Federal Republic of Nigeria & Others* (n 18 above); *Chief (Dr) Irene Thomas & 5 Others v The Most Reverend Timothy Omotayo Olufosoye* [1986] 1 NWLR (pt18) 669.

30 (1961) AllNLR 269.

there was therefore a danger of his right being infringed if the law were enforced, even though no action of any kind had been taken against him under it. The Northern Nigerian High Court dismissed the action and held that, since no rights of the appellant were alleged to have been infringed, a declaration can not be made *in vacuo*. The Court held further that only a person whose rights had been affected by a statute may challenge its constitutional validity and that the person's rights must be directly or immediately threatened. The judgment was affirmed by the Federal Supreme Court.

Similarly, in *Gamioba v Ezezi,*[31] the plaintiff sought to challenge a certain trust instrument as *ultra vires* and inconsistent with the Nigerian Constitution. Brett FJ, who delivered the judgment of the court citing *Olawoyin v Attorney-General, Northern Nigeria* held that, since the validity of a law is a matter of concern to the public at large, the court had a duty to form its own judgment as to the plaintiff's *locus standi,* and should not assume it merely because the defendant admitted it or did not dispute it. The court held that any person who invokes the judicial power of the court to declare a law or enactment invalid must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement and not merely that he suffers in some indefinite way in common with people generally.[32]

Also, in *Attorney-General of Bendel State v Attorney-General of the Federation and 22 Others,*[33] the Supreme Court held:[34]

> A party invoking the powers of the court with respect to an unconstitutional statute, must show, not only that the statute is invalid but that he has sustained or is immediately in danger of sustained some direct injury from its enforcement and not merely that he suffers in some indefinite way in common with the public generally.

The case of *Senator Adesanya v President of the Federal Republic of Nigeria and Others*[35] is widely accepted as a *locus classicus* on *locus standi* in Nigeria. In that case, Abraham Adesanya, then a serving Senator in the National Assembly, instituted an action against the President of the Federal Republic of Nigeria challenging the appointment of Justice

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31 (1961) AllNLR 584.

32 Thus, in *A-G Adamawa v A-G Federation* [2005] 18 NWLR (pt 958) 581 608, the Supreme Court held thus: 'It is not enough for a plaintiff to merely state that an Act is illegal or unconstitutional. He must show how his civil rights and obligations are breached or threatened.' See further *Oluokun v Governor of Oyo State* (1984) 3 NCLR 680; *Attorney-General of Eastern Nigeria v A-G Federation* (1964) 2 All NLR 224; *Onyia v Governor in Council & Others* (1962) 2 All NLR 174; *Adegbenro v AGF* (1962) 1 All NLR 432; *Usman Mohammed v Attorney-General of Kaduna State & Another* (1981) 1 NCLR 117.

33 (1982) 3 NCLR 1.

34 *Per* Nnamani JSC 114; See also *A-G Adamawa v A-G Federation* [2005] 18 NWLR (pt 958) 581 604.

35 (1981) 2 NCLR 358.

Ovie-Whiskey as the Chairperson of the Federal Electoral Commission (FEDECO). The appointment had passed through the process of confirmation by the National Assembly. In the confirmation process, Senator Adesanya objected to the appointment, claiming that it violated certain provisions of the 1979 Constitution, but he was not successful as the Senate confirmed the appointment. He thereafter approached a Lagos High Court seeking a declaration and injunction. In its judgment, the court declared the appointment unconstitutional and held that Justice Ovie-Whiskey was not competent under the Constitution to be appointed a member and Chairperson of FEDECO at the time the appointment was made.

There was an appeal against this decision to the Court of Appeal. At the hearing of the appeal, the President of the Court of Appeal raised the question of whether or not Senator Adesanya had standing to have instituted the action, and he therefore invited both counsel to address the Court on the issue. In its ruling, the Court held that Senator Adesanya had no *locus standi* to have challenged the appointment. Aggrieved by this decision, he appealed to the Supreme Court. The Supreme Court dismissed the appeal and affirmed the judgment of the Court of Appeal on *locus standi*. The Court held further that Senator Adesanya, having participated in the deliberations of Senate in connection with the subject matter over which his views in Senate were not accepted by majority of his fellow Senators before instituting the suit, had no *locus standi* to challenge the constitutionality of the appointment in the court.

The Court conceded the importance and desirability of encouraging citizens to come to court to have the Constitution interpreted. It, however, held that it was a common ground in all the jurisdictions of common law countries that the claimant must have some justifiable interest which may be affected by the action or that he will suffer injury or damage as a result of the action. It emphasised that meddlesome interlopers, professional litigants and the likes should not be encouraged to sue in matters that do not directly concern them. The Court was of the view that to allow that is to open the floodgate to frivolous and vexatious proceedings and that such latitude is capable of creating an undesirable state of affairs.[36]

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[36] However, this case has been criticised and described as an obstacle in the enforcement of rights and a negation of a purposive interpretation of the Constitution. A Nigerian jurist, Ademola Adenekan JCA, described the judgment as a negation of purposive interpretation of the Constitutions as is going on in India and Pakistan. He said: 'I can hear a voice saying; but the Supreme Court in Nigeria or the High Court for that matter can perform those feats that have been credited to the courts in India and Pakistan. My view is that the Supreme Court cannot unless it removes an obstacle which it has placed in its own way. In my respectful opinion, it must overrule its decision in *Senator Abraham Adesanya v President of the Federal Republic of Nigeria*.' See A Ademola 'Human rights and national development' in MA Ajomo & B Owasanoye *Individual rights under the 1989 Constitution* (1993) 12 28.

The principle established in Adesanya's case was followed in *Irene Thomas and 5 Others v The Most Reverend Timothy Omotayo Olufosoye.*[37] In that case, the plaintiffs, who were communicants of the Anglican Communion within the Diocese of Lagos, challenged the appointment of Reverend Joseph Abiodun Adetiloye as the new Bishop of Lagos and asked the court to declare the appointment void. The facts pleaded in the plaintiffs' statement of claim did not, however, disclose that they had an interest in contesting the office of the Bishop of the Diocese. On the contrary, the plaintiffs contested that the process of the appointment of Rev JA Adetiloye contravened some provisions of the Constitution of the Church of Nigeria (Anglican) Communion. The defence, by notice of motion, argued that the plaintiffs had no *locus standi* to institute the action and that the statement of claim disclosed no reasonable cause of action. The trial court accepted the objection and dismissed the suit. The plaintiffs' appeal to the Court of Appeal was equally dismissed. A further appeal to the Supreme Court was also not successful.

The Supreme Court held that the plaintiffs had no *locus standi* as they did not disclose any legal right or any question as to their civil rights and obligations. According to the court:[38]

> The broad and general principle of law is contained in the old Latin maxim *ubi jus ibi remedium*. *Jus* here signifies the legal authority to do or demand something and *remedium* here means the right of action, or theme as given by law for the recovery or the declaration or assertion of that right. In other words, the maxim presupposes that wherever the law gives a right, it also gives a remedy. Conversely, wherever a plaintiff is claiming a remedy that remedy must be founded on a legal right. Applying the above broad definition of the maxim, the first hurdle for the plaintiffs to clear is to let their statement of claim reflect their legal authority to demand the declaration sought and their right which is likely to be injured and for the protection of which they need the remedy of an injunction.
>
> The question will then arise who or what law invested the plaintiffs with a legal right to defend the Constitution of the Anglican Church in the Diocese of Lagos or does the mere fact that the plaintiffs are 'communicants of the Anglican Communion within the Diocese of Lagos' *ipso facto* and to quote, *mutatis mutandis*, the memorable words of my learned brother, Bello JSC in *Senator Adesanya v President of Nigeria* (1981) 2 NCLR 358 at 384 invest them with the right to play the role of archivists and build a shrine to preserve the sacred provisions of the Constitution of the Anglican Communion? Does it make them Sentries to ward off all those they suspect to be potential transgressors of the Constitution of the Anglican Communion? Does it further enlist them in the army to take up arms against all those they consider to be aggressors of the Constitution of the Anglican Communion? Or, are the plaintiffs merely constituting themselves into 'busybody' to perambulate the Diocese of Lagos suing and prosecuting all those they regard as constitutional (here Constitution of the Anglican Church) offenders? If the plaintiffs are a mere busybody, then they will have no legal right to

[37] n 29 above.

[38] *Per* Oputa JSC (n 29 above) 689-690.

> bring this action. A busybody is a meddlesome person, a mischief-maker such a one has no legal right to do what he is doing ...

However, the Supreme Court took a more relaxed approach on the issue of *locus standi* in its remarkable judgment in *Chief Gani Fawehinmi v Col Halilu Akilu and Another.*[39] The decision in this case is rather a bold one in which the Supreme Court adopted a wide and liberal approach to standing, especially during the dark era of military rule in the country. The facts of this case are as follows: In October 1986, Mr Dele Giwa, a journalist and editor-in-chief of a weekly magazine, *Newswatch,* was killed by a parcel bomb in his Ikeja residence. The appellant, Chief Gani Fawehinmi, a friend and a legal adviser to late Dele Giwa, submitted to the Director of Public Prosecutions (DPP), Lagos, a 39-page document containing all the details of the private investigation he had conducted together with information indicting two army officers, Colonel Halilu Akilu, the Director of Military Intelligence, and Lieutenant-Colonel AK Togun, Deputy Director of the State Security Services, of the murder of Dele Giwa.

The appellant requested the DPP to exercise his discretion under section 342 of the Criminal Procedure Law of Lagos state to decide whether or not to prosecute the said army officers and if he declined to prosecute, to endorse a certificate to that effect on the information submitted to enable him as a private prosecutor to prosecute. In November 1986 the appellant met with the DPP, who explained that he could not come to a decision whether or not to prosecute the said army officers until he received the report of the police investigation. Consequent upon this, the appellant filed an application in the High Court of Lagos for leave to apply for an order of *mandamus* to compel the respondent to decide whether or not to prosecute the two officers and if he decided not to prosecute, to endorse the information for private prosecution. The Lagos State High Court, *per* Ademola C Johnson CJ, heard the application for leave and dismissed it on the grounds that the DPP had not refused to perform his duty under section 342 of the Criminal Procedure Law, and that the DPP could not be forced to do so upon the limited materials before him. The Court of Appeal equally dismissed the appeal on the ground that the appellant had no *locus standi* in the death of Dele Giwa to bring the application he brought. It held further that the learned trial Chief Judge was right in refusing appellant's leave sought in the case.

The appellant subsequently appealed to the Supreme Court. In a considered judgment, the Supreme Court allowed the appeal and set aside the lower courts' judgments and granted the order of *mandamus*. The Court held *inter alia* that the appellant, as a person, a Nigerian, a friend and a legal adviser to Dele Giwa, had a personal and private

[39] [1987] 4 NWLR (pt 67) 797. See also *Col Halilu Akilu v Chief Gani Fawehinmi (No 2)* [1989] 2 NWLR (pt 102) 122 193.

right under the Criminal Procedure Law to see that a crime was not committed and, if committed, to lay a criminal charge for the offence against anyone committing the offence or in his view whom he reasonable suspected to have committed the offence. The Court held further that the Criminal Code and the Criminal Procedure Law (Lagos) did not by their provisions confine the complainant in respect of the offence of murder to a particular person or class of persons. Any person who has sufficient information in his possession to establish the crime and identify the accused person is entitled to lay the charge. Accordingly the Court, *per* Obaseki JSC, held as follows:[40]

> Criminal law is addressed to all classes of society as the rules that they are bound to obey on pain of punishment to ensure order in the society and maintain the peaceful existence of society. The rules are promulgated by the representative of society who form the government or the legislative arm of government for the benefit of the society and the power to arrest and prosecute any person who breaches the rule is also conferred on any person in the society in addition to the Attorney-General and other law officers for the benefits of the society.
>
> The peace of the society in the responsibility of all persons in the country and as far as protection against crime is concerned, every person in the society is each other's keeper. Since we are all brothers in the society, we are our brother's keeper. If we pause a little and cast our minds to the happenings in the world, the rationale for this rule will become apparent.
>
> There have been cases where brother assaults or kills brother, cases where a father assaults or kills his son, where a son kills his father, where a husband kills his wife and where a wife kills her husband. If consanguinity or blood relationship is allowed to be the only qualification for *locus standi*, then crimes such as listed above will go unpunished, may become order of the day and destabilise society. Can it be said that death of Dele Giwa is not as much a sad and bitter loss to his friend, lawyer and confidant as it is to his family? The answer to the first question, therefore, in my view, is in the affirmative, that is that the appellant has *locus standi*.

Kayode Eso JSC made his own contribution on *locus standi* in these words:[41]

> My Lords, the issue of *locus standi* has always been held as one of the utmost importance, by the court for in effect, it is one that delimits the jurisdiction of the court, for in the interpretation of the Constitution, it is to be hoped that the courts would not possess acquisitive instinct and gather more jurisdiction than has been ascribed to it by the organic law of the land. It is this I think that has inhibited your lordships, and rightly too, in being careful, as your lordships should be, in threading carefully on the soil of *locus standi* ... In this instant appeal before this court, I think, with respect, that the lead judgment of my learned brother Obaseki JSC is an advancement on the position hitherto held in this court on 'locus standi'. I think, again with

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40 As above. See also G Fawehinmi *Murder of Dele Giwa: The right of a private prosecutor* (1988) 38-39.

41 Fawehinmi (n 40 above) 40-42. This judgment has been described as representing a new philosophy, that is, that an individual has a role to play in public law. Thus, an individual can vindicate the rights which he is entitled to have protected under public law. See L Atsegbua *Administrative law: An introductory text* (1997) 123.

> respect, that it is a departure from the former narrow attitude of this court in the Abraham Adesanya case and subsequent decisions. My humbler view, and this court should accept it as such, is that the present decision of my learned brother, Obaseki JSC, in this appeal has gone beyond the *Abraham Adesanya* case. I am in complete agreement with the new trend, and with respect my agreement with the judgment is my belief that it has gone beyond the *Abraham Adesanya* case.
>
> It is the view of my learned brother Obaseki, which I fully share with respect that 'it is the universal concept that all human beings are brothers and assets to one another'. He applies this to ground *locus standi!* That we are all brothers is more so in the country where the socio-cultural concept [s] of 'family' and 'extended family' transcend all barriers it is not right then for the court to take note of the concept of the loose use of the word 'brother' in this country? 'Brother' in the Nigeria context is completely different from the blood brother of the English Language ... As I have said, I accept our present decision as a happy development and advancement on what, with utmost respect to your Lordships, I have always considered a narrow path being trodden hitherto by this court on *locus standi*.

The liberal approach which the Court adopted in the *Fawehinmi* case constitutes an exception rather than a general rule on *locus standi* in Nigeria. This appears to be a policy decision bordering on crime prevention as opposed to civil matters in which courts have been maintaining a very restrictive view. Apart from the provision of the Criminal Procedure Law (Lagos), which permitted a private prosecutor,[42] a further reason for this liberal approach could be deduced from the judgment of Obaseki JSC, where he held that the peace of society is the responsibility of all persons in the country and that, as far as protection against crime is concerned, every person in society is each other's keeper. Since we are all brothers in the society, we are our brother's keeper. The Court's liberal approach in this case was therefore based on the above reasoning.

4 Public interest litigation and constitutional interpretation

Public interest litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.[43] The fundamental principle of English law is that private rights can be asserted by individuals, but public rights can only be asserted by the Attorney-General as representing the public.[44] It is the Attorney-General who

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42 It is interesting to note that, subsequently after this judgment; the Lagos state government through military edict amended the Criminal Procedure Law (Lagos) and removed the power of the private prosecutor.

43 *Janata Dal v HS Chowdhary* AIR 1993 SC 892 (para 51); (1992) 4 SCC 305.

44 As above.

could vindicate a public right.[45] Notwithstanding, however, any person whose legal rights are under threat from public authority has *locus standi* to seek remedies in court. Under Nigerian law, if a public right is under threat, a private person may seek remedies in two cases: first, if some private right of his is interfered with at the same time with public interest;[46] secondly, if he suffers special damages peculiar to himself from the interference with the public right.[47]

However, in Britain there has been a relaxation on the principle that it is only the Attorney-General who could sue on behalf of the public. Now, every citizen has standing to invite the court to prevent some abuse of power and, in doing so, he may be regarded as a public benefactor rather than a meddlesome busybody or interloper.[48] This relaxation is based on the principle that public authorities have many duties of a general character, enforceable by no one unless by the ordinary citizen. The Attorney-General may appear not to concern himself with them and if the private citizen could not do so, then there would be a serious gap in the system of public law.[49] It is argued that there would be a grave *lacuna* in the public law system if a certain body or pressure group or even a single public-spirited tax payer is prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and to get the unlawful conduct stopped.[50]

Nigerian courts have equally adopted a liberal approach to *locus standi*, especially in cases that concern the validity of legislation *vis-à-vis* the Constitution. There is a plethora of cases in this regard. In *Chief Isiagba v Alagbe and Others*,[51] a Bendel State High Court gave a wider meaning to *locus standi*. In that case, the plaintiff sought in the Benin High Court a declaration that the defendants were members of the Bendel State House of Assembly from different constituencies from those who lost their seats in the Assembly Service Commission established by a law enacted by the Assembly in the exercise of its powers under section 94(5) of the 1979 Constitution.

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45 See *Gouriet v Union of Post Office Workers* (1978) AC 435.

46 A good example is by obstruction of the highway which also obstructs access to his land.

47 See *Boyce v Paddington BC* (1930) 1 ch 109; *Ekundare v Governor in Council* (1961) All NLR 149. See also HRW Wade *Administrative law* (1990) 690.

48 Thus, in *R v Thames Magistrates' Court ex parte Greenbaum* (1957) 55 LGR 129, Parker LJ said: 'Anybody can apply for it (*certiorari*), a member of the public who has been inconvenienced, or a particular or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary where, however, it is made by a person who has a particular grievance of his own whether as a party or otherwise, then the remedy lies *ex debito justitiae* ...' See *Durayappah v Fernando* (1967) AC 337.

49 Wade (n 47 above) 699-700.

50 Wade (n 47 above) 704.

51 [1981] 2 NCLR 424.

The issue of *locus standi* was raised by a way of preliminary objection. The court, *per* Omosun J, held that any Nigerian taxpayer had sufficient interest in the observance of the provisions of the Constitution and consequently had *locus standi*. The court held:[52]

> The plaintiff is a citizen of Nigeria. He has alleged that the defendants have contravened the provisions of the Constitution. It is suggested he has no *locus standi*, that he is a meddlesome litigant and that he has no sufficient interest to enable him to bring the action. His interest cannot be quantified in terms of Naira and Kobo, but certainly like all Nigerians, he would like to see the provisions of the Constitution observed. To adopt the view that he has no sufficient interest would lead to chaos. I cannot contemplate what will happen if violations of the Constitution go unchecked. It means that anyone with impunity can violate the Constitution and no one can say so because his private rights have not been injured.

Similarly, in *Alhaji Adefalu and Others v The Governor of Kwara State and Others*,[53] the Kwara State High Court adopted a liberal approach on *locus standi*. In that case, the plaintiffs sought a declaration that the Local Government (Establishment) (Amendment) Law, 1981, was illegal, null and void and of no effect. The learned trial judge, Obayan J, granted the application. Also, in *Attorney-General of Bendel State v Attorney-General of the Federation and Others*,[54] Obaseki JSC observed as follows:[55]

> The Constitution has opened the gates to the courts by its provisions and there can be no justifiable reasons for closing the gates against those who do not want to be governed by a law enacted not in accordance with the provisions of the Constitution.

In *Akinpelu and 2 Others v Attorney-General, Oyo State*,[56] the plaintiffs for themselves and on behalf of other persons and residents of Akinyele local government area sued the Attorney-General of Oyo State, challenging the validity of a bill to further amend the Local Government Law of Oyo State 1978. Oloko J held that in a case such as this where the plaintiffs were challenging the validity or constitutionality of any enactment in court, they were relieved of showing special interest or *locus standi*. Also, in *Ejeh v Attonery-General of Imo State*,[57] it was held that any person who is convinced that there is an infraction of the provisions of the Constitution can to go to court and ask for appropriate

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52 432.

53 [1984] 5 NCLR 766.

54 [1982] 3 NCLR 1.

55 88. Similarly, in *Tony Momoh v Senate of The National Assembly & Others* (1981) 1 NCLR 21, the provisions of sec 31 of the Legislative (Powers and Privileges) Act, Cap 102, LFN & Lagos, 1958, which provide that the court's process could not be served within the chambers or precincts of the legislative house while that house is sitting, were held inconsistent with the provisions of sec 42 of the 1979 Constitution and declared void.

56 (1984) 5 NCLR 557.

57 (1985) 6 NCLR 390.

relief if relief is required. The court held that when the cause of action is intended to keep the law and the constitution of the country serene and inviolate, it is wrong for the defendant to challenge the *locus standi* or capacity of the plaintiff to sue.

Further, in *Hon Godwin S Jideonwo and Others v Governor of Bendel State and Others,*[58] the Governor of Bendel State on the platform of the Unity Party of Nigeria (UPN) signed into law a bill dissolving and suspending the existing Local Government Councils in the state. The plaintiffs, representing both the Nigeria Peoples' Party (NPP) and National Party of Nigeria (NPN) members in the State House of Assembly, challenged the dissolution as unconstitutional. On the issue of *locus standi* raised by the defendants, Ovie-Whisky CJ held as follows:[59]

> If the legislature passes a law which is beyond its competence and which it has no jurisdiction to pass, whether or not it was passed by all members of the House, any member of the House or any member of the public who is affected by the law can challenge the law in court and nothing prevents the court from setting aside and declaring it *ultra vires* the legislature if in fact it is so.

It is important to mention that these cases were not directly involving the enforcement of fundamental rights, but rather dealt with the validity of some other laws within the constitutional context. The position of the court in this regard could not have been different since the Constitution itself proclaims its superiority and declares any law in conflict with it as null and void to the extent of its inconsistency.[60]

5 *Locus standi* and enforcement of fundamental rights

It is asserted that fundamental rights are not to be enjoyed in semantics only or in their mere inclusion in the pages of the Constitution.[61] Rights are meaningless unless there is also provision for access to an independent judiciary for their enforcement. Agbede posits that 'a right is no right if it cannot be vindicated by a prompt appeal to

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58 (1981) 1 NCLR 4.

59 15. See also *Prince Adeniji-Adele & Others v The Governor of Lagos & Others* (1982) 3 NCLR 698.

60 See secs 1(1) & (3) of the 1999 Nigerian Constitution which provide: 'This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria ... If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.'

61 See MA Ajomo 'The development of individual rights in Nigeria's constitutional history' in MA Ajomo & B Owasanoye *Individual rights under the 1989 Constitution* (1993) 8.

the court'.[62] It is for this reason that the Constitution confers a special jurisdiction on the High Court with respect to the enforcement of these rights.[63] The Constitution provides that any person who alleges that any provision of the chapter on the fundamental rights has been, is being, or is likely to be contravened to seek redress in any High Court, State or Federal.[64]

The procedure for obtaining redress for a contravention or likely contravention of these rights is spelt out by the Fundamental Rights (Enforcement Procedure) Rules.[65] The Rules make provision for a speedier hearing of human rights cases than other civil cases by the courts. Under these Rules, court cases for the enforcement of human rights go through a two stage process like the process for enforcing prerogative writs. The first stage is an *ex parte* application for leave or permission to bring the proceedings, while the second stage for the substantive application is through motion on notice. In terms of the Rules, an aggrieved person is required to apply *ex parte* to any High Court for leave to apply for an order and, if granted, this should be followed by motion on notice or originating summons asking for a substantive order. The court thereafter has the power to make an appropriate order or relief.[66] The task of the courts in the adjudication of disputes and controversies concerning entrenched human rights is enormous. It is therefore asserted that the degree of liberty obtainable in any society depends ultimately on the attitude of the courts.[67]

There has been a remarkable development since the Independence Constitution of 1960 in relation to the conferment of special jurisdiction to the courts for the preservation of fundamental rights.[68] Following

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62 See IO Agbede 'The rule of law and the preservation of individual rights' in Ajomo & Owasanoye (n 61 above) 42.

63 Ajomo & Owasanoye (n 61 above) 8.

64 See sec 46(1) of the 1999 Nigerian Constitution.

65 This was made pursuant to the 1979 Constitution by the Chief Justice of Nigeria and came into effect from 1 January 1980. The Rules have been amended and new ones put in place as Fundamental Human Rights (Enforcement Procedure) Rules 2008. See also sec 46(3) of the 1999 Constitution. In terms of the Fundamental Human Rights (Enforcement Procedure) Rules, it is only an issue bothering on ch IV of the Constitution that can be brought under the Rules. Thus, in *WAEC v Akinkunmi* [2008] 9 NWLR (Pt 1091) 154-155, the Nigerian Supreme Court held thus: 'In ascertaining the justiciability or competence of a suit commenced by way of application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, the court must ensure that the enforcement of the fundamental rights under chapter IV of the Constitution is the main claim and not ancillary claim. Where the main or principal claim is not the enforcement of a fundamental right, the jurisdiction of the court cannot be said to be properly invoked, and the action is liable to be struck out on ground of incompetence.'

66 Ajomo & Owasanoye (n 61 above) 8.

67 As above.

68 See sec 31(1) of the 1960 Independence Constitution, sec 32(1) of the 1963 Republican Constitution, sec 42(1) of the 1979 Constitution and sec 46(1) of the 1999 Constitution.

much disputed controversies on the scope and ambit of the jurisdiction of the State High Court and Federal High Court, it is now settled that an infringement of fundamental rights is a matter within the concurrent jurisdiction of both the State High Court and the Federal High Court.[69]

Section 46(1) of the 1999 Constitution provides that '[a]ny person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State *in relation to him* may apply to a High Court in that state for redress'. The scope of this section calls for examination herein. The section provides for three closely-knit but distinct sectors or limbs for the enforcement of fundamental rights by an aggrieved person. These are (a) when the fundamental right 'has been' contravened; (b) when the fundamental right 'is being' contravened; and (c) when the fundamental right 'is likely' to be contravened.[70]

In the first category, it is submitted that the words 'has been' (in the past participle) mean that, as far as the aggrieved person is concerned, the act of contravention is completed and therefore he or she has an enforceable grievance.[71] In *Chief Uzoukwu and Others v Ezeonu II, Igwe of Atani and Others,*[72] the Nigerian Court of Appeal, while dealing with the equivalent provisions in section 42(1) of the 1979 Constitution, held:[73]

> Section 42(1) has three major limbs. The first is that the fundamental right in Chapter 4 has been physically contravened. In other words, the act of contravention is completed and the plaintiff goes to court to seek for a redress.

Of all three sectors, this is the easiest to prove. This is because the act of contravention, being completed, is tangible, and the plaintiff will have less difficulty proving the allegation than in the case of the other two limbs.[74]

In the second category, the words 'is being' are in the present tense. According to the court,[75]

> the second limb is that the fundamental right 'is being' contravened. Here, the act of contravention may or may not be completed. But in the case of the latter, there is sufficient overt act on the part of the respondent that the process of contravention is physically in the hands of the respondent and that the act of contravention is in existence substantially.

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69 See *Senate of the National Assembly & Others v Tony Momoh* [1983] 4 NCLR 269; *Lt Col Gombe v Lt Col Madaki* [1984] 5 NCLR 435; *Alhaji Tukur v Government of Gongola State* [1989] 4 NWLR (pt 117) 517.

70 See *Chief Uzoukwu & Others v Ezeonu II, Igwe of Atani & Others* [1991] 6 NWLR (pt 200) 708; See also Ajomo & Owasanoye (n 61 above) 55.

71 Ajomo & Owasanoye (n 61 above) 55.

72 n 70 above.

73 784.

74 Ajomo & Owasanoye (n 61 above) 55.

75 *Uzoukwu v Ezeonu II* (n 70 above) 784.

It is submitted, however, that it is difficult to draw the factual line in this sector. However, it will be more in line with the intention of the drafters to say that what is anticipated is less of a completed act but more of an uncompleted act.[76]

The third limb, the words 'is likely' convey an anticipatory situation. The provision is futuristic contextually and in content. The plaintiff has cause to think that from the initial conduct of the defendant, his fundamental rights could be in danger of being contravened and he could not therefore afford to wait until he becomes a victim of the conduct of the defendant.[77] The Court of Appeal interpreted this third sector in *Chief Uzoukwu and Others v Ezeonu II, Igwe of Atani and Others* as follows:[78]

> In the third limb, there is likelihood that the respondent will contravene the fundamental rights or rights of the plaintiff ... by the third limb, a plaintiff or applicant need not wait for the last act of contravention. It might be too late to salvage the already damaged condition. Therefore the third limb gives him the power to move to court to seek for redress immediately he senses some move on the part of the respondent to contravene his fundamental rights. But before a plaintiff or applicant invokes the third limb, he must be sure that there are enough acts on the part of the respondent aimed essentially and unequivocally towards the contravention of his right. A mere speculative conduct on the part of the respondent without more, cannot ground an action under the third limb.

This is the most difficult to prove of all the three limbs. The evidence in the court could be mostly speculative and a plaintiff or applicant has a fairly difficult duty to prove to the satisfaction of the court that his fundamental right is likely to be contravened.[79]

The pertinent issue in the article is: Does the provision of section 46(1) of the Constitution confer *locus standi* on any other person or category of persons other than a person whose fundamental right 'has been', 'is being' or 'is likely' to be contravened? Put differently, apart from this category of person or persons, has any other person *locus standi* to bring an action for the enforcement of fundamental rights under section 46(1) of the Constitution?

As explained in the earlier part of the article, it is an established position of law in Nigeria that before a person can invoke the jurisdiction of courts of law, he or she must have 'sufficient interest' in the matter.[80] The law generally requires a litigant to personally have a direct and material interest in the relief sought. This restrictive approach has had

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76 Ajomo & Owasanoye (n 61 above) 56.

77 As above.

78 n 70 above, 784.

79 Ajomo & Owasanoye (n 61 above) 57.

80 A sufficient interest is not an objective term, it is rather subjective. The question of what constitutes sufficient interest will depend on the circumstances of each case. See *Namibian National Students Organisation v Speaker of the National Assembly of SWA* 1990 1 SA 617 (SWA) 627B-E.

the effect of curtailing the rights of people who might otherwise be entitled to bring an application to court.[81] The concept of *locus standi* has been severally criticised as constituting an artificial barrier between the litigant and the court. It is described as a major constraint on the legal protection and enforcement of human rights in Nigeria in the sense that it limits access to courts.[82] Before a person can maintain a suit, he or she must disclose his or her personal interest in the matter.[83] Obiagwu and Odinkalu assert:[84]

> There are two major obstacles posed by the strict interpretation of *locus standi* [in Nigeria]. First, a human rights NGO or an individual activist can not sue to enforce generic or group rights because it would be difficult to show under those circumstances a special interest in such a matter to meet the requirements of the *Adesanya* rule. The second obstacle is that individual victims who are required to disclose a sufficient personal interest in the matter rarely succeeded because personal interest, defined as interest over and above that of the general public, is difficult to prove where the alleged violation also affects other members of the public.

Agbede submits that 'the court has created an artificial barrier between the litigant and the court by the notion of *locus standi*'.[85] He questioned its rationale thus:[86]

> One may like to ask why any Nigerian should live under an unconstitutional law until someone assumes power under it to his detriment? I think it will be good law and good sense for anybody to challenge a statute on the basis of its unconstitutionality whether or not his rights are being threatened. Otherwise how can our Constitution remain supreme when inconsistent states abound with none clothed with the *locus standi* to challenge them?

He therefore suggests that the concept of *locus standi* should not apply when a statute is being challenged for its unconstitutionality.[87]

However, in most common law jurisdictions, a liberal position on *locus standi* has been adopted.[88] In this regard, the history of the

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81 See L Seafield 'The interdependence of all human rights' in AA An-Na'im (ed) *Human rights under African constitutions* (2003) 295 305.

82 See C Obiagwu & CA Odinkalu 'Combating legacies of colonialism and militarism' in An-Na'im (n 81 above) 211 233.

83 As above.

84 As above. See also T Ogowewo 'The problem with standing to sue in Nigeria' (1995) 39 *Journal of African Law* 9; T Ogowewo 'Wrecking the law: How article III of the Constitution of the United States led to the discovery of a law of standing to sue in Nigeria' (2000) 26 *Brooklyn Journal of International Law* 527.

85 Agbede (n 62 above) 42.

86 As above.

87 Agbede (n 62 above) 43.

88 Examples include countries such as Australia and South Africa. See eg sec 38 of the 1996 South African Constitution. See also *Ferreira v Levin NO* 1996 1 SA 984 (CC), where the South African Constitutional Court was called upon to determine whether the applicants had standing to challenge the validity of sec 417(2)(b) of the Companies Act 61 of 1973 on the ground that it was in conflict with sec 25(3) of the interim Constitution (providing for the right to a fair trial). The Court held that a broad approach should be adopted to the issue of standing in constitutional cases. This,

Indian Constitution is relevant in relation for its liberal and innovative approach to *locus standi*. From 1976, the Indian Supreme Court began to pursue a demonstrably more progressive and innovative approach to the question of standing, abandoning the traditional restrictive rule inherited from English jurisprudence. This applies in particular to those persons or class of persons who, as a result of historical and social disadvantage or disability, were incapable of complying with the traditional requirements.[89] This was a pioneering development in which Bhagwati CJ played a decisive, imaginative and perceptive role.[90]

According to Saharay:[91]

> It is well established that where a legal wrong or a legal injury is caused to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reason of poverty, helplessness of disability or socially or economically disadvantageous position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art[icle] 226 of the Constitution of India, and in case of breach of any fundamental right of such person or determinate class of persons, in the Supreme Court under Art[icle] 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

Even in England, where the Nigerian common law position on *locus standi* originated, courts have abandoned the restrictive approach and embraced a liberal interpretation of the concept. In England, new rules were introduced in 1977 for applications for review against public bodies. In terms of these rules, application for judicial review has to undergo two stages. First, an applicant had to seek leave to apply for judicial review. If leave is granted, the application would be heard. Before the court could allow an applicant leave to apply for judicial review, it has to be satisfied that he or she has *locus standi* to challenge the exercise of public power. The court will find that an applicant has

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according to the Court, would be consistent with the mandate given to it to uphold the Constitution and would serve to ensure that constitutional rights enjoyed the full measure of the protection to which they were entitled (paras 162-164). It was further held that the constitutional provision on *locus standi* did not require that a person acting in his or her own interest had to be a person whose constitutional rights had been infringed or threatened. The constitutional challenge could be brought by anyone and the Court would decide what constituted sufficient interest in the circumstances (para 168). A similar position was adopted in *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 3 SA 155 (N).

89 See *SP Gupta v Union of India* (1982) 2 SCR 365 520.

90 See Devenish (n 9 above) 50; see also C Loots 'Standing to enforce fundamental rights' (1994) 10 *South African Journal on Human Rights* 50.

91 HK Saharay *The Constitution of India: An analytical approach* (2002) 339.

standing if it is satisfied that the applicant has a 'sufficient interest' in the matter.[92]

Interpreting the words 'sufficient interest' in the Rules in *Inland Revenue Commissioners v National Federation of Self-employed and Small Business (Ltd),*[93] the court held that an applicant for judicial review did not need to have a direct legal or financial interest. However, a mere busybody would not have sufficient interest. According to Lord Wilberforce,[94]

> [i]t would, in my view, be a grave *lacuna* in our system of public law if a pressure group, like the federation, or even a single public spirited tax payer was prevented by outdated technical rules of *locus standi* from bringing the matter to court to vindicate the rule of law and get the unlawful conduct stopped ...

Writing on standing rules under English law, Lord Denning stated:[95]

> The tendency in the past was to limit to persons who had particular grievance of their own over and above the rest of the public. But in recent years there has been a remarkable series of cases in which private persons have come to the court and have been heard. There is now a much wider concept of *locus standi* when complaint is made against a public authority. It extends to anyone who is not a mere busy body but is coming to court on behalf of the public at large.

An important factor to be taken into account when considering the issue of standing is the merits of the challenge. The applicant may not necessarily have a personal interest in the dispute.[96] Other significant factors the court will consider are the importance of vindicating the rule of law, the importance of the issues raised, the likely absence of any other responsible challenger and the nature of the breach of duty against which the relief is sought.[97]

Another country that emulates this liberal approach is Canada. In *Minister of Justice of Canada v Borowski,*[98] it was held:[99]

> To establish status as a plaintiff in a suit seeking a declaration ... a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court.

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92 See Order 53 r 3(5) of the Rules of Supreme Court 1977 (UK); sec 31(3) of the Supreme Court Act 1981 (UK).

93 [1982] AC 617.

94 644.

95 See Lord Denning MR *The discipline of law* (1979) 117. See also *R v COP of the Metropolis, ex parte Blackburn* (1968) 2 QB 118.

96 See *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte World Development Movement Ltd* [1995] WLR 386.

97 See Ngcukaitobi (n 24 above) 599.

98 (1982) 130 DLR (3d) 588.

99 606. See also *Finlay v Minister of Finance of Canada* (1986) 146 DLR (3d) 704.

Thus, the Canadian courts will grant standing to a plaintiff who establishes that (i) the action raises a serious legal question; (ii) the plaintiff has a genuine interest in the resolution of the question; and (iii) there is no other reasonable and effective manner in which the question may be brought before the court.[100]

Section 38 of the Constitution of the Republic of South Africa, 1996, represents such a liberal and modern approach on *locus standi*. The section provides for the category of persons that has the right or standing to challenge a breach of rights in chapter 2 of the Constitution. It provides:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members.

The above provision is very wide compared to the common law restrictive position which only allows a person to approach a court of law if he or she has sufficient, direct and personal interest in the matter. As expected, courts have given this provision the wide and liberal interpretation it deserves.

In *Ferreira v Levin NO,*[101] the South African Constitutional Court held that a broad approach should be adopted on the issue of standing in constitutional cases. According to the Court, this would be consistent with the mandate given to it to uphold the Constitution and would serve to ensure that the constitutional rights enjoyed the full measure of the protection to which they were entitled. The Court further held that the constitutional provision on *locus standi* did not require that a person acting in his or her own interest had to be a person whose constitutional rights had been infringed or threatened.[102] The Court stated further that the constitutional challenge could be brought by anyone and the Court would decide what constituted sufficient interest in the circumstances.[103]

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100 See Devenish (n 9 above) 46; Ngcukaitobi (n 24 above) 596-597.

101 n 88 above.

102 Paras 162-164 1082.

103 Para 168 1084; also, in *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* 2002 6 SA 66 (T) para 27, the court held that a voluntary association was entitled to bring a dispute on behalf of residents who 'are mostly indigent and are unable to individually pursue their claims because of that fact'. See also *Permanent Secretary, Department of Welfare, Eastern Cape & Another v Ngxuza & Others* 2001 4 SA 1184 (SCA); *Lawyers for Human Rights & Another v Minister of Home Affairs* 2004 4 SA 125 (CC) paras 15 & 17; *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 3 SA 155 (N).

The cumulative effect of section 38 of the South African Constitution is that any person or organisation is empowered to enforce rights encapsulated in the Bill of Rights, irrespective of whether that person or organisation is prejudicially affected by circumstances that allegedly give rise to an infringement of such rights.[104] This constitutes a significant reform and a meaningful adaptation of the common law position on standing.

Advocating a liberal approach on standing in *R v Greater London Council, ex parte Blackburn*,[105] Lord Denning held as follows:[106]

> I regard it as a matter of high constitutional principle that if there is a good reason for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.

This liberal approach, the learned counsel for the appellants in *Olufosoye's* case, Mr HA Lardner, SAN, commended very strongly to the court, but the court rejected his submission. In rejecting the submission, the court, *per* Obaseki JSC, who delivered the lead judgment, said:[107]

> This court does not make law. Its function is to administer and interpret the law. As the law stands, there is no room for the adoption of the modern views on *locus standi* being followed by England and Australia. The adoption of those views in England has found support in the statute law of England.

The restrictive approach on *locus standi* was further affirmed by the Supreme Court in *Josiah K Owodunni and Others v Registered Trustees of Celestial Church of Christ, Nigeria Diocese.*[108] The Court affirmed the position in *Olawoyin*,[109] and held:[110]

> I think the interest or injury test applied by the Federal Supreme Court in *Olawoyin v A-G of Northern Region* (*supra*) should remain the yardstick in determining the question of *locus standi* of a complainant and this is to be determined in the light of the facts or special circumstances of each case. I do not think that test is affected by section 6(6)(b) of the Constitution.

As the law stands now in Nigeria, in order to have standing to commence an action (including the enforcement of fundamental rights), the plaintiff must have a sufficient interest in the matter. The term 'sufficient interest' is broad and generic. It is not an objective term;

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104 See Vrancken & Killander (n 20 above) 257; Devenish (n 9 above) 48.

105 [1976] 1 WLR 550.

106 559.

107 680-681; (1986) 2 SC 325, *per* Obaseki JSC 352-353.

108 (2000) 1 WRN (Vol 2) 29.

109 n 30 above.

110 *Per* Ogundare JSC, 50; see *Adediran v Interland Transport Ltd* (1991) 2 NWLR (Pt 214) 155.

it is rather subjective.[111] The term is vague and nebulous, and lacks a precise and apt legal meaning. It has to be determined in relation to the facts and circumstances of each case.[112] Over the years, however, Nigerian courts have examined the ambit of the expression 'sufficient interest'.[113] Sufficient interest is described as an interest which is peculiar to the plaintiff and not an interest which he shares in common with members of the general public.[114] If a person will be affected or aggrieved or is likely to be affected or aggrieved by the outcome of a court proceeding, he would be held as having a sufficient interest and he will be accorded *locus standi*.[115]

6 The roles of the judiciary, politicians and civil society in ensuring a flexible interpretation of standing rules

On the enforcement of fundamental rights, the Nigerian Constitution still adopts a narrow approach which invariably limits the category of person that can approach the court on the issue. The phrase 'in relation to him' as appears in section 46 of the 1999 Constitution is said to be too restrictive. This phrase equally appeared in section 42(1) of the 1979 Constitution. The limiting effect of this phrase has since been discovered and the phrase was recommended for review in preparation for the 1989 Constitution.[116] Thus, towards giving the country a new Constitution in 1989, a Constituent Assembly was inaugurated by the then President of the Country, General Ibrahim Babangida, on 11 May 1988. The Assembly was saddled with the responsibility of amending the 1979 Constitution and preparing a more acceptable Constitution for the country. Its Committee 6 on Fundamental Rights dealing with clause 44(1) of the Review Constitution (same with section 46(1) of the 1999 Constitution) recommended the following amendment:[117]

> Any person who alleges that any of the provisions of this Chapter [Chapter IV on Fundamental Rights] has been, is being or is likely to be contravened

111 See *Namibian National Students Organisation v Speaker of the National Assembly of SWA* (n 80 above).

112 Ajomo & Owasanoye (n 61 above) 57.

113 See *Hon Justice Ovie-Whisky v Chief Olawoyin* [1985] 6 NCLR 156; *Prince Maradesa v Military Governor of Oyo State* [1986] 3 NWLR (pt 27) 125.

114 See *Mohammed v Attorney-General, Kaduna State* (1981) 1 NCLR 117.

115 See *Chief O Emeka Ojukwu v Governor of Lagos State & Others* [1985] 2 NWLR (pt10) 806; *Arch-Bishop Anthony Olubunmi Okogie v Attorney-general Lagos State* [1981] 1 NCLR 218.

116 This Constitution never came into operation due to the aborted transition of power to civilians by the military government of General Ibrahim Babangida.

117 See the Report of the Constituent Assembly, Vol II (1989) 154. See also N Tobi *Understanding the 1989 Constitution better* (1992) 3-7.

> in any State or in the Federal Capital Territory Abuja may apply to a High Court having jurisdiction in that area for redress.

In presenting the Report of the Committee to the Assembly, the Chairperson of the Committee[118] said:[119]

> Section 44 tells us that a person is now free to defend the right of another person even when he suspects that somebody is going to contravene any of the provisions of Chapter IV that is any of the provisions which came under the examination of the Committee 6. It was stated in the Review Constitution that it authorises the person to fight for himself. We have removed 'himself' making the provision a general one so that any Nigerian citizen could fight for the right of any other citizens if he feels that citizens' rights have been contravened.

However, the Constituent Assembly did not see its way clear in adopting the amendment recommended by Committee 6 and so dropped it.[120]

Though a restrictive interpretation of standing rules is not without its advantages, however, the global trend now is towards a broad and expansive interpretation of standing.[121] A liberalised *locus standi* position has the important advantage of facilitating greater access to justice. It also encourages and promotes the practice in which interested individuals and organisations can approach the court for enforcement of fundamental rights on behalf of the less privileged and disadvantaged in society.[122] Although the courts have inherent power to invite *amici curiae*[123] in a matter of constitutional importance and public interest,

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118 Dr JE Henshaw.

119 See Report of the Constituent Assembly (n 117 above) 148.

120 See Ajomo & Owasanoye (n 61 above) 60.

121 Hogg, eg, explains that restrictions on standing are intended to accomplish six main objectives, namely, (i) to avoid opening the floodgates to unnecessary litigation; (ii) to ration scarce resources by applying them to real rather than hypothetical disputes; (iii) to place limits on the exercise of judicial power by precluding rulings that are not needed to resolve disputes; (iv) to avoid the risk of prejudice to persons who would be affected by the decision but are not before the court; (v) to avoid the risk that the case will be inadequately presented by parties who have no real interest in the outcome; and (vi) to avoid the risk that a court will reach an unwise decision of a question that comes before it in a hypothetical or abstract form, lacking the factual context of a real dispute. See P Hogg *Constitutional law of Canada* (1992) 1263.

122 Nigerian human rights activists have contended that *locus standi* constitutes an impediment to the enforcement of human rights by the NGOs on behalf of the citizens. See Obiagwu & Odinkalu (n 82 above) 233.

123 The phrase *amicus curiae* means friend of the court. It is employed to refer to a barrister who represents a party to an action at the request of the court. In the Nigerian context, the term is used to refer to a person with a strong knowledge or views on the subject matter of an action, who the court invites to file briefs (as friend of the court or in order to furnish the court with his knowledge) in the suit concerning matters of broad public interest.

however, it is submitted that a liberalised view of standing will further promote its use under Nigerian law.[124]

The present position on standing in Nigeria is anachronistically restrictive. There is a need for a drastic revision of this position to facilitate meaningful and pro-active enforcement of fundamental rights in the country. Thus, in the interest of the realisation of the importance of human rights, this narrow position has to change. The reason why this change is of seminal importance is that Nigeria is a developing state in which a large number of citizens are illiterate and living in abject poverty. Many people in the country whose fundamental rights are violated may not be in a position to approach the court for relief. For instance, they may be emotionally and intellectually unsophisticated or indigent and, in effect, they may be unable to enforce their fundamental rights. A regime of liberal standing will indeed permit any person, human rights activists or non-governmental organisations (NGOs) to approach the court on behalf of all those persons.[125]

Unlike the South African constitutional provisions on *locus standi*, the scope of section 46(1) of the Nigerian Constitution is narrow. Under the South African Constitution, the categories of persons that can approach the court include persons acting in their own interest, persons acting on behalf of another person, persons acting as a member of a group or class of persons, persons acting in the public interest and associations acting in the interest of their members.[126] The provision allowing persons to act in the public interest under this Constitution is wide and this will facilitate the adequate enforcement of fundamental rights. This wide provision is recommended for Nigeria. An amendment of section 46 of the Constitution may be required to accommodate this liberal approach. One hopes that the current National Assembly Sub-Committee on Justice will take up the call for a liberal provision on *locus standi* as recommended by Dr James Henshaw's Committee 6 of the 1988 Nigerian Constituent Assembly.[127] Fortunately enough, moves are now on in the National Assembly for the review or amendment of the 1999 Nigerian Constitution and this will afford the opportunity for such a liberal provision. The Nigerian Bar Association and the Attorney-

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124 Access to justice will obviously be facilitated if *amici curiae* are permitted to place before the courts (not until when invited) arguments on matters of constitutional importance by representative organisations which are not parties to the action. See also Devenish (n 9 above) 50.

125 It is observed that the present regime in the enforcement of fundamental human rights does not countenance representative action. It, however, behoves human rights activists or NGOs to obtain the consent or instructions of the victims of human rights violations to institute actions in the victim's name. It is submitted that this is sometimes practically impossible where the victim is held incommunicado, and there is nobody who can give the requisite instructions on his or her behalf. See AN Nwazuoke *Introduction to human rights law* (2006) 186-187.

126 See sec 38 of the South African Constitution.

127 See the Report of the Constituent Assembly (n 117 above) 148.

General of the Federation may have to play a leading role in this respect. However, before such amendment is carried out, the bulk of the work rests on the judiciary to accommodate a liberal position on *locus standi* through a purposive and expansive interpretation of section 46 of the Constitution.

7 Constraints on the enforcement of human rights

Not all the rights provided for under the Nigerian Constitution are absolute. Rights are inconceivable without some limitations. Thus, any right or freedom has its limitations and the beneficiaries also, at times, have special responsibilities. One major deficiency in the Bill of Rights in chapter 4 of the Constitution is that the chapter contains several claw-backs or grounds for derogation. Section 45 of the 1999 Nigerian Constitution provides circumstances under which the state could restrict the rights to private and family life, freedom of thought, conscience and religion, expression and the press, peaceful assembly, association and movement. These rights may be derogated by 'any law that is reasonably justifiable in a democratic society for the interest of defence, public safety, public order, morality, or public health; or for the purpose of protecting rights and freedom of other persons'.[128]

Also, the right to life and personal liberty can be lawfully restricted in a period of emergency or war.[129] The right to life can be limited for reasons of defence of persons and properties; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or for suppression of a riot, insurrection or mutiny.[130] The right to personal liberty may similarly be limited for the purpose of securing an individual's extradition or alien repatriation, or for effecting a person's arrest on suspicion of having committed a capital offence.[131]

In terms of section 46(4) of the Constitution, the National Assembly is required to make law to provide for financial assistance to any indigent citizen whose fundamental rights are violated, with a view to enabling him or her to engage the services of a legal practitioner. However, no such law has been made and no effective legal aid programme exists in Nigeria. The existing legal aid scheme is deficient and limited in scope. Initially, the Legal Aid Act provided legal assistance in respect of capital offences and serious criminal cases.[132] It has, however, been amended to cover 'cases involving the infringement of fundamental

[128] See secs 45(1)(a) & (b) of the Constitution.
[129] See sec 45(2) of the Constitution.
[130] See sec 33(2) of the Constitution.
[131] See secs 35(1)(c) & (f) of the Constitution.
[132] See Legal Aid Act 1976, Cap 205, LFN 1990.

human rights under the Constitution'.[133] Nonetheless, the Legal Aid Council is mandated by law to provide legal representation to indigent persons. The definition of 'indigent' under the Act is unrealistic in that it excludes many Nigerians below the poverty line who are genuinely unable to afford legal services.[134] It is submitted that the Legal Aid Act does not adequately fulfil the intention of section 46(4) of the Constitution. Also, the Council is grossly under-funded and lacks the required personnel complement to fulfil the demands placed upon it under the Act and the Constitution.[135]

Apart from standing rules, other constraints on the protection and enforcement of fundamental rights in Nigeria include deficiencies in the substantive provisions of the Bill of Rights and other laws as well as inadequate procedural rules for the enforcement of rights.[136] The non-justiciability of economic, social and cultural rights in chapter II of the 1999 Nigerian Constitution is one example of such deficiencies.[137] The provisions of these rights are important in the enjoyment of civil and political rights. In a country with a predominantly poor population such as Nigeria, these rights are fundamental to the well-being of the average person and for the effective enjoyment of other rights in the Constitution.[138] Other constraints include the complexity, technicalities and high expense involved in bringing action for the enforcement of rights. Other procedural requirements, such as pre-action notices, limitation periods and ouster clauses, have the effect of limiting access to court for the enforcement of rights. Court congestion and a delay in trial, which now characterise the Nigerian judicial system, also constitute formidable constraints on the enforcement of rights in the country. Other enduring impediments to the enforcement of human rights in Nigeria are executive lawlessness and a failure to obey court orders. In some instances, judicial summonses and court orders have been ignored with impunity.[139] For the proper enforcement of fundamental rights in Nigeria, we recommend that there should be concerted efforts targeted at removing the constraints and obstacles identified above. In addition, a culture of constitutionality and respect for the rule of law is also essential.

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133 See UA Hassan Baba 'Report on the Operation of the Legal Aid Council of the Federal Republic of Nigeria' presented to the Annual General Conference of the Nigerian Bar Association, Abuja, 21-25 August 2000 6.

134 See Obiagwu & Odinkalu (n 82 above) 225.

135 It is admitted that the Council does not have enough lawyers to provide a responsive customer service. See Hassan Baba (n 133 above) 13.

136 See Obiagwu & Odinkalu (n 82 above) 230.

137 See n 2 above.

138 See Obiagwu & Odinkalu (n 82 above) 230.

139 See *Ojukwu v Governor of Lagos State* [1986] 5 NWLR (pt 18) 15.

8 Conclusion

This article explores the scope of standing rules in section 46 of the 1999 Nigerian Constitution. It is observed that the section contains a restrictive and narrow provision on *locus standi*. The article found that this narrow provision has the effect of limiting access to court and it invariably constitutes an impediment or constraint on the enforcement of fundamental human rights in the country. Many common law countries, such as England, Australia, Canada, India and South Africa, have jettisoned this anachronistic position on standing for a more liberal and expansive interpretation. On the contrary, the Nigerian Constitution still maintains restrictive and outdated rules of standing. This, however, is inconceivable at a time like this when other common law jurisdictions are enthusiastically adopting a liberal approach to the concept.

Since the paramount object of any law (including the Constitution) is to promote fairness and social justice, the article therefore advocates a more flexible interpretation of standing rules in Nigeria. The Nigerian judiciary has a significant role to play in this regard. While it is accepted that the constitutional provisions are limited in this regard and needing review, it is, nevertheless, submitted that the Nigerian judiciary should, through judicial activism, relax the restrictive rules of standing by giving section 46 of the Constitution a more expansive and purposive interpretation. This liberal interpretation will accommodate a larger category of persons in the enforcement of fundamental rights.

AFRICAN HUMAN RIGHTS LAW JOURNAL

International human rights law and foreign case law in interpreting Constitutional rights: The Supreme Court of Uganda and the death penalty question

*Jamil Ddamulira Mujuzi**
Doctoral Researcher, Civil Society Prison Reform Initiative (CSPRI), Community Law Centre, University of the Western Cape; LLD Candidate, Faculty of Law, University of the Western Cape

Summary

On 21 January 2009, the Supreme Court of Uganda handed down a judgment in which it held that the death penalty was constitutional, that a mandatory death sentence was unconstitutional, that hanging as a mode of execution was not cruel and inhuman, and that the death row phenomenon is cruel and inhuman and therefore unconstitutional. Although the Constitution of Uganda does not empower or require the Court to refer to international law or foreign case law in interpreting the Constitution, the Court relied heavily on international human rights treaties and jurisprudence in arriving at its decision. This article has three purposes: one, to show how the Ugandan Court used international law and foreign case law in its judgment; two, to analyse the Court's orders; and third to recommend that the Constitution of Uganda be amended to empower or require courts to refer to international law and foreign case law in interpreting the country's Constitution.

* LLB (Hons) (Makerere), LLM (Human Rights and Democratisation in Africa) (Pretoria), LLM (Human Rights Specialising in Reproductive and Sexual Health Rights) (Free State), LLD (Western Cape); djmujuzi@yahoo.com. I am grateful to Prof Julia Sloth-Nielsen, Faculty of Law, UWC, for providing me with the funding I used in accessing most of the materials used in this article and to the anonymous referees for their constructive comments. The funding by OSF-SA and Ford Foundation to CSPRI and CLC is acknowledged. The views expressed in this article are those of the author.

1 Introduction

On 21 January 2009, the Supreme Court of Uganda handed down the long-awaited judgment on appeal in the case of *Attorney-General v Susan Kigula and 417 Others* (*Kigula* case).[1] This case was as a result of an appeal against the Constitutional Court's finding that, amongst other things, the death penalty was not unconstitutional as it was allowed for under the Constitution, but that the mandatory death sentence in the Penal Code Act[2] for murder was unconstitutional because it violated the accused's right to a fair trial in the sense that he or she could not be heard in mitigation once found guilty of murder, and that hanging, as a form of execution, did not violate article 24 of the Constitution which prohibits cruel, inhuman and degrading punishment.[3] Following the Constitutional Court's judgment, both the government and death row inmates appealed to the Supreme Court with the government arguing, *inter alia*, that the Constitutional Court erred in law when it found that the mandatory death penalty for murder was unconstitutional.[4] On the other hand, the death row inmates appealed against the Constitutional Court's ruling that the death penalty was not unconstitutional and therefore not a cruel, inhuman and degrading form of punishment because it was provided for under the Constitution.[5] They also appealed against the Constitutional Court's finding that hanging, as form of execution, was not a cruel and inhuman punishment within the meaning of article 24 of the Constitution and therefore not unconstitutional.[6]

On 21 January 2009, the Supreme Court finally handed down its judgment. It held, first, that the death penalty was constitutional as it was sanctioned under the Constitution and that the framers of the Constitution took into consideration Uganda's history of grave human rights violations before including article 22(1) of the Constitution which provides that the right to life may be taken away as long as the manner in which it is taken away is not 'arbitrary'; second, that the mandatory death sentence was unconstitutional because it violated the offender's right to a fair trial in the sense that he cannot be heard in mitigation at sentencing and that it infringed the doctrine of separation of powers because it eliminated the judge's discretion in determining which sentence fitted both the offence and the offender; three, that hang-

1 *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 03 of 2006 (judgment of 21 January 2009, unreported) Supreme Court of Uganda http://www.saflii.org (accessed 20 September 2009).

2 Penal Code Act, Cap 120.

3 *Susan Kigula & 417 Others v Attorney-General*, Constitutional Petition 6 of 2003 (judgment of 5 June 2005).

4 *Kigula* (n 1 above) 10.

5 As above.

6 *Kigula* (n 1 above) 2.

ing as a form of execution was not a cruel, inhuman and degrading punishment within the meaning of article 24 of the Constitution and therefore it was not unconstitutional and there was no evidence that other methods of execution, such as lethal injection, were less painful than hanging;[7] and finally, that when a prisoner sentenced to death spends three years in detention after his appeal had been dismissed by the highest court and his application for the President to exercise his prerogative of mercy and commute his sentence has not been dealt with to know whether he has been granted reprieve or remission or would be executed, the death row phenomenon sets in, and that the death row phenomenon is cruel, inhuman and degrading treatment and that executing a prisoner who has spent three years on death row is cruel, inhuman and degrading. The Court ordered that a prisoner's sentence, who has been on death row for three years and more, should automatically be commuted to 'imprisonment for life without remission'.[8]

The Court's judgment attracted considerable media coverage both in Uganda[9] and abroad.[10] However, it also confused prison authorities on how they should deal with prisoners who had exhausted their appeals and had been on death row for more than three years.[11] One of the striking elements of the Court's judgment is the extent to which it relied on international human rights and foreign case law to resolve the issues it was dealing with. This article examines the status of inter-

7 For a detailed discussion of the Supreme Court's ruling on the question of hanging as a method of execution, see JD Mujuzi 'Execution by hanging not torture or cruel punishment? *Attorney-General v Susan Kigula and Others*' (2009) 3 *Malawi Law Journal* 133–146.

8 *Kigula* (n 1 above) 63.

9 L Afedraru *et al* 'Uganda Supreme Court upholds death sentence' *Daily Monitor* 22 January 2009 http://www.monitor.co.ug/artman/publish/news/Ugandan_Supreme_Court_upholds_death_sentence_78608.shtml (accessed 24 January 2009); Editorial 'Positives from ruling on the death penalty' *Daily Monitor* 23 January 2009 http://www.monitor.co.ug/artman/publish/opinions/ Positives_from_ruling_on_the_death_penalty_78644.shtml (accessed 24 January 2009); A Mugisa *et al* 'Death sentence judgment puzzles lawyers' *The New Vision* 22 January 2008 http://www.newvision.co.ug/D/8/13/668974 (accessed 24 January 2009); A Mugisa & H Nsambu 'Supreme Court retains death penalty' *The New Vision* 21 January 2009 http://www.newvision.co.ug/D/8/12/668812 (accessed 24 January 2009).

10 'Uganda court keeps death penalty' *BBC News* 21 January 2009 http://news.bbc.co.uk/2/hi/africa/7841749.stm (accessed 24 January 2009); 'Uganda's Supreme Court declares death penalty right' *Guardian Newspaper* 22 January 2009 http://www.ngrguardiannews.com/africa/article02//indexn3_html?pdate=220109&ptitle=Uganda's%20supreme%20cour%20declares%20death%20penalty%20right&cpdate=240109 (accessed 24 January 2009).

11 See T Butagira *et al* 'Death penalty ruling puzzles prison bosses' *Saturday Monitor* 24 January 2009 http://www.monitor.co.ug/artman/publish/news/Death_penalty_ruling_puzzles_prison_bosses_78725.shtml (accessed 24 January 2009), where it is reported that '[t]he Supreme Court ruling that prisoners, who have stayed on death row for more than three years, after exhausting all appeals, should not be executed but imprisoned for life has confused prison officials. *Saturday Monitor* has learnt that the officials are puzzled about how to handle condemned persons still in formal confinement. Dr Johnson Byabashaija, the [C]ommissioner [G]eneral of

national law in the Constitution of Uganda and thereafter discusses the Court's reliance on international law.

2 International human rights instruments under the Constitution of Uganda and their relevance in interpreting the Bill of Rights

The history of Uganda has been characterised by gross human rights violations, a fact which the Supreme Court took judicial notice of.[12] Thus, during the debates that preceded the making of the 1995 Constitution,[13] the Uganda Constitutional Commission[14] and the Constituent Assembly[15] emphasised that the new Constitution should contain most of the rights included in international human rights instruments to which Uganda was party at the time[16] and the Universal Declaration of Human Rights (Universal Declaration). The Supreme Court observed that[17]

> [t]he framers of the Constitution were aware of the various United Nations instruments, particularly those to which Uganda is a party. That is why article 287 provided for the continuation of treaties and conventions to which Uganda is a party.

The Bill of Rights indeed covers, at great length, all the rights in the International Covenant on Civil and Political Rights (ICCPR).

The Constitution of Uganda mentions international law in various respects: It provides that 'the foreign policy of Uganda shall be based on the principles of ... (b) respect for international law and treaty obligations';[18] it empowers the Uganda Human Rights Commission 'to monitor the government's compliance with international treaty and convention obligations on human rights',[19] and provides that any treaty or agreement to which Uganda was a state party before the coming into force of the Constitution (in 1995) was not to be affected by

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Uganda Prisons, said the government needs to clarify if the ... decision, arising from a petition by some 417 death row inmates to have the court quash the death sentence, would apply retrospectively. "We are going to write to the Attorney-General ... for advice because the Supreme Court ruling has got implications on all persons who have gone through all appeals [and stayed thereafter] on death row for more than three years."'

12 *Kigula* (n 1 above) 20.

13 The 1995 Constitution repealed the 1967 Constitution.

14 See generally *Report of the Uganda Constitutional Commission: Analysis and Recommendations*, UPPC, Entebbe (1993).

15 *Proceedings of the Constituent Assembly (Official Report, Content*) August-September 1994 (when the draft Bill of Rights was being debated).

16 *Kigula* (n 1 above) 20.

17 *Kigula* (n 1 above) 22.

18 Objective XXVIII(b) of National Objectives and Directive Principles of State Policy.

19 Art 52(1)(h).

the coming into force of the Constitution and Uganda was to continue to be party to it.[20]

Whereas the Constitution recognises the importance of international treaties to which Uganda is a party, neither the Constitutional Court nor the Supreme Court is empowered to refer to international human rights treaties to which Uganda is party in interpreting the Constitution, and especially the Bill of Rights.[21] This position can be contrasted with that in the Constitutions of Malawi[22] and South Africa,[23] where courts are expressly required to refer to international law and foreign law (in the case of South Africa) and comparable foreign case law (in the case of Malawi) in interpreting the Constitution. The lack of a provision expressly requiring the courts to consider international law in interpreting the Constitution has resulted in situations where, in some cases, international law is completely ignored in circumstances where it should have been considered to enrich the court's jurisprudence, for example where the applicants have referred to it in their submissions,[24] and also situations, like the case that forms the subject matter of this article, where international human rights law is given prominence although neither the respondents nor the appellants referred to it in their grounds of appeal and cross-appeal.[25] In the United States, where the Constitution does not require courts to refer to international law in reaching their decisions, it has been observed that[26]

> [t]here is a jurisprudential battle looming over the Supreme Court between the justices who support the use of international law in constitutional interpretation and the other side, headed unofficially by Justice Scalia, who considers the practice completely inappropriate.

In Uganda, at present, the Supreme Court and Constitutional Court judges have not, at least in public, shown that they are opposed to

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20 Art 287.

21 See arts 132 & 137 of the Constitution.

22 Art 11(2)(c) which provides that '[i]n interpreting the provisions of this Constitution a court of law shall — where applicable, have regard to current norms of public international law and comparable foreign case law'.

23 Sec 39(1) provides that 'when interpreting the Bill of Rights, a court, tribunal or forum — (b) must consider international law; and (c) may consider foreign law'.

24 Eg, *Law and Advocacy for Women in Uganda v Attorney-General of Uganda,* Constitutional Petitions 13/05 and 05/06 (judgment of 5 April 2007, unreported). Although the Constitutional Court held that some provisions of the Penal Code and Succession Act were unconstitutional for violating women's right to freedom from discrimination, it did not refer to international human rights instruments although the petitioners argued that the impugned provisions also violated these treaties to which Uganda is party, such as the Convention for the Elimination of All Forms of Discrimination Against Women.

25 *Kigula* (n 1 above) 4–9.

26 H Arnould '*Lawrence v Texas* and *Roper v Simmons*: Enriching constitutional interpretation with international law' (2008) 22 *Saint John's Journal of Legal Commentary* 685 685–686.

using international law in interpreting the Constitution.[27] What follows is a discussion of how the Supreme Court invoked international human rights law in arriving at its conclusions in the *Kigula* case.

3 The Supreme Court's reliance on international human rights instruments and jurisprudence

Uganda is a dualist country where, before a treaty can be relied upon by any court, it has to, at least in theory, first be domesticated through enabling legislation. However, although most of the treaties referred to by the Supreme Court were ratified by Uganda, they have never been domesticated. It could be argued that Ugandan judges have become like other common law judges in countries such as Botswana, Ghana and Nigeria,[28] who 'are increasingly abandoning their traditional dualistic orientation to treaties and are beginning to utilise human rights treaties despite the absence of implementing legislation giving domestic legal effect to the treaties'.[29] As mentioned earlier, in the *Kigula* case the Supreme Court was dealing with the following issues: the constitutionality of the death penalty; the constitutionality of the mandatory death penalty for murder; the constitutionality of hanging as a mode of execution; and the question regarding the death row phenomenon.

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27 In *Paul Kawanga Ssemwogerere & Others v Attorney-General of Uganda* (Constitutional Petition 5 of 2002) [2003] UGCC 4 (21 March 2003), in which the petitioners challenged the constitutionality of some provisions of the Political Parties and Organisations Act 18 of 2002, for, *inter alia*, imposing unjustifiable restrictions on the activities of political parties and organisations, thus rendering them non-functional and inoperative contrary to the Constitution. One of the issues was whether the impugned provisions violated the international human rights instruments mentioned in the petition. The Supreme Court unanimously held that, *inter alia*, '[t]he International Human Rights Conventions mentioned in the petition are not part of the Constitution of the Republic of Uganda. Therefore, a provision of an Act of Parliament cannot be interpreted against them. This issue was therefore misconceived.' See para 6. In *Charles Onyango Obbo & Another v Attorney-General* (Constitutional Appeal 2 of 2002) [2004] UGSC 1 (11 February 2004), Mulenga J of the Supreme Court, in holding that sec 50 of the Penal Code Act which criminalised the publication of false news was unconstitutional on the ground that the limitations it imposed could not be justified in a free and democratic society, referred to art 9 of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights' Declaration of Principles on Freedom of Expression in Africa (paras 1 and 2) and art 10 of ICCPR and concluded that, *inter alia*, '[f]rom the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas and truthful information'.

28 RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into the national legal systems in Africa' (2007) 30 *Fordham International Law Journal* 296 313.

29 MA Waters 'Creeping monism: The judicial trend towards interpretative incorporation of human rights treaties' (2007) 107 *Columbia Law Review* 628.

Unlike the case in countries like the United States, where 'courts have long resisted attempts to construe their legal texts in light of biding [international human rights] instruments',[30] at the outset, in dealing with the issue of the constitutionality of the death penalty, the Court observed that '[i]n discussing this matter we will make reference to international instruments on the subject matter'.[31] This was so in spite of the fact that none of the counsel, either for the respondents or for the appellants, urged the Court to examine international law. The Court referred to the Preamble and to articles 3 (the rights to life, liberty and security of person) and 5 (freedom from torture, and so on) of the Universal Declaration, and held that the Universal Declaration did not abolish the death penalty, and that 'even as the ... [Universal Declaration] was being proclaimed, death sentences passed by international tribunals were being carried out against war criminals in Germany and Japan'.[32] The Court referred to articles 6(1), (2), (4) and 7 of ICCPR and held that those provisions did not abolish the death penalty, but that they require that the right to life should not be arbitrarily taken away and, according to the Court, the execution of the death penalty did not amount to torture.[33] The Court held that articles 6(1), (2), (4) and 7 of ICCPR 'are in *pari materia* with articles 22(1) and 24 of the Constitution of Uganda'.[34] To emphasise its point that the death penalty is not unconstitutional and its imposition would not amount to Uganda's violation of its international obligations under ICCPR, the Court referred to the Human Rights Committee's decision in *Ng v Canada*[35] and observed that[36]

> ... the extradition of a fugitive to a country which enforces the death sentence in accordance with the requirements of the ... [ICCPR] could not be regarded as a breach of the obligations of the extraditing country.

While referring to article 6(6) of ICCPR, which states that nothing in the Covenant shall prevent state parties from abolishing the death penalty, the Court ruled that '[i]n Uganda, although the Constitution provides for the death sentence, there is nothing to stop Uganda as a member of the United Nations (UN) from introducing legislation to amend the Constitution and abolish the death sentence'.[37] The Court also referred to article 4 of the African Charter on Human and Peoples' Rights (African Charter) and held that what it prohibits is the

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30 Y Shany 'How supreme is the supreme law of the land? Comparative analysis of the influence of international human rights treaties upon the interpretation of constitutional texts by domestic courts' (2006) 31 *Brooklyn Journal of International Law* 341.

31 *Kigula* (n 1 above) 12.

32 *Kigula* (n 1 above) 13–14.

33 *Kigula* (n 1 above) 14–15.

34 *Kigula* (n 1 above) 15.

35 Communication No 469/1991.

36 *Kigula* (n 1 above) 16.

37 As above.

'arbitrary' deprivation of the right to life and that a death sentence imposed and executed in accordance with the law does not amount to an arbitrary deprivation of the right to life,[38] and that the right to life in the Constitution of Uganda is not absolute because '[h]ad the framers intended to provide for a non-derogable right to life, they would have so provided expressly'.[39] The Court added that article 22(1) of the Constitution '[c]learly ... conforms to the international human instruments ... particularly the International Covenant on Civil and Political Rights to which Uganda is a party'.[40] In light of the above international human rights instruments, the Court concluded that '... it is recognised that for various reasons some countries still consider it desirable to have capital punishment on their statute books. The retention of capital punishment by itself is not illegal ... or a violation of international law'[41] and that '[c]learly, inclusion of the death penalty in the Constitution was therefore not accidental or a mere afterthought. It was carefully deliberated upon',[42] taking into consideration Uganda's international human rights obligations.

On the question of whether hanging, as a method of execution, is torture, cruel and inhuman, the Supreme Court referred to the definition of torture in article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and in particular emphasised the last part which is to the effect that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'[43] and held that the definition of torture under CAT 'leaves no doubt that it does not apply to a lawful death sentence'.[44] The Court also referred to the UN Resolution on Safeguards Guaranteeing Protection of the Rights of Those Facing Death Penalty,[45] especially paragraph 9 which provides that 'where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering' to conclude that '[w]hat is recognised is that suffering must necessarily be part of the death process, but that it must be minimised'.[46] The Court found that hanging 'caused death within minutes' and therefore met the 'standard of not causing excessive pain or suffering'.[47]

In his partly dissenting judgment, Justice Egonda Ntende, after referring to the chilling affidavit which indicated what happens from the time

38 *Kigula* (n 1 above) 18–19.
39 *Kigula* (n 1 above) 33.
40 *Kigula* (n 1 above) 23.
41 *Kigula* (n 1 above) 20.
42 *Kigula* (n 1 above) 22.
43 *Kigula* (n 1 above) 18.
44 *Kigula* (n 1 above) 17.
45 Resolution 1996/15.
46 *Kigula* (n 1 above) 61.
47 *Kigula* (n 1 above) 63.

the President signs the death warrant to the moment the offender is executed,[48] held that, although the death penalty was constitutional, hanging as a mode of execution was cruel and inhuman and violated article 24 of the Constitution. Justice Ntende relied on the European Court of Human Rights' decision in *Soering v The United Kingdom*,[49] to hold that although the death penalty itself may not violate article 3 of the European Convention on Human Rights, its mode of execution may amount to a violation of article 3.[50] He observed that[51]

> [t]he reasoning of the European Court is very persuasive. The European Convention on Human Rights is the forerunner of the bill of rights found in many independence constitutions, and post independence constitutions. The jurisprudence of the European Court is therefore quite persuasive.

He also relied on *Ng v Canada* and observed that the Human Rights Committee held that, although article 6 of ICCPR allowed the imposition of the death penalty in certain circumstances, its mode of execution should not be cruel and inhuman.[52] He added that the Human Rights Committee's jurisprudence required that, in executing the death penalty, state parties to ICCPR should ensure that 'the least possible physical and mental suffering' is caused and that 'hanging as practised in Uganda fails to meet that test'.[53] He concluded in the following strong terms:[54]

> It is worthwhile noting that Uganda acceded to the International Covenant on Civil and Political rights on 21st September 1995 and to the First Optional Protocol on 14th February 1996. At the very least the decisions of the Human Rights Committee are therefore very persuasive in our jurisdiction. We ignore the same at peril of infringing our obligations under that treaty and international law. We ought to interpret our law so as not to be in conflict with the international obligations that Uganda assumed when it acceded to the International Covenant on Civil and Political Rights.

The above extracts from the Supreme Court's ruling show that, although the Constitution of Uganda does not oblige or require the Supreme Court to consider or refer to international law in interpreting the Constitution, the Court indeed referred not only to treaties to which Uganda is a party, but also to UN resolutions (soft law) and to the jurisprudence developed by the Human Rights Committee. The minority decision relied heavily on the jurisprudence of the European Court of Human Rights. If the Supreme Court's decision is compared with the 2007 judgment of the High Court of Malawi, in which the Court declared the mandatory death penalty to be unconstitutional,

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48 *Kigula* (n 1 above) 91–96.
49 Application 14038/88.
50 *Kigula* (n 1 above).
51 *Kigula* (n 1 above) 78.
52 *Kigula* (n 1 above) 78–80.
53 *Kigula* (n 1 above) 97.
54 *Kigula* (n 1 above) 80.

one realises that the Ugandan Court (which is not required to refer to international law in interpreting the Constitution) relied more on international law than the Malawian Court (which did not base its ruling on international jurisprudence although it referred to ICCPR).[55] However, the most frustrating aspect about the Uganda Supreme Court's decision is its complete disregard for the rich jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) on the question of the death penalty.[56]

4 The Supreme Court and foreign case law

Unlike the position in the United States, where '[t]he citation of foreign law has been a matter of controversy for several years' and this controversy has been 'reflected in vigorous exchanges between Supreme Court Justices'[57] and where 'Justice Breyer takes the position that foreign case law is simply information like any other source — the same as ... law journals, or academic lectures — and it should not receive any different treatment',[58] for many years, courts in Uganda, especially the highest courts, have referred to jurisprudence from other countries, especially Commonwealth countries, to resolve issues before them.[59] Courts in different countries, whether empowered or required or otherwise by domestic law to consider foreign law, refer to decisions from foreign courts that are of importance to the issues before them and this has resulted in what has come to be known as 'the migration of constitutional ideas'[60] — where ideas developed by interpreting the South Africa Constitution, for example, are followed in interpreting constitutions in other countries. The fact that courts in Uganda have always referred to or considered foreign case law in interpreting the Constitution and other pieces of legislation could explain why, in the *Kigula* case, the Supreme Court observed that '[o]ne must ... bear in mind that different constitutions may provide for different things precisely because each Constitution is dealing with a philosophy and

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55 See *Francis Kafantayeni v Attorney-General*, Constitutional Case 12 of 2005 (judgment of 27 April 2007). The court referred to foreign law extensively and to the jurisprudence of the Inter-American Court on Human Rights.

56 For a detailed discussion of some of the jurisprudence of the African Commission on Human and Peoples' Rights on the death penalty, see L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 66–73 103–105 158–165.

57 R Reed 'Foreign precedents and judicial reasoning: The American debate and British practice' (2008) 124 *Law Quarterly Review* 253.

58 JJ Zehnder 'Constitutional comparativism: The emerging risk of comparative law as a constitutional tiebreaker' (2007) 41 *Valparaiso University Law Review* 1739 1767.

59 See, eg, *Paul Kawanga Ssemwogerere & Others v Attorney-General* Constitutional Appeal 1 of 2002, where the Supreme Court refers to judgments from several Commonwealth countries.

60 See generally S Choudhry (ed) *The migration of constitutional ideas* (2006).

circumstances of a particular country', but that '[n]evertheless there are common standards of humanity that all constitutions set out to achieve'.[61] It has been argued that[62]

> [w]hile foreign case law provides a fertile source of authorities for use under the reason- borrowing approach, it also generates many complications that would not arise in domestic analysis and that [r]ecognising the chief variations between ... [different legal systems] will help avoid unproductive or misleading reliance on foreign case law.

How did foreign case law find its way into the *Kigula* decision? Was it at the Court's own volition, as was the case with international human rights instruments and jurisprudence, that foreign case law found its way into this judgment? Unlike with regard to international law, it was counsel on both sides that invoked foreign case law to support their positions. In his submission counsel for the respondent argued that the death penalty was a cruel and inhuman punishment which violated article 24 of the Constitution. To support his argument, he cited the Tanzania High Court case of *Republic v Mbuushu* (1994) and the South African Constitutional Court case of *State v Makwanyane* (1995), in which both courts declared the death penalty to be a cruel and inhuman punishment.[63] In what appeared to be a foregone conclusion that the Supreme Court was likely to refer to case law from different countries, counsel for the respondent 'urged ... court not to rely on case law from jurisdictions [like Nigeria] that did not have ... [a provision that the right to freedom from torture was absolute] in their Constitutions'.[64] In determining whether the death penalty amounts to cruel, inhuman and degrading treatment, the Court cited several decisions from the Supreme Court of the United States on this question[65] and held that 'by majority in *Gregg v Georgia* ... [the US Supreme Court] rejected the decision in *Furman* that the death penalty is *per se* cruel and unusual'.[66] The Court added that '[w]e cannot say that those states in the United States of America, or indeed anywhere else in the world who retain the death penalty, have not evolved standards of decency'.[67] The Court distinguished the *Makwanyane* decision by holding that, unlike in the Ugandan Constitution, where the right to life is not absolute, the *Makwanyane* decision was based on a Constitution that provides for an absolute right to life.[68]

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61 *Kigula* (n 1 above) 12.

62 RR Zubaty 'Foreign law and the US Constitution: Delimiting the range of persuasive authority' (2007) 54 *UCLA Law Review* 1413 1440.

63 *Kigula* (n 1 above) 10.

64 *Kigula* (n 1 above) 11.

65 *Kigula* (n 1 above) 27–29.

66 *Kigula* (n 1 above) 30.

67 *Kigula* (n 1 above) 31.

68 *Kigula* (n 1 above) 34–37.

On the issue of the constitutionality of the mandatory death sentence, counsel for the respondent relied on case law from Pakistan and the Privy Council to argue that it violated the right to a fair trial in the sense that it denied the offender an opportunity to plead in mitigation, yet '[m]itigation is an element of fair trial'.[69] He also cited case law from the United States of America and the 2007 Malawian decision of *Kafantayeni and Others v Attorney-General* (in which the High Court of Malawi held that the mandatory death penalty was unconstitutional for, *inter alia*, violating the doctrine of separation of powers and the right to a fair trial) to support his argument that the mandatory death penalty violated the right to a fair trial.[70] Unlike on the question of the constitutionality of the death penalty, the Court, on the question of the constitutionality of the mandatory death sentence, did not discuss, let alone distinguish case law from other jurisdictions, even though counsel for the respondent, as shown, cited these cases.

On the question of whether to execute a person who has been on death row for more than three years (after the death row phenomenon has set in), counsel for the respondent cited cases from countries such as Jamaica and Zimbabwe to argue that it was inhuman and degrading to execute such a person.[71] On the other hand, counsel for the appellant also cited case law from countries where it has been held that the delay in executing a person who has been sentenced to death is not unconstitutional.[72] The Court referred to the Zimbabwean decision of *Catholic Commission for Peace and Justice in Zimbabwe v Attorney-General and Others*[73] and held that 'the Supreme Court of Zimbabwe set aside the death sentences because the appellants had been on death row for five years, in "demeaning conditions"'.[74] The Court held that being on death row for more than three years in poor prison conditions was unconstitutional as the offenders were serving a sentence of imprisonment, yet they were sentenced to a different sentence — that of death.

On the question of hanging as a method of executing the death penalty, the respondents argued that it was cruel and inhuman and that 'hanging had been stated to be a cruel, inhuman and degrading punishment in the *Mbuushu* and *Makwanyane* cases'.[75] The respondents also relied on the *Catholic Commission for Justice and Peace* case to argue that hanging was cruel, inhuman and degrading.[76] Counsel for the respondents 'conceded that every punishment involves pain,

69 *Kigula* (n 1 above) 39.
70 *Kigula* (n 1 above) 39.
71 *Kigula* (n 1 above) 46.
72 *Kigula* (n 1 above) 45–46.
73 (1993) 2 LRC 279.
74 *Kigula* (n 1above) 48.
75 *Kigula* (n 1 above) 58.
76 *Kigula* (n 1 above) 57–58.

but submitted that the degree of pain in hanging was excessive'.[77] Counsel for the appellant conceded that 'even if it is found that the death penalty is provided for in the Constitution, then the manner of carrying it out by hanging is unconstitutional as it constitutes a cruel and degrading punishment'.[78] In responding to these arguments, the Court observed that[79]

> [i]n the *Mbuushu* case ... the High Court considered the totality of the death penalty, ie, the sentence itself *and* the manner of carrying it out, in coming to the conclusion that the death penalty was a cruel punishment.

However, the Court, without examining the decisions of *Mbuushu* and *Makwanyane*, found that there was no evidence that hanging caused excessive pain or suffering for it to amount to cruel and degrading punishment.

As in the case with international human rights law, the Supreme Court examined jurisprudence from other countries to reach some of the decisions. This was the case, as mentioned earlier, albeit that the Constitution does not empower or require it to do so. One could argue that reference to foreign case law is done as a matter of practice and that, although unlikely, it is not impossible that future judges of the Supreme Court could change this practice on the basis that those decisions are based on circumstances different from those in Uganda. In countries where the constitutions do not empower or require judges to refer to foreign case law, the question is 'whether it is legitimate for a judge to consult foreign case law to help decide a domestic case'.[80] In England, for example,[81]

> Lord Bingham noted that even though the House of Lords has on a number of occasions 'gained valuable insights from the reasoning of Commonwealth judges deciding issues under different human rights instruments ... the United Kingdom courts must take their lead from Strasburg'.

The US Supreme Court, for example, has sometimes referred to foreign case law and international law in some of its decisions, notwithstanding the fact that the Constitution does not empower or oblige it to do so, apart from English law before the enactment of the US Constitution. However, the justices of the US Supreme Court are now sharply divided on whether international law and foreign law should be considered in interpreting the Constitution with '[t]hose who favour international law as an interpretative tool emphasise the "increasing number of domestic legal questions that directly implicate foreign or international law"'. They also stress that the growing number of constitutional issues

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77 *Kigula* (n 1 above) 59.

78 *Kigula* (n 1 above) 60.

79 *Kigula* (n 1 above) 59 (emphasis in original).

80 A Hamann & HR Fabri 'Transnational networks and constitutionalism' (2008) 6 *International Journal of Constitutional Law* 481 501.

81 R Singh 'Interpreting bills of rights' (2008) 29 *Statute Law Review* 82–99 94.

addressed by foreign courts can serve as helpful comparisons. Those who oppose it claim that 'however enlightened' the justices of other nations are, their views 'cannot be imposed upon Americans through the Constitution'.[82]

5 Conclusion and recommendations

The Supreme Court should be commended for relying on international and regional human rights treaties and jurisprudence in interpreting the relevant provisions of the Constitution. It is recommended that the Constitution of Uganda should be amended to expressly empower or require courts to refer to international law, especially to human rights treaties to which Uganda is a party, and foreign law in interpreting the Bill of Rights. The amendment should expressly require the Court to refer to jurisprudence, if any, developed by the African human rights bodies. This would ensure that courts give regional jurisprudence priority over jurisprudence developed by other bodies, like the European Court of Human Rights. A constitutional amendment requiring courts to refer to international law in interpreting the Bill of Rights will also enrich the jurisprudence of the Court. It would ensure that in the future, as it has happened in the USA, when judges who do not support reference to international law are appointed to the Court, they do not reverse the gains made so far in this area. An amendment to the Constitution to require or empower courts to refer to foreign case law should not mean that courts will be obliged to follow such case law. They will, of course, as they have done before, as in the *Kigula* case, treat foreign case law as persuasive as opposed to binding. Courts will also be at liberty to assess whether the utilisation of constitutional ideas from different courts interpreting constitutions adopted in different circumstances to deal with different issues would be to the advantage of the development of jurisprudence in Uganda.

82 Arnould (n 26 above) 686.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Defending human rights and the rule of law by the SADC Tribunal: *Campbell* and beyond

*Admark Moyo**
Teaching and Research Assistant, University of Cape Town, South Africa

Summary

On 28 November 2008, the Southern African Development Community Tribunal handed down judgment directing Zimbabwe to cease its racially discriminatory land reform programme and to compensate farmers whose land had been compulsorily acquired as a result. Apart from confirming and extending the Tribunal's groundbreaking findings in Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*, the article argues that the sorry state of the Tribunal's superficial reasoning on jurisdiction could have been enhanced by considering the approach of other international institutions. Drawing inspiration from international law and the jurisprudence of the South African Constitutional Court, the article argues that racial discrimination cannot solely be established by having regard to the impact of a contested law on a particular racial group. Much depends on the historical context and the fairness of the remedial mechanisms adopted to address prevailing socio-economic disparities between racial groups. The article concludes that the observance of human rights and the rule of law in the region, and the future relevance of the Tribunal, will be determined by the Summit's response to Zimbabwe's disregard of the legal process.*

1 Introduction

Established under article 9(g) of the Southern African Development Community (SADC) Treaty as one of the institutions of SADC, the

* LLB (Hons) (Fort Hare), LLM (Cape Town); admarkm@yahoo.com. I am indebted to the two anonymous reviewers of the *African Human Rights Law Journal* for their scholarly comments on the first draft of the article. My thanks also go to Professor Danwood Chirwa (UCT) for his willingness to go through the earlier versions of the article and for his helpful response; to Benjamin Kujinga, Shingira Masanzu and Olivia Rumble for their moral support.

SADC Tribunal became operational only in 2005. Although the Treaty was signed in 1992, the Tribunal could not be operationalised due to budgetary constraints.[1] Pursuant to article 4 of the Protocol on the Tribunal, the Summit of Heads of State and Government, on 18 August 2005, appointed the members of the Tribunal in Gaborone, Botswana. On 18 November 2005 the inauguration of the Tribunal and the swearing in of its members took place in Windhoek, Namibia.

In what was to be the Tribunal's first landmark decision, Mike Campbell (Pvt) Limited and William Michael Campbell on 11 October 2007 filed an application with the Tribunal contesting the acquisition (by the Zimbabwean government) of a farm called Mount Carmell in Chegutu, Zimbabwe. They applied simultaneously for interim relief restraining the Zimbabwean government from removing or allowing the removal of the applicants from their land and mandating the respondent to take all necessary steps to protect the applicants' occupation of their land until the final adjudication of the dispute. In *Mike Campbell (Pvt) Limited and Another v The Republic of Zimbabwe* (Interim),[2] the applicants argued that the Tribunal had to consider the following criteria: (a) a *prima facie* right; (b) a threatened interference with that right; (c) the absence of an alternative remedy; and (d) the balance of convenience or a discretionary decision in favour of the applicants. The respondent argued that the applicants had not exhausted local remedies.

On 13 December 2007 the Tribunal held that the exhaustion of local remedies was only relevant to the main case and could not be considered in the application for interim relief.[3] Confirming the criteria advanced by the applicants' agent, the Tribunal held that the test for granting an interdict tilted the balance of convenience in the applicants' favour.[4] The respondent was rightly ordered to take no steps and to permit no steps to be taken to evict from or interfere with the peaceful residence of Mount Carmell farm, pending the final settlement of the dispute on the merits.[5] When proceedings in the main application started, 77 other applicants who also contested the acquisition of their farms were joined as parties to the dispute. On 28 November 2008, the Tribunal handed down judgment in *Campbell* (Merits) in which it found in favour of the applicants.[6]

While occasional reference will be made to the Tribunal's findings in *Campbell* (Interim), the main focus of this article is to offer a criti-

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1 Statement of the Executive Secretary of SADC, Windhoek Namibia, 18 November 2005 http://www.sadc.int/archives/read/news/612 (accessed 22 September 2008).

2 Case SADC (T) 2/07, 13 December 2007; http://www.saflii.org/sa/cases/SADCT/2007 (accessed 30 September 2009).

3 n 2 above, 7.

4 As above.

5 As above.

6 SADC (T) Case 02/2008, 28 November 2008; http://www.saflii.org/sa/cases/SADC/2008/2.html (accessed 30 September 2009).

cal evaluation of the Tribunal's findings on issues that were raised for determination in *Campbell* (Merits). Part two of the article is a brief description of the background, powers and functions of the Tribunal as well as the laws it should apply. Part three briefly paraphrases the facts and issues raised. It restates the Tribunal's holding that its jurisdiction was founded on principles of human rights, democracy and the rule of law, and that Zimbabwe's land reform programme amounted to racial discrimination in violation of article 6(2) of the Treaty. Apart from confirming these findings, part four contends that the sorry state of the Tribunal's superficial reasoning on jurisdiction could have been enhanced by borrowing from the practice of other international institutions. Contrary to the Tribunal's reasoning, it is insisted that the fact that a law has negative effects on a particular racial group does not necessarily mean that that law automatically unfairly discriminates against that group. Much depends on the historical context and the fairness of the remedial mechanisms adopted to address prevailing socio-economic disparities between racial groups. Challenges surrounding the implementation of decisions at the regional level and implications of the decision for human rights, the rule of law and regional integration are considered in part five. Part six of the article concludes the discussion.

2 The SADC Tribunal

2.1 Establishment, operationalisation, powers and functions

Although it was established in 1992, the Tribunal became operational only in 2005 and started delivering judgments in 2007. Article 16(1) of the Treaty states that the 'Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon disputes ... referred to it'. The Tribunal has jurisdiction over all disputes 'arising from the interpretation and application of the [SADC] Treaty; the application or validity of Protocols or other subsidiary instruments made under [the] Treaty'.[7] Article 14 describes the basis of the Tribunal's jurisdiction;[8] article 15 covers the scope of jurisdiction;[9] and articles 16 to 20 point out areas in which the Tribunal exercises discretionary or exclusive

7 See arts 32 of the Treaty; art 14 of the Protocol on the Tribunal.

8 Arts 14(1) & (2) of the Protocol read: 'The Tribunal shall have jurisdiction over all disputes and all applications ... which relate to: (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the community, and acts of the institutions of the Community ...'

9 Art 15 states: '(1) The Tribunal shall have jurisdiction over disputes between states, and between natural or legal persons and states. (2) No natural or legal person shall bring an action against a state unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.'

jurisdiction. Unlike the African Commission on Human and Peoples' Rights (African Commission), which acts as a quasi-judicial body,[10] the procedure in the Tribunal is highly judicialised and its decisions are final and binding.[11] When a dispute is referred to the Tribunal, the consent of other parties to the dispute is not required.[12] The Tribunal is the final and competent arbiter in disputes within its jurisdiction.

2.2 Applicable laws

Article 21 of the Protocol states that the Tribunal is under an obligation to apply the provisions of the Treaty, the Protocol itself, all subsidiary instruments adopted by the Summit or the Council or other institutions or organs of the SADC, pursuant to the Treaty or Protocol. It is not clear what documents would qualify as 'subsidiary instruments', but it is suggested this ranges from decisions and resolutions made by SADC structures to any communiqué made by SADC institutions under the Treaty and the Protocol. The phrase 'subsidiary instruments' should therefore be given the widest possible interpretation with the *caveat* that the 'instrument' should have been adopted under the Treaty and the Protocol. Further, the Tribunal should develop its own Community jurisprudence in light of 'applicable treaties, general principles and rules of public international law and principles of the law of states'.[13] This provision was most likely designed to broaden the sources from which the Tribunal can draw authority and to ensure that our regional jurisprudence is consistent with that of other international bodies.

3 The Campbell case

3.1 Facts and issues

Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Tribunal contesting the acquisition of their farm in Chegutu, Zimbabwe. Pursuant to article 30 of the Protocol on the Tribunal,[14] 77 other persons (whose farms had been designated for compulsory acquisition) applied and were allowed to intervene in the proceedings. These applications were then consolidated into one case: *Campbell* (Merits).

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10 F Viljoen 'Communications under the African Charter: Procedure and admissibility' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 76 77.

11 Art 16(5) of the Treaty and art 24 of the Protocol.

12 Art 15(3) of the Protocol.

13 Art 21 of the Protocol.

14 Art 30 permits other persons or states to apply to be joined as parties if they have legal interests in the dispute.

The respondent submitted that the Tribunal had no jurisdiction because the SADC Treaty did not spell out benchmarks against which member states' conduct could be assessed and that if the Tribunal were to borrow these benchmarks from other treaties, it would be legislating on behalf of member states. The respondent also contended that, in the absence of a regional Protocol on human rights and agrarian reform, the objectives and principles of the Treaty were not binding on member states. The applicants submitted that the Tribunal had competence to determine the matter because they (the respondent) were unable to 'proceed under the domestic jurisdiction' as required by article 15(2) of the Protocol.

The applicants also argued that the decision as to whether or not agricultural land was to be expropriated was determined by the race or country of origin of the registered owner; that Amendment 17 was the ultimate legislative tool used by the respondent to seize all white-owned farms;[15] and that land reform was directed at persons who owned land because they were white, regardless of whether they acquired the land during or after the colonial period.[16] The applicants argued that, although Amendment 17 made no reference to the race and colour of the farm owners whose land was acquired, it struck only at white farmers and no other rational categorisation could be made in the circumstances. Hence, the respondent was in breach of article 6(2) of the Treaty which prohibits discrimination based on, among other grounds, race and ethnic origin.[17] The respondent argued that its land reform programme was for the benefit of those historically disadvantaged under colonialism; that, given the history of land ownership, it was inevitable that land reform would adversely affect white farmers and thus the respondent had not breached article 6(2) of the Treaty.

Accordingly, the Tribunal was called upon to determine whether it had jurisdiction to entertain the matter, whether the applicants had been denied access to courts in Zimbabwe; whether the applicants had been discriminated against on the grounds of race; and whether compensation was payable for the lands compulsorily acquired from the applicants by the respondent.[18]

3.2 Decision of the Tribunal

On jurisdiction the Tribunal observed that it had already held in *Campbell* (Interim) that it has jurisdiction, based on articles 14(a) and 15 of the Protocol.[19] The Tribunal held that Amendment 17, particularly the

15 Para 128 applicants' heads of argument.

16 Para 175 applicants' heads of argument.

17 Art 6(2) of the Treaty prohibits discrimination on grounds of 'gender, political views, race, ethnic origin...'

18 16-17 of the judgment.

19 18.

provision stating that 'a person having any right or interest in the land shall not apply to a court to challenge the acquisition of the land by the state, and no court shall entertain any such challenge',[20] ousted the jurisdiction of the local courts and the applicants were therefore 'unable to proceed under the domestic jurisdiction' within the meaning of article 15(2) of the Protocol.[21] Moreover, the Zimbabwe Supreme Court's holding that the legislature had lawfully ousted the jurisdiction of the courts of law,[22] confirmed that the applicants were unable to proceed under the domestic jurisdiction.[23]

The Tribunal observed that it was a fundamental requirement of the rule of law that those who are affected by the law be heard before they are deprived of a right, interest or legitimate expectation.[24] It further observed that the provisions of sections 18(1) and (9) — provisions which guarantee the right to equal protection of the law and to a fair hearing — had been taken away regarding land acquired in terms of section 16B(2)(a) of the Zimbabwean Constitution.[25] The Tribunal held that section 16B(3) of the Constitution[26] barred farmers from challenging the validity of land acquisitions implemented under section 16B(2)(a)(i) and (ii), and ousted the local court's jurisdiction to entertain any such challenge. Since judicial review did not lie at all in respect of land acquired under section 16B(2)(a) (a section in terms of which applicants' land had been acquired), the applicants had been denied the opportunity to seek redress in courts of law.[27]

On racial discrimination the Tribunal held that, since the effects of Amendment 17 of the Constitution would 'be felt by white Zimbabwean farmers *only*, its implementation affect[ed] white farmers *only* and consequently constituted indirect discrimination or substantive inequality'.[28] Given that Amendment 17 had an unjustifiable and disproportionate impact upon persons distinguished by race, the respondent had discriminated against the applicants on the basis of race in violation of article 6(2) of the Treaty.[29] According to the Tribunal, if (1) the criteria for land reform had not been arbitrary but reasonable and objective; (2) fair compensation had been paid for land

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20 Sec 16(3)(a) of the Zimbabwean Constitution.

21 21.

22 See *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* SC 49/07 28-29.

23 *Campbell* (Merits) (n 6 above) 21.

24 35.

25 37.

26 Sec 16B(3) states that '... a person having any right or an interest in the land — (a) shall not apply to a court to challenge the acquisition of land by the state, and no court shall entertain any such challenge; (b) may ... challenge the amount of compensation payable for any improvements ...'

27 40-41.

28 53.

29 53-4.

compulsorily acquired; and (3) the acquired lands had been distributed to poor, landless and marginalised individuals or groups, *making the purpose of land reform legitimate*, the differential treatment afforded to the applicants would not constitute racial discrimination.[30]

To remedy the contravention, the Tribunal unanimously directed the respondent to take all necessary measures to ensure the applicants' peaceful occupation and ownership of their lands, and to pay 'fair compensation', on or before 30 June 2009, to three of the applicants whose land had already been seized under Amendment 17. Below is a critical analysis of the findings of the Tribunal on each of the issues that were raised for determination.

4 *Campbell*: A critique

4.1 Admissibility

A complaint is admissible if it fulfils the requirements set out in articles 14 and 15 of the Protocol on the Tribunal. The key requirements are that it should be lodged only if an applicant has 'exhausted available local remedies or is unable to proceed under domestic jurisdiction'.[31]

4.1.1 Exhaustion of internal remedies

Under international law, the general rule is that international courts lack the competence to entertain cases involving the application of national law unless the applicant has taken the case through the national court system.[32] The duty to exhaust all internal remedies, noted the Tribunal, was fashioned to enable domestic courts to deal with legal issues arising from national law because they are better placed to apply national law.[33] The local remedies rule is intended to serve as a screening or filtering mechanism between national and international institutions, and to limit the number of cases entertained by international bodies. That way, the regional Tribunal would not be flooded with cases which could easily have been dealt with in the national courts.[34]

The *raison d'être* for the local remedies rule derives from the consensual nature of public international law[35] and the belief that a state must be afforded an opportunity to remedy breaches of its human rights obligations through domestic channels before any of the parties

30 54.

31 Art 15(2) of the Protocol.

32 See, generally, NJ Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 1.

33 20.

34 As above.

35 Viljoen (n 10 above) 111.

seeks relief from an international supervisory organ.[36] According to the African Commission, this requirement is based 'on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation before [being] called before an international body'.[37] The need to exhaust local remedies confirms the principle that international law does not replace but supplements national law. Seeking relief in local courts saves the parties huge costs in terms of time, resources, effort and the effectiveness of enforcement mechanisms.[38] That said, the chief motivation behind the rule appears to be the recognition of the respondent state's sovereignty and freedom from unwelcome interference in relationships between the state in question and other persons or states.[39]

Reference to 'all available local remedies' implies that, if upon proven facts a particular remedy is unavailable, ineffective or insufficient, the applicant will not be required to comply with the local remedies rule.[40] Even then, the complainant bears the onus to prove that no local remedies exist or that those available are ineffective. If a complaint lacks 'concrete evidence' or a sufficient factual basis 'to cast doubt about the effectiveness of domestic remedies', and relies on 'isolated or past incidences',[41] the complaint would be declared inadmissible. If a complaint is pending before domestic courts, local remedies would not have been exhausted.[42] This explains why the Tribunal proceeded with the main suit only after the judgment, on 22 January 2008, of Zimbabwe's Supreme Court.[43] In *Campbell* (Interim), the applicants succeeded in interdicting the respondent before the conclusion of proceedings in the Supreme Court because anything less could have defeated the purpose of instituting action. Further, the respondent still had a chance to defend herself in the main suit.

Ankumah argues that it is not necessary to comply with the requirement to exhaust local remedies if the complainant has been denied access to them, or if the domestic laws impede due access to legal procedures.[44] A close reading of article 15(2) of the Protocol allows such an interpretation. In terms of this article, the Tribunal has competence to

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36 EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 67.

37 *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

38 *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) para 48.

39 See, generally, CF Amerasinghe *Local remedies in international law* (2004) 56-59.

40 *Campbell* (Merits) (n 6 above) 21.

41 Viljoen (n 10 above).

42 n 38 above, para 62.

43 *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* (n 22 above). There is some confusion about the date of the decision. In the SADC Tribunal judgment on the merits (n 6 above), 22 February is mentioned as the date on which the Supreme Court delivered its judgment (21 of SADC Tribunal decision).

44 Ankumah (n 36 above) 68.

exempt parties from proving that they have exhausted 'local remedies' if they show they were 'unable to proceed under the domestic jurisdiction'. Whatever meaning the Tribunal will give to the phrase 'unable to proceed under the domestic jurisdiction', it arguably covers many factors (including undue delay or the unavailability or ineffectiveness of local remedies) impeding a complainant's meaningful access to local courts. In *Campbell* (Merits), the clause ousting the jurisdiction of the local courts justified the Tribunal's finding that the applicants were 'unable to proceed under domestic jurisdiction'. However, the local remedies rule became a non-issue in light of the Supreme Court's decision.

4.1.2 Subject matter jurisdiction

The respondent argued that the listed principles and objectives of SADC were non-binding in the absence of a separate Protocol on human rights and land reform.[45] The Tribunal found that it was charged (by article 21(b) of the Protocol) 'to develop its own jurisprudence, "having regard to applicable treaties, general principles and rules of public international law" which are sources of law for the Tribunal'.[46] That settled the question whether the Tribunal could draw inspiration from other instruments where the Treaty is silent.[47] Given that the principles of 'human rights, democracy and the rule of law' are codified under article 4(c) of the Treaty, held the Tribunal, it was unnecessary to have a separate Protocol on human rights in order to give effect to these principles. The Tribunal held that it clearly had 'jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application'.[48]

Member states are enjoined to 'conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of ... co-operation and integration'.[49] Areas of co-operation include, among others, 'food security, land and agriculture; natural resources and environment; peace and security'.[50] Human rights and agrarian reform are not specifically mentioned as areas of co-operation in the Treaty. Whether the items 'food security, land and agriculture' were intended to embrace 'agrarian reform and human rights' as specific areas of co-operation remains unclear. Surely the respondent's argument on the relationship between the principles and objectives of the Treaty deserved a better response. The question of why general principles, in the absence of specific objectives or obli-

45 See p 23 of the judgment.
46 See p 24 of the judgment.
47 As above.
48 See p 25 of the judgment.
49 Art 22(1) of the Treaty.
50 Art 21(3) of the Treaty.

gations crafted in similar terms, should be deemed to burden states with positive obligations was not answered in the judgment. Below are some of the reasons the Tribunal could have considered in answering this question.

First, comparative literature on the subject reveals that the Tribunal's approach is consistent with that of other international bodies. For instance, article 4(g) of the Economic Community for West African States (ECOWAS) Treaty codifies in broad terms the protection of human rights as a fundamental principle. In *Hadijatou Mani Koraou v Republic of Niger*,[51] the ECOWAS Court of Justice observed that SADC's article 4(g) mandate to protect human rights charged the Court with the obligation to ensure the protection of human rights 'even in the absence of other ECOWAS legal instruments relating to human rights'.[52] The International Court of Justice (ICJ) and the European Court of Justice have also followed a similar path.[53]

Second, the Tribunal's decision is consistent with the teleological approach to the interpretation of international treaties. This finds support from article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) which promotes an interpretation which is consistent with the overall object and purpose of the treaty. In the *South West Africa* cases, the ICJ preferred a teleological approach by interpreting contradictions in the Mandate for South West Africa, the League of Nations Covenant and the United Nations (UN) Charter in a way consistent with the object of the mandates system.[54] To the extent the principles of a treaty provide the overall framework within which states' obligations must be understood, they are justiciable.

Third, a close textual reading of the provisions of the Treaty suggests that its general principles create positive obligations on member states. Under article 6(1), parties positively 'undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and [to] refrain from taking any measure likely to jeopardise the *sustenance of its principles*, the achievement of its objectives and the implementation of the provisions of this Treaty'. This translates into promoting human rights and the rule of law as some of the minimum democratic ideals all member states should comply with even in the absence of a protocol to that effect. Human rights are fundamental in every democracy. It will be absurd to suggest that in the absence of a protocol on human rights, states are entitled to violate their international obligations to respect and protect human rights. Repeated references to 'regional integration' 'co-ordination', 'co-operation' and harmonisation' in

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51 ECW/CCJ/JUD/O6.

52 Paras 41-42.

53 See GJ Naldi '*Mike Campbell (Pvt) Ltd* et al *v The Republic of Zimbabwe:* Zimbabwe's land reform programme held in breach of the SADC Treaty' (2009) 53 *Journal of African Law* 305 310-313.

54 South West Africa Cases, Preliminary Objections *ICJ Reports* (1962) 318.

articles 5, 21 and 22 of the Treaty register an enduring collective desire to foster regional development by respecting the Treaty in its entirety.

The Tribunal's willingness to deny Zimbabwe the opportunity to invoke its national laws to evade international treaty obligations brings our regional jurisprudence in conformity with settled principles of public international law. Drawing inspiration from article 27 of the Vienna Convention,[55] the Tribunal found that the respondent could not rely on the infamous Amendment 17. Malcolm's treatise, also referred to in the judgment, is quite instructive on this matter. Malcolm observes that 'it is no defence to a breach of an international obligation to argue that the state['s] actions were consistent with "the dictates of its own municipal laws" as states would evade international law by the simple method of domestic legislation'.[56] The implication is that national legislation and policy should be consistent with the Treaty and other international instruments.[57]

4.2 The merits

Writing about the African Charter, Viljoen observes that 'consideration of the merits is aimed at establishing whether the state against which the complaint has been brought has violated a Charter provision'.[58] Establishing a violation of a treaty demands a cautious deliberation based on facts and arguments submitted by the parties to the dispute.[59]

4.2.1 The right of access to courts

The Tribunal considered whether the applicants had been denied access to courts and whether they had been deprived of a fair hearing by Amendment 17. For purposes of the judgment, the Tribunal confined the rule of law (arguably an elusive concept) to the rights of access to court and a fair hearing.[60] To the Tribunal, the most important provisions in this regard were articles 4(c) and 6(1) of the Treaty. Article 4(c) binds states to respect principles of 'human rights, democracy and the rule of law'. Article 6(1) of the Treaty enjoins states to undertake to 'refrain from taking any measure likely to jeopardise the sustenance of

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55 Art 27 of the Vienna Convention states that 'a party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement'.

56 MN Shaw *International law* (2003) 104-105.

57 See M Dube & R Midgley 'Land reform in Zimbabwe: Context, process, legal and constitutional issues and implications for the SADC region' in A Bösl *et al* (eds) *Monitoring regional integration in Southern Africa* (2008) 303 325.

58 Viljoen (n 10 above) 78.

59 See VOO Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 230-231.

60 Pages 26-27 of the judgment.

its principles, the achievement of its objectives and the implementation of the provisions of the Treaty'.[61]

Relying heavily on the judgment of the Zimbabwe Supreme Court,[62] the respondent argued that in ousting the jurisdiction of the local courts, section 16B(3) of the Zimbabwean Constitution had not taken away for the future the right of access to the remedy of judicial review in cases where expropriation was not in terms of section 16B(2)(a). The applicants argued that the court's review powers were confined to determining whether the facts on which section 16B(2)(a) provided that the acquisition of agricultural land must depend, existed. This formulation essentially meant that courts were entitled to review not the constitutionality of the provisions of Amendment 17, but simply whether land acquisitions were done in terms of section 16B(2)(a) — the very section the applicants were challenging as unconstitutional in the first place.

The respondent's argument that the legislature had the competence to water down the review powers of courts by stating those occasions in which the courts' jurisdiction was ousted was rightly not allowed to stand. Surely the inquiry should go beyond the respondent's narrow construction of the question that confronted the Tribunal. The question was not, as argued by the respondent, whether compulsory land expropriations were done in terms of section 16B(2)(a) of the Constitution and therefore lawful acquisitions within the meaning of that section. If it were to be so, the inquiry would be limited to whether compulsory acquisition of property was carried out in terms a law (Amendment 17) the constitutionality of which was in issue. The impugned provision would then have provided the very legitimacy it lacked as its constitutionality was being contested. The real question that confronted the Tribunal was whether it was permissible under national law for the legislature to spell out the facts upon which the compulsory expropriation of land could be based, in circumstances where the courts' jurisdiction to review the lawfulness of the expropriation is ousted by the very law authorising the expropriation. Given the importance of the right of access to courts and the right to a fair hearing, this question would then have been answered in the negative.

The Tribunal was therefore right in holding that the applicants had been expressly denied the right of access to courts and the right to a fair hearing, which are essential ingredients of the rule of law. It is difficult to understand how a citizen whose rights to due process have been statutorily taken away can nevertheless be said to have the right to a fair hearing. The Zimbabwean government was thus correctly found to have breached article 4(c) of the Treaty.

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61 As above.

62 See 28-29 and 38 of the Zimbabwe Supreme Court judgment.

4.2.2 Racial discrimination

After referring to a number of international human rights instruments outlawing discrimination on the basis of race,[63] the Tribunal found that, since the implementation of Amendment 17 affected white farmers *only*, it constituted indirect discrimination or substantive inequality. Thus, the Tribunal relied heavily on the effect of Zimbabwe's land reform policy and concluded that the Amendment racially discriminated against white farmers. In other words, although the government contended that land reform was a legitimate measure to address historical imbalances between whites and blacks, the fact that it targeted white-owned farms meant that it indirectly discriminated against white farmers. Indirect discrimination recognises that conduct or law which may appear to be neutral may nevertheless result in discrimination based on any of the prohibited grounds.[64] This is because indirect discrimination almost always has a legitimate government purpose other than a discriminatory purpose in the conduct or the law to which the objection is made.[65]

Surely, the impact of any law or conduct should not, under normal circumstances, affect a significant segment of a particular social group. However, the use of the phrase 'since the effects will be felt by the Zimbabwean white farmers *only*' wrongly implies that if there had been one black farmer or a handful of black farmers — and I am sure there were — who lost their lands during 'fast track' land reform, Zimbabwe's use of force to regain control of white-owned farms thereby would have been justified. The Tribunal failed to observe that, even if land reform had overwhelmingly (but not exclusively) affected white farmers, it could still have amounted to racial discrimination against white farmers who, in large numbers, stood to lose their farms.

Further, the fact that the implementation of Amendment 17 affected white persons *only* does not necessarily mean that it *automatically unfairly* discriminated against whites on racial grounds.[66] In Zimbabwe and in every other country that has a colonial history, race and land ownership are so inextricably linked that legislative and other measures designed to promote the rights of persons belonging to historically disadvantaged communities will invariably adversely affect those previously advantaged by systematic patterns of racial segregation. Sachikonye records that at independence, about 6 000 white commercial farmers owned 15,5 million hectares of land and 8 500 small-scale African farmers had 1,4 million hectares. The rest, an esti-

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63 See 44-50 of the judgment.

64 *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 31.

65 *Walker* (n 64 above) para 43.

66 The Tribunal has to borrow from the jurisprudence of the South African Constitutional Court in this regard. Sec 9 of the South African Constitution of 1996 prohibits unfair discrimination (not just discrimination) but, even then, unfair discrimination can be justified in terms of sec 36 (the limitation clause).

mated 700 000 indigenous communal farming households, subsisted on 16,4 million hectares.[67] Seventy five per cent of the land owned by communal farmers was in agro-ecological regions IV and V, which are dry and barren.[68]

Considered in its historical context, land reform would inevitably adversely affect white farmers who benefited from colonial seizures of native land on grounds of race. This is not to say that expropriation of property without paying compensation is fair, but to demonstrate that there are circumstances under which discrimination may not be determined solely by reference to the impact of government action on a particular social group. Historical patterns of institutionalised advantage and disadvantage overtly implemented by the colonial administration for over nine decades show why every piece of legislation and virtually every kind of government action will differentially impact on various social groups. Dissenting, Sachs J in *Walker* holds that[69]

> differential treatment that happens to coincide with race *in the way that poverty and civic marginalisation coincide with race,* should [not] be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalisation.

As a matter of principle, it will be wrong in law to hold that all government actions which coincidentally benefit the great majority of one racial group at the expense of another are *automatically unfairly* discriminatory. As noted by the UN Human Rights Committee, the equal enjoyment of rights and freedoms does not mean identical treatment in every instance.[70] Equality may require states to adopt specific affirmative steps to eliminate or dismantle structures and practices perpetuating patterns of disadvantage.[71] States may grant preferential treatment to disadvantaged groups in society.[72] To overcome patterns of prejudice, persons who became affluent through state-sponsored privileges and accumulated discrimination should be barred from de-contextualising and de-historicising inequalities. Differential treatment is unfairly discriminatory if the governmental action being objected to serves no legitimate purpose or nullifies the exercise of human rights.[73] In *Campbell*, the fact that the loss of land (designated for compulsory acquisition) coincided with race (white) in the same way landlessness coincided with race (black) did not in itself imply that farmers who

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67 LM Sachikonye 'From "growth with equity" to "fast-track" reform: Zimbabwe's land question' (2003) 30 *Review of African Political Economy* 227 228-229.

68 As above.

69 *Walker* (n 64 above) para 118.

70 United Nations Human Rights Committee 'CCPR General Comment 18: Non-discrimination' http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument (accessed 10 April 2008) para 8.

71 n 70 above, para 10. See Langa DP for the majority in *Walker* (n 64 above) para 33.

72 General Comment 18 (n 70 above).

73 n 70 above, paras 6 & 10.

were white as a consequence of history had been discriminated against on the basis of race.[74]

Equally confusing is the Tribunal's observation that land redistribution along racial lines constitutes substantive inequality. Substantive equality requires that the actual social, economic and historical context in which different social groups find themselves be duly considered when determining whether the achievement of equality is being promoted or not. In the Zimbabwean context, substantive equality therefore envisages preferential treatment of historically disadvantaged groups, if needs be, to heal the deep wounds of decades of systematic racial segregation against blacks. In this respect, the South African Constitutional Court observes:[75]

> [A]lthough a society which affords each human being equal treatment on the basis of equal worth is our goal, *we cannot achieve that goal by insisting upon the identical treatment* in all circumstances before that goal is achieved ... A classification which is unfair in one context may not necessarily be unfair in another.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[76] the Constitutional Court notes:[77]

> Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past ... Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and indefinitely ... One could refer to such equality as remedial [or substantive] equality.

Unlike formal equality, which requires uniform treatment of persons according to the same 'neutral' norm, substantive equality requires that persons in unequal circumstances be treated unequally in order to address the imbalance. In light of Zimbabwe's history of forced removals of blacks from their land, substantive equality therefore requires that affirmative action measures be taken to acquire land from white farmers and re-allocate such land among landless peasants. In authorising land acquisitions, land reform legislation and policy may not be strictly based on identical treatment between different racial categories because, as a result of history, land owners are predominantly white and the landless are predominantly black. While in accord with the Tribunal's observation that land reform in Zimbabwe has had an unjustifiable and disproportionate impact upon a group of individuals

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74 This observation does not mean that the laws in terms of and the manner in which land reform was implemented in Zimbabwe were constitutional. It just means that the concept of racial discrimination goes beyond the Tribunal's skin-deep understanding of the subject.

75 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

76 1999 1 SA 6 (CC).

77 Paras 60-1.

distinguished by race, my view is that redistributive reform will always adversely affect those previously advantaged on grounds of their membership to a particular group.[78] Land reform was therefore consistent with the meaning of substantive equality since it benefited historically disadvantaged persons (blacks). Once again, the jurisprudence of the South African Constitutional Court is very informative in this regard: 'The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from previously advantaged communities.'[79]

Whether the beneficiaries were politically connected to the ruling party or not does not say anything on whether the land reform programme benefited the black majority or not. Even ZANU PF supporters are, broadly speaking, members of the historically disadvantaged black population, but it would be unfair, arbitrary and discriminatory, both in terms of national and international law, for any government to select its target beneficiaries based on their political affiliation. The correlation between victimhood and political orientation was never explored in the Tribunal's decision. The broader purpose of the deployment of war veterans on white-owned farms was to crush support for the opposition in rural areas in the run-up to the 2000 elections.[80] Could not the correlation between victimhood and political affiliation have proven an ulterior motive in the sense of a desire to win a political advantage over the opposition? If so, would not that have demonstrated that the alleged 'public purpose' — addressing historical disparities in land ownership — was an excuse for unfair or reverse discrimination?

Despite President Mugabe's claim that the noble aim of the invasions remained the re-allocation of land to the landless majority, it became patently clear that land reform was a smokescreen for a crude political campaign against the opposition.[81] Discrimination also appears to have been evident from the criteria and procedure that was used to designate land for compulsory acquisition. The Tribunal observed that if (1) the criteria for land reform had not been arbitrary but reasonable and objective, (2) fair compensation had been paid for land compulsorily acquired, and (3) the acquired lands had been distributed to poor and landless individuals, the differential treatment afforded to the applicants would not have constituted racial discrimination.[82] While

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78 This is not to say that land should be expropriated unlawfully and without compensation.

79 *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 4 (SA) 490 (CC) para 74.

80 See J Chaumba *et al* 'From *jambanja* to planning: The reassertion of technocracy in land reform in South-Eastern Zimbabwe?' (2003) 41 *Journal of Modern African Studies* 533-534.

81 *The Daily News* 11 June 2001.

82 p 54.

the first observation undoubtedly points to racial discrimination, the last two require some qualification.

It is evident from the facts that the criteria for designating land for compulsory acquisition had nothing to do with the current use of the land — acquisition was arbitrary and unreasonable in that even commercial farms that were 'going concerns' were designated for acquisition. The UN Human Rights Committee has stated that if the criteria for differentiation are unreasonable and unobjective and the aim is to achieve an illegitimate objective, such differentiation will constitute unfair discrimination.[83] Moreover, compulsory acquisition of land was arbitrary and unreasonable in the sense that no compensation was paid for all agricultural lands acquired,[84] but holding that the decision not to compensate white farmers necessarily constituted racial discrimination wrongly implies that black farmers who also lost their lands were compensated for the loss. Non-payment of compensation would affect everyone (black and white) owning land if vast tracts of land were not owned almost solely by white Zimbabweans. However, the fact that non-payment of compensation could have equally affected black and white farmers (if vast tracts of land were not owned solely by whites) does not mean that non-payment ceases to be discriminatory, but it demonstrates that the discrimination could have been motivated by factors other than race. In this case, one such factor was political affiliation.

Similarly unfortunate is the Tribunal's third observation that the fact that acquired land was given to ZANU PF supporters rendered the purpose illegitimate. If anything, this amounted to discrimination based on the beneficiary's political orientation rather than (or and) the landowner's race. In fact, a significant number of white farmers retained their farms because they were politically connected to ZANU PF and some few black farmers lost their farms because they were politically connected to MDC. Further, while some productive lands were seized and given to ZANU PF loyalists, by far the largest portion of 'invaded' lands in Matebeleland and Midlands (traditional MDC support bases) was given to the landless masses regardless of their political affiliation. To hold that if land was distributed among the poor, landless and marginalised groups, land reform would not have been discriminatory, wrongly implies that if seized farms were distributed among the poor from both sides of the ethno-political divide, then the fact that land was seized without compensation or based on unreasonable criteria would not have elicited findings of racial discrimination. The existence of a legitimate government purpose for land seizures does not necessarily make discriminatory governmental action non-discriminatory.

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83 General Comment 18 (n 70 above) para 13.

84 Secs 16B(2)(a) & (b) of the Zimbabwean Constitution read together.

However, such a purpose justifies the differential treatment (or discrimination) by showing the existence of more pressing social goals. A legitimate government purpose thus distinguishes unfair discrimination from mere differentiation or fair discrimination. Part of the problem to the growth of our equality jurisprudence may be that article 6(2) of the Treaty merely prohibits discrimination, not unfair discrimination. Thus, the Tribunal has two options: to find that there is discrimination (which is prohibited) or that there is no discrimination. This all-or-nothing approach, as already shown by the Tribunal's over-simplistic analysis of racial discrimination, hampers the development of our regional equality jurisprudence.

4.3 Remedies

The Tribunal ordered the respondent to take all necessary measures to protect the possession; occupation and ownership of the lands of all the applicants save for three applicants who had already been evicted from their lands.[85] The respondent was ordered to take appropriate steps to ensure that no action is taken, pursuant to Amendment 17, to evict applicants from or interfere with their peaceful residence on their farms.[86] The Tribunal also directed the respondent to pay, on or before 30 June 2009, 'fair compensation' to three applicants whose lands had already been expropriated.[87] The inclusion of the date by which the respondent had to comply with the judgment suggests that the Tribunal may exercise supervisory jurisdiction on the implementation of the decision and the use of the word 'fair' rightly implies that the three applicants may contest the amount of compensation awarded. The respondent had unsuccessfully invoked the provisions of the 1978 Lancaster House agreement which shouldered the duty to pay compensation on the former colonial power, Britain.

The Tribunal observed that in terms of international law, the respondent as the expropriating state should shoulder the responsibility to pay compensation.[88] The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962 permits 'nationalisation, expropriation or requisitioning for reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign'.[89] 'Appropriate compensation [should then] be paid in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.'[90] The Charter of Economic Rights

85 pp 58-59.
86 p 59.
87 As above.
88 pp 56-7.
89 Para 4.
90 As above.

and Duties of States (Charter), contained in Resolution 3281 (XXIX) of 1974, also entitles states 'to nationalise, expropriate or transfer foreign property in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances which the state considers pertinent'.[91] States implementing coercive measures are economically responsible to the peoples affected for the restitution and full compensation for the exploitation of and damages to resources of those peoples.[92] In *Texaco v Libya,*[93] the arbitrator held that the voting on Resolution 1803 (XVII) reflected that it was supported by the 'majority of states belonging to the various representative groups' and largely symbolised 'the expression of a real general will' and that the relevant part of Resolution 3281 (XXIX) 'must be analysed as a political rather than a legal declaration concerned with the ideological strategy of development and, as such, only by non-industrialised states'.[94] Therefore, Resolution 1803 (XVII) has persuasive or binding authority as a source of international law governing the expropriation of private property.

The validity of land reform in Zimbabwe should be considered in light of the requirements laid down in Resolution 1803 (XVII). First, there is consensus that expropriation must be done for a public purpose or in the public interest but, as was held in *US v Iran*,[95] 'it is clear that, as a result of the modern acceptance of the right to nationalise, this term is broadly interpreted, and that states, in practice, are granted extensive discretion'.[96] Second, the prohibition on racial discrimination seemingly remains an integral ingredient of customary international law.[97] Third, international law requires states to pay compensation for expropriated property although the standard to be applied for calculating compensation is everything but established.[98] Dugard demonstrates, on good authority, that the standard of 'prompt, adequate and fair compensation' is no longer part of international law and that the standard of 'appropriate' compensation is gaining impetus in international law.[99] This is because the word 'appropriate' is so flexible that all the circumstances of each case will be considered in determining the amount of compensation payable.

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91 Art 2(c) of the Charter.

92 Art 16(1) of the Charter.

93 (1978) 17 *ILM* 1; (1997) 53 *ILR* 389.

94 Paras 87-88.

95 (1988) 27 *ILM* 1314.

96 Para 145.

97 See *Libyan American Oil Company v Libya* (1981) 20 *ILM* 1, paras 58-59; *US V Iran* (n 95 above) paras 140-42.

98 Former colonial powers maintain that an 'international standard' should govern expropriation while decolonised states insist that expropriation be governed by rules of national law.

99 J Dugard *International law: A South African perspective* (2005) 301-302.

Thus, states are not allowed to legislate themselves out of their obligations under international law just because land reform is purportedly intended to address historical injustice. Historical injustice is one thing and the requirements for lawful expropriation another. Although the history of acquisition and current use of property usually feature prominently in calculating the amount of compensation payable, compensation should be paid regardless of how land was acquired in the first place. Clarity abounds in international law that the legitimacy of the purpose of expropriation does not exonerate the concerned state of its duty to pay compensation. Consequently, international guarantees of national sovereignty cannot be used to justify the passing into law of arbitrary rules permitting the expropriation of private property without compensation. In the circumstances of the case, Zimbabwe was rightly denied the opportunity to rely on its oppressive legislation to evade peremptory obligations under international law.

5 Beyond *Campbell*

5.1 The implementation question

It is worthwhile considering the regional mechanisms for enforcing compliance with the Tribunal's decision if a member state chooses not to do so. Decisions of the Tribunal are binding upon parties to the dispute and enforceable within the territory of the state concerned.[100] One of the principles governing the conduct of member states is the peaceful settlement of disputes.[101] States and institutions are duty bound to take all measures necessary to ensure the execution of the decisions of the Tribunal.[102] Any party to the dispute may refer (to the Tribunal) any failure by a state party to comply with the Tribunal's decision.[103] If the Tribunal establishes such failure, it must report its findings to the Summit, which is under a legal obligation to take appropriate action.[104] The regional commitment echoed in the provisions cited above suggests that the Tribunal's jurisprudence is an integral part of its institutional mandate. Member states should therefore co-operate with and assist the Tribunal in the performance of its duties. However, there are no mechanisms through which the Tribunal can supervise the implementation of its decisions. Thus, political leadership and good

[100] Art 32(3) of the Protocol.
[101] Art 4 of the Treaty.
[102] Art 32(2) of the Protocol.
[103] Art 32(4) of the Protocol.
[104] Art 32(5) of the Protocol.

faith are needed at the Summit level if the Tribunal's judgments are to be worth the paper they are written on.[105]

This is because when it comes to the enforcement of judgments against defiant states, decision making is deferred to the executive branch of the regional block. The Summit consists of the Heads of State and Government and it is the *supreme* policy-making institution of SADC.[106] Thus, the head of state of a member that elects not to comply with the Tribunal's decision may (the Treaty is silent on the matter) also be part of the Summit that decides whether or how to enforce the judgment. Given that the decisions of the Summit are taken by consensus,[107] the head of a transgressor state may easily block that consensus if the decision is against his or her government. Legally, the Summit is not bound to punish a transgressor state and there is no guarantee it will do so. Article 33(1) provides that sanctions be imposed on a state that persistently fails, without good cause, to fulfil obligations assumed under the Treaty or implements policies which undermine the principles and objectives of SADC. There are no guidelines on the nature of sanctions that may be imposed and the bonds that anti-imperialism creates among countries in the region make this a less likely route to take.

Yet, this may be over-thinking the matter. The bottom line is that the enforcement of judgments of international bodies is an age-old problem as these bodies have to rely on the goodwill of the very states against which they find. This is one of the inherent flaws of international law and states are inclined to disregard the decision if non-compliance bears no imminent threat to peace and security.[108] Shaw observes that 'once the court has found that a state has entered into a commitment concerning its future conduct, it is not the court's function to contemplate that it will not comply with it'.[109]

On more than one occasion, Zimbabwe has indicated that it will not reverse land reform because the Tribunal decided the matter outside its historical context.[110] Zimbabwe treats the Tribunal's rulings with contempt, as demonstrated by the then Minister of Lands, Mr Didymus Mutasa's remarks that the Tribunal had no jurisdiction over the matter and that farmers who dared return to their farms would be prosecuted.[111] This problem is not new, given that Zimbabwe also refused to comply with the interim ruling. What is more, farm seizures and the

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105 See OC Ruppel & FX Bangamwabo 'The SADC Tribunal: A legal analysis of its mandate and role in regional integration' in Bösl *et al* (n 57 above) 179 199-201.

106 Art 10(1) of the Treaty.

107 Art 10(9) of the Treaty.

108 Dube & Midgley (n 57 above) 24.

109 The *Nuclear Test* case, ICJ Reports 996.

110 See 'No land changes: Govt' *The Herald* 1 December 2008.

111 'Zimbabwe: Govt violated rule of law — SADC Tribunal' *The Standard* 29 November 2008.

onslaught of violence and intimidation against farm owners continue to this day.[112] More recently, Zimbabwe's Justice Minister, Patrick Chinamasa, announced, in a letter dated 7 August and delivered to the Tribunal on 10 August this year, that the purported application of the provisions of the Protocol violates international law as the Protocol was not ratified by the required two-thirds of SADC countries.[113] Cropping up eight months after the ruling, Zimbabwe's purported withdrawal from the Tribunal's jurisdiction will be dealt with below, as an 'afterthought'.

Thus, the decision appears to be largely a ceremonial victory for the applicants who now, after long legal battles at home and abroad, find themselves holding a court judgment which they cannot easily, if at all, enforce. Yet, all problems which the applicants may face in enforcing the decision must be construed more as a reflection of the degree to which the political terrain is heated in Zimbabwe than as a manifestation of the inadequacy of the applicable law or the challenges the Tribunal will confront in every other case. Though it resonates with the members' commitment to upholding the values of human rights and equal access to justice, the decision will remain paper law if, as is likely, the SADC Summit pays no attention to recent developments in Zimbabwe. Much depends on how the Summit will respond to these developments, but it is evident that if Zimbabwe, meaning ZANU (PF), is allowed to go scot-free with its irresponsible position on the role of the Tribunal, this will send a signal to landless peasants in Southern Africa that they can take the law into their own hands without having to account. This may be the beginning of another dark chapter, characterised by violence, intimidation and unlawful detentions, in race and political relations in Zimbabwe.

5.2 Globalisation and the fading concept of sovereignty

Both the creation of the Tribunal and its decision in *Campbell* highlight the impact of globalisation on regional perceptions and values. In examining whether the Tribunal drew the lines of sovereignty in the right place, we need to consider two aspects of the order it gave. First, the Tribunal unanimously ordered the respondent to take all necessary measures to protect the applicants' possession, occupation and ownership of their lands without spelling out the actual steps to be taken. Thus, the Tribunal rightly observed that it could have usurped the

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[112] 'Tsvangirai orders arrest of farm invaders' *New Zimbabwe.com* http://www.newzimbabwe.com/pages/farm86.19589.html (accessed 27 March 2009); 'Mutambara leads probe into fresh farm invasions' http://www.newzimbabwe.com/pages/farm89.19685.html (accessed 16 April 2009).

[113] 'Chinamasa pulls Zim out of Tribunal without Cabinet approval' *The Zimbabwean* http://www.thezimbabwean.co.uk/2009090324142/weekday-top-stories/chinamasa-pulls-zim-out-of-sadc-tribunal-without-cabinet-approval.html (accessed 24 September 2009).

functions of the respondent to regulate her relationship with her own nationals. Surely, this would have intruded even on Zimbabwe's sovereign equality with other member states and the cost of enforcing such a decision would have been prohibitive. When Mutasa indicated that Zimbabwe would not reverse land reform, he appears to have thought that the Tribunal had declared that every farmer should recover their land regardless of when that land was seized. Yet, the Tribunal barred the respondent from evicting more farmers and seizing more lands under Amendment 17.

Second, the Tribunal ordered the respondent to pay compensation to three applicants who had already lost their farms. Regardless of the provisions of Amendment 17, the respondent was forced to pay compensation pursuant to her obligations under international law. Obviously, not only three but hundreds of farmers have lost their land since 'fast track' reform started at the close of the twentieth century, but the Tribunal confined itself to cases emanating from the 2005 Amendment 17. To the extent that the decision overruled domestic law and national policies, it was conveniently and purposively intrusive. The decision blurred the lines of sovereignty, and elevated international treaties to the stature of a regional constitution. Member states may slowly realise that legal issues, once perceived as domestic, are now governed by a growing body of international law and tribunals. Initially thought of as the ugly side of globalisation, the competence of international tribunals to alter domestic policies or laws has emerged as a major drive in resolving human rights disputes and shaping legal practice in many regions of the globe.[114] While *Campbell* (Merits) does not mean that Zimbabwe's sovereignty has been submerged into some kind of regional federalism, it does reflect on the Tribunal's inclination toward transnationalism. Effectively, it implies that national policy decisions must be reflective of some neutral transnational agenda and regional value system. This means that where national human rights standards are poor, the evolution of internal value systems will increasingly be shaped by external conditions.

Central to the evolution of supranationalism in Southern Africa, as the Tribunal has implicitly shown, is the changing concept of sovereignty. Initially seen as an absolute impediment to external interference in the domestic sphere of member states, national sovereignty now recedes to the background when human rights and the rule of law are under threat. The violent nature of land reform in Zimbabwe, the historic levels of repression in Southern Africa and the need to globalise human rights norms and the rule of law called the Tribunal to observe that national sovereignty is not illimitable. By regionally judicialising intra-national relations between governments and their citizens, the jurisprudence of the Tribunal indeed confirms that globalisation has

[114] See JF Stack Jr & ML Volcansek *Courts crossing borders: Blurring the lines of sovereignty* (2005) 5.

taken its toll on the traditional nation-state and its historical claim to sovereign authority. In this respect, *Campbell* (Merits) does not only set our regional jurisprudence in the right direction, but also reflects the Tribunal's attentiveness to its competence to promote a supranational mandate broader than the national interests or priorities of individual states.

5.3 Afterthought

Minister Chinamasa's letter to the Tribunal does not only cast doubt over the human rights record of Zimbabwe and Southern Africa, but also seriously implicates the future relevance of our regional court. To the Minister, the Tribunal lacked jurisdiction because the required two-thirds of SADC membership had not ratified the Protocol. The Minister insisted that Zimbabwe would neither appear before nor respond to any suit instituted in the Tribunal and that any prior or future decisions (of the Tribunal) against Zimbabwe 'are null and void'.[115] The Minister's submissions are more political than legal, but the Summit's failure to condemn Zimbabwe's contemptuous attitude[116] gives her the drive to ridicule both the regional Tribunal and the legal process.

Legally, Zimbabwe is bound by the judgments. Article 16(2) of the Treaty provides that the Protocol is an *integral* part of the Treaty, rendering ratification thereof unnecessary. Article 16(2) exempts the Protocol from the provisions (of article 22) which require the two-thirds ratification referred to by the Minister. In this context, the purported withdrawal from the jurisdiction of the Tribunal is null and void. Besides, Harare is bound by the judgments because her leaders, at all material times, knew the Protocol's ratification status. Political intervention is needed if the region's human rights record is to improve; otherwise landless peasants in South Africa and Namibia — which inherited similar land disparities — will resort to self-help. Currently, Zimbabwe is relying heavily on SADC mediation to resolve its decade-old political impasse, yet she is allowed to systematically disregard judgments from SADC's judicial institution. This ambivalence must cease if Zimbabwe and Southern Africa are to prevent another violent agrarian revolution. For human rights and the rule of law, the picture is tremendously bleak.

6 Conclusion

Land reform is a contested terrain in Africa and it impedes consensus (on human rights) between the north and the south. Traditionally, the controversy embodies the contradiction between countries' sovereignty to address uneven distribution of land, on the one hand, and

[115] *The Zimbabwean* (n 113 above).

[116] See SADC Communiqué: Kinshasa, DRC.

the requirements for lawful expropriation on the other. The Tribunal's findings are groundbreaking save that the effect of political affiliation on the designation of farms for redistribution appears to have been inadequately considered. Despite the Tribunal's resolve to uphold the rule of law, the respondent's refusal to implement the decision ridicules the legal process and raises concerns about the effectiveness of our regional enforcement mechanisms. If SADC tacitly condones Zimbabwe's refusal to respect the order of the Tribunal, the *Campbell* decision would have created a bad and dangerous precedent. The decision will be a 'bad' precedent in that it will send a signal to other states that they may in future choose not to obey the decisions of SADC institutions and 'dangerous' in that it tempts the landless masses in the region to terrorise white farmers to 'recover stolen ancestral land'. This will not only hamper regional integration, but may further perpetuate racial discrimination and racism.

If SADC compels Zimbabwe to comply with the decision, then this will give member states an incentive to respect decisions of its institutions and heighten prospects of meaningful regional integration. The Tribunal's reliance on international law to deny member states the opportunity to rely on their municipal laws is a great leap toward defending human rights and the rule of law at the regional level. The *Campbell* decision is a landmark ruling, one that paves the way for regional integration, transnationalism and a culture of responsibility. National sovereignty, being a limitable concept, should not be a bar to positive developments in a region that has been unfairly burdened by the contagious, multiplier effect of the collapse of Zimbabwe's state apparatus. The SADC, its Tribunal and the *Campbell* decision are likely to apply more influence than any international tribunal would, because in a regional context, the spirit of brotherhood nurtures greater interdependence between countries. Further, similar socio-cultural, historical and political identities easily translate into respect for regional institutions. However, all these factors mean nothing to Zimbabwe and the success of the Tribunal in asserting its influence over regional developments and maintaining its future relevance will largely depend on how the Summit responds to Zimbabwe's refusal to comply with the *Campbell* decision.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009

*Japhet Biegon**
Researcher and LLD candidate, Centre for Human Rights, University of Pretoria; Advocate of the High Court of Kenya

Summary

The article examines the results of and insights from the Pretoria Gender Expert Meeting which was convened with the primary purpose of developing state reporting guidelines under the African Women's Protocol. The focus of the article is the draft guidelines that were adopted at the end of the meeting, and the process and deliberations that yielded that draft. The Pretoria Draft Guidelines clears up the uncertainty regarding how a report under the Protocol should be grafted into a report under the African Charter in terms of article 26 of the Women's Protocol. As a set of guidelines, it seeks to achieve clarity and precision in three ways: by requiring states to report in terms of a list of measures of implementation; by drawing a clear distinction in the nature of information required in respect of first and subsequent reports; and by grouping the provisions of the Protocol into thematic clusters for reporting purposes. In the final analysis, it is concluded that the Pretoria Draft Guidelines provide a promising platform for the invigoration of the African Commission's state reporting mechanism and, by extension, the promotion and protection of women's rights in Africa. However, it has been noted that the effectiveness and impact

* LLB (Hons) (Moi), Post Grad Diploma in Law (Kenya School of Law), LLM (Human Rights and Democratisation in Africa) (Pretoria); tehpajia@yahoo.com. The author was a joint Rapporteur of the Gender Expert Meeting on State Reporting on the Protocol on the Rights of Women in Africa, 6-7August 2009, Pretoria, South Africa.

of the reporting guidelines (and that of the reporting system as a whole) will depend on at least three other factors: the effective dissemination of the guidelines; the harmonisation of reporting guidelines; and the general reform of the African Commission's reporting mechanism.

1 Introduction

The coming into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) in November 2005 was greeted with much enthusiasm throughout Africa and beyond. Writing shortly after it entered into force, Banda noted that '[t]he African Protocol is a cause for celebration, but not complacency'.[1] While it is debatable whether this statement still holds true, it is apparent that the potential lying within the African Women's Protocol is yet to be fully tapped. While there have been significant improvements in recent years towards the promotion and protection of women's rights in Africa, women continue to experience discrimination and gender abuse. Efforts by the African Commission on Human and Peoples' Rights (African Commission) to monitor the implementation of the Women's Protocol have been undermined by several factors, chief among which are the confusion and ambiguity that surround state reporting obligations under the Protocol.

State reporting under the Protocol is closely linked to the reporting process under the African Charter on Human and Peoples' Rights (African Charter). Specifically, state parties to the African Women's Protocol are required to submit reports under the Protocol 'in their periodic reports submitted in accordance with article 62 of the African Charter'.[2] As such, the form which state reports under the African Women's Protocol should take has never been clear and no consistent practice has been established. Therefore, there has long been a need to develop reporting guidelines that would bring clarity and precision to the reporting process under the African Women's Protocol. Motivated by this need, the Centre for Human Rights at the University of Pretoria organised and hosted the Gender Expert Meeting on State Reporting on the Protocol on the Rights of Women in Africa (Pretoria Gender Expert Meeting), which was held from 6 to 7 August 2009 with the primary aim of drafting reporting guidelines for reports under the Women's Protocol. The article examines the results of and insights gained from this meeting. The main focus of the article is the draft guidelines (Pretoria Draft Guidelines) that were adopted following the conclusion of the meeting, as well as the process and deliberations that yielded that draft.

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1 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72 84.

2 African Women's Protocol, art 26.

The article is divided into six sections, with this introduction being the first. The second section briefly explains the role and place of guidelines in state reporting. The third section provides an exposition of state reporting under the African Charter, which is the parent treaty of the African Women's Protocol and to which state reporting under the Protocol is linked. The fourth section focuses on the main subject of this article: developing guidelines for state reporting under the African Women's Protocol. Here, the need for guidelines under the Protocol is highlighted, and the output of and insights from the Pretoria Gender Meeting are reviewed. In the next section, the author makes suggestions on how the effectiveness and impact of the guidelines in particular and that of the reporting mechanism in general may be improved and reformed. The final section draws the work to a conclusion. For ease of reference, the Pretoria Draft Guidelines are annexed to the article.

2 Place of guidelines in state reporting

State reporting has evolved into an essential tool in monitoring states' implementation of human rights instruments. Its place in the field of human rights has been described in glowing terms. The United Nations (UN) considers state reporting as lying at the very heart of the international system for the promotion and protection of human rights.[3] Nowak describes it as an 'essential pillar of international human rights monitoring',[4] while Symonides views it as an 'indispensable component of the overall strategy of the implementation of the human rights treaties'.[5] Thus, the requirement that states periodically submit reports to designated human rights supervisory bodies on the 'measures' and 'steps' they have taken to 'give effect' to human rights treaties is now an established feature of international human rights monitoring.[6] While it first developed within the auspices of the International Labour Organisation (ILO) and later under the UN system,[7] state reporting has since, with the emergence and development of regional human rights systems, trickled down to the regional levels.[8]

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3 United Nations *United Nations action in the field of human rights* (1988) 313-314.

4 M Nowak *CCPR commentary* (2005) 713-714.

5 J Symonides *Human rights: International protection, monitoring, enforcement* (2003) 59.

6 State reporting is a mandatory requirement of the nine core UN human rights treaties. Each of these treaties requires states to submit initial reports, to be followed by periodic reports, indicating the measures they have taken to implement the rights enumerated in the treaties. See generally United Nations *Manual on human rights reporting* (1997).

7 See P Alston 'The purposes of reporting' in United Nations (n 6 above) 19-20.

8 On regional human rights systems, see D Shelton (ed) *Regional protection of human rights* (2008).

The effectiveness and impact of state reporting as a human rights monitoring mechanism depend upon a variety of factors, one of which is the clarity and precision of the reporting obligation. Generally, treaties are couched in broad terms and, in respect to state reporting, the focus is usually on the period within which states are required to submit their reports. In the same vein, in stipulating the expected content of state reports, treaties usually use such broad and ambiguous terms as 'measures' and 'steps'. As such, it has necessarily fallen on human rights treaty monitoring bodies to articulate the detailed and precise reporting obligations under the various human rights treaties. These bodies have undertaken this task by adopting guidelines for state reporting under the various treaties, which in the main seek to help states in discharging their reporting obligations. It is through these guidelines that states get to understand and appreciate what is expected of their state reports. With such an understanding and appreciation, states are in a position to put adequate and relevant information in their reports.[9] Moreover, these guidelines provide the yardstick on which reports are examined. Thus, if followed by states, reporting guidelines not only make the work of the monitoring bodies easier, but they also infuse a sense of uniformity in the reporting process.[10] Ultimately, such guidelines would serve to enhance the effectiveness and impact of the reporting process.

The essence and role of guidelines for state reporting should be seen within the broader philosophy that underlies the concept and practice of state reporting. Unlike other mechanisms for human rights monitoring, such as complaints procedures, which are inherently adversarial, the state reporting procedure is non-adversarial in nature. It is intended to initiate a constructive dialogue between states and treaty-monitoring bodies, with the main aim of helping states comply with treaty obligations. Thus, according to Alston, 'the assumption underlying the entire procedure is that the primary aim is to assist governments rather than just to criticise their performance'.[11] Therefore, guidelines for state reporting serve this broader purpose, that is, assisting governments to implement the rights which they have undertaken to guarantee. In sum, if the state reporting process ensures 'introspection' nation-

9 According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), human rights treaty bodies adopt guidelines on the form and content of state reports 'in order to ensure that reports contain adequate information to allow the committees to do their work'. See OHCHR *The United Nations human rights treaty system: An introduction to the core human rights treaties and the treaty bodies* (2005) 18.

10 In its Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights, the UN Human Rights Committee notes that compliance with the guidelines 'will reduce the need for the Committee to request further information when it proceeds to consider a report; it will also help the Committee to consider the situation regarding human rights in every state on an equal basis'.

11 Alston (n 7 above) 20.

ally and 'inspection' internationally, as contended by Viljoen,[12] then reporting guidelines are the beacon that direct these processes in the right and desired direction.

It is not always the case, however, that reporting guidelines will achieve their intended results. Their potential to do so, just like the effectiveness and impact of the process of state reporting, depends on, amongst other factors, the clarity and precision of the guidelines. In essence, guidelines can stir confusion and ambiguity just as much as they can bring clarity and precision. The drafting of state reporting guidelines, therefore, is a significant process that largely defines the extent to which the resultant guidelines will achieve their intended results. In sum, guidelines play an important role in defining the success or otherwise of a state reporting mechanism.

3 State reporting under the African Charter on Human and Peoples' Rights

The African Charter, being the main canvas upon which Africa's continental catalogue of rights (and duties) is painted, is rightly said to lie at the heart of the African human rights system.[13] State reporting under the African Charter is anchored in article 62 under which state parties have undertaken to submit biennial reports on the 'legislative or other measures' they have taken to give effect to Charter rights. These reports are submitted to and examined by the African Commission, which is the African Charter's monitoring body.[14] They are examined in public during the Commission's ordinary sessions which are held twice a year.[15] The notion of constructive dialogue underlies the reporting process,[16] although a 'true' dialogue is yet to be

12 F Viljoen *International human rights law in Africa* (2007) 37.

13 C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155 156.

14 Art 62 of the African Charter does not expressly confer on the African Commission the duty of receiving and examining state reports under the Charter. Its authority to do so was entrusted on it by the Organisation of African Unity Assembly of Heads of State and Government after the African Commission submitted to it a resolution asserting itself as the appropriate organ capable of examining state reports under the African Charter. See Second Annual Activity Report of the African Commission (1988-1989) 20.

15 For an elaborate exposition of the African Commission's state reporting procedure, see A Danielsen *The state reporting procedure under the African Charter* (1994); M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 49.

16 See African Commission on Human and Peoples' Rights *State reporting procedure: Information sheet No 4.*

achieved.[17] The African Commission examined the first batch of state reports in 1991[18] and by the end of May 2009 it had examined a total of 74 reports.

Recognising the essence and role of guidelines in state reporting, and taking a cue from UN human rights treaty bodies, the African Commission adopted the first set of guidelines for state reporting under the African Charter in April 1989.[19] The guidelines, entitled Guidelines for National Periodic Reports (1989 Guidelines), were intended to ensure that state reports 'are made in a uniform manner'.[20] If complied with, it was envisaged that they would 'reduce the need for the Commission requesting additional information and for it to obtain a clearer picture of the situation in each state regarding the implementation of the rights, fundamental freedoms and duties of the Charter'.[21] The Guidelines fall within the African Commission's broader desire to establish a system of periodic reports that would create a channel for constructive dialogue between the states and the Commission on human and peoples' rights.[22] In practice, however, the Guidelines have failed to elicit these results.

Studies of state reports submitted to and examined by the African Commission following the adoption of the 1989 Guidelines reveal a general pattern of non-compliance with the Guidelines.[23] While states are guilty of ignoring them, it is the lack of clarity and precision in the Guidelines that has been blamed for non-compliance. While they were elaborate, the 1989 Guidelines were 'too detailed, lengthy and in some areas repetitive and unnecessarily complex'.[24] As such, they were found not to be user-friendly.[25] According to Quashigah, the Guidelines are more likely to confuse than to guide.[26] For these rea-

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17 Viljoen (n 12 above) 379, observing that 'the procedure adopted by the Commission is also hardly conducive to true dialogue. A series of questions is posed in quick succession by each of the 11 commissioners, followed by responses to some of these questions by an often-bewildered representative. The process is more akin to a series of critical statements, followed by a statement in defence of the report.'

18 It was at its 9th session in March 1991 that the African Commission considered its first batch of state reports from the states of Libya, Rwanda and Tunisia.

19 See African Commission Second Annual Activity Report 1988-1989 ACHPR/RPT/2nd. The Guidelines are reprinted in C Heyns (ed) *Human rights law in Africa* (2004) 507-524.

20 The 1989 Guidelines, para 2 under the 'general guidelines regarding the form and contents of reports from states on civil and political rights'.

21 As above.

22 The 1989 Guidelines, para 2 under 'Introduction'.

23 Viljoen (n 12 above) 373.

24 G Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268 279.

25 F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 110 111.

26 K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261.

sons, it has been contended that the Guidelines might have deterred reporting and constructive dialogue.[27] In the words of Viljoen, the 1989 Guidelines are 'very elaborate, but also too lengthy and complicated, making compliance a matter of impossibility'.[28]

The above criticisms compelled the African Commission to adopt, in 1998, a new set of guidelines that comparatively were clearer and more precise than the 1989 Guidelines.[29] In adopting the new guidelines — the 1998 Guidelines — the African Commission conceded that the 1989 Guidelines were too lengthy and that they had probably served to discourage states from reporting.[30] The 1998 Guidelines, comprising of 11 questions that are meant to guide states in preparing their reports, are short, precise and to the point.[31] The 1998 Guidelines have nevertheless invited their share of criticism. If the 1989 Guidelines were found to be too lengthy and complex, then the 1998 Guidelines have been criticised for being too brief and vague. According to Evans and Murray, the 1998 Guidelines are 'so vaguely constructed that they might fail to give sufficient guidance on the material that the Commission requires — or should be requiring — if the dialogue is to have substance'.[32] In the same vein, Quashigah has noted that, in comparison to the 1989 Guidelines, the 1998 Guidelines are 'a less detailed — but equally unhelpful — set of guidelines'.[33] Perhaps lending credence to these criticisms, there is little tangible evidence to suggest that states have followed the 1998 Guidelines in preparing their reports. With the exception of a few reports that have complied with the Guidelines,[34] the majority of reports submitted by states thus far are too varied in form and content that it is difficult to extract a particular pattern. As such:[35]

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27 Danielsen (n 15 above) 49.

28 Viljoen (n 12 above) 372.

29 'Guidelines for periodic reporting under article 62 of the African Charter on Human and Peoples' Rights' by UO Umozurike, adopted at the African Commission's 23rd session (1998), Doc/OS/27(XXIII); reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 169.

30 The 1998 Guidelines, Preamble.

31 Viljoen (n 12 above) 373. In addition to the 1998 Guidelines, there is in existence an undated third set of guidelines prepared by Commissioner Dankwa. These guidelines are essentially an elaboration of the 1998 Guidelines and they are usually sent out to governments together with the 1998 Guidelines. These Guidelines, however, have never been officially adopted by the Commission and the status of the Guidelines is therefore unclear. See 'Simplified Guidelines for State Reporting under article 62 of the African Charter on Human and Peoples' Rights' printed in Viljoen (n 25 above) 112-113.

32 Evans & Murray (n 15 above) 63.

33 Quashigah (n 26 above) 264.

34 The South African initial report and the Zimbabwean report are lauded as among the few reports that have complied with the 1998 Guidelines. See Viljoen (n 25 above).

35 Evans and Murray (n 15 above) 62-63.

> Although reports in more recent years have tended to be of greater length, they have always varied hugely in their quality and style, and this has continued under the new Guidelines. It is therefore not clear that States have in fact obtained or followed the simplified Guidelines. Indeed, some States say that they have not obtained a copy of them.

In sum, the 1989 and the 1998 Guidelines have had little impact. The failure of the Guidelines to achieve their intended goals must, however, be seen within the broad spectrum of challenges that beset state reporting under the African Charter. To begin with, the rate of non-submission of reports by state parties is so high that it has become a 'chronic problem'.[36] While all the 53 African states are state parties to the African Charter, only 12 states, representing 23% of all the states, are up to date in the submission of their reports.[37] Of the remaining 77%, 12 states (or 23%) have never submitted a report since they ratified the African Charter, while 23 others (or 43%) have overdue reports ranging from one to six overdue reports.[38] Six states (or 11%) are posed to present their reports during the next session of the African Commission in November 2009.[39] Other problems facing state reporting under the African Charter include the poor quality of state reports; inconsistency in the adoption of concluding observations coupled with their poor dissemination; and the lack of a credible follow-up mechanism. For these reasons, it is contended that, even with the improvements in recent years, the reporting system under the African Charter cannot be considered a success.[40]

Thus, the development of reporting guidelines under the African Women's Protocol is cast against a dim background: a reporting system that is beset with numerous challenges, one of which is the failure of reporting guidelines to achieve their purpose. This background nevertheless provides vital lessons for developing guidelines under the Women's Protocol, which lessons the Pretoria Gender Expert Meeting, it should be presumed, was mindful to take advantage of. It is to the purpose of that meeting — developing reporting guidelines under the African Women's Protocol — to which I now turn.

4 Developing guidelines under the African Women's Protocol

The African Women's Protocol was adopted in July 2003 and entered into force on 25 November 2005. As of 30 June 2009, the Protocol

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36 J Biegon & M Killander 'Human rights developments in the African Union during 2008' (2009) 9 *African Human Rights Law Journal* 295 300.

37 26th Activity Report of the African Commission, EX CL/529(XV), para 134.

38 As above.

39 As above.

40 Shelton (n 8 above) 544.

had been ratified by 27 African states, all of which are also state parties to the African Charter. The adoption of the Women's Protocol was necessitated by the African Charter's insufficiency to provide for women rights, and the failure of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to address the particular plight of the African woman. The African Women's Protocol breaks new normative ground for being the first treaty to cover such issues as polygamy,[41] medical abortion,[42] domestic violence[43] and HIV/AIDS.[44] By and large, it presents a progressive normative framework for the promotion and protection of women's rights in Africa.[45]

The potential of the Women's Protocol, however, remains untapped. While there is a growing awareness of women's rights in Africa, gender inequalities still abound on the continent. In a line, the presence of the Women's Protocol is yet to be substantively felt by the African woman for whom it was adopted. Efforts by the Protocol's monitoring body, the African Commission, to promote women's rights by the adoption of resolutions,[46] and through its Special Rapporteur on the Rights of Women,[47] have not yielded much. Similarly, monitoring the Protocol's implementation through the state reporting procedure has been elusive. As will be discussed below in detail, the lack of clarity that surrounds the format and content of state reports under the Women's Protocol has undermined its monitoring through state reporting. It is against this background that the convening of the Pretoria Gender Expert Meeting and the development of state reporting guidelines under the Protocol should be viewed.

4.1 The need for guidelines

Over and above the essence and role of guidelines highlighted earlier, there are pressing reasons for developing guidelines for state reporting under the African Women's Protocol. The Protocol, like human rights

41 African Women's Protocol, art 6(c).

42 Art 14(2)(c).

43 Art 4(2).

44 Arts 14(1)(d) & (e).

45 See Banda (n 1 above); D Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on women's rights' (2006) LIII *Netherlands International Law Review* 63.

46 The African Commission has adopted the following resolutions touching on women's rights: Resolution on maternal mortality; Resolution on the right to a remedy and reparation for women and girl victims of sexual violence; Resolution on the health and reproductive rights of women; Resolution on the situation of women in the Democratic Republic of Congo; Resolution on the status of women in Africa and the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and Resolution on the situation of women and children in Africa.

47 See generally R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 15 above) 344.

treaties before and after it, imposes on state parties a reporting obligation. This obligation is tied to the parent treaty, to the effect that 'in their periodic reports submitted in accordance with article 62 of the African Charter', state parties should indicate the legislative and other measures they have undertaken to give full realisation of the rights contained in the Protocol. As such, the Protocol does not envisage an independent report under its ambit, but one that is subsumed in a periodic report under the African Charter. However, how such a report should be 'grafted' into a periodic report under the African Charter is subject to speculation. Indeed, the compatibility of the stock (a report under the African Charter) and the scion (a report under the Women's Protocol) is yet to be tested.

The problem is compounded by the fact that states are already required to report, under the African Charter, on the 'legislative and other measures' they have taken to give effect to women's rights. In particular, article 18(3) of the African Charter imposes a dual obligation on state parties to 'ensure the elimination of every discrimination against women' and to 'ensure the protection of the rights of the woman'. Should a report under the African Women's Protocol, therefore, be grafted into a report under the African Charter through article 18(3)? Or should it be an annexure? Or should it be afforded a section within the report under the African Charter? In the absence of guidelines, answers to these questions are speculative.

The practice of the African Commission in examining state reports has not shed any meaningful light to dispel these speculations. During the examination of state reports, questions relating to women's rights have been posed to representatives of states, primarily by the Special Rapporteur on the Rights of Women, without specifically referring to the Protocol. This practice tends to suggest that the African Commission, perhaps knowing it is to blame for not developing reporting guidelines, has not expected states to comply with their reporting obligation under the Protocol. If it has expected states to do so, then it is utterly surprising that it has consistently failed to specifically refer to the Women's Protocol during the examination of state reports.

The practice of states has been equally unhelpful. Since it came into force, seven state parties to the Protocol have submitted and presented their reports under the African Charter.[48] However, an examination of these reports shows that they have not dealt with the provisions of the Protocol. They have instead restricted reference to women's rights to the requirements of article 18(3) of the African Charter. It thus appears that, in the absence of guidelines, states have simply ignored their reporting

[48] These states are Benin, Libya, Nigeria, Rwanda, Tanzania, Zambia and Zimbabwe. The Republic of Seychelles, whose report was examined in 2006, has been excluded from this list because its report had been prepared and submitted to the African Commission long before the country had ratified the Protocol and before the Protocol had come into force.

obligations under the Protocol or, alternatively, they have erroneously presumed that the obligation is duly discharged when they deal with article 18(3) in their report. Thus, according to the background paper to the Pretoria Gender Expert Meeting:[49]

> As for state practice, the reports of state parties to the Women's Protocol almost universally omit any specific discussion on the measures taken to give effect to the Women's Protocol. Women's rights are mostly dealt with as part of the report under article 18(3) of the Charter.

In a few instances, non-governmental organisations (NGOs) have sought to fill the gap in state reports by preparing shadow reports exclusively focusing on the African Women's Protocol. For instance, in respect to Benin's periodic report presented during the African Commission's 45th ordinary session, the Centre for Human Rights prepared and submitted a shadow report primarily on the Protocol. While more of these reports are welcome, they do not substitute states' reporting obligations under the Protocol. In essence, guidelines that would clear the confusion and ambiguity that shroud the reporting obligation under the Protocol are long overdue. The need for such guidelines cannot be overemphasised.

4.2 The Pretoria Gender Expert Meeting: An overview

It was on the premise discussed above, that is, the need for reporting guidelines under the African Women's Protocol, that the Pretoria Gender Expert Meeting was convened. Funded by the Germany-based donor organisation, Heinrich Böll Stiftung, the meeting was organised under the auspices of the African Commission in conjunction with and hosted by the University of Pretoria's Centre for Human Rights (CHR) with the specific purpose of developing the guidelines. The meeting's overall objective was to 'strengthen the capacity of the African Commission to promote and protect women's rights in Africa through monitoring implementation of the Protocol'.[50] It was inspired by CHR's identification of the need to support the African Commission in the development of reporting guidelines under the Protocol.[51] While the Commission had mandated the office of the Special Rapporteur on the Rights of Women to develop the guidelines, no concrete steps had been taken several years after the office was established. As such, the Pretoria Gender Expert Meeting was the first concrete step towards the development of reporting guidelines under the Women's Protocol.

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49 Centre for Human Rights 'Background paper: Towards the adoption of reporting guidelines under the African Women's Protocol' http://www.chr.up.ac.za/centre_projects/gender/docs/Background-paper-protocol-29July2009.doc (accessed 18 October 2009).

50 Centre for Human Rights 'Concept note for Gender Expert Meeting on 6 and 7 August at the Farm Inn, Pretoria, South Africa' http://www.chr.up.ac.za/centre_projects/gender/docs/ concept%20note%20(2).doc (accessed 18 October 2008).

51 Centre for Human Rights (n 49 above).

The meeting brought together 14 gender experts from across Africa, amongst them three commissioners of the African Commission, including the incumbent Special Rapporteur on the Rights of Women.[52] The meeting ran for two consecutive days, during which period proposals on the form and content of reports under the Protocol were deliberated intensely. The discussion was initially based on a draft proposal prepared by Master of Laws (LLM in Human Rights and Democratisation in Africa) students at CHR — the LLM Draft Proposal. At the end of the first day of the meeting, discussions on the LLM Draft Proposal yielded a set of draft guidelines which were further deliberated upon on the second day of the meeting. The final result of the meeting was a set of draft guidelines — the Pretoria Draft Guidelines. A review of the Pretoria Draft Guidelines follows below.

It must be noted here that the drafting of reporting guidelines under the African Women's Protocol is essentially part of the African Commission's broader initiative to 'unpack', by way of guidelines or declarations, the content of rights guaranteed under the African Charter and the Women's Protocol. In this regard, the African Commission has adopted several sets of guidelines relating to various thematic human rights issues on the continent. These include the Declaration of Principles on Freedom of Expression in Africa;[53] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa;[54] and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[55] Most recently, the African Commission has prepared the Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights which, upon finalisation and adoption, would serve as 'additional guidelines for the submission of state party reports to the Commission'.[56]

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52 The commissioners who participated in the meeting are Commissioner Soyata Maiga (Special Rapporteur on the Rights of Women in Africa), Commissioner Pansy Tlakula (Special Rapporteur on Freedom of Expression and Access to Information in Africa) and Commissioner Dupe Atoki (Chairperson of the follow-up committee on the Robben Island guidelines). The full list of participants is available at http://www.chr.up.ac.za/centre_projects/gender/docs/participants.doc (accessed 18 October 2008).

53 ACHPR/Res 62 (XXXII) 02, adopted during the African Commission's 32nd ordinary session, Banjul, The Gambia, from 17 to 23 October 2002; reprinted in Heyns & Killander (n 29 above) 279-283.

54 ACHPR/Res 61 (XXXII) 02, adopted during the African Commission's 32nd ordinary session, Banjul, The Gambia, from 17 to 23 October 2002; reprinted in Heyns & Killander (n 29 above) 284-288.

55 Adopted during the African Commission's 33rd ordinary session, Niamey, Niger, 15-29 May 2003; reprinted in Heyns & Killander (n 29 above) 288-311.

56 Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights http://www.achpr.org/english/other/Draft_guideline_ESCR/Draft_ Pcpl20&%20Guidelines.pdf (accessed 19 October 2009).

4.3 Pretoria Draft Guidelines: A review

The drafting of state reporting guidelines is a complex endeavour. It calls for a balancing act: The guidelines ought to be concurrently concise and comprehensive. The criticisms levelled against the Charter Guidelines testify to the difficulty in achieving this criterion — a concise set of guidelines may be regarded 'brief and vague', while a comprehensive one may be considered 'lengthy and complex'. In essence, it is difficult to draft a perfect set of guidelines. In drafting the Pretoria Draft Guidelines, the experts nevertheless sought to come up, as much as they could, with a concise and comprehensive set of guidelines.

To achieve clarity and precision, and probably to escape the criticisms that have been levelled against the Charter Guidelines, three particular approaches were adopted. First, the Guidelines provide a list of 'measures of implementation' which are essentially indicators that show the extent to which the provisions of the African Women's Protocol have been given effect. Secondly, the Guidelines draw a clear distinction in the nature of information required in respect of first (initial) and subsequent (periodic) reports. Finally, the Guidelines break up the provisions of the Women's Protocol into thematic clusters under which states would be required to provide information on implementation. The features of the Pretoria Draft Guidelines are discussed in detail below.

4.3.1 Format of state reports

The first issue that the Pretoria Gender Expert Meeting had to tackle is the manner in which a report under the African Women's Protocol would be grafted into a periodic report under the African Charter. Three options were available for consideration: first, integrating a report under the Protocol through article 18(3) of the African Charter; second, incorporating details of women's rights into each article of the African Charter; and last, having a separate report under the Protocol which would be part of the African Charter report. The first two options were rejected. It was noted that the Protocol would not be accorded the attention it deserves if its provisions were dealt with under article 18(3) of the African Charter or if women's rights were read into each article of the Charter.

It was observed that, although the Protocol is a supplement to the African Charter, it is nevertheless a treaty in its own right and, therefore, calls for particular attention. It was thus the consensus of the meeting that the provisions of the Protocol should be dealt with separately, but within a report of the Charter as required by article 26 of the Protocol. In line with the recommendation of the LLM Draft Proposal, it was agreed that for state parties to the Women's Protocol, their periodic reports under the African Charter would be structured into two parts. Part A would cover all the rights in the African Charter, while Part B

would cover all the rights under the African Women's Protocol. Thus, the Pretoria Draft Guidelines state as follows:

> A state party to the African Charter and the Protocol must submit its report in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol.

While the above position was reached with relative ease, an issue that dominated the subject on the format of state reports is the relationship between state reports under the Women's Protocol and state reports under its sister instruments — CEDAW, the African Union (AU) Solemn Declaration on Gender Equality in Africa, and the South African Development Community (SADC) Protocol on Gender and Development. According to the LLM Draft Proposal, it was important for the Pretoria Gender Expert Meeting to consider the relationship in the reporting mechanisms under these instruments since 'the extent of potential overlap in obligations is evident'.

The LLM Draft Proposal, therefore, proposed that, rather than preparing entirely new reports under the Women's Protocol, states should attach their recently submitted reports under the sister instruments to their African Women's Protocol reports. It then suggested that the guidelines for reporting under the Protocol should stipulate the additional aspects, unique to the African Women's Protocol, on which states have to report. This approach, it was submitted, would address 'the recurrent apprehension of states about being overburdened by reporting obligations' and that it would help in avoiding 'unnecessary duplications'. In proposing this approach, inspiration was drawn from the guidelines for state reporting under the African Charter on the Rights and Welfare of the Child (African Children's Charter), which allow states to attach their reports under the Convention on the Rights of the Child (CRC) to their reports under the African Children's Charter. According to the guidelines:[57]

> A state party that has already submitted its report to the UN Committee on the Rights of the Child is required to re-submit such report to the African Committee together with a supplementary report devoted to the provisions of the Children's Charter not duplicated in the CRC.

After much deliberation, the proposal to attach the reports of sister instruments to the report was rejected. It was noted that, while the idea behind the proposal was noble, its adoption would create extra work for the commissioners, as they would have to read through three other reports. It was also observed that states too would find it a difficult task to make cross-references between the reports. Further, it was noted that, since the provisions of the African Children's Charter and those of CRC are largely similar to each other, it was easier for the guidelines under the African Children's Charter to allow states to attach

[57] Guidelines for initial reports of state parties to the African Charter on the Rights and Welfare of the Child, Cmttee/ACRWC/2 II Rev 2, para XI, provision 24.

their CRC reports to the Children's Charter report. A similar match does not exist between the African Women's Protocol and its sister instruments. It was thus advised that the reports under the sister instruments may form a 'background pack' of information that may be used by the African Commission during its examination of reports under the Women's Protocol. The Special Rapporteur on the Rights of Women was thus advised to maintain a database of state reports under sister instruments.

Another issue that the meeting sought to address concerned the appropriate terms to be used in describing reports under the African Women's Protocol. The Charter Guidelines have been criticised for failing to draw a clear distinction between initial and periodic reports. For instance, Viljoen has observed that the distinction between initial and periodic reports is not followed through consistently in the Charter Guidelines.[58] Thus, in practice, confusion characterises the use of the terms 'initial' and 'periodic' reports to the extent that, in some instances, reference has been made to 'initial periodic report'.[59] To avoid this confusion, the term 'first reports' is used in the Pretoria Draft Guidelines to refer to reports that states would submit under the Women's Protocol for the first time. The term 'first report' is preferred over the term 'initial report'. Ordinarily, an initial report broadly covers the historical background of a country and, most importantly, its overall legal, institutional and policy framework for the realisation of treaty rights. In the case of a first report under the Women's Protocol, this extensive information would not be required since states would have already presented their initial reports under the African Charter. As such, a report presented under the Women's Protocol for the first time would not be an initial report in the conventional sense of the word, hence the preference of the term 'first report'. Moreover, the Pretoria Draft Guidelines uses the term 'subsequent reports' to refer to reports that would be submitted by states following the submission of the first reports. The difference between first and subsequent reports is further reinforced by the fact that the Draft Guidelines draw a clear distinction in the nature of information that is required from states in respect of the two kinds of reports.

4.3.2 Content of state reports

Understandably, a considerable amount of time was spent during the Pretoria Gender Expert Meeting discussing the expected content of state reports. As was recommended in the LLM Draft Proposal, three particular approaches were adopted in order to ensure that states are clearly and precisely guided as to the nature of information they should

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58 F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 385.

59 As above.

include in their first and subsequent reports. First, the Pretoria Draft Guidelines outline what was referred to in the LLM Draft Proposal as 'measures of implementation'. These are indicators which would guide states in demonstrating the extent to which the rights in the Protocol have been implemented. In respect to each right, states would be required to provide information on how they have given effect to that right in accordance with the measures of implementation. These measures cover 10 main areas: legislation; administrative measures; institutions; policies and programmes; public education; any other measures; remedies; challenges experienced; accessibility; and disaggregated statistics. For clarity, questions have been posed regarding the measures to give the exact picture of what information is required. For instance, under accessibility, states are required to indicate whether the Women's Protocol rights are accessible to all women, especially rural and impoverished women.

Secondly, the Pretoria Draft Guidelines draw a clear distinction in the nature of information required in respect to first and subsequent reports. In relation to first reports, the LLM Draft Proposal explained that they are the reports by which state parties introduce to the African Commission all information relevant to the African Women's Protocol. As such, first reports form the background information for and the foundation of subsequent reports. The Draft Guidelines, therefore, require states to provide the following information when they report for the first time under the Protocol:

(a) the extent to which civil society, in particular individuals and organisations working on gender issues, were involved in the preparation of the report;
(b) a brief description of the state's overall legal framework as it relates to women's rights (such as the Constitution, other laws, policies and programmes);
(c) an explanation as to whether the Protocol is directly applicable before national courts or if it is incorporated into domestic law. Information on whether in practice the provisions of the Protocol have been invoked before national courts and tribunals (with some examples of the most important cases) should be included;
(d) if the state has entered any reservations to the Protocol, it should provide an explanation including the effect of the reservation(s) on the enjoyment of the Protocol rights;
(e) a brief description of state institutions, if any, relevant to the Protocol and information on their budgetary allocation;
(f) general information on gender budgeting;
(g) information on gender mainstreaming, including any policy and capacity-building efforts; and
(h) information on any gender audit laws or legal reform efforts undertaken from a gender perspective.

In respect of subsequent reports, the LLM Draft Proposal explained that they should only cover the developments of the period — ideally two years — following a previous report of a state party. Information provided in the first report need not be repeated in subsequent reports.

In this regard, the Pretoria Draft Guidelines require subsequent reports to cover the following issues:

(a) measures taken to implement recommendations in the concluding observations of the Commission emanating from the examination of the previous report;
(b) measures taken to publicise and disseminate the concluding observations adopted after the examination of the previous report;
(c) progress made in the implementation of the Protocol since the last report;
(d) the challenges faced in the implementation of the Protocol since the last report, and steps taken to address these challenges; and
(e) future plans in regard to the implementation of the Protocol.

Finally, the Pretoria Draft Guidelines divide the substantive provisions of the African Women's Protocol into thematic clusters. Thus, using the measures of implementation highlighted above, states would be required to report on all the substantive provisions of the Protocol under thematic clusters rather than on an article-by-article basis. In grouping the Protocol rights into clusters, the Pretoria Gender Expert Meeting went through each of the rights to ensure that no right had been alienated. Eight clusters were identified: equality/non-discrimination; protection of women from violence; rights relating to marriage; health and reproductive rights; economic, social and cultural rights; the right to peace; protection of women in armed conflicts; and the rights of especially protected women's groups. For clarity, the Guidelines indicate which of the Protocol rights fall under each of the clusters. For instance, under the cluster 'economic, social and cultural rights', states are required to report on articles 13, 15, 16, 17, 18 and 19, which deal with: economic and welfare rights; the right to food security; the right to adequate housing; the right to positive cultural context; the right to a healthy and sustainable environment; and the right to a sustainable environment.

In adopting this approach, the Pretoria Gender Expert Meeting noted that this underscores the indivisibility and interdependence of women's rights. It was also observed that the approach would, on the one hand, help minimise cross-referencing in state reports and, on the other hand, enhance the logical flow of the dialogue between the African Commission and representatives of state parties during the examination of state reports. Evidently, it appears that the inspiration to adopt the thematic rather than the article-by-article approach was drawn from the guidelines and practice of the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The CRC Guidelines group the provisions of CRC into nine clusters for purposes of state reporting. The Guidelines explain the rationale of this approach as follows:[60]

[60] General guidelines regarding the form and content of periodic reports to be submitted by state parties under art 44, para 1(b) of the Convention, CRC/C/58/Rev 1, para 3.

> The present guidelines group the articles of the Convention in clusters with a view to assisting State parties in the preparation of their reports. This approach reflects the holistic perspective on children's rights taken by the Convention: ie that they are indivisible and interrelated and that equal importance should be attached to each and every right recognised therein.

The guidelines for state reporting under the African Children's Charter take a similar approach. It groups the provisions of the Children's Charter into 10 sections, 'equal importance being attached to all the rights and welfare recognised by the Children's Charter'.[61] The first two state reports — that of Egypt and Nigeria — to be examined by the African Children's Committee have been well received by both the Committee and civil society.[62] The report of Nigeria has been described as 'very comprehensive' and as following the 'outline given in the African Committee guidelines closely'.[63] Sloth-Nielsen and Mezmur note that the examination of the report of Egypt was 'an exceptionally lively and thorough session'.[64] It is to be hoped that the first states to present their reports under the African Women's Protocol would equally set a positive precedence in relation to compliance with the reporting guidelines and willingness to engage with the African Commission in the spirit of a true constructive dialogue.

4.3.3 Length of state reports

The length of an ideal state report, in terms of pages, is an issue that eludes consensus and, as it would be expected, invoked considerable debate during the Pretoria Gender Expert Meeting. The discussion swung between those who advocated a maximum page limit for state reports to be set, and those who opposed the idea. The LLM Draft Proposal had recommended that initial reports should not exceed 50 pages, whereas periodic reports should not exceed 30 pages. It was on the basis of this proposal that the debate on the length of state reports was conducted. Those who advocated for a maximum page limit, on the one hand, argued that state reports should be as concise as possible. It should only bring within its fold the relevant information required by the reporting guidelines. In other words, a report should limit its reach to such information that would enable a constructive dialogue to ensue between the African Commission and the state concerned. It was observed that many reports submitted to the Commission thus far

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61 Guidelines for initial reports of state parties, Commttee/ACRWC/2 II Rev 2, para 7.

62 See J Sloth-Nielsen & B Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336 342-346.

63 Save the Children Sweden & Plan International *Advancing children's rights: A guide to civil society organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child* (2009), cited in Sloth-Nielsen & Mezmur (n 62 above) 344.

64 Sloth-Nielsen & Mezmur (n 62 above) 342.

have been lacking in this feature,[65] a fact that is partly to blame for the poor performance of the state reporting mechanism.

Those who opposed the idea of setting a maximum page limit argued that such a limitation would not augur well with states that have much to report about. They contended that it would be difficult for such states to summarise all it would wish to report about within the maximum pages allowed. As such, an emphasis on the length of state reports may deflect its drafters from focusing in its quality. In any event, a good report may well exceed the maximum number of pages, while a bad report may fall far below the page limit. In essence, the focus should be on the quality rather than on the length of a report. Therefore, the meeting wished for a set of guidelines that emphasised the quality of state reports without necessarily putting a ceiling on the number of pages.

As is apparent from the above exposition, both schools of thought presented well-reasoned arguments and legitimate concerns. In the end, therefore, a compromise had to be reached to the effect that, while the guidelines would set a limit on the number of pages, the limit would not be couched as a strict condition, but rather as the preferred maximum length of state reports. It was thus agreed that the guidelines would indicate that it would be preferable if, as the LLM Draft Proposal had recommended, first and subsequent reports were limited to 50 and 30 pages respectively. The relevant part of the Pretoria Draft Guidelines, therefore, reads as follows: 'A state's first report under Part B must, preferably, not exceed 50 pages and subsequent reports should not exceed 30 pages.' So far, huge volumes of state reports have posed a translation challenge to the African Commission, in addition to heavily burdening the commissioners who have had to read through reports that run into hundreds of pages. So it is expected that when it considers the Pretoria Draft Guidelines, the African Commission likely will be inclined towards the retention of the limitation on page numbers.

If the limitation is retained as expected, then the guidelines for state reporting under the African Women's Protocol will join the ranks of reporting guidelines that impose a page limit on state reports. The UN Committee on the Rights of the Child requires state reports under CRC to be limited to 120 regular-size pages.[66] Reports are required to be 'concise, analytical and focused on key implementation issues'.[67] Similarly, the Harmonised Guidelines on Reporting under UN human rights treaties impose page limits on state reports, although recognis-

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65 The 1989 and the 1998 Guidelines do not set a limit on the number of pages. As a consequence, reports submitted to the African Commission have varied vastly in length, ranging from reports of less than 10 pages to those that run into hundreds of pages.

66 Decision 5 (2002) CRC/C/148.

67 As above.

ing concerns similar to those which were raised by those opposing the setting of page limits during the Pretoria Gender Expert Meeting. The relevant clause states as follows:[68]

> Although it is understood that some States have complex constitutional arrangements which need to be reflected in their reports, reports should not be of excessive length. If possible, common core documents should not exceed 60 to 80 pages, initial treaty-specific documents should not exceed 60 pages, and subsequent periodic documents should be limited to 40 pages.

It is evident from the above clause that these page limits are not strict conditions, but that they are only applicable in so far as it is possible to contain all relevant information in the pages allowed. This position resonates with the one adopted under the Pretoria Draft Guidelines. However, in comparison with the CRC decision and the Harmonised Guidelines on Reporting, the Pretoria Draft Guidelines set lower page limits both for initial and periodic reports. The LLM Draft Proposal did not explain how the 30 and 50 page limits were arrived at, and neither was this issue discussed during the Pretoria Gender Expert Meeting. Thus, if the Pretoria Draft Guidelines are officially adopted by the African Commission, it would be left to practice to demonstrate whether the page limits set therein are reasonable or not.

5 Beyond the adoption of guidelines for state reporting

Beyond the adoption of guidelines with clear and precise directives, the reporting mechanism under the African Charter is without doubt in dire need of urgent improvement and reform, geared towards enhancing its effectiveness and impact. While guidelines for state reporting are important, they cannot solely guarantee the success of a reporting mechanism. As Evans and Murray observe, '[t]he most important factor is not the Guidelines, but the will of the state to engage fully with the reporting process'.[69] Improvement of the African Charter's reporting mechanism, which includes harnessing the will of the states, as Evans and Murray suggest, calls for the commitment, co-operation and collaboration of all relevant stakeholders in the African human rights system: the African Commission, governments, national human rights institutions (NHRIs), civil society organisations (CSOs) and donor organisations, amongst others. Highlighted below are some suggestions which, if implemented, would harness the effectiveness

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[68] Harmonised Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Core Document and Treaty-Specific Documents, HRI/GEN/2/Rev 5, para 19.

[69] Evans & Murray (n 15 above) 64.

and impact of the African Women's Protocol guidelines and that of the African Commission's reporting mechanism as a whole.

5.1 Dissemination of guidelines

A perennial problem that has long undermined the effectiveness and impact of the African Commission in general, and of its reporting mechanism in particular, is the lack of or poor dissemination of information about the Commission. While it will soon celebrate its Silver Jubilee, the existence of the Commission is little known on the continent. Its visibility is limited to a few government officials, human rights activists and academics. Thus, while efforts have been made in the recent past to improve its visibility, the African Commission remains an elite institution. It mainly disseminates information through its website, effectively locking out a huge percentage of Africa's population which is yet to access the internet as a medium of information. In any event, the Commission's website is only occasionally updated and, as such, it is not the most reliable source of information about the Commission. As Viljoen laments:[70]

> [T]he question must be asked as to how information about the Commission's activities could be expected to permeate the public domain if the main authoritative source of its activities, its Activity Report, is (for years after its adoption) not accessible on the Commission's own website.

If the dissemination of the African Commission's Activity Reports has been poor, then that of its reporting guidelines cannot be expected to be any better. As it has been observed in respect of the 1998 Guidelines, 'the Commission has no clear strategy for ensuring that the Guidelines are properly disseminated'.[71] Considering the high prevalence of non-compliance with the 1989 and the 1998 Guidelines, it is doubtful whether these guidelines were effectively disseminated, if at all, to all state parties to the African Charter. According to Evans and Murray, some states have indicated that they never obtained a copy of the 1998 Guidelines.[72] It cannot, therefore, be emphasised that upon adoption, the reporting guidelines under the African Women's Protocol would need to be disseminated to all state parties and relevant stakeholders. The guidelines should also be made available on the Commission's website as soon as they are adopted. In addition, hard copies of the guidelines should be made and distributed to representatives of state parties and other stakeholders during the Commission's ordinary sessions. At the national level, NHRIs and CSOs should take the initiative to popularise the guidelines amongst relevant government officials and, most importantly, to advocate for compliance with the guidelines.

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70 Viljoen (n 12 above) 415-416.

71 Evans & Murray (n 15 above) 64.

72 Evans & Murray (n 15 above) 62-63.

5.2 Harmonisation of state reporting guidelines

As had been discussed earlier, the 1989 and the 1998 Guidelines have been found lacking in clarity and precision. This shortcoming has been complicated by the fact that it has never been clear which of the two sets of guidelines should be followed in the preparation of state reports. The relationship between the two sets of guidelines is at best vague and it has, therefore, fallen on the discretion of states to choose which guidelines to follow. Consequently, even where states have complied with the African Commission's Guidelines, disparity has still persisted in the form and content of state reports. It has been suggested that the simultaneous existence of the 1989 and the 1998 Guidelines points to the probable fact that the Commission is more interested in states submitting their reports with sufficient detail and critique than in the uniformity of those reports.[73] But it is difficult to see how state reports would be of 'sufficient detail and critique' when states are torn between two sets of guidelines; one considered as lengthy and complex, the other regarded as brief and vague.

There is, therefore, an urgent need to replace the 1989 and the 1998 Guidelines with a new single set of guidelines. This need will be more imperative with the adoption of guidelines under the African Women's Protocol. Assuming that the structure suggested in the Pretoria Draft Guidelines is adopted in the final guidelines for state reporting under the Protocol, then Part A of the report would be regulated by the 1989 and the 1998 Guidelines and Part B by the Protocol guidelines. This would give rise to an absurdity, since the guidelines for the different parts of the report take entirely different approaches in what they require of state reports. Thus, as a participant put it during the Pretoria Gender Expert Meeting, the guidelines under the Protocol and those under the African Charter should 'speak to each other'. If the guidelines are to speak to each other, then the Charter guidelines should take the same approach as the Protocol guidelines. In particular, the provisions of the Charter should be broken into clusters or themes under which states would be required to provide details of implementation.

5.3 Reform of the state reporting procedure

It was earlier indicated that the state reporting mechanism under the African Charter faces numerous challenges. These challenges must be tackled if the mechanism is to ever operate effectively and have a meaningful impact on the promotion and protection of human rights in Africa. To begin with, the Commission must seek to address the high prevalence of non-submission of reports by states. In conjunction with NHRIs, CSOs and donor organisations, the African Commission must double its efforts in lobbying states to fulfil their reporting obligations

[73] Evans & Murray (n 15 above) 63.

under the Charter. However, resolving the problem of the non-submission of reports goes beyond encouraging states to submit their overdue reports. Indeed, if all states were to submit all their overdue reports before its next session in November 2009, the African Commission would have a total of 184 reports to examine. However, if each state consolidates its overdue reports into one report, then the Commission would have a total of 23 reports to examine. On average, the Commission examines six reports per year and, as such, it would take it four years to examine 23 reports, by which time there will be a new backlog of overdue reports. Thus, what was said of the UN reporting system rings true of the reporting mechanism under the African Charter:[74]

> [The] present reporting system functions only because of the large-scale delinquency of states which either do not report at all, or report long after the due date. If many were to report, significant existing backlogs would be exacerbated, and major reforms would be needed even more urgently.

Thus, the lobbying of states to submit their overdue reports must be accompanied with structural reforms of the reporting mechanism with a view to encouraging the timely submission of reports and their expeditious examination. The African Charter's requirement that states report biennially has proved not only ambitious, but also impossible for compliance. The ideal solution to this problem would have been to amend the African Charter to extend the reporting cycle to more than two years. In this regard, valuable lessons would have been borrowed from the practice of the UN human rights treaty bodies where the reporting cycle is generally four or five years. However, amending the African Charter is a complex and lengthy process. Therefore, the more pragmatic solution lies in boosting the capacity of the African Commission to examine more reports annually than it currently does. Presently, the Commission examines state reports during its ordinary sessions which are held twice a year, each session lasting about two weeks.[75] These sessions are usually a beehive of activity, resulting in a shorter time allocated for state reporting and, sometimes, a postponement of the examination of reports. To ensure that more reports are examined by the Commission, the ordinary sessions should be extended to last for more than two weeks or more than two ordinary sessions should be held yearly. To implement these changes, the AU would need to significantly increase its budgetary allocation for the African Commission.

In addition to the above reforms, the African Commission must also commit itself to a culture of consistent and prompt adoption of concluding observations and their effective dissemination. So far, the practice of the Commission in adopting concluding observations

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[74] Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system, E/CN 4/1997/74, para 48.

[75] Rules of Procedure of the African Commission, 1995, Rule 2(1).

has been inconsistent, an aspect that has been accompanied by poor publicity and dissemination of the observations. Moreover, to ensure the implementation of concluding observations, the Commission must establish a credible follow-up mechanism. In this regard, the Working Group on Specific Issues Relevant to the African Commission has a particular role to play. In particular, the Working Group should, by borrowing lessons from other reporting systems, devise a means of tracking the implementation of concluding observations.

NHRIs and CSOs have a role, too, in ensuring the implementation of concluding observations by states. Borrowing from the initiative and experience of the German Institute for Human Rights,[76] NHRIs and CSOs may organise 'national meetings on concluding observations' following the examination of a report of the state in which they are based. Following the examination of German's state reports by UN treaty bodies, the German Institute for Human Rights has established a tradition of organising national meetings of experts and 'influential actors concerned with the implementation of human rights legislation and human rights practice' in which the focus is the concluding observations issued by the treaty bodies.[77] In these meetings, concluding observations are distributed and ways of implementing them are explored. In the experience of the German Institute for Human Rights, these meetings have resulted in 'intense and high quality dialogues between civil society, thematic experts and ministry representatives'.[78] NHRIs and CSOs in Africa may do well to borrow a leaf from the experience of the German Institute for Human Rights.

6 Conclusion

The Pretoria Gender Expert Meeting provided the first concrete step towards the development and adoption of reporting guidelines under the African Women's Protocol. The product of the meeting, the Pretoria Draft Guidelines, will form the basis of the guidelines that will ultimately be adopted by the African Commission. If the substance of the Draft Guidelines is adopted without alteration, then state parties to the Women's Protocol would structure their periodic reports under the African Charter into Parts A and B, covering Charter rights and Protocol rights respectively. These Guidelines have sought to achieve clarity and precision in three particular ways: by requiring states to report in terms of a list of measures of implementation; by drawing a clear distinction in the nature of information required in respect of first and subsequent reports; and by grouping the provisions of the Protocol into thematic

76 F Seidensticker *Examination of state reporting by human rights treaty bodies: An example of follow-up at the national level by national human rights institutions* (2005).

77 Seidensticker (n 76 above) 11.

78 Seidensticker (n 76 above) 16.

clusters for reporting purposes. To ensure that state reports are concise, the Guidelines recommend that first and subsequent reports should respectively be restricted to a maximum of 50 and 30 pages. Thus, the Pretoria Draft Guidelines provide a promising platform for the invigoration of the African Commission's state reporting mechanism and, by extension, the promotion and protection of women's rights in Africa.

However, as it has been argued in this article, the effectiveness and impact of the reporting system under the African Charter and the African Women's Protocol turn on a number of factors that go beyond the adoption of reporting guidelines. The guidelines must be disseminated effectively; the confusion stirred by the co-existence of the 1989 and the 1998 Guidelines must be cleared by the adoption of a new single set of guidelines; and the reporting system under the Charter must be reformed. In this regard, it has been suggested that to allow more time to examine state reports, the African Commission must extend its ordinary sessions to last for more than two weeks or more than two ordinary sessions which must be held annually. It has also been recommended that the Commission not only effectively disseminates its concluding observations, but it also establishes a credible follow-up mechanism. NHRIs and CSOs have been implored to organise national meetings on concluding observations modelled around the initiative and experience of the German Institute for Human Rights. In the final analysis, however, it must be appreciated that at the core of a functioning reporting mechanism is the political will of states to engage with the system, and it is in harnessing this political will that a greater challenge lies.

Annexure: The Pretoria Draft Guidelines

Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Pursuant to article 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol), read together with article 62 of the African Charter on Human and Peoples' Rights (the African Charter), each state party to the Protocol has agreed to submit every two years, from the day the Protocol comes into force, a report on the legislative, judicial, administrative and other measures taken with a view to ensure full realisation of the rights and freedoms contained in the Protocol.

A state party to the African Charter and the Protocol must submit its report in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol. A state's first report under Part B must, preferably, not exceed 50 pages and

subsequent reports should not exceed 30 pages. In the preparation of Part B, state parties should follow the following guidelines:

First reports

When states report for the first time under the Protocol, they must provide the following:

Process of preparation

1 To what extent was civil society, in particular individuals and organisations working on gender issues, involved in the preparation of the report?

Background information

1 A brief description of the state's overall legal framework as it relates to women's rights (such as the Constitution, other laws, policies and programmes).
2 An explanation as to whether the Protocol is directly applicable before national courts or if it is incorporated into domestic law. Information on whether in practice the provisions of the Protocol have been invoked before national courts and tribunals (with some examples of the most important cases).
3 If the state has entered any reservations to the Protocol, it should provide an explanation indicating the effect of the reservation(s) on the enjoyment of the Protocol rights.
4 A brief description of state institutions, if any, relevant to the Protocol and information on their budgetary allocation.
5 General information on gender budgeting.
6 Information on gender mainstreaming, including any policy and capacity-building efforts.
7 Information on any gender audit of laws or legal reform efforts undertaken from a gender perspective (attach relevant documents).

Specific provisions of the Protocol

In respect of each of the provisions of the Protocol (which have been thematically structured below), states should explain the measures of implementation that they have undertaken with regard to the following:

a Legislation (What legislative measures has the state taken to give effect to the particular right guaranteed in the Protocol?)
b Administrative measures (What administrative measures, including budgetary allocations, has the state taken to give effect to the particular right guaranteed in the Protocol?)

c Institutions (What institutional mechanisms are in place to ensure that the particular right guaranteed in the Protocol is given effect?)
d Policies and programmes (What policies and programmes has the state adopted in order to give effect to the right in question?)
e Public education (What public education and awareness-raising activities has the state undertaken with respect to the right?)
f Any other measures (What other general measures, which are not covered in the points above, has state adopted to ensure the protection of the particular right?)
g Remedies (judicial and administrative (extra-judicial)) (What are the available avenues for redress in the event of a breach of the particular right provided in the Protocol? Have any cases been decided in respect to each of the right; and if so, have these decisions been implemented?)
h Challenges experienced (What are the challenges that the state has faced in the implementation of the particular right, and what steps have been taken to overcome these challenges?)
i Accessibility (Is the particular right accessible to all women, especially rural/impoverished women?)
j Disaggregated statistics (Where relevant, the state should provide relevant data and statistics disaggregated by gender in so far as the right in question is concerned.)

With reference to the measures of implementation above, states must report on all the provisions of the Protocol, preferably as grouped under the following eight (8) themes:

1 Equality/Non-discrimination

- 1.1 Elimination of discrimination (article 2)
- 1.2 Access to justice, including legal aid and the training of law enforcement officials (article 8)
- 1.3 Political participation and decision-making (article 9)
- 1.4 Education (article 12)

2 Protection of women from violence

- 2.1 Bodily integrity and dignity, including sexual violence, trafficking of women and medical and scientific experimentation (article 3 & 4)
- 2.2 Practices harmful to women, including female genital mutilation (article 5).
- 2.3 Female stereotypes (article 4(2)(c))
- 2.4 Sexual harassment
- 2.5 Domestic violence (article 4(2)(a))
- 2.6 Support to victims of violence, including heath services and psychological counselling (article 5(c))

3 Rights relating to marriage (articles 6-7)

- 3.1 Marriage and its effect on property relations, nationality, name (article 6(e) to (j))
- 3.2 Minimum age of marriage (article 6(b))
- 3.3 Registration of marriages (article 6(d))
- 3.4 Protection of women in polygamous marriages (article 6(c))
- 3.5 Protection of women during separation, divorce or annulment of marriage (article 7)
- 3.6 Protection of children in the family (article 6(i) &(j))

4 Health and reproductive rights

- 4.1 Access to health services (article 14(2)(a))
- 4.2 Reproductive health services, including the reduction of maternal mortality (article 14(1)(a) & (b))
- 4.3 Provision for abortion (article 14(2)(c))
- 4.4 HIV/AIDS (article 14(1)(d))
- 4.5 Sex education (article 14(1)(g))

5 Economic, social and cultural rights

- 5.1 Economic and welfare rights (article 13)
- 5.2 Right to food security (article 15)
- 5.3 Right to adequate housing (article 16)
- 5.4 Right to positive cultural context (article 17)
- 5.5 Right to a healthy and sustainable environment (article 18)
- 5.6 Right to sustainable development, including the right to property; access to land and credit (article 19)

6 Right to peace (article 10)

- 6.1 Women's participation in peace and conflict prevention and management (article 10(1)) and in all aspects of post-conflict reconstruction and rehabilitation (article 10(2)(e))
- 6.2 Reduction of military expenditures in favour of social spending (article 10(3))

7 Protection of women in armed conflicts (article 11)

- 7.1 Indicate measures of protection for asylum seekers, refugees, internally displaced women and ensure the punishment of all violators of such protection (article 11(1) — (3)).
- 7.2 Protection that no child especially girls take a direct part in hostilities and no child is recruited as a solider (article 11(4))

8 Rights of specially protected women's groups

- 8.1 Widows, including their inheritance rights (articles 20 & 21)
- 8.2 Elderly women (article 22)
- 8.3 Women with disabilities (article 23)
- 8.4 Women in distress (article 24)

Subsequent reports

Subsequent reports should cover the following:

- Measures taken to implement recommendations in the concluding observations of the Commission emanating from the examination of the previous report.
- Measures taken to publicise and disseminate the concluding observations adopted after the examination of the previous report.
- Progress made in the implementation of the Protocol since the last report.
- The challenges faced in the implementation of the Protocol since the last report, and steps taken to address these challenges.
- Future plans in regard to the implementation of the Protocol.

AFRICAN HUMAN RIGHTS LAW JOURNAL
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but may also be posted to:
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All correspondence, books for review and other communications should be sent to the same address.

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The submission must be original.

- The submission should not already have been published or submitted 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 30 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' .
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The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
Fax: (012) 362-5125
chr@up.ac.za

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CHART OF RATIFICATIONS : AU HUMAN RIGHTS TREATIES

Position as at 31 July 2009
Compiled by: I de Meyer
Source: http://www.africa-union.org (accessed 30 September 2009)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**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		30/08/07	
Benin	20/01/86	26/02/73	17/04/97		30/09/05	
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	
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		21/06/05	
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	18/03/04	
Congo	09/12/82	16/01/71	08/09/06			
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03		
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91				02/02/05	
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			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00		
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04	13/06/07	
Guinea	16/02/82	18/10/72	27/05/99			
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	
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	26/10/04	
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			
Malawi	17/11/89	04/11/87	16/09/99	09/09/08	20/05/05	
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		

Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	
Namibia	30/07/92		23/07/04		11/08/04	
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	16/12/04	
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	
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	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
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	17/12/04	
Sudan	18/02/86	24/12/72	30/07/05			
Swaziland	15/09/95	16/01/89				
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	12/10/05	
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01		
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	**53**	**45**	**45**	**25**	**27**	**2**

* Additional declaration under article 34(6)
Ratifications after 31 December 2008 are indicated in bold