AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 12 No 2 2012

The financial assistance of the European Union
is gratefully acknowledged.

First Floor
Sunclare Building
21 Dreyer Street
Claremont
7708
South Africa

ISSN 1609-073X

Cover design: Colette Alves

Typeset in 10 on 12 pt Stone Sans by ANdtp Services, Cape Town

Printed and bound by Shumani Printers

CONTENTS

SUBMISSIONS

Please note that the editors will only consider submissions that have not already been submitted for publication or published elsewhere. Submissions should be no longer than 10 000 words (footnotes included).

For further information, see 'Guidelines for Contributors' following the last contribution in this *Journal*.

Editorial

This editorial marks the end of an era: The present issue of the *Journal* is the last to be formatted and printed by JUTA, in Cape Town, South Africa. Since the inception of the *Journal* in 2001, JUTA has provided excellent service. Over the past 12 years, a strong professional collaboration has developed, resulting in the publication of 24 issues of the *Journal*. The editors would like to take this opportunity to thank JUTA and the staff, with whom we have had the privilege to work, for their support and service.

As one era ends, another beckons. The main reason for the change is that the *Journal* will from 2013 on be a fully open-access publication, accessible online. In other words, the *Journal* will be freely available in full text to anyone who is interested. A limited number of copies of the *Journal* will still be printed, and printed copies will be available on demand. The *Journal* will be hosted by the Pretoria University Law Press (PULP). We trust that this change will ensure greater access and visibility, not only to the *Journal*, but also to issues pertaining to human and peoples' rights in Africa.

This editorial also appears as a major milestone in the African human rights system has been reached: It is 25 years since the African Commission on Human and Peoples' Rights first met in November 1987. In 2011, 30 years have passed since the adoption of the founding human rights instrument of the African regional system - the African Charter on Human and Peoples' Rights. While the elaboration of human rights instruments is a necessary starting point, standards alone are not sufficient. Because the role, relevance and resonance of human rights instruments to a large extent depend on their implementation, implementing (or supervisory) bodies are very important. This is also true for the African human rights system.

At its 52nd session, held in Yamoussoukro, Côte d'Ivoire, from 9 to 22 October 2012, the African Commission took stock of its achievements and challenges. A nagging issue is the negligible demonstrable impact of the Commission's work on the continent. To assist in collecting some information on this topic, the Centre for Human Rights, together with *alumni* of its LLM (Human Rights and Democratisation in Africa) programme, in 2012 conducted research in this area, leading to the publication of a report entitled *The impact of the African Charter and Women's Protocol in selected African states* (see www.pulp.up.ac.za).

In the last decade, the African Commission was complemented by the African Court on Human and Peoples' Rights. It remains a source of disappointment that the Court has heard so few cases. While one of the main reasons for the small number of cases is the failure of notorious 'violator' states to ratify the Protocol establishing the Court, the Commission could certainly have referred more cases to the Court. At the very least, the Commission should elaborate on its Rules of Procedure, to clarify the criteria applicable to the various categories of referral in Rule 118.

As we write this editorial, the Court has yet to deliver judgment in a case on the merits. This is particularly disappointing given that the Court in June 2012 heard its first case concerning its merits. The Court met subsequently in September 2012, but did not deliver its judgment. By December 2012, when it met yet again, some five months had already passed by without a judgment being handed down. This delay makes a mockery of the stipulation in the Court Protocol that the Court must render its judgment '90 days of having completed its deliberations'. Arguing that the 'deliberations' have not yet been 'completed', or are deferred from session to session, seems fanciful and based on a very formalistic interpretation of the wording of the Protocol. The Court's tardiness and disregard for its own Rules are all the more disappointing, given expectations that the Court would deliver its first judgment soon after hearing the case, and given the relatively uncomplicated nature of the first case heard by the Court. (The case concerns the right of a person not belonging to a political party ('an independent') to run for elected office in Tanzania: *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (Applications 9/2011 and 11/2011)).

In this issue, a number of aspects of the African Union regime relevant to human rights are discussed. These include the Democracy Charter, the AU's role in the 'responsibility to protect', and the first decision of the African Committee of Experts on the Rights and Welfare of the Child. The majority of articles focus on aspects of the domestic application of human rights in The Gambia, Kenya, Nigeria, Uganda and Zambia.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the consistent quality of the *Journal*: Jegede Ademole; Akinola Akintayo; Atangcho Akonumbo; Hope Among; Japhet Biegon; Maria Burnett; John Dugard; Yonatan Fessha; Charles Fombad; Waruguru Kaguongo; Enga Kameni; Dan Kuwali; Sandra Liebenberg; Hye-Young Lim; Bronwen Manby; Christopher Mbazira; Bruno Menzan; Remember Miamingi; Chacha Bhoke Murungu; Lea Mwambene; Satang Nabaneh; Salima Namusobya; Chinedu Nwagu; Enyinna Nwauche; Paul Ogendi; Kate O'Regan; Ally Possi; Susan Precious; Michael Reisman; Johan van der Vyver; and Egbonwale Wahab.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Ten years of the Robben Island Guidelines and prevention of torture in Africa: For what purpose?

Debra Long[*]
Research Associate, University of Bristol, United Kingdom

Rachel Murray[**]
Professor of International Human Rights Law; Director, Human Rights Implementation Centre, University of Bristol, United Kingdom

Summary

In 2002 the African Commission on Human and Peoples' Rights adopted a resolution containing the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines). This is the first instrument adopted by the African Commission focused solely on preventing torture and other forms of ill-treatment. Ten years on, the article aims to examine the background to the adoption of the Robben Island Guidelines in order to explore the motives behind their development and to identify reasons for their subsequent lack of impact. The article will demonstrate that the context and institutional setting within which the Robben Island Guidelines were developed have had an impact on their level of implementation. The article arises out of a four-year research project, funded by the Arts and Humanities Research Council in the United Kingdom, which is examining the implementation of soft law through an analysis of the use of the Robben Island Guidelines in practice. Through an analysis of this one document, the article hopes to offer some lessons for the drafting, use and relevance of other soft law documents in human rights law.

[*] MA (Glasgow), Dip Law (College of Law, Surrey), MA (London); Debra.Long@bristol.ac.uk
[**] LLB (Leicester), LLM (Bristol), PhD (West of England, Bristol); Rachel.Murray@bristol.ac.uk

1 Introduction

In 2002 the African Commission on Human and Peoples' Rights (African Commission) adopted a resolution containing the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines or RIG). The RIG were the result of a three-day expert workshop that took place between 11 and 14 February 2002 in Cape Town and on Robben Island, South Africa. The RIG contain a series of provisions concerned with the prohibition and prevention of torture and other ill-treatment and responding to the needs of victims. It is the first instrument adopted by the African Commission focused solely on preventing torture and other forms of ill-treatment. With the adoption of the RIG, the African Commission, unusually for a non-binding document, also resolved to establish a committee to, among other things, develop strategies and 'promote and facilitate the implementation' of the RIG.[1]

At the tenth anniversary of the RIG, the aim of this article is to explore the background to their adoption in order to shed some light on their intended purpose. It will track the drafting process, examining the reasons for their development and subsequent adoption by the African Commission. It will demonstrate that the context and institutional setting within which this particular piece of soft law has developed have had an impact on their level of implementation. It will argue that, in order for such a document to have a use beyond its adoption, a coherent strategy needs to be considered when the document is being drafted as to how it will be employed and what purpose it is to serve. In the context of the RIG, we will argue that there was a lack of clarity on whether the RIG were planned as a policy tool to achieve ratification of an international instrument, or as a device for strategic development at the regional level, or whether they were intended as a practical tool for training and advocacy at the national level. As a result, the subsequent use of the RIG has been disappointing, both within and outside of the African Commission. Through an analysis of this one document, the article hopes, therefore, to offer some lessons for the drafting, use and relevance of other soft law documents in human rights law.

1 ACHPR Res 61 (XXXII) 02 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) 2008, http://www.achpr.org/instruments/robben-island-guidelines-2008/ (accessed 31 October 2012).

2 Where did the idea for a specific instrument on the prohibition and prevention of torture and other ill-treatment in Africa come from?

Torture and cruel, inhuman or degrading punishment and treatment (other ill-treatment)[2] are prohibited under article 5 of the African Charter on Human and Peoples' Rights (African Charter).

The African Commission has been the main body mandated to monitor state parties' compliance with their obligations under the African Charter. The African Commission has established a number of procedures by which it carries out its mandate, namely, the consideration of periodic state reports;[3] the examination of individual and inter-state communications;[4] promotional and fact-finding missions to states; and the creation of special mechanisms (Special Rapporteurs; working groups or committees) for specific issues. Over the years, numerous alleged violations of article 5 have been considered by the African Commission under these procedures and mechanisms. Notwithstanding these activities, towards the end of the 1990s there was a call from an international non-governmental organisation (NGO), the Association for the Prevention of Torture (APT), for the African Commission to develop a more strategic approach to tackling torture and other ill-treatment, in particular by establishing some form of special mechanism with the mandate to work on torture prevention and to consider developing a specific instrument concerned with the prohibition and prevention of torture and other ill-treatment in Africa.

At the 27th ordinary session of the African Commission held between 27 April and 8 May 2000, the APT issued a statement and submitted a position paper outlining the reasons for the prevalence of torture and other ill-treatment in Africa and called upon the African Commission to address the question of torture prevention, including by the establishment of an 'inter-African Committee or Special Commissioner' and considering the development of an African declaration on the prevention of torture.[5]

This call for an African declaration and special mechanism on torture prevention was made to address concerns that the African Commission lacked 'a coherent strategy towards the prohibition and prevention of torture and other ill-treatment in Africa'.[6]

---

2 In this article torture and other forms of cruel, inhuman and degrading treatment or punishment will be referred to as torture and other ill-treatment.

3 Art 62 African Charter.

4 Arts 47-59 African Charter.

5 Position Paper of the APT submitted to the 27th ordinary session of the African Commission (2000), copy filed with the Human Rights Implementation Centre, University of Bristol.

6 As above.

There would appear to be some merit in this criticism of the African Commission's approach to the prevention of torture. For instance, while states had traditionally included information on measures taken to comply with article 5 in their periodic reports, these lacked detail and tended to focus almost exclusively on the extent to which the prohibition of torture had been enacted in the Constitution or other legislation and did not include information on the prevalence of these forms of abuse and efforts to address any problems at the national level. In addition, under the individual communications procedure, the African Commission's decisions in relation to alleged article 5 violations were at times inconsistent or unnecessarily restrictive.[7]

As well as strengthening the regional approach to torture, the APT were also particularly keen to ensure that the issue of the prevention of torture and other ill-treatment was placed firmly on the agenda of the African Commission at this time because of events happening at the international level.

Since its establishment in 1977, and particularly during the 1980s and 1990s, the APT was heavily involved with negotiations at the United Nations (UN) to develop an Optional Protocol to the UN Convention against Torture (OPCAT), which would establish a new treaty body to visit places of detention and make recommendations aimed at the prevention of torture and other ill-treatment. It was in the context of these negotiations that the APT considered lobbying the African Commission to develop an instrument on torture prevention in Africa.

It was believed by the APT that developing a 'home-grown' instrument to provide a focus on the prevention of torture and other ill-treatment would assist with the process of building political consensus in Africa around the concept of the prevention of torture and other ill-treatment.[8] Not only would this assist regional efforts to tackle torture and other ill-treatment, but this could also be used as a political leverage at the international level to encourage African states to support the draft OPCAT by demonstrating that the concept of preventive visits to places of detention had broad regional support and was not an idea imposed by the international or European communities.

As well as developing an instrument that could be used to promote the concept of torture prevention within Africa, the creation of a new special mechanism was also central to the APT's regional strategy to raise the profile of torture prevention within the African Commission. This strategy was driven, on the one hand, by the emerging use of special mechanisms as a means for NGOs to try and keep their issues 'alive' and placing them at the heart of the work of the African

7 See J Mujuzi 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 423 434-435.

8 As above.

Commission, and, on the other hand, it may have been a strategic decision to ensure that even without a text for the OPCAT being adopted at the UN, there would at least be a body established at the regional level that was mandated to work on torture prevention.

Since 1994 and the establishment of the special mechanism system by the African Commission, the creation of Special Rapporteurs was seen by NGOs as a useful way in which their particular issues and agenda could receive a certain prominence within the African Commission.[9] It was a clear strategy of the APT from the start to push for a new special mechanism with a specific torture prevention mandate, rather than calling for the Special Rapporteur on Prisons to develop a more coherent torture prevention strategy within this existing mandate.

This is instructive of the importance felt by NGOs on having a special mechanism established specifically to raise the profile of a particular human right. Thus, while successive Special Rapporteurs had considered issues relating to torture and other ill-treatment while carrying out their mandate, albeit in an inconsistent manner,[10] it was perhaps felt by the APT that issues relating to torture prevention could be 'lost' within the broader mandate of the Special Rapporteur on Prisons and the best chance of raising the profile of their issue within the African Commission was through the establishment of a new special mechanism that was clearly identified with the prevention of torture and other ill-treatment.

In addition, the strategy of creating a regional body mandated to prevent torture had already been successfully deployed by the APT in Europe in the 1980s when negotiations on OPCAT were on hold. During this hiatus in the OPCAT negotiations, the APT were instrumental in the process that led to the Parliamentary Assembly of the Council of Europe adopting the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987.[11] This Convention established the European Committee for the Prevention of Torture (CPT), an expert body mandated to carry out visits where people are deprived of their liberty by a public authority within state parties and to make recommendations to the authorities aimed at preventing torture and other forms of ill-treatment.[12] While the intention of the APT may not have been to replicate exactly the CPT in Africa, the establishment of regional bodies to act as a focal point for torture prevention activities was regarded as an effective

9 See J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 251; R Murray 'The Special Rapporteurs in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice 1986-2006* (2008) 373-374.

10 See Murray (n 9 above) 208.

11 The European Convention on the Prevention of Torture came into force in 1989.

12 For more information on the CPT, see http://cpt.coe.int/en/ (accessed 31 October 2012).

strategy by the APT and was one of the main reasons behind the call for a special mechanism on torture prevention to be created by the African Commission.

Interestingly, the language used in this position paper concerning the creation of a special mechanism indicates that this body can be established independently from an instrument on torture prevention and that the two were not necessarily dependent on the other, notwithstanding that the APT states that a committee could monitor the implementation of a declaration. In fact, the language is slightly stronger in relation to the creation of a new special mechanism as the APT asks the African Commission expressly to establish one, whereas they ask the African Commission to 'examine the appropriateness of developing a declaration'.[13] However, in the end the RIG became a means by which a special mechanism could be established.

However, following the adoption of the RIG and the creation of a special mechanism to monitor their implementation, unlike the Special Rapporteur on Prisons and Conditions of Detention in Africa, who did receive, for a period of time, direct external assistance to carry out its mandate, the APT did not provide financial support to the Follow-Up Committee on the RIG from the outset. Linked to this strategic decision was an event that had not been foreseen during the drafting of the RIG in 2002, namely, that in the same year that the RIG were drafted, a final text of OPCAT was finally adopted by the UN General Assembly. The adoption of OPCAT inevitably meant that the APT had to change its overall strategy and move its resources in order to respond to the creation of this new international instrument. These events and the strategic decisions that followed have had a direct impact on the purpose and effectiveness of the Committee that was established and the RIG.

3 Momentum gathers for an instrument on torture prevention in Africa

At the 28th ordinary session of the African Commission, held between 23 October and 6 November 2000, the APT stated that they could organise jointly with the African Commission a workshop to develop a plan of action on the prevention of torture.[14]

Following this call, in January 2001 the Secretary of the African Commission informed the APT that the African Commission was in favour of the proposal to organise a workshop to draft an instrument on the prevention of torture and asked the APT to proceed with

13 Position paper of the APT (n 5 above).

14 Oral statement made by Mr Jean-Baptiste Niyizurugero at the 28th ordinary session of the African Commission, 23 October-6 November 2000, copy filed with the Human Rights Implementation Centre, University of Bristol.

the idea. Subsequently, the APT undertook a series of consultations with commissioners of the African Commission to consider the most appropriate way to move forward with the idea and what form such an instrument should take. During these consultations it was decided that it would not be appropriate to develop a binding instrument such as a convention for the prevention of torture in Africa for a number of pragmatic reasons. First, such an undertaking would be a lengthy process. Second, even if a convention was agreed upon and adopted, ratifications could take many years to obtain, particularly as many African states had not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Third, with the negotiations on OPCAT proving to be controversial and difficult, it was seen as too much of an undertaking for the APT to commence negotiations on a binding treaty at the regional level at the same time as lobbying at the international level.[15] Accordingly, bearing in mind article 2 of CAT, which obliges each state party to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture', it was agreed to develop some sort of 'guiding' or non-binding instrument on the prevention of torture and other ill-treatment in Africa.

The reasoning behind this decision is illustrative of some of the key reasons for the development of soft law that have been identified by commentators. As Shelton notes, the soft law form may be used 'when there are concerns about the possibility of non-compliance either because of domestic political opposition, lack of ability of capacity to comply, uncertainty about whether compliance can be measured, or disagreement with aspects of the proposed norm'.[16] It has also been noted that soft law can allow for more active participation of non-state actors and can be adopted or amended more rapidly because it is non-binding.[17]

At the 29th ordinary session of the African Commission, held between 23 April and 7 May 2001, the APT presented a confidential draft position paper to the African Commission which outlined details of the expert workshop. The plan of action to be drafted was to 'contain concrete proposals, measures and mechanisms to ensure improved prevention',[18] and would be presented for possible adoption by the African Commission and the Organisation of African Unity (OAU).[19]

15 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

16 D Shelton 'Law, non-law and the problem of soft law' in D Shelton (ed) *Commitment and compliance. The role of non-binding norms in the international legal system* (2000) 12.

17 Shelton (n 16 above) 13.

18 Oral Statement made by the APT at the 29th ordinary session of the African Commission.

19 As above.

On the basis of article 45 of the African Charter, which mandates the African Commission to, *inter alia*, formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights, the APT were of the firm belief that no matter what form the plan of action or instrument took, in order for it to have political legitimacy within Africa, the African Commission must be involved with the drafting process and the final product should be adopted by the Commission.[20] It was considered that this would ensure that the instrument was perceived as an instrument of the African Commission and not that of an international NGO or something imposed from an external process. As noted earlier, this was part of the APT's overall regional strategy to create an instrument that could be considered to be 'home-grown', as it was believed that this would increase the chances that such an instrument would be used by the African Commission and gain greater acceptance from states.

The African Commission was now committed to moving ahead with the proposal and, during the 30th ordinary session of the Commission, held between 13 and 27 October 2001, the commissioners met with the APT in private in order to discuss the final details of the workshop.[21] It was decided that the workshop would be held in South Africa in February 2002 and that all or part of the workshop would take place on Robben Island. Robben Island was suggested as a venue for the workshop because it was believed that the final instrument could benefit from the symbolism attached to the island.[22]

The workshop to draft the Robben Island Guidelines was held between 12 and 14 February 2002 and brought together 27 individuals, including representatives from the African Commission, the European CPT, the International Committee of the Red Cross (ICRC), national police services and civil society organisations, the majority of whom were from the region.[23] Prior to the workshop, the participants were

20 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

21 As above.

22 n 20 above.

23 The participants were Mr Andrew Chigovera, commissioner of the African Commission and Attorney-General of Zimbabwe; Mr Barney Pityana, commissioner of the African Commission; Mr Germaine Baricako, Secretary to the Africa Commission; Mrs Fiona Adolu, Legal Officer to the African Commission; Prof Renate Kicker, professor at the University of Graz, Austria and member of the European Committee for the Prevention of Torture; Mr Jody Kollapen, Deputy Chairperson of the South African Human Rights Commission; Mrs Antoinette Brink, South African Police Services; Mr Ephrem Gasasira, member of the Brussels Bar; Mrs Misie Mosarwa, Legal Officer for the Botswana Police Service; Prof Malcolm Evans, professor at the University of Bristol, UK; Mr Mabassa Fall, International Federation for Human Rights (based in Senegal); Mrs Karen McKensie, executive director of the Independent Complaints Directorate of South Africa; Mr Shadrack Mahlangu, officer at the Independent Complaints Directorate in South Africa; Mr Tommy Tshabalala, officer at the Independent Complaints Directorate of South Africa; Mrs Hannah Forster, executive director for the African Centre for Democracy and Human Rights Studies (based in The Gambia); Mr Guy Aurenche, International

informed that the purpose of the workshop was to draft a 'plan of action' to prevent torture and other ill-treatment and the expected plan of action would contain regional and national measures for the prevention of torture relating to three main themes:[24]

(i) legal measures (normative framework);
(ii) control measures (control mechanisms); and
(iii) training and empowerment.

The workshop was run over three days with an ambitious schedule to draft a 'plan of action' within this short space of time. Consequently, in order to facilitate the drafting process, the APT had previously prepared an initial outline of an instrument to be amended as necessary to reflect the discussions of the workshop.[25] This preliminary document was entitled 'Ideas and Principles for Possible Inclusion in the Draft Robben Island Plan of Action'. In the introduction it was stated that[26]

> the Plan of Action will not only provide guidelines and serve as a tool for states, thereto meet their obligations on prohibition [*sic*] and prevention of torture, but it will also serve as an indicator by all actors concerned, helping them to act effectively for the prevention of torture.

In fact, this preliminary document does not resemble a 'plan of action' with precise and measurable steps to be taken by states and other actors to prevent torture and other ill-treatment. The document is quite long and contains 63 provisions derived from existing instruments relating to the treatment of persons deprived of their liberty, including CAT; the UN Standard Minimum Rules for the Treatment of Prisoners (UN SMR); the UN Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment; the European Prison Rules; and 'standards' elaborated by the European CPT through their recommendations to countries following a visit. Interestingly, the document did not make a reference to existing regional instruments

---

Federation of Action by Christians for the Abolition of Torture (FIACAT) (based in France); Dr Tertius Geldenhuys, South African Police Services; Mrs Henrietta Didgu, legal officer of the Economic Community of West Africa States (based in Nigeria); Mr Patrick Zahnd, International Committee of the Red Cross (based in South Africa); Father Michael Lapsley, Institute for Healing and Memories (based in South Africa); Prof Shabbir Wadee, Department of Forensic Medicine at Stellenbosch University (based in South Africa); Mrs Shelia Keetharuth, Amnesty International (based in Mauritius); Mr Vincent Saldanha, Legal Resources Centre (based in South Africa); Mr Honore Tougouri, President of the African Penitentiary Association (based in Burkina Faso); Mr Marco Mona, President of the APT (based in Switzerland); Mr Jean-Baptiste Niyizurugero, APT Africa Programme Officer (based in Switzerland); and Ms Debra Long, APT Programme Advisor (based in Switzerland).

24 Letter to Prof Malcolm Evans dated 13 November 2002 [*sic*], copy filed with the Human Rights Implementation Centre, University of Bristol.

25 APT *Ideas and principles for possible inclusion in the Draft Robben Island Plan of Action*, filed with the Human Rights Implementation Centre, University of Bristol.

26 As above.

relevant to the prevention of torture and other ill-treatment in Africa, such as the Kampala Declaration on Prison Conditions in Africa.[27] One of the reasons for this is that the original drafters of the preliminary document were more familiar with the relevant UN and European instruments relating to the treatment of persons deprived of their liberty and conditions of detention,[28] and the UN instruments, in particular, were regarded as useful because of their level of detail and broad acceptance by the international community.

This preliminary document was not shared with all of the workshop participants as it was felt by the APT that it would be counter-productive to present a draft document for discussion as this might be perceived as presenting a document as a *fait accompli*, whereas the APT wanted the final product to be seen as emanating from the participants of the workshop and not from a single international NGO. It was believed by the APT that this would help to ensure that the final instrument was regarded as an African-owned instrument that reflected African concerns. Therefore, this preliminary document was only shared with a few members of the workshop who were selected by the APT to form a core drafting group, which met at the end of each day to amend the preliminary draft to reflect the focus of discussions.[29] Accordingly, the majority of the drafting process was not in fact done during the plenary sessions of the workshop, but actually carried out by this core drafting group of seven individuals. Furthermore, while some of the wording of this preliminary document was altered over the course of the workshop, the overall approach and format of this document was to have a significant impact on the final content and structure of the RIG.

The workshop was co-chaired by Commissioner Andrew Chigovera (then Attorney-General of Zimbabwe) and Mr Marco Mona (President of the APT). The first day of the workshop was taken up with presentations from some of the participants of the workshop, focusing on four broad themes: legal measures; control measures; rehabilitation and reparation; and training and empowerment to prevent torture

27 This was drafted between 21 and 26 September 1996 at an expert workshop organised by Penal Reform International, the African Commission, the Uganda Prison Services, the International Committee of the Red Cross, the Foundation for Human Rights Initiative and the Observatorie International des Prisons. See http://www.penalreform.org/files/rep-1996-kampala-declaration-en.pdf (accessed 31 October 2012).

28 The preliminary draft was prepared by Mr Niyizurugero, APT Africa Programme Officer and Ms Long, APT Programme Advisor.

29 The members of this core drafting team were Mrs Adolu, legal officer to the African Commission; Mr Baricako, Secretary to the African Commission; Prof Evans, Bristol University; Mrs Forster, Executive Director of the African Centre for Democracy and Human Rights Studies, The Gambia; Prof Kicker, member of the European Committee for the Prevention of Torture, Austria; Ms Long; and Mr Niyizurugero.

and other ill-treatment.[30] At the end of the first day, the core drafting group met to discuss and amend the preliminary document.

On the morning of the second day, more presentations were made to the plenary, while two members of the core drafting group finalised in private the draft document to be shared with the other participants.[31]

On the afternoon of the second day of the workshop, the document from the core drafting group was presented for discussion to the participants of the workshop. There were some provisions within the first draft that proved to be divisive among the workshop, namely, the inclusion of a reference to the abolition of the death penalty, recognition of judicial corporal punishment as a form of torture and other ill-treatment, a call for the exercise of universal jurisdiction over acts of torture, and no immunity from prosecution for former heads of state for acts of torture.

On the third day, the workshop was moved to Robben Island. In the end, the discussions on the last day proved to be less contentious than the previous day, partly because the core drafters had managed to address some of the issues with carefully-crafted language. Accordingly, during this last day a further revised text was presented by the core drafting group and a final text was adopted by all the participants.

It can be seen from the above that during the workshop there was a heavy focus on presentations and the actual main drafting of the RIG took place within the core drafting group. This is instructive because, as noted earlier, the aim of the process was to produce a 'home-grown' instrument and one of the merits of the RIG has often been described as being the fact that it is 'the work of Africans themselves'.[32] However, in fact three of the seven members of the core drafting group were European,[33] and two of the three primary drafters were European.[34] Yet, as noted earlier, the APT were always of the opinion that in order for the RIG to have political legitimacy within the region and therefore to be used and useful within the region, it was important for the instrument to be perceived as emanating from a process that could be regarded as an African initiative. Thus it was not necessarily who was involved with the actual wording of the instrument that was important, but rather the fact that an instrument would emanate from a workshop which the African Commission had co-chaired. This

30 For further details of the presentations, see APT 'Preventing torture in Africa: Proceedings of a joint APT-ACHPR Workshop, Robben Island, South Africa' 12-14 February 2002, APT, Geneva 2003.

31 The two members of the core drafting group who finalised the draft document were Prof Evans and Ms Long.

32 See J-B Niyizurugero & GP Lissène 'The Robben Island Guidelines: An essential tool for the prevention of torture in Africa' (2010) 6 *Essex Human Rights Review* 113.

33 Namely, Prof Kicker (Austria), Prof Evans and Ms Long (both from the UK).

34 The primary drafters were Prof Evans, Mr Niyizurugero and Ms Long.

strategy enabled the African Commission to be directly associated with the end product of the workshop, which it was hoped would smooth the way for the final document to be adopted by the African Commission.

4 Key issues that arose during the workshop

As noted earlier, there were some issues that arose during the workshop that proved to be contentious and divisive, while a few issues were stressed as being particularly pertinent when addressing torture and other ill-treatment in Africa.

Even though one of the main initial motivations behind the drafting of the RIG was to develop a regional instrument that could help to promote the concept of visits to places of detention as a means to prevent torture and in turn be used to garner political support for OPCAT within the region, in fact very little discussion took place on these issues during the workshop and the final document contains only a few generic provisions that are concerned with OPCAT and preventive visits to places of detention. It is proposed that this is indicative of the fact that the purpose of the drafting process was, either deliberately or inadvertently, beginning to change and the RIG were becoming less linked to events occurring at the international level and to a certain extent taking on a 'life of their own'. This is further evidenced by the preliminary document that the APT drew up as a basis for the discussions, which contained only three generic references to establishing and supporting visiting mechanisms.[35] Some of the possible reasons for this are, firstly, that in 2001 there was a change in leadership at the APT, which inevitably brought with it a change in their overall strategy. Secondly, the negotiations on OPCAT were at a crucial stage and to some extent events at the regional level had to take second place in the APT's activities and strategy at that time. Thirdly, as noted above, the working document that the core drafting group revised on the basis of the discussions did not focus on preventive visits but was a much broader document dealing with different aspects of the prohibition and prevention of torture. This inevitably shaped the overall discussions and the final text. Accordingly, the issues that received most debate were concerned more with substantive issues of torture prevention rather than with OPCAT or visiting mechanisms.

4.1 Death penalty

Looking first at issues that were contentious, the preliminary document prepared by the APT, which served as starting point for the

35 *Ideas and principles* (n 25 above) 5.

discussions, contained a reference to the abolition of the death penalty. Under the general heading 'Prohibition and sanctions of torture in national legislation' addressed to governments, the document states as follows, '[t]ake steps to abolish the death penalty, and where it is still applied it shall be performed in conformity with recognised international standards'.[36] A reference to the abolition of the death penalty remained in the working draft presented to the participants on the second day of the workshop. This draft had a more concise reference and stated '[t]ake steps to abolish the death penalty where it is still applied'.[37]

This provision was debated heavily during the plenary session. A few participants believed that this went too far and did not reflect the status of international law on the issue, which allows states to impose the death penalty under certain circumstances and with specific restrictions.[38] However, many participants, particularly from civil society organisations, felt strongly that the document should make a reference to abolishing the death penalty as this was a pressing issue in the region where many states still retained capital punishment for certain crimes. In the end, a pragmatic decision was taken by the core drafters to exclude a reference to the abolition of the death penalty, because it was believed that it would be unpalatable to many states and would be unlikely to receive the broad support of the African Commission, which would reduce the chances that the document would be adopted by this body. Unfortunately, this discussion marked the beginning of some tension among the workshop participants and frustrated many of the participants who disagreed with the decision.[39]

4.2 Corporal punishment

Another issue that caused perhaps even more disagreement than the issue of the death penalty among the participants related to corporal punishment. The first working draft presented to the group stated simply '[a]bolish all forms of judicial corporal punishment'.[40] A few members of the group were of the opinion that there was insufficient recognition under international law that judicial corporal punishment fell within the scope of the prohibition of torture and other ill-treatment. A long debate took place about the existence of a large body of jurisprudence and expert opinion at the international,

36 *Ideas and principles* (n 25 above) 1.

37 As above.

38 See art 6 ICCPR.

39 Since the adoption of the Robben Island Guidelines in 2002, the African Commission's position on the application of the death penalty has been clarified, in particular with the adoption of a Resolution in 2008 calling for a moratorium on the death penalty, Resolution 136, and the establishment of a Working Group on the Death Penalty in 2005.

40 *Ideas and principles* (n 25 above) 1.

regional and national levels, which recognised that forms of corporal punishment amounted to torture and other cruel, inhuman or degrading punishment. For example, the definition of torture under article 1 of CAT has been interpreted by the UN Committee against Torture, the UN Special Rapporteur on Torture and other experts and commentators on international human rights law as extending to forms of corporal punishment.[41] In the end, the RIG does not include an express reference to the prohibition of corporal punishment. However, a compromise was reached by making reference to states ensuring that 'acts that fall within the definition of torture, based on article 1 of the UN Convention against Torture, are offences within their national legal systems'.[42] Therefore, it was felt by the core drafting group that this reference to article 1 of CAT would be a pragmatic way to ensure that acts of corporal punishment would in fact be covered by the RIG, albeit in an indirect way, because of the interpretation of article 1 of CAT by the Committee against Torture and other experts to cover acts of judicial corporal punishment.[43]

4.3 Universal jurisdiction

Another issue which caused great tension within the working group was the inclusion of a reference to states exercising universal jurisdiction over acts of torture. One participant in particular was strongly opposed to this reference. It had not been anticipated that this would be a controversial issue by the APT and the core drafting group because universal jurisdiction over acts of torture is recognised within the provisions of CAT.[44] However, it was clear that in order to achieve consensus on a text, a compromise would have to be made. Thus it was decided within the core drafting group that the express reference to universal jurisdiction would be deleted and, instead, article 5(2) of CAT, which provides that state parties shall take all measures necessary to exercise universal jurisdiction over acts of torture, would be expressly mentioned. Accordingly, a provision was inserted into the RIG which states that '[n]ational courts should have jurisdictional

41 See Committee against Torture Concluding Observations on Saudi Arabia, UN Doc CAT/C/CR/28/5, 2000 para 8(b); Committee against Torture Concluding Observations on South Africa, UN Doc CAT/C/ZAF/10/1, 2006 para 25; Report of the UN Special Rapporteur on Torture, UN Doc e/cn.4/1997/7, 10 January 1997.

42 See provision 4 of the Robben Island Guidelines.

43 Since the adoption of the Robben Island Guidelines, the African Commission has also determined that 'there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state-sponsored torture under the [African] Charter and contrary to the very nature of this human rights treaty.' See *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) para 42.

44 See art 5 of CAT.

competence to hear cases of allegations of torture in accordance with article 5(2) of the UN Convention against Torture'.[45]

4.4 Immunity

Linked to the issue of universal jurisdiction over acts of torture, a further highly-contentious aspect of the text was whether there should be a provision that ensures that former heads of state cannot rely on immunity from prosecution for acts of torture. The inclusion of a provision reflecting this position was strongly opposed by at least one participant, whereas others were equally certain that the text should take a strong position against immunity. This debate took place within the context of emerging jurisprudence from other jurisdictions, in particular the 1999 decision of the House of Lords in the United Kingdom regarding the case brought against the former Chilean head of state, Augusto Pinochet, wherein the House of Lords held, *inter alia*, that former heads of state could not rely upon immunity for certain crimes against humanity, including torture.[46] The statutes of the International Criminal Tribunal for Rwanda and the tribunal for the former Yugoslavia, as well as the Rome Statute of the International Criminal Court, were also used to demonstrate an emerging opinion that former heads of state could not rely upon immunity from prosecution for acts of torture.[47]

This debate may also have been triggered by a prominent case brought before the International Court of Justice (ICJ) by the Democratic Republic of the Congo (DRC) against Belgium, which was being considered at the same time as the RIG workshop. This case involved an international arrest warrant issued against the incumbent Minister of Foreign Affairs of the DRC.[48] This case had received a lot of attention both within the region and internationally and no doubt had an impact on the views of some of the participants in the working group.

The deadlock on this issue was overcome by including a provision within the RIG, which calls upon states to[49]

---

45 See provision 6 of the Robben Island Guidelines.

46 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2001] 1 AC 61; *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [No 3] [2001] 1 AC 147 (Pinochet [No 3]).

47 See Statute of the International Criminal Tribunal for the Former Yugoslavia UN Doc S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda UN Doc S/RES/955 (1994); and Rome Statute of the International Criminal Court, A/CONF 183/9 (1994).

48 Arrest Warrant of 11 April 2000 (*DRC v Belgium*) (Merits), 14 February 2002, http://www.icj-cij.org 23 September 2002, para 54.

49 Provision 16(b) of the Robben Island Guidelines. Universal jurisdiction and immunity remain controversial issues within Africa in light of the number of decisions being handed down by the International Criminal Court against individuals from Africa.

ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as possible under international law.

4.5 Definition of torture

The final issue that stimulated a lot of debate was whether the document should include a definition of torture and, if so, whether the definition contained in article 1 of CAT[50] should be used or whether another definition should be considered. The majority of participants maintained that it was better to avoid elaborating a definition because it could lead to conflicting definitions and confusion. It was therefore agreed to include an express reference to article 1 of CAT, which contains an internationally-recognised definition of the crime of torture.[51]

4.6 Access to family members

As noted earlier, there were also a few provisions that were not contentious but are notable because they were highlighted as being particularly relevant to combating torture and other ill-treatment in Africa. The first of these provisions was the need to include an express reference to ensuring that people deprived of their liberty have access to family members as soon as possible after their detention. This was stressed as being an essential provision because in many African states, detainees rely heavily, and in some instances exclusively, on family members to provide them with food and clothing while in detention. The final provision requires that states should '[e]nsure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members'.[52]

4.7 Prohibition on the use, production and trade of equipment

A further issue that was regarded as particularly important to include was a reference to prohibiting the use, production and trade of

50 Art 1(1) of CAT reads as follows: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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 only from, inherent in or incidental to lawful sanctions.'

51 See provision 4 of the Robben Island Guidelines.

52 See provision 31 of the Robben Island Guidelines.

equipment for the infliction of torture or other ill-treatment. This was seen as a crucial element because many African states import or use policing and security equipment that is either designed to inflict or is used in such a manner that it inflicts suffering. Examples of such forms of equipment are means of restraints such as fixed wall restraints; metal leg cuffs; metal thumb cuffs; 'belly chains'; as well as electric shock devices.

A reference to adopting 'national legislation prohibiting the use, production and trade of equipment designed to inflict torture or ill-treatment' had already been included in the preliminary draft prepared by the APT and had been influenced by the Guidelines on EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[53] as well as the 2001 UN General Assembly Resolution on Torture.[54] This language was altered slightly during the drafting process and the final text included the following provision:[55]

> States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.

5 Final text

The final text adopted was entitled Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines). The RIG contain 50 provisions divided into three main parts dealing with the prohibition of torture, the prevention of torture, and responding to the needs of victims. As noted earlier, in the end the final product does not resemble a 'plan of action', as originally proposed by the APT, detailing 'concrete measures and policies' aimed at the prevention of torture.[56] Instead, the RIG are a compilation of standards and principles mainly derived from other existing international hard and soft law instruments; some of the provisions are worded very precisely while others are expressed in more general and broad terms.

Accordingly, the RIG are illustrative of the 'infinite variety' of soft law.[57] The RIG are a 'patchwork' of provisions that straddle some of the broad categories of and purposes for developing soft law that

53 See Guidelines on EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the Council of the European Union on 9 April 2001.

54 See UN Doc A/RES/56/143 3 para 11.

55 See provision 14 of the Robben Island Guidelines.

56 See *Ideas and principles* (n 25 above).

57 See R Baxter 'International law in her infinite variety' (1980) 29 *International and Comparative Law Quarterly* 549-566.

many commentators have identified.[58] For example, it has been noted that soft law can be used as a tool to elaborate on obligations found in binding instruments and indeed many provisions of the RIG do elaborate on the general prohibition on torture and other ill-treatment found in article 5 of the African Charter.[59] However, some of the provisions of the RIG are not specific enough to fully satisfy this purpose and have themselves required further elaboration.[60]

In addition, as Shelton notes, some soft law can have normative content,[61] and indeed, some of the provisions of the RIG contain what can be considered to be 'hard law' obligations, many of which are derived from existing international treaties, in particular CAT and the International Covenant on Civil and Political Rights (ICCPR).[62] Yet, numerous provisions of the RIG mirror or reference other international soft law instruments and commitments and do not appear to be intended to have normative effect but are more promotional in character.[63]

This multifaceted nature of the RIG, however, raises a problem in that *prima facie* it can be difficult to pinpoint the exact purpose of the RIG. It is suggested that this is one reason for the lack of impact of the RIG to date within the region.

Looking in more detail at the provisions of the RIG, as noted above, they are divided into three sections. The first part looks at measures aimed at the prohibition of torture. This section contains 19 provisions dealing with issues relating to the ratification of regional and international instruments; promoting and supporting co-operation with international mechanisms, the criminalisation of torture, *non-refoulement*, combating impunity, and complaints and investigation procedures. Nine out of these 19 provisions either restate or paraphrase obligations already contained in CAT.[64]

---

58 See A Boyle 'Some reflections on the relationship between treaties and soft law' (1999) 48 *International and Comparative Law Quarterly* 901-909.

59 See eg provisions 4-15 of the Robben Island Guidelines which are derived from CAT and ICCPR.

60 See eg provisions 33 and 34 of the Robben Island Guidelines. Guidelines were published by the APT, the East Africa Regional Office of the Office of High Commissioner for Human Rights and the African Commission in order to provide a commentary on the provisions and how they could be implemented at the national level. See *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: A practical guide for implementation* (2008) http://www.achpr.org/english/_info/index_RIG_Under_en.htm (accessed 31 October 2012).

61 See Shelton (n 16 above) 2.

62 See eg provision 4 of the Robben Island Guidelines which provides: 'States should ensure that acts, which fall within the definition of torture, based on article 1 of the UN Convention against Torture, are offences within their national legal systems.'

63 See eg provision 42 which provides that states should 'encourage and facilitate visits by NGOs to places of detention'.

64 See provisions 4, 6, 7, 9, 11, 12, 15, 18 & 19 of the Robben Island Guidelines.

Other provisions within this section contain more general language calling on states to ratify relevant treaties or to co-operate with the African Commission and UN bodies.[65]

The second section is the largest and contains 28 provisions aimed at the prevention of torture. Once again, some of these provisions either restate or are influenced by obligations found in other treaties such as CAT and ICCPR.[66]

Other provisions within this section make an express reference to existing international soft law instruments which set out minimum standards and safeguards relating to the treatment of persons deprived of their liberty and calls on states to ensure that any measures taken are either in conformity with these instruments or are guided by them.

In addition, the origins of some of the provisions can also be traced back to other forms of soft law such as General Comments and decisions made by the UN treaty bodies, in particular the UN Human Rights Committee (HRC), or opinions expressed by the UN Special Rapporteur on Torture. For example, provision 24 prohibits the use of incommunicado detention. While international standards do not expressly prohibit incommunicado detention in all circumstances, restrictions are placed upon its use and the HRC has stated in its General Comment 20 that 'prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment'.[67] The Special Rapporteur on Torture has also called for incommunicado detention to be prohibited.[68]

The final section of the RIG looks at responding to the needs of victims and contains only three provisions. The first provision considers issues relating to the safety of alleged victims of torture and other ill-treatment, as well as witnesses, those conducting investigations, other human rights defenders and families. This provision was included in the preliminary draft prepared by the APT and was influenced by article 13 of CAT, as well as the practice of the UN Special Procedures, the European Committee for the Prevention of Torture and the ICRC.

The second provision within this section recalls the obligation for states to offer reparation to victims of torture and other ill-treatment and their dependants. This provision reflects article 14 of CAT.

Finally, the RIG end with a provision which recognises that families and communities which have been affected by torture and other ill-treatment can also be considered victims. This provision, and particularly the inclusion of 'communities' within the category of

65 See provisions 1, 2 & 3 of the Robben Island Guidelines.

66 See provisions 20, 25, 26, 27, 29, 31, 32, 35 & 36 of the Robben Island Guidelines.

67 See Human Rights Committee, General Comment 20, UN Doc HRI/GEN/1/Rev.6 (2003) para 11.

68 See Report of the Special Rapporteur on Torture, UN Doc E/CN.4/1995/434 para 926(d).

possible victims of torture and other ill-treatment, reflects discussions in the workshop concerning the impact of acts of violence on the wider community both from the perspective of obtaining adequate justice for victims of violence and the punishment and re-integration of perpetrators.[69]

It can be seen from the above that many of the provisions of the RIG can be traced directly back to obligations contained in international treaties or standards contained in existing international soft law instruments, as well as General Comments and decisions made by UN treaty bodies and the Special Rapporteur on Torture. As such, aside from their title, the provisions of the RIG are not in themselves readily identifiable with the region. For example, they do not draw on African instruments or jurisprudence but on UN documents, and in a few instances on instruments from other regions,[70] and apart from the odd provision on the involvement of families which may reflect the African reality, and those on the death penalty and immunity which reflect African states' reluctance to accept these issues, it is hard to identify an 'African' approach or indeed one which differs significantly from the international instruments upon which it heavily draws.

One of the reasons for this is that the international standards that have been developed to protect people deprived of their liberty are universal in nature and it was not the intention of the APT, or the majority of the participants of the workshop, to develop new standards for Africa, which may have raised controversial issues relating to cultural relativity and may have resulted in weaker standards than those provided for in the international instruments. However, to some extent it might be the safeguards that have been left out or obliquely referenced that are perhaps most striking and indicative of the context within which they were elaborated and concepts which were considered difficult to obtain consensus on within the region. For example, as noted above, a reference to the abolition of the death penalty had to be deleted and references to judicial corporal punishment, universal jurisdiction, and head of state immunity were very contentious and compromise language had to be found for these issues.

The RIG have been described as 'representing a consensus of opinion and shared goals among African states '.[71] Yet, states were not involved in the process that led to their drafting nor to their adoption by the African Commission. Thus, this claim stems solely from the endorsement of the RIG in 2003 by the African Union Assembly of

69 See eg Father Lapsley 'Measures required on rehabilitation and reparation. The case of South Africa' in 'Preventing torture in Africa' (n 30 above) 131-138; and the opening speech to the workshop on the Robben Island Guidelines by Dr P Maduna in 'Preventing torture in Africa' (n 30 above) 51-56.

70 See provision 14 of the Robben Island Guidelines which closely mirrors language used in the Guidelines on EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (n 53 above).

71 See Niyizurugero & Lissène (n 32 above) 93.

Heads of State and Government when they approved the Activity Report of the African Commission, which contained the Resolution on the RIG.[72] Notwithstanding the lack of engagement with states, the RIG are expressly intended to modify state behaviour. Thus, *prima facie,* the RIG could be regarded as falling within a category of soft law instruments that have been described as 'controversial claimants' to international soft law status, namely, those instruments that do not emanate either directly or indirectly from states, but which are nevertheless intended to modify transnational behaviour.[73]

However, the claim to soft law status by the RIG has not in practice been controversial and it would appear that the adoption of the RIG by the African Commission has, as intended by the APT, given the RIG a certain political legitimacy, at least within the regional human rights system, so that the RIG are regarded by the African Commission and perceived by others as being a soft law instrument of the African Commission. Unfortunately, this 'ownership' over the RIG has not so far resulted in the African Commission usefully deploying the RIG within their activities.

6 Adoption of the RIG by the African Commission

At the end of the drafting workshop, the participants agreed upon and adopted a statement which made a number of recommendations directed towards the African Commission. This statement recommended that the African Commission took the following action:[74]

(i) adopt a resolution endorsing the Robben Island Guidelines;
(ii) consider organising an orientation seminar with the support of other interested organisations to explain and present the Robben Island Guidelines to national and regional stakeholders;
(iii) include on its agenda an item on the issue of torture in order to reflect strategies for its prohibition and prevention;
(iv) consider including the issue of torture in the mandates of its Special Rapporteurs as well as incorporating torture on the checklist of commissioners during their promotional missions; and
(v) raise awareness of the Robben Island Guidelines in order to complement the work of other stakeholders.

This statement and the RIG were presented and discussed at the NGO Forum held prior to the 31st ordinary session of the African Commission in May 2002. The NGO Forum supported the final output of the workshop and submitted a draft resolution to the African Commission,

72 See African Union Decision Assembly/AU/Dec.11 (II).

73 C Chinkin 'Normative development in the international legal system' in Shelton (n 16 above) 29.

74 See 'Preventing torture in Africa' (n 30 above) 171.

recommending that they endorse the RIG during their 31st ordinary session. While there was broad support among the commissioners for the RIG, the resolution to adopt the RIG was presented at a time when there was an internal debate within the African Commission concerning the means by which the obligations contained within the African Charter should be developed and elaborated.[75] Some commissioners considered that the commitments contained within the African Charter should be elaborated by developing protocols to the Charter instead of resolutions adopted by the African Commission, as had been the practice up until that time.[76] Consequently, consideration of the RIG, along with other similar processes concerning freedom of expression and fair trials, was postponed until the next scheduled ordinary session of the African Commission in November 2002.[77]

In order to garner support for the RIG during this hiatus in the adoption process and to apply pressure on the African Commission to adopt them, the APT took part in an international seminar on torture, organised by the International Federation of Christians Against Torture (FIACAT), in July 2002 in Dakar, Senegal. One of the recommendations arising out of this international seminar was a call for the African Commission to adopt the RIG at their 32nd ordinary session.[78]

Accordingly, the APT submitted a draft resolution endorsing the RIG to the African Commission at their 32nd ordinary session, held between 17 and 23 October 2002. This time the African Commission approved the resolution and adopted the RIG.[79]

The aim of this resolution was not only to ensure that there was political support from the African Commission for the RIG, but it also set out the intention to create a special mechanism in the form of a Follow-Up Committee for the RIG comprising representatives of the African Commission, the APT and any other prominent African experts as the Commission may determine.[80] The resolution also set out the mandate for the Follow-Up Committee, namely, that it was to organise seminars to disseminate the RIG, to develop and propose strategies to the African Commission on the promotion and implementation of the RIG, and to promote and facilitate the implementation of the RIG within member states.[81] In addition, the resolution called upon the Special Rapporteurs and members of the African Commission to

75 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

76 As above.

77 As above.

78 See the final declaration of the international seminar on torture 'Working together for an end to torture in Africa' http://www.fiacat.org/en/spip.php?article217 (accessed 31 October 2012).

79 See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (n 1 above).

80 As above.

81 As above.

widely disseminate the RIG, encouraged state parties to the African Charter to consider the RIG in their periodic reports to the African Commission, and invited NGOs and other relevant actors to widely disseminate and utilise the RIG in the course of their work.[82]

The proposal to establish a Follow-Up Committee is an interesting aspect of the resolution because, as discussed earlier, in its statement to the African Commission in 2000 the APT had called upon the Commission to establish some form of special mechanism to consider the prevention of torture and other ill-treatment. Thus, the RIG became the hook by which this could be achieved by calling for a committee to be established to promote them and to monitor their implementation.

Some of the participants of the workshop believed at the time of the workshop that the instrument to be drafted should either directly establish or pave the way for the establishment of a monitoring body within the African Commission along similar lines to the European Committee for the Prevention of Torture.[83] (As noted earlier, the APT had been instrumental in the adoption of the European Convention on the Prevention of Torture and the establishment of the CPT as part of their regional strategy on CAT.)[84] However, there is no evidence to suggest that the APT had ever intended to establish an African version of the European CPT. In the end, the establishment of a Follow-Up Committee was not discussed at length during the drafting workshop due to the pressures of time and the difficulty in obtaining agreement on the content of the final output of the workshop. Nevertheless, the APT were of the opinion that any instrument arising out of the drafting workshop would require some kind of follow-up body in order to ensure that the instrument would not 'be forgotten about'.[85]

The decision to establish a committee on the RIG instead of a Special Rapporteur was an unusual one at that time. Previously, the position of Special Rapporteur had been the common form of special mechanism to consider thematic issues. However, the endorsement of the RIG took place at the same time as the use of the Special Rapporteur system of the African Commission was under review because it was considered by the Commission that this type of mechanism had not been very successful.[86] While this review was being conducted, the African Commission decided to appoint focal persons as a 'stop-gap measure' for projects that were already underway until the review

82 As above.

83 Interview with Prof Renate Kicker, 9 March 2009; interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

84 For more details on the role played by the APT in the establishment of the CPTA, see *The Optional Protocol to the UN Convention against Torture: A manual for prevention* (2004) 35-36.

85 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

86 See 17th Annual Report of the African Commission on Human and Peoples' Rights, 2003-2004, para 32.

had been concluded.[87] This moratorium on establishing Special Rapporteurs may have led the APT and commissioners involved with the RIG to consider establishing an alternative mechanism by which to monitor the implementation of the RIG. The decision to create a Follow-Up Committee also had a further potential advantage over a Special Rapporteur mechanism, in that it enabled more individuals, including the APT, to be directly involved with activities to take the RIG forward under the auspices of the African Commission, which in turn had the potential to provide additional resources and guidance for activities on the RIG. In practice, however, this extra support did not materialise.

Following the adoption of this resolution and the corresponding endorsement of the RIG by the African Commission at its 32nd ordinary session, no further official action was taken to establish the Follow-Up Committee until the 33rd ordinary session of the African Commission, held in May 2003. At this session, the African Commission requested the Secretariat of the Commission to circulate amongst all the commissioners a list of nominees for election as members of the Follow-Up Committee. It was anticipated that the Follow-Up Committee would be established at the 34th ordinary session of the African Commission in November 2003.[88] Proposals for possible candidates were to be submitted to the Secretariat of the African Commission. In practice, the list of names of candidates for the Follow-Up Committee was compiled by the Secretariat of the African Commission in consultation with the APT and other key members of the drafting workshop.

Pending the anticipated establishment of the Follow-Up Committee, it was decided to appoint the Vice-Chairperson of the African Commission, Commissioner Jainaba Johm, and Commissioner Andrew Chigovera to act as focal persons and undertake activities aimed at implementing the resolution and disseminating the RIG. Their mandate covered the six-month inter-sessional period between the 33rd and 34th ordinary sessions of the African Commission.[89]

During this interim period, in order to take advantage of the momentum created by the adoption of the RIG, the APT, in collaboration with the African Commission, decided to officially launch the RIG in a parallel event during the African Assembly of Heads of State and Government meeting in July 2003 in Maputo, Mozambique. This was seen as a good opportunity to publicise and build political support for the RIG as an 'African-owned' instrument to prevent torture and continue to apply pressure to establish a special mechanism for the

87 As above.

88 African Commission *Report on the Consultative Meeting on the Implementation of the Robben Island Guidelines* held from 8-9 December 2003, Ouagadougou, Burkina Faso, African Union, 2.

89 As above.

RIG within the African Commission.[90] The official launch of the RIG at the African Assembly of Heads of State and Government summit took place on 11 July 2003 in Maputo, Mozambique.

At the 34th ordinary session of the African Commission, held in November 2003, the Commission was unable to establish the Follow-Up Committee as expected because it was taking longer than anticipated to get the list of possible candidates completed and agreed upon.[91] Accordingly, it was decided to nominate Commissioner Sanji Monageng as the focal person within the African Commission to undertake activities to promote and implement the RIG until the next session of the African Commission which was due to take place in May 2004.[92]

However, the APT had already submitted a proposal to the African Commission prior to the 34th ordinary session to hold a consultative meeting in December 2003 in anticipation that the Follow-Up Committee would have been established. The idea behind this consultative meeting was to provide what would have been the newly-established Follow-Up Committee with a forum to draw up a strategy and plan of action for its future work. While the process to establish a Follow-Up Committee was delayed, the African Commission nevertheless decided to continue with this consultative meeting on the understanding that the outcome of such a meeting would be conveyed to the members of the Follow-Up Committee when elected.[93] The consultative meeting was organised jointly by the APT and the African Commission and took place in Ouagadougou, Burkina Faso, from 8 to 9 December 2003. The consultative meeting brought together a small number of experts from the African Commission and civil society to discuss these objectives.[94]

The final outcome of this meeting was the elaboration of a series of recommendations (commonly known as the Ouagadougou Recommendations) aimed at assisting the national implementation of the RIG. This document is quite detailed and sets out a general comment on each of the provisions of the RIG, followed by a series of questions that could be used by various actors to ascertain the extent to which each provision has been complied with at the national level, and lastly a set of recommendations for action by states, the African

90 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

91 As above.

92 *Report on the Consultative Meeting on the Implementation of the Robben Island Guidelines* (n 88 above) 3.

93 As above.

94 The participants included Commissioner Sanji Monageng; Leila Zerrougoui, Chairperson of the UN Working Group on Arbitrary Detention; Vincent Zakane, representative of the Ministry for the Promotion of Human Rights of Burkina Faso; Honore Tougouri, representative of the Association Penitentaire Africaine (APA); Malick Sow, co-ordinator of the Senegalese Human Rights Commission; and Jean-Baptiste Niyizurugero, Africa Programme Officer for the APT.

Commission and civil society.[95] Unfortunately, this document has not been widely disseminated notwithstanding its obvious value to those working on issues relating to the prevention of torture and other ill-treatment and remains a largely-unknown document. However, in 2008, the APT secured funding to use the output of this Ouagadougou meeting to develop a practical guide on the implementation of the RIG.[96]

At its 35th ordinary session, held between 21 May and 4 June 2004, the African Commission finally agreed upon the establishment of the Follow-Up Committee on the implementation of the RIG and designated the first members of the Follow-Up Committee.[97] In accordance with the 2002 resolution for the adoption of the RIG, the Follow-Up Committee was assigned the following mandate:[98]

- to organise, with the support of interested partners, seminars to disseminate the Robben Island Guidelines to national and regional stakeholders;
- to develop and propose to the African Commission strategies to promote and implement the Robben Island Guidelines at the national and regional levels;
- to promote and facilitate the implementation of the Robben Island Guidelines within member states; and
- to make a progress report to the African Commission at each ordinary session.

The first meeting of the Follow-Up Committee did not take place until 18 and 19 February 2005 and was funded and hosted by the School of Law at the University of Bristol. At this first working session of the Follow-Up Committee, the members adopted their internal rules and procedures and sought to interpret and elaborate their mandate by developing another programme of activities that the Follow-Up Committee would undertake. At this meeting, the members set out a number of ways in which the Follow-Up Committee would engage

95 *Report on the Consultative Meeting on the Implementation of the Robben Island Guidelines* (n 88 above), Annex 1.

96 J-B Niyizurugero & GP Lessène *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: A practical guide for implementation* (2008).

97 The first members were Commissioner Ms Sanji Monageng, elected Chairperson of the Follow-Up Committee; Mr Jean-Baptiste Niyizurugero, elected Vice-Chairperson of the Follow-up Committee – Programme Officer for Africa, APT; Mrs Hannah Forster, African Centre for Democracy and Human Rights Studies (ACDHRS); Mrs Leila Zerrougui, Magistrate and Professor of Law at the National Institute of Magistracy in Algiers and Chairperson of the United Nations Working Group on Arbitrary Detention; Advocate Ms Karen McKenzie, Director of the Independent Complaints Directorate of South Africa; and Mr Malick Sow, Executive Secretary of the Senegalese Committee of Human Rights.

98 See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (n 1 above).

with states, NGOs, national human rights institutions, and UN bodies and agencies.

The main programme of activities to be used by the Follow-Up Committee to facilitate its efforts in reaching its objective of promoting the RIG and their implementation was described as follows:[99]

- organising seminars, campaigns and training sessions in countries to promote the Robben Island Guidelines and to ensure their dissemination;
- publishing position papers and articles relating to the Guidelines;
- identifying pilot countries and pilot projects for case studies;
- organising activities in pilot countries in order to stimulate and initiate national plans of action for implementation of the Robben Island Guidelines;
- conducting studies and research on issues relating to themes developed in the Robben Island Guidelines in order to develop strategies to promote the implementation of the Robben Island Guidelines at national and regional levels and producing policy documents for adoption by the African Commission; and
- publication and dissemination of the Ouagadougou Recommendations.

Despite the elaboration of this comprehensive programme of activities and strategy for its work, in practice, between 2005 and 2008 the Follow-Up Committee did not implement this plan. There were a number of reasons for this. First, there was a general lack of funds provided for all the special mechanisms of the African Commission.[100] Secondly, the legal officer of the African Commission assigned to the Follow-Up Committee left her position and for a period of time there was no staff assigned to the Follow-Up Committee.[101] Lastly, with the adoption of OPCAT by the UN General Assembly in 2002, the APT's priorities and regional strategy changed in order to focus on a global ratification campaign on OPCAT.[102] In November 2007, Commissioner Dupe Atoki, a lawyer from Nigeria, was elected as Chairperson of the Follow-Up Committee and in April 2008, the University of Bristol facilitated a second meeting of the Follow-Up Committee, which took place in Cape Town, South Africa. The purpose of this second meeting was to review the progress of the Follow-Up Committee so far, and to draw up another plan of action for the promotion, dissemination and implementation of the RIG. The Chairperson of the Follow-Up Committee reported to the 43rd ordinary session of the African Commission in May 2008 that at this second meeting, three countries

99 *Report of the First Working Session of the Follow-up Committee on the Implementation of the Robben Island Guidelines 7.*

100 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

101 As above.

102 As above.

had been identified for pilot activities (although the names of these countries were not shared in this report), and that it had been decided to arrange another meeting of the Follow-Up Committee to be held in Nigeria.[103] Consequently, in July 2008, using additional funding given to the African Commission by the African Union, the Follow-Up Committee undertook its first official in-country activity when it held a sub-regional training and sensitisation workshop in Nigeria for heads of police and prisons within West African states.[104] Unfortunately, no report has been prepared of this workshop so its findings are unknown.

Between 2008 and 2009, the Follow-Up Committee carried out a few promotional missions. The first was to Liberia between 4 and 6 September 2008; the second was to Uganda between 25 and 27 October 2009;[105] and a third was carried out to Benin between 21 and 23 October 2009.[106] Unfortunately, no mission reports have been prepared and therefore the only information available on these missions is contained in the inter-sessional activity reports presented by the Chairperson of the Committee. From these reports it is clear, first of all, that the visits were very short, on average three days. They also all involved a one or two-day workshop to promote the RIG among government officials, police and prison personnel and, in respect of Uganda and Benin, also NGOs.

In November 2009, a resolution was adopted to change the name of the Follow-Up Committee to the Committee for the Prevention of Torture in Africa (CPTA), in order to address the ambiguity in the previous title and ensure that the special mechanism was clearly identifiable as having a mandate to look at the prevention of torture in Africa. Following the adoption of this resolution, four of the members of the Follow-Up Committee were re-appointed as members of the CPTA and one commissioner was newly appointed to join the CPTA.[107]

As well as having almost exactly the same members as the Follow-Up Committee, the CPTA has also inherited the same mandate which, as outlined above, is stated in rather general terms and combines a mixture of activities aimed at promotion and advocacy. Accordingly,

---

103 See Report of Activities by Commissioner Dupe Atoki, 2008 1-2 http://www.AfricanCommission.org/english/Commissioner%27s%20Activity/43rd%20OS/Special%20Rapporteurs/robben%20Island%20Guidelines.pdf (accessed 31 October 2012).

104 See Report of Activities by Commissioner Dupe Atoki delivered at the 43rd ordinary session of the African Commission 2.

105 See Activity Report of the Chairperson of the Follow-up Committee of the Robben Island Guidelines, delivered at the 46th ordinary session of the African Commission 1-2.

106 As above.

107 Commissioner Musa Ngary Bitaye was appointed as a member of the newly-named CPTA but has since retired as a commissioner. The members of the CPTA as at October 2012 are Commissioner Dupe Atoki, Chairperson; Mr Jean-Baptiste Niyizurugero, Vice-Chairperson; Mr Malick Sow, re-appointed as a member; and Ms Hannah Forster, re-appointed as a member.

the change is in name only and the CPTA continues to work within the scope of the mandate established for the Follow-Up Committee.

Unfortunately, similarly to its predecessor, the CPTA has also, at the time of writing, largely failed to carry out much of its mandate as articulated in the 2002 resolution.

It was anticipated that creating a special mechanism to promote and monitor the implementation of the RIG would provide the necessary focal point within the African Commission through which such a strategy could be developed. However, preliminary findings from our research indicate that there has been little use of the RIG, not only within African states but, more importantly for the purposes of this article, by the African Commission itself and the AU. There has been little reference in the state reporting procedure either by commissioners or states to the RIG, and limited reference in promotional and protective missions by commissioners. Only three individual communications publicly available since the adoption of the RIG refer to them expressly,[108] yet there have been over 60 individual communications submitted to the African Commission since 2002 that involve aspects of torture and other ill-treatment.

Two of the communications that do reference the RIG do so only once as evidence of the African Commission's stance on amnesty laws.[109] However, the most recent case, that of *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, which was decided by the Commission in 2011, contains more references to the RIG and in a more substantive way. In this communication, the RIG is used by the complainants as evidence of the absolute prohibition of torture and other ill-treatment and states' obligation to prevent these forms of abuse under international human rights law.[110] The RIG is also referenced in this case by the African Commission itself during its analysis of the merits. The Commission uses the RIG as a reference for the types of safeguards to be afforded detainees,[111] in particular the right of access to a lawyer,[112] and the right to be brought promptly before a judicial officer.[113]

While these limited cases are not enough to demonstrate an evolution in the way in which the RIG will be used both by complainants and the African Commission itself within the communications procedure,

108 See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 208; *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 62 (ACHPR 2008) para 96; and Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, 2011, paras 109, 112, 174, 179 & 184.

109 See *Zimbabwe Human Rights NGO Forum* (n 108 above) para 208; and *Mouvement Ivoirien* (n 108 above) para 96.

110 See *Egyptian Initiative* (n 108 above) paras 109 & 112.

111 *Egyptian Initiative* (n 108 above) para 174.

112 *Egyptian Initiative* (n 108 above) para 179.

113 *Egyptian Initiative* (n 108 above) para 184.

the substantive use of the RIG in the Egyptian case is instructive for future communications and demonstrates the potential for the RIG to be used as an additional advocacy tool within this procedure.

In addition, although it can be argued that having the Committee has ensured that torture remains a constant item on the agenda of the African Commission at each session, and having a named figurehead for torture ensures that questions are asked during the state reporting as the Special Rapporteur and commissioners on the Committee usually are expected to take the lead on questions relating to their specific remits. On the other hand, it is likely that questions would have been posed on torture anyway and there is no indication that the questions that are asked during state reporting, for example, are any more nuanced or detailed than they would have been had there been no Committee or Guidelines.

Overall, our research findings indicate that there has been a failure on the part of the African Commission to use the RIG within its various procedures to develop a coherent message on the prevention of torture and other ill-treatment, and secondly a failure on the part of the Follow-Up Committee and now the CPTA to implement their mandate effectively.

7 Lessons that can be drawn from the experience of the Robben Island Guidelines

Overall, the history of the drafting of the RIG provides some useful lessons, not only for those seeking to develop soft law at the African Commission level, but also more generally in order to ensure that documents adopted at the regional and international levels maintain some relevance and purpose beyond their texts being finalised.

7.1 The need for a clear purpose and strategic approach

As noted earlier, while the initial idea to develop some form of regional document on the prevention of torture in Africa was partly aimed at garnering regional support for CAT and the concept of preventive visits it promotes, there is only a limited reference to visits to places of detention and CAT within the text of the RIG.

The fact that the RIG do not *prima facie* appear to be a piece of soft law designed to promote CAT or preventive visits is not in itself a concern. It could be argued that the broader focus of the RIG makes them potentially more widely applicable than if they focused more on preventive visits to places of detention. However, what is problematic is that the purpose of the RIG and how best to use them appear to have been unclear during the drafting process and subsequently at the regional level.

The institutional setting through which soft law can be developed and/or promoted has been observed as being a factor that can affect compliance.[114] As Shelton notes, institutions and mechanisms may foster compliance through judicial or quasi-judicial rulings and that 'supervisory mechanisms are crucial, especially in subject areas where the norm is accompanied by strong incentives not to comply'.[115]

Thus, the institutional setting of the RIG has an important part to play in the perceived status of the RIG and their implementation within the region. Unfortunately, the experience of the RIG exposes a major weakness at the institutional level, namely, that the African Commission has not created its own practice for strategic development, nor does it systematically use instruments it adopts or take responsibility for special mechanisms it establishes.[116]

7.2 Content has an impact upon implementation

Linked to the issues of purpose and strategy discussed above, the provisions of the RIG cover a wide variety of issues relating to the prohibition and prevention of torture and other ill-treatment that could be useful for a range of national and regional actors. Yet, many of their provisions are drawn from existing international hard and soft law instruments and their 'added value' as a piece of soft law has been questioned because it is unclear what extra the RIG can 'bring to the table'.[117]

The RIG have been promoted as having value because they emanate from the region.[118] However, our research findings indicate that this has not in fact translated into the RIG being used any more than international hard and soft law instruments by the African Commission, states and civil society organisations. Therefore, in practice it is arguable that the importance of the 'African heritage' of the RIG has been overstated and instead, perhaps what is more crucial as a factor in the level of implementation, or lack thereof, is the content of the RIG. Furthermore, neither is it possible to identify any link between the adoption of the RIG and the instances of torture across the region, or indeed to measure whether torture has increased or diminished since their adoption.

One of the reasons for developing soft law has been identified as to fill a gap within hard law instruments.[119] The RIG would certainly

114 Shelton (n 16 above) 14.

115 Shelton (n 16 above) 15.

116 Murray (n 9 above) 374-375.

117 See *Report of a workshop for East African national human rights institutions on the implementation of torture prevention standards*, University of Bristol 18-19 October 2010 http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/documents/eastafricareport.pdf (accessed 31 October 2012).

118 Niyizurugero & Lissène (n 32 above) 113.

119 Chinkin (n 73 above) 30.

appear to fit into this category and its provisions can be regarded as elaborating measures to implement the general prohibition of torture and other ill-treatment contained in article 5 of the African Charter, even if that was not its original intended purpose. However, the RIG can only be seen as filling a gap within the regional context as many of its provisions, as described in section 3 above, can be found in other international hard law instruments such as CAT and ICCPR, as well as international soft law instruments such as the UN Standard Minimum Rules for the Treatment of Prisoners.

Furthermore, some of the provisions of the RIG are not as specific as those contained in these international instruments. For example, provision 34 of the RIG makes a general statement that states should '[t]ake steps to improve conditions in places of detention, which do not conform to international standards',[120] whereas the UN SMR, for example, specifically set out the steps that should be taken to ensure that conditions of detention are humane. Accordingly, the RIG has been perceived by some civil society actors as less useful to their work, and they would prefer to use the more detailed hard and soft law instruments from the international context rather than less specific provisions from the region.[121] As Shelton notes, 'ambiguity and open-endedness can limit efforts to secure compliance'.[122]

7.3 Support at the institutional level

As observed above, the institutional setting through which soft law is developed and promoted can be a factor in the overall level of compliance.[123] The RIG are unusual among soft law instruments within international human rights law in that a specific mechanism was established in order to 'follow up' on them and to suggest strategies to assist with their implementation.

While the creation of a special mechanism has at least enabled the APT, and others, a formal body through which torture prevention issues could be raised, in practice, to date, despite holding approximately six strategic meetings between 2005 and 2011 where programmes of activities have been developed, these plans have largely failed to translate into concrete action. Any activities that have been undertaken have been broadly promotional in their focus, thus the more functional aspect of the Committee's mandate, namely, 'to develop and propose strategies to the African Commission to prevent torture and other ill-treatment at the national and regional levels', has not been implemented. This is unfortunate as it is arguably this part of the mandate of the Committee which has the potential to have the

120 See provision 34 of the Robben Island Guidelines.

121 *Report of East African Workshop* (n 117 above) 19-20.

122 Shelton (n 16 above) 14.

123 Shelton (n 16 above) 15.

greatest impact by providing the African Commission, and others, with authoritative guidance and policies for strategies on the prevention of torture and other ill-treatment in Africa.

Successive Chairpersons of the Follow-Up Committee have identified a lack of funding as the reason for this inability to carry out the mandate fully.[124] This is not unusual, and a lack of resources is a common complaint from the special mechanisms of the African Commission and the African Commission in general.[125] Part of the reason for this is that for many years the African Commission did not establish a specific budget for the special mechanisms to 'tap into' in order to carry out their activities.[126] This then changed with an increase in funding from the AU leading to the Follow-Up Committee carrying out its first in-country activity in 2008.

Other Special Rapporteurs and working groups at the African Commission have functioned effectively because funding and impetus have been provided by the NGO who initiated the establishment of the special procedure in the first place. After the adoption of the RIG in 2002, the APT took the strategic decision not to provide funds directly to the Follow-Up Committee. One of the reasons for this was that the APT had seen the impact of the dependence of the mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa on the support it received from Penal Reform International, so that when Penal Reform International were no longer in a position to provide financial and other assistance, the Special Rapporteur was unable to be as active as before. In light of this experience, the APT were of the opinion that the Follow-Up Committee should not be reliant on their financial support to function and that the African Commission needed to take on the responsibility of supporting the special mechanism.

Yet, the initial success of the Special Rapporteur on Prisons has been widely acknowledged as resulting from the support the mandate received from Penal Reform International. This support had not only enabled missions to countries to be carried out and reports to be published, but had also provided a source of strategic development for the mandate.[127] This level of activity had been in stark contrast with the first Special Rapporteur position to be created, the Special Rapporteur on Extra-Judicial Executions, which had not received external support and had been beset with problems from the start.[128]

Thus, at the time of the establishment of the Follow-Up Committee, which was only the fourth special mechanism to be established, there was no precedent within the history of the African Commission for

124 See 19th Activity Report (2005) para 46 & 20th Activity Report (2006) para 39.

125 See eg 13th Activity Report 1999-2000 paras 28 & 29.

126 Murray (n 9 above) 375.

127 F Viljoen 'Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 135.

128 Harrington (n 9 above) 255-256.

special mechanisms to function effectively without external support. Furthermore, it is likely that there was an expectation, based on previous experience with the Special Rapporteur on Prisons, that the APT would provide support to that body, particularly as the 2002 resolution which calls for the establishment of the Follow-Up Committee specifically names the APT as being a member of the Committee.[129] It is not unreasonable therefore to suppose that the African Commission was expecting the APT to provide the necessary resources and strategic support to this special mechanism, and was itself either unable or unwilling to provide adequate support to the Follow-Up Committee.

However, as well as wanting the Follow-Up Committee to be independent from the APT and fully 'owned' by the African Commission, there was also a pressing pragmatic reason for the APT's decision not to provide assistance directly to the Follow-Up Committee, namely, that it could not afford to do so as it had to put its resources into a global ratification campaign for CAT.

Therefore, the support the APT has given to the Follow-Up Committee and the Committee for the Prevention of Torture in Africa has been *ad hoc* and limited to activities such as the arrangement of meetings and assistance in publishing documents. In 2010 the APT took the decision that the CPTA needed more support in order to function and they were able to secure funding to pay a monthly stipend for an intern to be based at the African Commission to provide support to the legal officer for the CPTA, to co-ordinate CPTA activities, and to assist with event planning and field projects; as well as a range of other administrative matters. However, in the middle of 2012, the APT withdrew its funding of this internship.

Without assistance from an NGO or other body, the Follow-Up Committee and the CPTA have struggled to implement their mandates fully. However, it is unwarranted to lay the blame on the APT for this failure. The African Commission had agreed to the development of an instrument on torture prevention, had agreed to co-chair the drafting workshop, had adopted the RIG and established a special mechanism to promote their implementation. Thus, while the idea for this strategy on torture prevention was not their own, the African Commission had stood alongside the APT in the process. The failure to subsequently embrace the instrument they adopted and the special mechanism they created is symptomatic of a general over-reliance of the African Commission on NGOs for the strategic development and effective functioning of their special mechanisms.

129 See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (n 1 above).

8 Conclusion

It can be seen from the above that the RIG are interesting as an example of soft law and a number of factors have had a crucial impact on the lack of implementation of the RIG, demonstrating that it is a combination of factors which determine the extent to which instruments will be utilised, regardless of their binding or non-binding status.[130]

One of the problems with the RIG is that their purpose was never particularly clear from the outset and, on the face of it, the RIG appear to serve different roles and different actors. The context and process within which soft law instruments are developed have been identified as vital factors that affect the level of compliance.[131] While the RIG would appear to fill a gap within a binding instrument, that is, the African Charter, which is one of the key reasons for elaborating soft law instruments, it has been observed that the RIG do not have 'added value' for civil society actors working to tackle the prevention of torture because they either mirror existing international instruments, or they lack the necessary level of detail to make them a useful interpretive text to article 5 of the African Charter.[132]

Unfortunately, the institutional setting within which the RIG are placed, that is, the African Commission, has a poor record of using both binding and non-binding instruments systematically and strategically.

While the African Commission's close relationship with NGOs is unique among existing human rights bodies and has been instrumental in many of its successes,[133] it is unfortunate that the African Commission does not have its own policy of strategic development and often appears to abdicate 'responsibility for the operation' of its special mechanisms to NGOs.[134] Consequently, the roles and responsibilities of NGOs and the African Commission can become blurred.[135] This leaves the special mechanisms in a vulnerable position, as NGOs' priorities and levels of funding can change from year to year.[136] Unfortunately, the experience of the RIG has been no exception. While the APT instigated their development, they wanted the African Commission to assume responsibility for them. However, the African Commission has not done so effectively and has demonstrated that it is unable or unwilling to take on this role. Consequently, without an NGO assuming responsibility and providing assistance that would have enabled the special mechanism

130 Shelton (n 16 above) 13-17.

131 Shelton (n 16 above) 14.

132 See *Report of East African Workshop* (n 117 above) 19-20.

133 Murray (n 9 above) 95-96.

134 Murray (n 9 above) 374.

135 As above.

136 Murray (n 9 above) 377.

to be more effective, the RIG and their special mechanism have so far failed to fulfil their potential to be used by the African Commission as a means to develop an effective strategy on the prevention of torture and other ill-treatment in Africa.

Yet, despite the lack of awareness and use of the RIG, it can still play an important role in the region in a variety of ways. Firstly, there is a symbolic relevance for the RIG as an African document focusing specifically on the prevention of torture and other ill-treatment in the region. This has a potential important practical application beyond mere symbolism. The RIG can be particularly useful as an advocacy tool by a range of stakeholders working in states that are resistant to embrace instruments emanating from outside of the African region.

Furthermore, as an 'umbrella' document bringing together key international standards relevant to the prohibition and prevention of torture and other ill-treatment, the RIG have an obvious use in training and advocacy, and as a blueprint for developing national action plans to combat these forms of abuse.[137]

However, the future visibility of the RIG and its impact depend on the role and future activities of the CPTA. Further thought therefore needs to be given as to how to bolster the capacity of the CPTA and its impact within the region.[138] The Johannesburg Declaration and Plan of Action on the Prevention and Criminalisation of Torture in Africa, which was adopted by participants of a commemorative seminar that was held in Johannesburg to mark the tenth anniversary of the adoption of the RIG on 23 August 2012, sets out a number of activities and objectives for the CPTA, which to a certain extent provides some clarity regarding the purpose and future activities of the CPTA.[139]

Many of the provisions of this Declaration directly concerning the CPTA relate to the CPTA's relationship with other vital stakeholders in combating torture and other ill-treatment in the region. This Declaration also envisages an advisory role for the CPTA and calls on the Committee to provide advice and technical support to national actors on the criminalisation of torture, the compensation of victims, implementation of the RIG, the ratification of OPCAT and to support National Preventive Mechanisms. The Declaration also calls on the CPTA to develop model legislation on the criminalisation of torture in collaboration with its partners.[140]

---

137 University of Bristol, Summary report of an expert seminar on the strategic use of soft law human rights documents, Bristol, 4 July 2012 11, http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/events.html (accessed 31 October 2012).

138 n 137 above, 10.

139 See The Johannesburg Declaration and Plan of Action on the Prevention and Criminalisation of Torture, http://www.apt.ch/content/files/region/RIG+10%20Seminar%20Outcome%20Document. pdf (accessed 31 October 2012).

140 n 139 above, 5-6.

However, while the Declaration is to be welcomed, many of its provisions concerning the CPTA mirror previous plans of actions that have been developed for the CPTA and its predecessor, the Follow-Up Committee, in particular the 2005 Plan of Action for the Follow-Up Committee.[141] Therefore further thought needs to be given as to how exactly the CPTA can concretely implement the Declaration and its overall mandate in order to provide the leadership on torture prevention that is needed at the regional and national levels in order to effectively combat torture and other ill-treatment in the region.

141 *Report of the first working session of the Follow-up Committee on the implementation of the Robben Island Guidelines* (n 99 above).

AFRICAN HUMAN RIGHTS LAW JOURNAL

African civil society and the promotion of the African Charter on Democracy, Elections and Governance

André Mbata Mangu[*]
Research Professor and Head of the Verloren van Themaat Centre for Public Law Studies, College of Law, University of South Africa

Summary

When the African Charter on Democracy, Elections and Governance was adopted on 30 January 2007 in Addis Ababa, Ethiopia, most African countries were governed by leaders who came to power or were clinging to power by coups d'état, constitutional manipulations, human rights violations or vote rigging. Africa continues to be subject to authoritarian and corrupt governance, which impact negatively on its development and on the living conditions of its people. Under these conditions, the adoption of the African Democracy Charter by those very same African leaders who were rightly or wrongly blamed for their authoritarian and corrupt governance was a miracle. The Charter came into force on 15 February 2012. In light of this, the article reflects on the African Democracy Charter, its significance, its shortcomings as well as the prospects for its implementation and the particular role that civil society organisations can and should play in promoting its values.

1 Introduction

The Charter of the Organisation of African Unity (OAU), adopted in May 1963 and entering into force in September 1963, failed to take

* *Licence en Droit* (LLB) (Kinshasa), LLM LLD (UNISA); manguamb@unisa.ac.za. The article is based on the keynote address that the author delivered during the regional workshop jointly organised in Pretoria from 17 to 18 May 2012 by the University of South Africa and the National Development Institute (NDI) on Civil Society and the African Charter on Democracy, Elections and Governance. I wish to thank NDI and the anonymous reviewers whose comments helped me improve the article.

democracy, elections, good governance and human rights seriously. For more than two decades, authoritarianism and bad governance remained the rule, and democracy, elections and good governance the exception. In the early 1980s African leaders came to realise that this had to change.

The first major step taken by the OAU to reverse this state of affairs was the adoption of the African Charter on Human and Peoples' Rights (African Charter). Pityana revealed that when it came into operation on 21 October 1986, the African Charter was considered 'a miracle'.[1]

This was an extraordinary and powerful instrument of liberation, and an unprecedented event in the history of a continent famous for the gross and massive human rights violations of its leaders.

Since the establishment of the African Union (AU), African countries have adopted several conventions or treaties aimed at promoting human rights, democracy and good governance. The African Charter on Democracy, Elections and Governance (African Democracy Charter) was adopted on 30 January 2007 in Addis Ababa, Ethiopia. This was an even greater miracle as most African leaders who adopted it had come to power by undemocratic means. Some were still clinging to power through vote rigging and had become famous for their authoritarian governance. Some had not held elections since they came to power.

The African Democracy Charter was to come into operation 30 days after the deposit of the fifteenth instrument of ratification.[2] On 16 January 2012, following Burkina Faso, Chad, Ethiopia, Gabon, Ghana, Guinea, Guinea Bissau, Lesotho, Mauritania, Niger, Nigeria, Sierra Leone, South Africa and Zambia, Cameroon became the fifteenth country to deposit its instrument of ratification. The African Democracy Charter entered into operation on 15 February 2012. This historic moment unfortunately went unnoticed, not only by the AU, but also by the individual member states that had signed and ratified it. The African Democracy Charter could not have been less favourably received by the overwhelming majority of the African people. The few who were aware of its existence considered that there was nothing to celebrate since African leaders had signed and ratified numerous treaties that were never implemented.

The African Democracy Charter is not the first AU instrument related to democracy, elections and governance. So, what is its particular significance among different African instruments? What may be learnt from the Democracy Charter? Did Africa make any contribution to the promotion of democracy, elections and governance as it did with the African Charter in the field of human rights? What did the

1 B Pityana 'Hurdles and pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the Africa Court on Human and Peoples' Rights' (2003) 28 *South African Yearbook of International Law* 112.

2 Art 48 African Democracy Charter.

African Democracy Charter add to the intellectual discourse about democracy, elections and governance? On the other hand, what are the shortcomings of the African Democracy Charter as a legal instrument that embodies a new African political discourse endorsed by African leaders? Further, the Democracy Charter would be useless if it did not contribute to consolidating democracy, improving governance, and raising the living standards of the African people. What are the challenges to its implementation and what role can civil society play in its enforcement?

The article strives to address these critical questions without pretending to provide definitive answers as it reflects on the African Democracy Charter, its significance and also its shortcomings, as well as on the prospects for its implementation and the particular role that civil society organisations can and should play in promoting the values entrenched therein.

2 Significance of the African Democracy Charter

The significance of the African Democracy Charter can be assessed both legally and conceptually. Legally, the Democracy Charter contributes to reinforcing the African human rights system as it complements the African Charter. Conceptually, it embodies an African vision of democracy, elections and governance that broadens the conventional liberal or Western discourse on these issues.

2.1 Legal and political significance of the African Democracy Charter

The African Democracy Charter enhances the declarations and decisions of the OAU/AU, including the 1990 Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world; the 1995 Cairo Agenda for the Re-launch of Africa's Economic and Social Development; the 1999 Algiers Decision on Unconstitutional Changes of Government; the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government; and the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa.[3]

The significance of the African Democracy Charter lies in the fact that, unlike the aforementioned instruments, the Democracy Charter is a treaty. As such, it is binding on state parties which must comply with their obligations under the treaty. Moreover, the Democracy Charter is the first African treaty of its kind that specifically aims at promoting democracy, elections and good governance. Unfortunately for the African Democracy Charter, as for other AU instruments, the pace

3 Preamble African Democracy Charter.

of ratification has been disappointingly slow, as it takes a minimum period of five years to receive the required number of instruments of ratification to bring them into operation.

The African Charter, as the founding instrument of the African human rights system, provides for civil, political and socio-economic rights as well as for individual, collective and peoples' rights. The latter include peoples' rights to equality,[4] self-determination,[5] disposal of wealth and natural resources,[6] the right to development,[7] national and international peace and security,[8] and their right to a general satisfactory environment favourable to their development.[9] The African Charter established the African Commission on Human and Peoples' Rights (African Commission) to promote human and peoples' rights and ensure their protection.[10] The second and most important enforcement mechanism is the African Court on Human and Peoples' Rights (African Court). The African Court was established by a protocol to the African Charter.[11] Unlike the decisions of the African Commission, the judgments of the African Court are final and binding on the state parties to the Protocol.[12]

The African Democracy Charter complements the African Charter by adding the right to democracy, free and fair elections and good governance to the human and peoples' rights provided for in the African Charter. The African Commission and the African Court as enforcement mechanisms of the African Charter should therefore also promote and ensure the protection of this right.

Further, the African Democracy Charter complements the political and legal framework adopted by the AU to promote good and democratic governance on the continent. This framework consists of the New Partnership for Africa's Development (NEPAD) Declaration,[13] the Declaration on Democracy, Political, Economic and Corporate

4 Art 19 African Charter.

5 Art 20 African Charter.

6 Art 21 African Charter.

7 Art 22 African Charter.

8 Art 23 African Charter.

9 Art 24 African Charter.

10 Arts 30-63 African Charter.

11 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights adopted on 10 June 1998 and entered into force on 25 January 2004.

12 Arts 28 & 30 African Court Protocol (n 11 above),

13 This Declaration was adopted at the first meeting of the Heads of State and Government Implementation Committee of NEPAD in Abuja, Nigeria, in October 2001. See http://www.chr.up.ac.za (accessed 20 September 2012); C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 290-293.

Governance (DDPECG),[14] and the African Peer Review Mechanism (APRM) Base Document.[15]

The African Democracy Charter also aims to promote the fight against corruption in line with the AU Convention on Preventing and Combating Corruption, as corruption undermines good governance.[16]

2.2 Conceptual significance of the African Democracy Charter

Democracy, elections and governance are interrelated concepts that feature prominently in the African Democracy Charter. Of these, democracy is arguably the most important as it entails regular, competitive, free and fair elections and good governance. The Democracy Charter expresses a vision of democracy, elections and governance that African people have been longing for, though the vision is not original.

2.2.1 Democracy and elections

The conventional political and scientific discourse focuses on Western and liberal conceptions of democracy, elections and governance. These conceptions are mainly 'minimalist'.[17]

Minimalist conceptions are based on institutions of government and institutions such as political parties and pressure groups, elections and the rule of law that place emphasis on procedures and institutions to the detriment of values and substance. Democracy is defined as a specific political machinery of institutions, processes and roles.[18] This notion of procedural or institutional democracy is of the sort found in Dahl's concept of polyarchy.[19]

According to Dahl, polyarchy in a political order is characterised by seven institutions, all of which must be present. These are elected

---

14 Declaration adopted by the AU Assembly in Durban, South Africa, in July 2002. See Heyns & Killander (n 13 above) 293-298.

15 Document adopted at the 6th Summit of the NEPAD Heads of State and Government Implementation Committee in March 2003 in Abuja, Nigeria. See Heyns & Killander (n 13 above) 298-301.

16 See http://www.africa-union.org (accessed 20 September 2012); art 2 African Democracy Charter.

17 See JE Nyang'oro 'Discourses on democracy in Africa: Introduction' in JE Nyang'oro (ed) *Discourses in democracy: Africa in comparative perspective* (1996) X; RL Sklar 'Developmental democracy' (1987) 4 *Comparative Studies in Society and History* 166; IG Shivji 'State and constitutionalism: A new democratic perspective' in IG Shivji (ed) *State and constitutionalism: African debate of democracy* (1991) 27-69; AMB Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (2002) 172-201.

18 D Ronen 'The state and democracy in Africa' in D Ronen (ed) *Democracy and pluralism in Africa* (1986) 200.

19 See RA Dahl *Polyarchy: Participation and opposition* (1971); RA Dahl *Democracy and its critics* (1989) 220-224; G Sorensen 'Democracy and the developmental state' in Nyang'oro (n 17 above) 42; JA Wiseman *The new struggle for democracy in Africa* (1996) 8.

officials; free and fair elections; inclusive suffrage; the right to run for office; freedom of expression; alternative information; and associational autonomy.[20] Polyarchy is distinguished by two broad characteristics, which are that 'citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in government'.[21] In Sorensen's view, Dahl's notion of polyarchy has three elements: competition for government power; political participation in the selection of leaders and policies; and civil and political rights.[22]

In minimalist terms, democracy is synonymous with competitive, multiparty democracy, and elections. It is very often and abusively reduced to two components, namely, elections and a multiparty system.

Elections and democracy have become virtually synonymous in Western political thought and analysis.[23] Yet, the experience in many African countries has shown that authoritarianism may well and often does tie the knot with elections and an integral multipartyism.[24] Elections and multipartyism are not synonymous with or a guarantee for democracy, but they really matter.[25] In the modern era, one can have elections or multipartyism without democracy, but democracy is not possible without elections or mutlipartyism.[26]

Three chapters of the African Democracy Charter[27] deal with democracy. According to the Democracy Charter, democracy entails a respect for human rights,[28] the supremacy of the Constitution and the rule of law,[29] separation of powers,[30] gender equality,[31] popular participation through universal suffrage,[32] and political pluralism.[33]

---

20 Dahl (1989) (n 19 above) 220-224; Wiseman (n 19 above) 9.

21 As above.

22 Sorensen (n 19 above) 42.

23 See M Bratton & DN Posner 'A first look at second elections in Africa with illustrations from Zambia' in R Joseph (ed) *State, conflict, and democracy in Africa* (1999) 378; JW Harbeson 'Rethinking democratic transitions: Lessons from Eastern and Southern Africa' in Joseph (above) 39.

24 G Conac *Etat de droit et démocratie* (1993) 492.

25 See G Bauer 'Challenges to democratic consolidation in Namibia' in Joseph (n 23 above) 439-441; Bratton & Posner (n 23 above) 379; G Conac 'Introduction' in G Conac *L'Afrique en transition vers le pluralisme politique* (1993) 5; Conac (n 24 above) 492; J Pelletier *L'Afrique en mouvement* (1993) 477; G Nzongola-Ntalaja 'The state and democracy in Africa' in G Nzongola-Ntalaja & M Lee (eds) *The state and democracy in Africa* (1997) 15.

26 See Bratton & Posner (n 23 above) 379; Mangu (n 17 above) 199.

27 Art 4-16 African Democracy Charter.

28 Art 3(1) African Democracy Charter.

29 Art 3(2) African Democracy Charter.

30 Art 3(5) African Democracy Charter.

31 Art 3(6) African Democracy Charter.

32 Arts 3(7) & 4(2) African Democracy Charter.

33 Art 3(11) African Democracy Charter.

Democracy, the rule of law and human rights are interrelated.[34] This connection makes it clear that democracy is meaningless without respect for the rule of law and human rights. The rule of law implies that the Constitution is supreme and its amendment or revision requires national consensus, obtained, if need be, through referendum, and everyone should be equal before the law and enjoy equal protection by the law as a fundamental precondition for a just and democratic society.[35]

Inspired by the African Charter, the African Democracy Charter stresses that democracy requires a respect for human rights, not only individual civil and political rights, but also collective, social and economic rights, including the rights of women, ethnic, religious and racial minorities, migrants, refugees, people with disabilities, displaced persons and other marginalised and vulnerable groups.[36]

The African Democracy Charter deals with political culture and peace as requirements for democracy.[37] It requires that civic education be taken seriously and that state parties invest therein.[38] The link between democracy and peace is critically important for a continent plagued by numerous conflicts. Peace contributes to the creation of an environment that helps democracy prosper and *vice versa*. Violence and war are inimical to democracy. On the other hand, democratic institutions that are independent or autonomous, well-resourced to perform their missions efficiently and effectively and remain accountable to competent national organs should also be established for democracy to prosper.[39] Moreover, constitutional control over the armed and security forces is required to ensure the consolidation of democracy and constitutional order.[40]

The African Democracy Charter stresses that African states should hold democratic elections.[41] These should be held regularly, be free, fair, transparent and credible and be conducted by competent, independent and impartial national electoral bodies.[42] Elections should also be competitive. All adult citizens and legally-recognised political parties should be allowed to participate in these elections. National mechanisms should be established to deal in a timely manner with election-related disputes. These mechanisms usually are the courts of

34 Arts 4-10 African Democracy Charter.

35 Art 10 African Democracy Charter.

36 Arts 8-9 African Democracy Charter.

37 Arts 11-13 African Democracy Charter.

38 Art 12(4) African Democracy Charter.

39 Arts 14-16 African Democracy Charter.

40 Art 14 African Democracy Charter.

41 Arts 17-22 African Democracy Charter.

42 Preamble, paras 8 & 11; arts 2(3), 3(4), 17, 23(4) & 32(7) African Democracy Charter.

law that should also be independent and impartial and subject to the Constitution which they should enforce without fear or favour.

Contesting parties and candidates should sign and abide by a code of conduct which includes a commitment to accept the results of elections or challenge them through legal channels. All contesting parties or candidates should enjoy fair and equitable access to state-controlled media during elections. Furthermore, independent observers should be allowed to monitor these elections. State parties should fully co-operate with these observers, abstain from interfering in their activities, guarantee their security and ensure that they enjoy their right to free access to information and freedom of movement.[43] Electoral observer missions should be conducted in an objective, impartial and transparent manner.[44]

The African Democracy Charter adopts a broad definition of democracy, which is both political and socio-economic, and includes competitive, regular free and fair elections, respect for the rule of law and human rights. The Democracy Charter goes far beyond a conception that defines democracy as a process or a set of institutions and focuses on political democracy emphasising individual and political rights. Its approach to democracy is close to the maximalist ones.[45] In maximalists' view, democracy is not just political, but also socio-economic, participative, popular or social democracy. 'Substantive democracy'[46] is advocated in the African Charter for Popular Participation.[47] According to Ake, unlike a liberal democracy that emphasises abstract individual and political rights, it stressed concrete political, social, collective and economic rights.[48] The African Democracy Charter adopts the same broad approach to governance.

2.2.2 Governance

During the first two decades of Africa's independence, many Western political leaders and intellectuals as well as international financial institutions favoured what scholars like Gregor, Nicol and Sklar refer to as 'dictatorships of development'.[49] The 'developmental state' or

43 Arts 18-22 African Democracy Charter.

44 Art 21(3) African Democracy Charter.

45 See Mangu (n 17 above) 180-184; D Glaser 'Discourses of democracy in the South African left: A critical commentary' in Nyang'oro (n 17 above) 251.

46 See C Ake *Democracy and development in Africa* (1996) 137 139; IG Shivji 'Contradictory class perspectives in the debate on democracy' in Shivji (n 17 above) 254-255; IG Shivji *Fight my beloved continent: New democracy in Africa* (1992) 2.

47 ch II, 17.

48 Ake (n 46 above) 132-134.

49 See AJ Gregor *Italian fascism and developmental dictatorship* (1974) 4; D Nicol 'African pluralism and democracy' in Ronen (n 18 above) 165; Sklar (n 17 above) 1-30.

the state that was considered the most likely to achieve development had to be authoritarian. Many political scientists and legal scholars endorsed the controversial idea of a developmental or modernising oligarchy.[50]

Towards the end of the 1970s, African governments proved unable to deliver on their developmental objectives. Accordingly, the 'dictatorships of development' had failed.[51] A shift to 'governance' occurred in the discourse of Western governments and international financial institutions. 'Governance' became 'conditionality' for African governments to benefit from loans and other financial advantages from the Bretton Woods institutions.[52] At the beginning, 'governance' referred to the management of states' affairs or the practical exercise of power and authority to conduct public affairs.[53] It did not entail respect for human rights, including peoples' rights to freely elect their leaders. The emphasis was on accountability, the fight against corruption and freedom of expression. It is only in a paper read at a World Bank-sponsored conference on development economics in 1992 that Boeninger suggested that governance was the same as 'good government'.[54] Such governance did not necessarily mean 'democratic governance'. Most African leaders were still opposed to the discourse on 'governance' that they considered neo-colonial and unacceptable Western interference in their domestic affairs. However, this changed when they adopted the AU Constitutive Act in 2000.

After decades of authoritarianism, African heads of state and government agreed 'to promote and protect human and peoples' rights, to consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.[55] The objectives of the AU are *inter alia* to 'promote democratic principles and institutions, popular participation and good governance'.[56] One of the major principles of the AU is 'respect for democratic principles, human rights, the rule of law and good governance'.[57]

The African Democracy Charter drew from the AU Constitutive Act and insisted on good governance which was related to elections and democracy. This relationship was already stressed in the 2001 NEPAD Declaration and in the 2002 Declaration on Democracy,

50 See Gregor (n 49 above) 3; AJ Gregor *Democracy, dictatorship, and development: Economic development in selected regimes of the Third World* (1976); Sandbrook (n 17 above) 140; Sklar (n 17 above) 2; Sorensen (n 19 above) 31-60.

51 See Nicol (n 49 above) 165; Sklar (n 17 above) 1-30.

52 World Bank *Sub-Saharan Africa: From crisis to sustainable growth* (1987).

53 G Hyden 'Governance and the reconstruction of political order' in Joseph (n 23 above) 184.

54 See E Boeninger *Governance and development: Issues of governance* (1992) 24-38; Hyden (n 53 above) 184; Mangu (n 17 above) 48.

55 Preamble AU Constitutive Act.

56 Art 3(g) AU Constitutive Act.

57 Art 4(m) AU Constitutive Act.

Political, Economic and Corporate Governance (DDPECG). The African Democracy Charter adopts a holistic conception of governance even though it emphasises political governance.[58] Governance should be political, economic and social or corporate.[59] It should be 'good governance'[60] and 'democratic governance',[61] excluding corruption,[62] but requiring transparency, popular participation,[63] access to information, freedom of the press, accountability in the management of public affairs,[64] and an independent judiciary.[65]

3 Shortcomings of the African Democracy Charter

Despite its significance, the African Democracy Charter also contains a number of shortcomings. At least four shortcomings may be identified.

The first shortcoming of the Democracy Charter, as is the case with most other AU instruments, relates to sanctions against the violators of the provisions of this important instrument. When they are provided, they are vague and weak.

In its final clauses, for instance, the African Democracy Charter vaguely refers to appropriate measures that the AU Assembly and Peace and Security Council may impose on any state party that violates the Charter.[66] It is rather more precise and detailed on the sanctions that may be imposed in cases of unconstitutional changes of government.[67] These sanctions include the suspension, after diplomatic initiatives have failed, of the state party where an unconstitutional change of government was perpetrated; the interdiction of the perpetrators of unconstitutional change of government to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their state; and their prosecution before the competent court of the AU.[68] The principal victims of the suspension of the state where an unconstitutional change of government has been perpetrated are its citizens and not the individual perpetrators of unconstitutional changes of government since, despite their non-recognition at the regional level, the AU still maintained diplomatic

58 Arts 27-32, 34, 35, 36 & 38 African Democracy Charter.
59 Arts 27, 33, 40, 42, 43(1) & 43(2) African Democracy Charter.
60 Preamble, paras 6 & 10; arts 2(6) & (13), 12(1), 32 & 33 African Democracy Charter.
61 Arts 36 & 44 African Democracy Charter.
62 Arts 2(9) & 33(3) African Democracy Charter.
63 Preamble, para 10 African Democracy Charter.
64 Arts 2(10) & 3(8) African Democracy Charter.
65 Art 32(3) African Democracy Charter.
66 Art 46 African Democracy Charter.
67 Arts 23-26 African Democracy Charter.
68 Arts 25(1)-(5) African Democracy Charter.

contacts with them.[69] They were even recognised by some African leaders opposed to the previous governments. A sanction like the interdiction to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their state applied to countries such as Guinea and Niger and not Mauritania or Madagascar.

In Mauritania, for instance, General Mohammed Ould Abdel Aziz and his colleagues who perpetrated a *coup d'état* in August 2008 were put under a sanction regime decided on by the AU Peace and Security Council. These sanctions included travel bans and the seizure of assets within AU member states that continued to recognise the deposed President Sidi Ould Cheikh Abdallahi who had been elected in April 2007 as the country's legitimate president. However, General Aziz was allowed to participate in the 2009 elections that he won.

The irony is that he was later appointed by the AU Assembly to lead an AU high-level panel to mediate in the post-electoral crisis in Côte d'Ivoire between former President Laurent Gbagbo and his then main political rival, Alassane Ouattara.

In the case of Madagascar, Andry Rajoelina, who was the Mayor of Antananarivo, benefitted from the March 2009 *coup d'état* against President Marc Ravalomanana who had been elected in February 2002. The first reaction of the international community, including the AU, the Southern African Development Community (SADC) and the United Nations, was not to recognise his government and to suspend Madagascar from participating in their activities. However, President Rajoelina later was recognised by the international community, including the AU and SADC.

The African Democracy Charter could have expressly provided for the prosecution of the perpetrators of unconstitutional changes of government before the African Court of Human and Peoples' Rights as evidence that African leaders are fully committed to democracy. It is not enough to just provide that the perpetrators of these acts will be dealt with in accordance with the law,[70] or that they may be tried before the competent court of the AU without any details about the court, the organ that will try them and the sanctions which may be imposed on them.[71] A draft protocol was adopted in May 2012 in order to amend the Protocol Establishing an African Court of Justice and Human Rights and the statute thereto,[72] and to provide

69 Art 25(3) African Democracy Charter.

70 Art 14 African Democracy Charter.

71 Art 25(5) African Democracy Charter.

72 See Decisions Assembly/AU/Dec.45 (III) and Assembly/AU/Dec.83 (V) of the Assembly of the AU, adopted respectively at its 3rd (6-8 July 2004, Addis Ababa, Ethiopia) and 5th (4-5 July 2005, Sirte, Libya) ordinary sessions, to merge the African Court of Justice and Human Rights and the Court of Justice of the AU into a single court; Protocol to the African Charter on the Establishment of the African Court of Justice and Human Rights of 1 July 2008 (Merged Court Protocol); Draft

for the prosecution of the perpetrators of unconstitutional changes of government. Considering that the Protocol Establishing an African Court of Justice and Human Rights has not come into operation since its adoption in July 2008, the Protocol aimed at amending it will take even longer to come into force.

Pending the entry into force of this Protocol, perpetrators of unconstitutional changes of government will continue to enjoy immunity in Africa as there will be no competent court to prosecute and judge them.

The African Democracy Charter also provides for sanctions that may be imposed on any member state that is proved to have instigated or supported the unconstitutional change of government in any other state.[73] Arguably, the 'club syndrome' survived the OAU and prevails within the AU where solidarity or mutual support among African leaders remains. Due to this, the AU Assembly that takes its decisions by consensus or by a two-thirds majority of member states, will not be in a position to impose sanctions on those member states that supported unconstitutional changes of government, or harboured or gave sanctuary to their perpetrators.

On the other hand, the African Democracy Charter's definition of unconstitutional changes of government includes 'any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections' and 'any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government'.[74] This is an important provision since military *coups d'état* have declined in Africa and most unconstitutional changes of government occur under the guise of constitutional and electoral manipulations or refusal by incumbent leaders to concede defeat and relinquish power. Vote rigging, constitutional manipulations, mismanagement, embezzlement and corruption of heads of state and government also qualify as violations of the African Democracy Charter.

As demonstrated by scholars such as Ake, Bayart, Darbon, Eilis, Fatton, Hibou, Mbembe, Médard, Shafer and William, who denounced the 'politics of the belly', 'prebendal politics', 'corruption', 'predatory rule', and the 'criminalisation of the state' in Africa where 'rulership appears to be an exercise in 'how to ruin a country',[75] a number

---

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Amending Merged Court Protocol) of May 2012.

73 Art 25(6) African Democracy Charter.

74 Arts 23(4)-(5) African Democracy Charter.

75 See Ake (n 46 above) 40; R Gerster 'How to ruin a country: The case of Togo' (1989) 71 *IFDA Dossier* 25; JF Bayart *The state in Africa: The politics of the belly* (1993); JF Bayart *et al La criminalisation de l'Etat en Afrique* (1997); D Darbon 'L'Etat prédateur' (1990) 39 *Politique africaine* 37-45; R Fatton *Predatory rule: State and civil society in Africa* (1992); A Mbembe 'Pouvoir, violence et accumulation' (1990) 39 *Politique africaine* 7-24; JF Médard 'L'Etat patrimonialisé' (1990) 39 *Politique*

of African leaders have specialised in vote rigging, corruption, embezzlement, bad economic governance and electoral and constitutional manipulations in order to remain in power. The African Democracy Charter did not provide for sanctions in these cases. Even if they were provided for, African leaders would have been unable to agree on a decision, let alone to enforce it against a colleague head of state or government found in breach of the provisions of the Democracy Charter.

The second shortcoming of the African Democracy Charter is that it has no efficient enforcement mechanism. As pointed out earlier, the Democracy Charter could have provided for the African Court on Human and Peoples' Rights as its enforcement mechanism. This could have resulted in an amendment to the Protocol establishing this Court. The adoption of the Democracy Charter resulted from internal and external pressure on African leaders who were required to demonstrate their commitment to democracy, free and fair elections and good governance as 'conditionality' for support from Western governments and international financial institutions.

For African leaders who adopted the African Democracy Charter, it could be a political suicide to recognise the African Court on Human and Peoples' Rights as its enforcement mechanism. They only agreed on the AU Commission as the central co-ordinating structure for the implementation of the Democracy Charter. The Chairperson of the AU Commission is appointed by the Assembly, which consists of heads of state and government of AU member states.

The AU Commission, as the central co-ordinating structure for the implementation of the African Democracy Charter, has no power or role to play when a state party violates its obligations related to economic and corporate governance. Moreover, it lacks autonomy *vis-à-vis* the Assembly and its Chairperson is too dependent on the Assembly that elects him or her and is also competent to renew his or her mandate. Accordingly, the AU Commission would do no or little wrong against non-complying state parties and their leaders. The African Democracy Charter provides, for instance, that electoral observer missions should be constituted and conducted in an objective, impartial and transparent manner.[76] These missions are to report to the AU Commission. No AU observer mission has ever declared an election to be unfair despite the fact that the rules of the political game in many AU member states remain vote rigging and electoral manipulations by incumbent leaders. In the Democratic Republic of Congo (DRC), for instance, the presidential and national assembly elections of 28

africaine 25-36; DM Shafer 'The perverse paradox of peace and the predatory state' paper read at the American Political Science Association Annual Meeting, Washington DC, 25 September 1995; R William *Corruption and state in Sierra Leone* (1995).

76 Art 21(3) African Democracy Charter.

November 2011 had been rigged by incumbent President Joseph Kabila and his majority according to several reports from Congolese electoral observers[77] and political leaders from both the majority and the opposition. Despite the fact that these elections were held in violation of the relevant dispositions of the African Democracy Charter, the OAU/AU Declaration on the Principles Declaration Governing Democratic Elections in Africa,[78] the SADC Principles and Guidelines Governing Democratic Elections,[79] the Economic Community of Central African States (ECCAS) Declaration on Electoral Support to Member States,[80] and the International Conference on the Great Lakes Region (ICGLR) Protocol on Democracy and Good Governance,[81] the AU, SADC, ECCAS, ICGLR and the Common Market of Eastern Africa (COMESA) unanimously applauded their results.

They declared categorically that these elections were free, fair, transparent and credible.[82] The 'club syndrome' referred to earlier also explains the fact that the AU has been consistent in applauding the elections held in its member states, the most recent being the 31 August 2012 general elections in the Republic of Angola. Despite the political environment that made it almost impossible for the opposition to access the media, campaign freely, and win these elections, the AU observer mission, led by Mr Pedro Verona Pires, former President of the Republic of Cape Verde, welcomed their results and unreservedly declared that they were free, fair, transparent and credible.[83] This statement was endorsed by the observers of SADC, ECCAS, ICGLR and the Community of Portuguese-Speaking Countries (CPLP) that congratulated the Angolan authorities and called on the losers to accept the outcome of the polls and follow legal processes in cases of dispute.[84]

A third shortcoming relates to a lack of funding or resources. In implementing the African Democracy Charter, the AU Commission will establish a Democracy and Electoral Assistance Unit and a Democracy

77 See Mission Nationale d'Observation *Rapport à mi-parcours de l'observation des élections du 28 novembre 2011* (2012) ; Mission Nationale d'Observation *Observation de la Compilation des Elections Législatives du 28 Novembre 2011* (2012).

78 (OAU/AU) Durban Declaration on the Principles Governing Democratic Elections in Africa as adopted by the Assembly of the African Union in July 2002 (AHG/Decl.1 (XXXVIII).

79 SADC Principles and Guidelines Governing Democratic Elections of 17 August 2004.

80 ECCAS Declaration on Electoral Support to Member States of 7 June 2005.

81 ICGLR Protocol on Democracy and Good Governance of 1 December 2006.

82 AU, SADC, ECCAS, ICGLR and COMESA Joint Declaration on the Presidential and Parliamentary Elections in the DRC, 30 November 2012.

83 AU Electoral Observer Mission to the 31 August 2012 General Elections in the Republic of Angola, Statement of 2 September 2012.

84 Joint Declaration on the 31 August 2012 General Elections of the Republic of Angola, 2 September 2012.

Assistance Fund to provide the needed assistance and resources to state parties in support of electoral processes. Admittedly, the AU has been struggling to get funding.

Many member states are in arrears with their contributions that are also insignificant. The AU has to rely on foreign donors to undertake most of its activities. Many member states rely on foreign assistance to hold regular elections. The AU Electoral Assistance Unit and Democracy Assistance Fund have not been established as yet. It is expected that they will be established under the leadership of South Africa's Home Affairs Minister, Dr Nkosazana Dlamini-Zuma, who succeeded Dr Jean-Ping of Gabon and became the first female to preside over the AU Commission.

However, the question is where these two units will get funding to provide assistance to state parties. Anyway, it is the duty of the AU Commission to take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund provide the needed assistance and resources to state parties in support of electoral processes.[85] Apart from financial resources, the AU Commission will also need competent personnel to perform its functions under the African Democracy Charter and work with the designated focal points in the different regional economic communities.

A fourth shortcoming of the African Democracy Charter relates to its lack of focus. If the primary aim is to promote democratic principles and institutions, popular participation and free and fair elections, the Democracy Charter should have been restricted to political governance instead of extending to economic and corporate governance. The assessment of economic and corporate governance could have been left to the African Peer Review Mechanism and other international monitoring mechanisms that deal with issues of economic and corporate governance despite their own shortcomings related to a lack of funding and sanctions.

As was pointed out earlier, the AU Commission plays no role in the implementation of the provisions of the African Democracy Charter related to economic and corporate governance and there is no sanction for those African leaders who are responsible for bad economic and corporate governance.

This 'dilution' of the African Democracy Charter that embraces so many lofty objectives is likely to run against its primary objective to promote democracy, free and fair elections, and good political governance. Any attempt to deal with the shortcomings of the Democracy Charter will result in its amendment. The Democracy Charter already took five years to get the fifteenth ratification instrument to be deposited for it to come into operation, and two-thirds

85 Art 44(2)(A) African Democracy Charter.

AU member states have not ratified it as yet. Any campaign to amend the African Democracy Charter before it has even been implemented would be a huge waste of time and resources.

As with any legal instrument, the African Democracy Charter has its shortcomings. It remains perfectible and will ultimately be amended. For the time being, however, it may be worth focusing on its implementation or its enforcement.

4 Prospects for the implementation of the African Democracy Charter and the role of civil society

4.1 Implementation of the African Democracy Charter

The African Democracy Charter is to be implemented both at the national and regional levels.[86] At the national level, state parties should comply with their obligations under the Charter. They are required to report every two years, from the date the Democracy Charter comes into force, on the legislative or other relevant measures taken with a view to giving effect to the principles and commitments of the Charter.[87] A copy of this report should be submitted to the relevant organs of the AU for appropriate action within their respective mandates.

However, states' compliance with these obligations will depend mainly on African leaders' commitment to democracy, free and fair elections, and good governance. Unfortunately, vote rigging, electoral frauds, constitutional manipulation, corruption and bad governance that are still common practice across the continent demonstrate that there is still a long way to go towards implementing the African Democracy Charter.

The AU Commission is the central co-ordinating structure for the implementation of the African Democracy Charter. It is to assist state parties in this process and also to co-ordinate evaluation on implementation of the Charter with other key organs of the AU, including the Pan-African Parliament, the Peace and Security Council, the African Commission, the African Court of Justice and Human Rights, the Economic, Social and Cultural Council, the regional economic communities and appropriate national-level structures.[88] In implementing the African Democracy Charter, the AU Commission has a responsibility at the continental and at the regional levels.[89]

At the continental level, the AU Commission is required to develop benchmarks for the implementation of the commitments and principles

86 Art 44 African Democracy Charter.

87 Art 48 African Democracy Charter.

88 Art 45 African Democracy Charter.

89 Art 44 African Democracy Charter.

of the Democracy Charter and to evaluate compliance by state parties; to promote the creation of favourable conditions for democratic governance in Africa, in particular by facilitating the harmonisation of policies and laws of state parties; to take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Electoral Assistance Fund provide the necessary assistance and resources to state parties in support of their electoral processes; and to ensure that effect is given to the decisions of the AU in regard to unconstitutional changes of government on the continent.

At the regional level, the AU Commission should establish a framework for co-operation with regional economic communities on the implementation of the principles of the African Democracy Charter. It should commit these regional economic communities to encourage member states to ratify or adhere to the Democracy Charter and to designate focal points for co-ordination, evaluation and monitoring of the implementation of the commitments and principles in the Charter to ensure the massive participation of stakeholders, particularly civil society organisations, in the process.

The AU Commission shall prepare and submit to the Assembly, through the Executive Council, a synthesised report on the implementation of the African Democracy Charter. The Assembly shall then take appropriate measures aimed at addressing issues raised in the report.[90]

The African Democracy Charter only came into operation on 15 February 2012 and it is too early to assess the work of the AU Commission in implementing it at the continental and regional levels.

Arguably, the role of the AU Commission in implementing the Democracy Charter at both the continental and regional levels will depend on the commitment of its Chairperson to the values embedded in the Charter and on her leadership and courage in dealing with African heads of state and government who are not always committed to the ideals of the Charter. While Dr Zuma's personal commitment to democratic values and principles cannot be questioned, the fact that she comes from a democratic South Africa is not enough.

Considering the fact that many African leaders are reluctant or even opposed to fully embarking on democratic governance, to hold free and fair elections and to respect the rule of law, civil society will have to play an important role in promoting the African Democracy Charter.

90 Art 49 African Democracy Charter.

4.2 Civil society and its role in the promotion of the African Democracy Charter

4.2.1 Civil society

Civil society organisations existed under colonisation, but the leaders of the newly-independent African states decided to ignore or rather oppose them as they were seen to be an obstacle to the consolidation of their authoritarian rule. The sentiment was that a strong state was better suited to achieve development and 'starving people do not need democracy'.[91]

During the first two decades of independence that were dominated by one-party or military rule, Western democratic countries and international financial institutions, such as the World Bank and the International Monetary Fund (IMF) that later engineered the Structural Adjustments Programmes (SAPs), also supported this view and shared African leaders' negative attitude towards civil society.

From 'statist' talk in the 1960s and 1970s, the discourse became frankly 'anti-statist'. Subsequently, there were calls were made for less of state, which in theory and practice continued to be seen as the main obstacle to growth, development and liberty on the continent.[92]

This discourse dramatically contrasted with that of the modernisation and adjustment era when the state was considered to be instrumental to modernisation or development. Like the earlier pro-SAP discourse, the anti-statist discourse of good governance was mainly commissioned by developed countries and international financial institutions, namely, the World Bank and the IMF.

The conventional Western and mainly American political science discourse of the 1980s and early 1990s celebrated the 'crisis', 'weakness', 'disintegration', 'failure', 'decline', 'fall', 'collapse', 'statelessness' and 'quasi-statehood' in Africa.[93] Some scholars held that citizens were disengaging from the state[94] and applauded the emergence of what was assumed to be elements of a vigorous and self-reliant civil society. However, with the 'survival' of the embattled and collapsed African state,[95] some of them who argued that the state was a 'problem'

91 Mangu (n 17 above) 194.

92 Mangu (n 17 above) 49.

93 Mangu (n 17 above) 50.

94 See TM Callagy *The state-society struggle: Zaire in comparative perspective* (1984); D Rothchild & N Chazan *Precarious balance: State and civil society in Africa* (1988); Mangu (n 17 above) 53; V Azarya & N Chazan 'Disengagement from the state in Africa: Reflections on the experience of Ghana and Guinea' (1987) 26 *Comparative Studies in Society and History* 106.

95 See P Quantin 'L'Afrique central dans la guerre: Les Etats-fantômes ne meurent jamais' (1999) 4 *African Journal of Political Science* 106; R Joseph 'The reconfiguration of power in late twentieth-century Africa' in Joseph (n 23 above) 68; RH Jackson & CG Rosberg 'Why Africa's weak states persist: The empirical and the juridical in statehood' (1982) 35 *World Politics* 1.

changed their minds to hold that it was also a 'solution'[96] and had to be brought 'back in'.[97] The state had to be reconciled with civil society, which was considered inimical to it.[98] A *modus vivendi* had then to be found.

When they adopted the African Charter, African leaders recognised some role to civil society organisations among those entities that could make communications to the African Commission in cases of violations of the rights enshrined in the African Charter.[99] They took one step further in the Protocol to the African Charter on the Establishment of an African Court for Human and Peoples' Rights adopted in 1998. The Protocol entitles non-governmental organisations to bring cases before the African Court against a state party subject to its prior declaration recognising the competence of the Court to deal with such applications.[100] The AU Constitutive Act further established two organs that could work with civil society organisations, namely, the Pan-African Parliament[101] and the Economic, Social and Cultural Council.[102]

The NEPAD Declaration (2011), the DDPECG (2002) and the APRM Base Document (2003) recognise the role of civil society in promoting and assessing governance in AU member states. The African Democracy Charter makes reference to civil society organisations and stresses their role in promoting democracy, free and fair elections, and good political, economic and corporate governance.

The African Democracy Charter requires state parties to create conditions conducive for civil society organisations to exist and operate within the law.[103] State parties should foster popular participation and partnerships with civil society organisations.[104] They should ensure and promote strong partnerships and dialogue between government, civil society and the private sector.[105] Moreover, in implementing the African Democracy Charter, the AU Commission should commit regional economic communities to designate focal points for the co-ordination, evaluation and monitoring of the implementation of the commitments and principles enshrined in the Democracy Charter in order to ensure massive participation of stakeholders, particularly

96 P Evans 'The state as problem and solution: Predation, embedded autonomy, and structural change' in S Haggard & RR Kaufman (eds) *The politics of economic adjustment* (1992) 139.

97 P Evans *Bringing the state back in* (1985).

98 Mangu (n 17 above) 53.

99 Arts 55-56 African Charter.

100 Arts 5(3) & 34(6) African Court Protocol.

101 Art 17 AU Constitutive Act.

102 Art 22 AU Constitutive Act.

103 Art 12(3) African Democracy Charter.

104 Art 27(2) African Democracy Charter.

105 Art 28 African Democracy Charter.

civil society organisations, in the process.[106] However, civil society organisations should also contribute to the promotion of the African Democracy Charter.

4.2.2 Civil society and the promotion of the African Democracy Charter

Civil society organisations should contribute to raising awareness of the African Democracy Charter among the African people at the national as well as at the regional and continental levels. Democracy, free and fair elections and good governance require state parties to the African Democracy Charter to create conducive conditions for civil society organisations to exist and operate within the law.[107]

The African Democracy Charter is unknown to the overwhelming majority of African people. Civil society organisations, members of parliament, the government and the judiciary are not aware that such a legal instrument exists and has even come into operation.

Civil society organisations should contribute to the popularisation of the African Democracy Charter at the national level. This is critically important since the Democracy Charter is still to be signed, ratified, domesticated and enforced in two-thirds of AU member states. Democracy, free and fair elections and good governance should be promoted through the ratification and the enforcement of the African Democracy Charter at the national, regional and continental levels. Civil society organisations should engage in dialogue and co-operate with AU member states to sensitise them and get them to sign, ratify and domesticate the African Democracy Charter.

In time, they should assist state parties in reporting to the AU Commission and to regional economic communities on their compliance with the Democracy Charter. The Democracy Charter obliges state parties to foster popular participation and partnerships with civil society organisations.[108] Strong partnerships and dialogue should be promoted between government, civil society and the private sector.[109] They should do the same with the AU Commission at the continental level and assist it in performing its functions of co-ordinating the evaluation and implementation of the Democracy Charter and even in developing the benchmarks for its implementation.[110] They should collaborate with regional economic communities committed by the AU Commission to ensure that they encourage member states to ratify the Charter.[111]

106 Art 44(B)(b) African Democracy Charter.

107 Art 12 African Democracy Charter.

108 Art 27(2) African Democracy Charter.

109 Art 28 African Democracy Charter.

110 Art 44(2)(A)(a) African Democracy Charter.

111 Art 44(2)(B)(a) African Democracy Charter.

They should participate in the process of the implementation of the commitments and principles enshrined in the African Democracy Charter through the focal points designated by the regional economic communities under the supervision of the AU Commission.[112]

According to Moyo, 'Africa suffers from governance crises'.[113] Critical among them is the crisis of democracy or good political governance. There is an acute 'democratic deficit' and many countries are yet to make substantive democratic progress as opposed to the cosmetic changes that are currently in place. In many instances, democratic gains already achieved are being eroded.[114]

Despite what they have achieved thus far, African civil society organisations need to meet several challenges in order to promote democracy, free and fair elections and good governance in Africa through the implementation of the African Democracy Charter.

The first challenge relates to capacity building. It would be difficult to promote the African Democracy Charter if civil society organisations, themselves, are not conversant with the commitments and principles enshrined in the Charter. Popularisation of the Democracy Charter by civil society organisations should start among their members and the civil society movement as a whole. Civil society organisations should start by appropriating the Charter before taking it to or engaging with the people, AU member states, regional economic communities' focal points and the AU Commission. Civil society organisations also lack skills to lobby state parties' officials, those of regional economic communities and the AU to get the Democracy Charter implemented fully.

Civil society organisations should take up the challenge of networking. They tend to work in isolation, without any common agenda, and to fight among themselves to attract the rare resources coming from Western donors. They suffer from the same wrongs that affect political parties and leaders.

Networking is required at the national, regional and continental levels to better promote democracy, free and fair elections, good governance and other developmental objectives in Africa. While civil society organisations should co-operate among themselves, they should also develop new ways to co-operate with the state. Over the years, African governments dealt with civil society organisations as opposition parties and civil society organisations behaved themselves as such.[115] Yet, even when they rightly challenge the *status quo* which runs against the interests of their members, in particular, and society, in general, civil society organisations do not form a society against the

112 Art 44(2)(B)(b) African Democracy Charter.

113 B Moyo *Introduction: Governing the public sphere: Civil society and regulation in Africa* (2010) 3.

114 As above.

115 JW Harbeson *Civil society and the state in Africa* (1994).

state. They are part of the state. However, they are not the government. Nor should they behave like political parties. They should collaborate with the government to help it deliver on its development objectives or criticise and advise when it fails to do so.

On the other hand, many civil society organisations are poorly equipped in terms of financial and material resources. To achieve their objectives, civil society organisations should be able to raise funds internally before resorting to foreign and Western donors. There is no reason why civil society organisations should not be funded from the national budget when public funding is provided for political parties.

A lack of resources makes civil society organisations vulnerable and heavily dependent on national authorities, Western governments and donors that tend to dictate their agendas.

Closely related to the previous is the challenge concerning the autonomy of civil society organisations and their 'political' independence or loyalty. Many civil society organisations are allied to the government, the opposition, Western governments and donors. Some actually operate as branches or sections of the opposition.[116] Yet, they should emancipate and remain responsible for their agendas instead of losing their identity and subjecting themselves to their funders.

Another challenge relates to the legitimacy of civil society organisations. Many are unknown to the people they pretend to serve and are not credible, making it difficult to support their work. Many civil society organisations that pretend to promote democracy, good governance, accountability, respect for human rights and the rule of law fail to lead in this regard. There is no democracy in their functioning. Like political parties' leaders, the leaders of the civil society movement tend to consider their organisations as a personal or family affair to help them improve their living conditions or access power. They do not feel they should be accountable and hardly abide by the constitutions of their organisations. Many are also corrupt and do not respect the principles of good governance. This is the 'un-civic face'[117] or the *Janus* face[118] of several civil society organisations in Africa. Failure to set an example contributes to making some civil society organisations illegitimate and undermining their contribution to democratic governance.

Perhaps the most critical challenge is the one that relates to the enabling of the public sphere that would help civil society to operate freely. In their reflection on the legal environment in African countries such as Angola, Cameroon, DRC, Ethiopia, Gabon, Kenya, Madagascar, Mauritius, Mozambique, Tanzania and Zambia, Moyo and other

116 Moyo (n 113 above) 8.

117 Moyo (n 113 above) 6.

118 See M Duverger *Janus, les deux faces de l'Occident* (1972).

authors find that the public sphere in many African countries has been '(dis)enabling' rather than 'enabling'.[119]

According to Machel, the space for citizens has been shrinking through restrictive regulatory instruments, and bad behaviour within both society and the state.[120] Yet, as she emphasises, 'for Africa to develop there is a need for her citizens to be enabled to utilise their capabilities in ways that are not restrictive, controlling and disempowering'.[121] In Machel's view, Africa is set to develop only if her citizens play active roles in their governance and enabling spaces to collaboration, critical thinking, association and challenges are created.[122]

The above challenges are serious, but they are not insurmountable. While civil society organisations should do their best to overcome their own internal challenges (legitimacy, transparency, accountability, good governance, democracy, capacity building, autonomy and networking), the governments of AU member states, regional economic communities and the AU Commission should create the necessary conditions to operate freely and partner with them in the promotion of democracy, free and fair elections and good governance in Africa. Foreign governments and institutions interested in good and democratic governance in Africa may also assist without dictating to them or using them as instruments of foreign policy in exchange for funding.

5 Conclusion

The adoption on 30 January 2007 of the African Democracy Charter and its coming into force on 15 February 2012 constitute a major step in the protracted struggle for democracy, free and fair elections and good governance that African peoples embarked on since independence.

The African Democracy Charter is now binding on 15 AU member states who are therefore bound to comply with its provisions. As a treaty, the primary responsibility for its implementation lies with state parties. This is why most of its provisions are directed to them.

However, this is not the first time that AU member states have adopted an international instrument related to the promotion of democracy and good governance. Since the adoption of the African Charter on Human and Peoples' Rights, the African legal system has developed tremendously. Many declarations and treaties were

119 B Moyo *(Dis) Enabling the public sphere* (2010).

120 G Machel 'Foreword' in S Parmar *et al* (eds) *Children and transitional justice: Truth-telling, accountability and reconciliation* (2010) I.

121 Machel (n 120 above) I-II.

122 Machel (n 120 above) II.

adopted. African history is littered with declarations and conventions which have never been implemented. It is one thing to adopt a legal instrument – and African leaders have done exceptionally well in this regard – but another to enforce or implement it. This is unfortunately where they have failed dramatically.

The adoption and entry into force of the African Democracy Charter came as good news, some of the few that we have heard from the AU since it was established a decade ago. The majority of African leaders who constitute the AU Assembly did not come to power through free and fair elections and specialist in vote rigging, electoral and constitutional manipulations in order to retain power. Some had never organised an election. Most of them had a poor track record in terms of governance. It was therefore a miracle that the AU Assembly could agree on a regional convention that was expected to bind and compel them to promote democracy, elections and governance. This arguably resulted mainly from intense pressure from Western governments and international organisations and also from African peoples who had been demanding democracy and good governance for decades during which they could not be heard because both the West and East unreservedly supported authoritarian leaders allied to them. African leaders came to realise that their own survival and that of their people required them to firmly embark on the road to democracy and good governance as a prerequisite for peace and development.

The African Democracy Charter is to play a crucial role in the promotion of democracy, free and fair elections and good governance in Africa. It complemented and enriched the African human rights system and features among the most important AU instruments.

Unfortunately, its entry into operation went unnoticed by African leaders, the majority of African peoples and civil society organisations who have been demanding democracy, free and fair elections and good governance, by most governments that present themselves as democratic, and to national institutions established to support democracy. It also failed to attract special and sustained attention from African political scientists, legal scholars and democracy militants, including those who had been prolific against authoritarianism and championed good political governance, a respect for human rights and the rule of law in Africa as if there was nothing worthy of celebration.

This article intended to break this relative silence[123] and to turn the spotlight on the African Democracy Charter as it reflected on its

123 See UNESCO *The African Charter on Democracy, Elections and Governance: The role of national human rights institutions* (2010); S Saungweme *A critical look at the African Charter on Democracy, Elections and Governance in Africa* (2007); T Alemu *The African Charter on Democracy, Elections and Governance: A normative framework for analysing electoral democracy in Africa* (2007); L Ajong Mbapndah & E Ngonji Nyungwe 'Applying the African Charter on Democracy, Elections and Governance to dictatorships: The Cameroonian experience' (2008) 2 *Cameroon Journal on Democracy and Human Rights*; B Tchikaya 'La charte africaine de la démocratie, des

significance, but also on its shortcomings, on the prospects for its implementation at the national, regional and continental levels, and on the crucial role that civil society should play in the promotion of democracy, free and fair elections and good governance in AU member states, which is the overall objective of the African Democracy Charter.

élections et de la gouvernance' (2008) 54 *Annuaire français de droit international*.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Towards defining the 'right to a family' for the African child

Ekanem Okon[*]
Research Associate: Child Rights and Education, South African Human Rights Commission, Johannesburg, South Africa

Summary

Most international instruments and national legislation dealing with children recognise the need for children to grow up in a family environment – in an atmosphere of love and understanding. In different regions around the world there are various family structures and patterns – traditional families with the heterosexual marriage form as the cornerstone; extended families with up to four generations in one household; and a mixture of family forms (cohabitation, homosexual ('lesbigay') unions, non-residential father households, single parented households, child-headed households, to mention a few). This article argues that every child has a right to a family which includes other familial rights, such as the right to family life and the right to a family environment. It begins with a brief overview of existing family forms, followed by an examination of the functions of the family. From that premise, it explains the need for understanding family from a functional rather than a structural viewpoint. It argues that, for the effective realisation of all familial rights enjoyable by the child, the concept 'family' must be defined. The definition must be based on its function, and tailor-made by each state to suit its societal circumstances. The article concludes that such a definition would provide clarity to the concept and aid in avoiding the legal limbo which sometimes affects children's familial status. Legal references in the article are mainly to international documents, regional documents and legislation from selected African countries.

* BA (Hons) (Ambrose Alli), LLB (Free State), LLM (Pretoria); mmaeyen@gmail.com

1 Introduction

The family may be described as the central unit of human society. Most international instruments and national legislation acknowledge the family as the 'fundamental group of society'.[1] The primary responsibility for the protection, upbringing and development of the child rests with the family.[2] The United Nations (UN) Convention on the Rights of the Child (CRC) states:[3]

> [T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) contains a similar acknowledgment in its Preamble and, like the African Charter on Human and Peoples' Rights (African Charter), describes the family as 'the natural unit and basis of society'.[4] The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (Hague Convention, 1993) recognises the importance of child development in a family environment.[5]

In humanitarian law, the 'principle of family unity' states that all children have a right to a family.[6] Also at national level, children's legislation in South Africa,[7] Kenya[8] and Nigeria[9] supports the

1 Including arts 12 & 16(1) of the Universal Declaration of Human Rights; Preamble & art 23 of the International Covenant on Civil and Political Rights; arts 1, 2 & 17 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, 1986; arts 9, 10, 20, 21 & 22 of the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, all through the document; art 10 of the International Covenant on Economic, Social and Cultural Rights; art 18 of the African Charter on Human and Peoples' Rights; art 16 of the European Social Charter; and Preamble of the African Charter on the Rights and Welfare of the Child.

2 Resolution of the UN General Assembly on the report of the *ad hoc* Committee of the Whole A/S-27/19/Rev 1 and Corr 1 and 2, 10 May 2002 – A world fit for children.

3 Preamble CRC.

4 Art 18 African Children's Charter; art 18 African Charter.

5 Preamble para 1, Hague Convention.

6 CRC, IRC, UNHCR, UNICEF Save the Children UK, WVI *Inter-agency guiding principles on unaccompanied and separated children* (2004) 16.

7 Preamble, Children's Act 38 of 2005, as amended.

8 Sec 6 Children Act 8 of 2001.

9 Sec 8 Child's Rights Act of 2003.

growth and development of the child in a family environment.[10] Even at grassroots level, few people will dispute the fact that the family is the backbone of the development of the child.

Certain familial rights have found definition in human rights law, including the right to (respect for) family life;[11] the right to found a family;[12] the right to family care;[13] and the right not to be arbitrarily separated from the family.[14] However, the exact contour of 'the right to a family' is not defined in human rights law. In fact, certain academics are of the view that there is no right to a family available to the child in international law.[15] Moreover, although the familial rights mentioned above are recognised, there is no universally-accepted definition for the term 'family'. Some academics and writers have commented on this.[16]

The article argues that efforts towards the recognition and realisation of familial rights available to the child may remain futile if the term 'family' is not fully understood. It attempts a definition of 'family' and promotes a functional (needs-based) approach to such a definition. Without making blanket rulings about the internal dynamics and functioning of family, the article highlights different forms in which family may be constituted *internally* and *externally,* after which the functions of family are described. It proceeds with arguments for the recognition of the right of the child to a family as a canopy for other familial rights *enjoyable* by the child. The article concludes on the note that, with clarity given by states to the concept 'family', the realisation of all familial rights would be more effective. This would also aid in avoiding the legal limbo which sometimes affects children's familial status.

10 These three countries have been selected because, in Africa, they have relatively new children's legislation which was enacted in the 21st century.

11 Art 8(1) European Convention on Human Rights; art 8 Human Rights Act (Act of Parliament of the United Kingdom); sec 8 Child's Rights Act of 2003.

12 Art 9 Charter of Fundamental Rights of the European Union.

13 Art 28 Constitution of the Republic of South Africa, 1996.

14 Art 9 CRC; arts 19 & 25 African Children's Charter.

15 For a detailed discussion on this, see J Sloth-Nielsen *et al* 'Inter-country adoption from a Southern and Eastern African perspective' (2010) *International Family Law* 86-96. A brief discussion of their views is presented in para 6 below.

16 A van der Linde *Grondwetlike erkenning van regte ten aansien van die gesin en gesinslewe met verwysing na aspekte van artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* unpublished LLD thesis, University of Pretoria, 2001 23, quoting D Hodgson 'The international legal recognition and protection of the family' (1994) 8 *Australian Journal of Family Law* 219.

2 Defining family

The term 'family'[17] is very complex. Almost two decades after celebrating the International Year of the Family,[18] there is still no universally-accepted definition of family.[19] A major challenge in attempting a definition for family is the diversity of family forms. The role and functions of family also vary immensely from era to era, region to region, state to state, and culture to culture. This diversity hinges on the variety in culture, religion, sociological order (including individual lifestyle preferences) and legal perspectives that exist around the globe. Moreover, modern-day understanding of family relationships has been fuelled by scholarship in diverse disciplines, including sociology, anthropology, psychology, history, family studies, child development studies, family therapy, education, medicine, economics, demography, social work and law.[20]

---

17 This paper acknowledges the inevitability of changes in the family as people evolve and, ultimately, advocates for the development and establishment of criteria based on which the existence of *a family* can be identified and upon which the right to a family of children can be promoted.

18 The UN in its 78th plenary meeting on 8 December 1989 proclaimed 1994 to be the International Year of the Family.

19 DH Demo *et al* (eds) *Handbook of family diversity* (2000) 1. It is believed that the absence of a clear definition of the concept might even come into conflict with adoptive relationships. See also International Social Services (ISS)/International Reference Centre for the Rights of Children Deprived of their Family (IRC) 'How to strike a balance between the right to respect the private and family life and the protection of the child's best interest in adoption' (2009) *Monthly Review* 1.

20 JL Roopnarine & UP Gielen (eds) *Families in a global perspective* (2005) 7. GP Murdock *Social structure* (1949) 1 defines the family as '[a] social group characterised by *common residence*, economic co-operation and reproduction. It includes *both sexes*, at least two of whom maintain a *socially-approved* sexual relationship, and one or more children, own or adopted, of sexually-cohabiting adults'. This definition contains some elements which do not exist in some societies. Other definitions are 'two or more people who are in a relationship created by birth, marriage or choice' (LB Silverstein & CF Auerbach '(Post-) modern families' in Roopnarine & Gielen (above) 33) including adoption (Demo *et al* (n 19 above) 1). One common element in all societies is that the key function of family is nurturing and socialisation (IL Reiss *The family system in America* (1971) 26). A more contemporary and less restrictive definition is '[a] family is one or more adults related by blood, marriage or affiliation who co-operate economically, who *may* share a common dwelling place, and who *may* rear children' (B Strong *et al The marriage and family experience: Intimate relationships in a changing society* (1998) 14. Also see NV Benokraitis *Marriage and families – Changes, choices and constraints* (2005) 3). RF Winch defines family as a group of related persons in different positions within the family who fulfil functions necessary for the existence and survival of the family (reproduction, emotional care and child socialisation) (RF Winch 'Toward a model of familial organisation' in WR Burr *et al* (eds) *Contemporary theories about the family* (1979) 162-179). Popenoe argues that family is not necessarily based on heterosexual adult relationships, but that a single adult-household, with a dependent child or adult is also a family (D Popenoe 'American family decline 1960-1990: A review and appraisal' (1993) 55 *Journal of Marriage and Family* 529–535). According to Benokraitis, the distinguishing feature of family is that its members identify themselves with the

There remains an open definition of family because of the different perspectives which exist regarding what family structures and family relationships (blood-related or 'adoptive' households) should exist. Factors such as the increase in unmarried couples with children, the increase in divorce and re-marriage rates, the decline in legal marriage, and the emergence of child-headed households have also hindered the development of nomenclature to describe these different family compositions.[21] In a seminar on family by the Center for Families, Children and the Courts, moderated by CJ Ogletree, the topic 'What is family?' was tackled in an intriguing hypothetical.[22] When asked what, in their opinion, a family is, answers from panellists varied. According to Muncie and Langan, 'the diversity of contemporary society demands interdisciplinary forms of analysis' in order to capture the complex nature of the concept.[23] Freeman is of the view that 'it is difficult to define the "essence" of family' and that the diversity in perceptions of what a family is makes a 'core' definition unworkable.[24]

One of the major challenges in defining family is the fact that the nuclear family is widely perceived as the normal family.[25] A universal definition for family must be one that is capable of including families from different cultures and historical periods. This, however, is practically impossible. Therefore, it is important that in understanding family, the concept firstly is demythologised.[26] Two main questions are pertinent: (1) What is the appropriate subject matter for the concept[27] within the context of the society it aims at serving? (2) What is family for?[28] In the Center for Families, Children and the Courts seminar referred to above, the moderator ended the seminar by stating that

group and are attached to the group (which also has its own identity) (Benokraitis (above) 3. Some other authors describe family as the 'haven of primary fulfilment and meaningful experience' (B Zinn & S Eitzen *Diversity in families* (1990) 14). In Gittins's view, family is a stereotype produced and maintained as a tool for social control (D Gittins *The family in question: Changing household and familiar ideologies* (1995) 15). Gubrium & Holstein suggest that individual experience rather than structure or form define a family (JF Gubrium & JA Holstein *What is family?* (1990) 1-10).

21 Silverstein & Auerbach (n 20 above) 34.

22 CJ Ogletree 'Parentage issues challenging California's judicial system: What is a family?' (2005) 6 *Journal of the Center for Families, Children and the Courts* 99-120.

23 J Muncie *et al* (eds) *Understanding the family* (1997) 1.

24 J Freeman 'Defining family in *Mossop v DSS*: The challenge of anti-essentialism and interactive discrimination for human rights litigation' (1994) 41 *University of Toronto Law Journal* 57.

25 See n 19 & n 20 above where various definitions are provided.

26 Zinn & Eitzen (n 20 above) 14.

27 Cheal advises that to obtain an answer to the question, an exploration of the roots of family variations in different ethnic, racial and cultural identities is necessary. See D Cheal *Family and the state of theory* (1991).

28 J Muncie & R Sapsford 'Issues in the study of the family' in Muncie *et al* (n 23 above) 8.

in the twenty-first century, there is an urgent need for every nation to confront the issue of what family is in 'a democratic, progressive society and answer it for *ourselves* in a way that would have meaning in the twenty-first century'. That is the exact attitude with which matters dealing with family should begin to be addressed.[29]

2.1 Forms of families

There are a myriad forms of families. This is because of the various functions and cultural patterns associated with the family and the variation in effectiveness with which family objectives are carried out.[30] As human beings evolve, so also do their perceptions of how things are and should be done – cultures, traditions, religious activities, community norms and beliefs modify. In Africa, in particular, factors such as poverty, career ambitions, (un)employment, sickness and the use and abuse of technology are additional challenges to the existence and stability of the traditional family form. In the process of change, accepted family forms are altered and disappear, giving way to new forms and resulting in various familial forms in different eras. When discussing family forms, three broad headings are used based on era, household and marriage.

2.1.1 Family forms based on era

In the pre-modern era, families typically consisted of the patriarchal father (husband and breadwinner) with his wives (mothers and caretakers) and concubines, and children. Children were highly valued for agricultural work and they were expected to be obedient.[31] With the Greeks, for instance, the adoption of children was common. Men

29 Ogletree (n 22 above) 120. It is also important to note that there are different theories in family studies which inform the definition of family. These theories include the family systems theory; the human ecology theory; the family development theory; the individualism and interaction theories – symbolic interactionism theory, exchange and resource theory; the difference and diversity theories – phenomenology theory and feminist theory; the situational approach; and the institutional approach. Due to word restrictions, a detailed discussion of these theories cannot be accommodated in this article. For a crisp discussion, see E Okon *Protection of the right to a family in the context of separated and unaccompanied children in natural disasters* unpublished LLM dissertation, University of Pretoria, 2011. For a detailed study, see S Smith 'Family theory and multi-cultural family studies' in BB Ingoldsby & S Smith (eds) *Families in multicultural perspective* (1995) 8-35; CB Broderick *Understanding family process* (1993); N Kingsbury & J Scanzoni 'Structural functionalism' in PG Boss *et al* (eds) *Sourcebook of family theories and methods* (1993) 195-210; BB Ingoldsby & S Smith (eds) *Families in multi-cultural perspective* (1995) 15; FI Nye *The family: Its structure and interaction* (1973) 21-23; R LaRossa & DC Reitzes 'Symbolic interactionism and family studies' in Boss *et al* (above) 135-162; and JF Gubrium & JA Holstein 'Phenomenology, ethnomethodology and family discourse' in Boss *et al* (above) 654.

30 MC Elmer *The sociology of the family* (1945) 17.

31 BB Ingoldsby 'The family in Western history' in Ingoldsby & Smith (n 29 above) 39.

who had no sons adopted male children who could inherit their property.[32] During Roman times, the Roman family was the religious, economic, legal and educational centre of society.[33] Men had absolute powers as the *patria potestas or paterfamilias* who represented the community. In terms of Roman family law, these men were allowed to have only one wife.[34] Roman women controlled childrearing to a certain degree.[35] In medieval Europe, children were accorded special customary and legal protection as minors.[36]

The traditional family (household) in most African societies contained the husband with his wives and children, and blood or marriage relatives. In South Africa, in particular, during the pre-colonial era the basic family form was the traditional kinship structure.[37] In Zulu tradition, in pre-modern times, polygamy symbolised a man's 'social standing, wealth and virility';[38] wives were responsible for bringing up children.[39] In Kenya, the Kikuyu society is traditionally polygamous.[40] The father in pre-modern times usually had his own hut where he met with his children for lessons on family norms and traditions, and his wives for discussion of serious family issues. Mothers had their individual huts where they lived with their children – boys lived with their mothers until puberty, then they moved into the young men's hut.[41] In the traditional Yoruba[42] family, in Nigeria, the extended family is relevant in the establishment of family (which begins with marriage) and the survival of the family.[43] Polygamy also existed (and still exists), particularly with non-Christian members of this group.

---

32 Ingoldsby (n 31 above) 41. Females were not allowed to inherit. Where a man had no sons and did not adopt, his daughter might have been forced to marry a close relative.

33 Ingoldsby (n 31 above) 42.

34 *The new encyclopaedia Britannica* (1978) Vol 7 157.

35 Ingoldsby (n 31 above) 42.

36 Ingoldsby (n 31 above) 48.

37 E Pretorius 'Family life in South Africa' in Roopnarine & Gielen (n 20 above) 368.

38 http://www.warthog.co.za/dedt/tourism/culture/family/polygamy.html (accessed 20 April 2011).

39 http://www.zulu-culture.co.za/zulu_family.php (accessed 20 April 2011). The wives are subservient to their husbands.

40 http://en.wikipedia.org/wiki/Kikuyu_people (accessed 20 April 2011). The Kikuyu are Kenya's most populous ethnic group.

41 As above.

42 http://en.wikipedia.org/wiki/Yoruba_people (accessed 20 April 2011). Yorubas are one of the largest ethnic groups in Nigeria. They make up about 21% of the Nigerian population.

43 M Ogundipe-Leslie *Re-creating ourselves: African women and critical transformations* (1994).

The effects of industrialisation and globalisation have changed the 'traditional' structure of families in most cultures, resulting in a preference for the nuclear family form. In South Africa, for instance, with the discovery of gold and diamonds, the establishment of mines and the commercialisation of agriculture, many able-bodied African men left their families for employment on the mines and farms. The consequence of this economically-influenced separation was the absence of the father from the family for long periods of time and, thus, the disruption of family life.[44]

Modern families are characterised by dual-earning partners or spouses in non-role-sharing families.[45] However, women still bear the responsibility of childcare and housekeeping. Post-modern families feature extended family members coming to the rescue of stressed nuclear family members. In African – and even American – societies, grandparents (usually grandmothers) live in the home of their child (with grand or great-grandchildren), either for short or long periods of time.[46] This made little difference to societies like those in India who have maintained the extended family structure with grandparents, uncles, aunts, nieces, nephews, sisters-in-law, parents and children in the same household.[47] According to some social constructionists, post-modern families are 'a deconstruction or transformation of at least one aspect of the traditional family'.[48] They list deconstructed and transformed families to include families constituted of lesbigay couples, single mothers, families conceiving children via reproductive technology, and transnational families.[49]

2.1.2 Household forms

Families may form households.[50] Some authors are of the view that the composition of a family is largely determined by the decision of a

44 Pretorius (n 37 above) 368.

45 Silverstein & Auerbach (n 20 above) 34.

46 Silverstein & Auerbach (n 20 above) 39.

47 P Laungani 'Changing patterns of family life in India' in Roopnarine & Gielen (n 20 above) 87-88. However, there are also nuclear families in Indian communities.

48 Silverstein & Auerbach (n 20 above) 34.

49 As above.

50 Muncie & Sapsford (n 28 above) 11.

newly-married family to set up a new household or to become members of an existing household where close kin of either of the new spouses live.[51] Two main forms of household have been identified, namely, the nuclear family[52] and the extended family.[53] With the 'deconstruction and transformation' characteristic of the post-modern era, various other household forms exist. These include the joint family;[54] one-parent

51 *The new encyclopaedia Britannica* (1978) Vol 10 478.

52 This 'universal' type of domestic family is found in all societies. (Murdock calls it 'a universal human social grouping'. See Murdock (n 20 above) 2.) It consists only of a heterosexually married couple (from different families) to the exclusion of any other person and their unwed children (biological or adoptive). As indicated by Muncie & Sapsford (n 28 above) 10, all other forms of family tend to be defined with reference to the nuclear family. Some other family scholars describe it as the nucleus of the corporate and the extended families – the first stage of both. Others are of the view that the nuclear family evolved from the extended family structure as a result of industrialisation and urbanisation. However, some anthropologists argue that 'the nuclear family is a 'social arrangement' rather than a universal form or 'biologically-determined family form'. See also Department of Social Development 2011 *Green paper on families 'Promoting family life and strengthening families in South Africa'* 24-40.

53 Also known as the non-nuclear family, the extended family may be made up of polygamous families, monogamous nuclear families or a combination of both. The typical structure of an extended family includes parents, unwed and married children with their spouses and offspring, and even grandparents. There may also be great-grandparents living in the same house with their children, and grandchildren and great-grandchildren. In industrial societies, the extended family takes the form of a domestic family plus close relatives living elsewhere, while in non-industrial settings, the extended family is a single household unit. As J Broodryk *Ubuntu: Life lessons from Africa* (2002) 29-31 points out, the extended family structure in African societies is such that a child has many fathers and mothers in his uncles and aunties. So, where the child's biological parents are not available to care for the child, his or her other parent(s) will assume such responsibility. An advantage of the extended family form is that children learn from a very early age to be tended by a variety of persons; they are not overly attached to any particular person (Laungani (n 47 above) 87). Also, this family form is more effective for maintenance and transfer of family traditions from one generation to another (Nye (n 29 above) 41).

54 Although often confused with the extended family structure, the joint family is a variant of the extended family (Nye (n 29 above) 42). This family form is common among the Hindu in India. It is a structure where all members of a family live together, including brothers and their wives and children, and have a communal kitchen, income, property and other resources with the patriarch as the head of the family and commander of the unit. Some, but not all, extended families are joint families.

family;[55] family with adoptive parent(s) and foster parents;[56] child-headed family (households);[57] same-sex parented family ('lesbigay family');[58]

55 This family form was found among the people of caste (coloureds) in the USA and exists today common in South African societies. In some societies, where women are so economically empowered that they have difficulty in finding men that can contribute to their economic security, marriage is rare. Such women sometimes choose single-parenthood through adoption, artificial insemination or surrogate motherhood. As a result, most single-parent families are those where the mother is responsible for provision and care for the house. Death of a spouse, through various causes, has also led to the increased number of single-parented families that exist today. For more on this see, Pretorius (n 37 above) 370 and Silverstein & Auerbach (n 20 above) 36. There are also absent parent(s) families (or non-resident father or mother households) where one or both parents are absent from the household for various reasons.

56 Adoption is a legislation-regulated practice which establishes a child's legal membership in an adoptive family. It may be carried out domestically or internationally. In most countries, adoption terminates all parental rights that existed between previous parents, biological or otherwise, or caregivers of the child; the new parents then become adoptive parents for all purposes (see the Children's Act 38 of 2005 sec 242 for effects of adoption). Foster care is a form of care for parentless children, children without families or those whose families cannot be identified. It is generally a form of interim care where a child is placed in state-managed and supervised care of a family to which the child may *not* be related (this applies in the United States, some European countries and South Africa). In Western Europe and Scandinavia, foster care is long-term care, like adoption. For more on this, see J Williamson & A Greenberg *Families, not orphanages* (2010) Better Care Network Working Paper September 2010 17, http://crin.org/BCN/ results.asp?keywords=family&offset=20 (accessed 21 October 2010). Since placement is intended to last until the child is reunited with his or her parents, attains adulthood or is permanently adopted, the state retains guardianship of the child for the period of foster care. Foster parents are compensated by the state for care of the child through foster child grants.

57 In some African countries – Ethiopia, South Africa and Zimbabwe – child-headed families (households) are a relatively new phenomenon which resulted from the high mortality rate of parents and caregivers as a result of the HIV/AIDS pandemic. For more on this, see S Tsegaye 'The lives of children heading household' http://www.crin.org/docs/The20Lives20of20Children20Heading20Families[1].pdf (accessed 20 April 2011); http://www.mida-international.org/index.php?option=com_content&view=article&id=53&Itemid=62 (accessed 20 April 2011). See also Save the Children *Field guide to separated children programmes in emergencies* (2004) 15 http://www.ecdgroup.com/docs/lib_005230015.pdf (accessed 19 April 2010). Best described in legal terms, a child-headed household is a household where, because 'the parent, guardian or caregiver is terminally ill or has died or has abandoned the children in the household', and there is no adult caring for the children, a child above the age of 16 years assumes the role of caregiver for the other (younger) children in the house (Children's Act sec 137(1)(a)). Where there is no extended family member or community-based care to turn to, the older children in these households fend for the younger children, sometimes at the cost of their own education.

58 The union of gay couples has been legalised in the Netherlands, France, South Africa (following the landmark decision of the Constitutional Court in *Minister of Home Affairs v Fourie & Bonthuys & Another* 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC), Denmark, the United Kingdom, Canada and some states within the USA. Child custody rights are also now accorded to these couples. As a result, same-sex families are becoming an accepted family form. These families also come in different forms. One combination that has been found is that of a family with a gay dad and lesbian mothers living in a duplex – the gay dad living downstairs and the lesbian mothers living upstairs. Children in this structure may be biological, adopted or surrogated.

corporate family;[59] experimental family;[60] and reorganised family.[61]

2.1.3 Marriage forms – Monogamous and polygamous

Monogamy is a marriage form where one husband has one wife. It is the simplest form of marriage common in many cultures. Nuclear families are monogamous in nature. More complex is the polygamous marriage which refers to any form of plural marriage such as one where a husband takes more than one wife (polygyny); a wife takes more than one husband (polyandry);[62] a group marriage (cenogamy); and several men and several women embrace a marital union (polygynandry).[63] Most countries where Islam is practised widely, for example Egypt and Nigeria, allow polygamy.[64] Murdock identified four societies that practise(d) polyandry: the Toda of Southern India; the Nayar of South-West India; the Tibetans of China; and the Marquesans.[65] In Nigeria, the Birom tribe in Jos Plateau, the Irigwe in Benue and the Abisi tribe have been noted for practising polygynandry.[66] The most common of all polygamous marriages is polygyny. Most African societies are traditionally polygynous – the Zulus of South Africa, the Kikuyis of Kenya, and the Yorubas and Hausa Moslems of Nigeria are typical examples of polygynous societies.

---

59 The corporate family structure bases its existence on activities such as farming, hunting, trading in products, and rearing its children within its territory. This familial form is common to pre-industrial or pre-literate societies.

60 With the experimental family form, a large number of people with different backgrounds, education, and from different countries are brought together for work in groups. The tasks include clearing, irrigation and planting on land, washing and mending clothes, making meals and caring for children. The fabric of this household form is the formation of small groups and the mutual interaction between the people in these groups, thus creating a family group. An example of this household form is the *kibbutz* in Israel which is a collective agricultural community. This community has a unique method of child-rearing where all children in the community sleep in communal children's homes.

61 Remarried parents with their children from previous marriages are a common description of this family form. Also, where a previously nuclear family household becomes legally separated, the family structure is reorganised to, possibly, a single-parented family.

62 Some parts of the West allowed polyandry. Eg, the Dieri of Australia and the Chukchee of Siberia have been associated with this family form. However, there are views that these group marriages seldom exist. What is often found is an extension of sexual privileges, but not the economic benefits and responsibilities, to a group of men and women. See Murdock (n 20 above) 23-40.

63 *The new encyclopaedia Britannica* (1978) Vol 7 155. For more on polygamous marriages, see Murdock (n 20 above) 2 23-40 and Ingoldsby (n 31 above) 117-137.

64 RA Ahmed 'Egyptian families' in Roopnarine & Gielen (n 20 above) 161.

65 Ingoldsby (n 31 above) 124-126 quoting GP Murdock 'World ethnographic sample' (1957) 59 *American Anthropologist* 664-687.

66 Ingoldsby (n 31 above) 128-131.

2.2 Functions of family

'The basic task of the family is to serve human needs. As the needs differ, the organisation and activities of the family will differ.'[67] In understanding the functions which the family serves in relation to children, the vital question is: What needs do families serve for individuals and society? This explains the shift in perceptions of what the family should be to what the family is. The following paragraph moves swiftly through the needs the family satisfies for today's children.

'A key function of family ... is the ability to provide a locus for emotional support and fulfilling relationships.'[68] The family performs seven major functions for individual members – 'production of economic goods and services, status giving, education of the young, religious training of the young, recreation, protection, and affection'.[69] Zaretsky is of the view that in a capitalist society, the family serves as a closed society which protects members from the 'impersonal, rational and anonymous' society.[70]

The satisfaction of emotional and psychological needs is the primary responsibility of a child's parent(s), legal guardians or persons responsible for the child.[71] The presence, or lack of, maternal warmth predicts 'later emotional adjustment, including feelings of insecurity, loneliness, depression, and perceived self-worth' while paternal warmth predicts 'later social and school adjustment' such as peer and teacher-assessed social competence.[72] What appears to be commonly accepted in most cultures is the fact that the most important sources of psychological needs within the family are companionship and parenthood.[73] Parents are seen as a shield from the harshness of the outside environment – school and playing field.[74]

Another need the family serves is the satisfaction of physical and material needs, including security. However, this is not to say that where, as a result of poverty or other social factors, parents cannot provide food, shelter and clothing for their children, a family does not exist. It is at this point that states have the duty to preserve the family by affording it the necessary protection and assistance[75] in the form

67 Elmer (n 30 above) 9.

68 Muncie & Sapsford (n 28 above) 24.

69 Nye (n 29 above) 8. See also Kingsbury & Scanzoni (n 29 above) 195-210; Murdock (n 20 above) 10; and Elmer (n 30 above) 3.

70 E Zaretsky *Capitalism, the family and personal life* (1976).

71 Arts 18 & 27 CRC.

72 X Chen & Y He 'The family in mainland China: Structure, organisation and significance for child development' in Roopnarine & Gielen (n 20 above) 57-58.

73 *The new encyclopaedia Britannica* (1978) Vol 7 156.

74 As above.

75 Preamble para 5 CRC.

of 'material assistance and support programmes, particularly with regard to nutrition, clothing and housing'.[76]

The social functions for which the family's existence is essential depend, to a large extent, on the culture within which the family is founded. A major benefit of child socialisation in the family is that, when effectively carried out at all stages of a child's development, the child acquires life satisfaction and emotional and psychological well-being, which are important for adolescence.[77] This results in the satisfaction of mental and emotional needs required in the child for adjustment to his or her social environment and responsibilities.[78]

It is important that in defining the family, stereotypes should be avoided – a *functional* perspective of family appears expedient.[79] However, as Viljoen states, the fact that an institution performs a function does not mean that that function could not be performed if that institution does not exist or that the performance of the function creates the institution.[80] It is therefore suggested that, in defining the family, the functional perspective should be supported by the intention of parent(s) or caregivers to permanently perform those functions. Where parent(s) or care-givers intend to permanently uphold their responsibilities of providing emotional, psychological, socialisation, financial and educational care for a child, they create a unit (family) to which the child can belong and on which the child can depend. The family should be seen as that unit to which a child permanently identifies and can return to on a daily or regular basis until (and even after) adulthood is attained – a unit that is legally, morally and socially obligated to care for the child emotionally, socially, psychologically, materially, financially, educationally and spiritually (whether the child is biologically related to the unit or attached to it by choice).

2.3 An all-encompassing definition

In developing an all-encompassing definition of family, the contemporary family forms that exist should be accommodated. Also, certain criteria should be set to determine whether a group constitutes a family.[81] Furthermore, consideration should be given to factors which determine family membership – affinity, consanguinity, affection, cohabitation, adoption, a combination of one or more of

76 Art 27 CRC.

77 DT Heath 'Parents' socialisation of children' in Ingoldsby & Smith (n 29 above) 161.

78 Elmer (n 30 above) 7 11.

79 The structural and functional theory to family studies has been employed by many social scientists in the field of family studies. This approach is used to organise and explain research study results.

80 F Viljoen 'Family structure and support networks' in AF Steyn *et al* (eds) *Marriage and family life in South Africa: Research priorities* (1987) 6.

81 Van der Linde (n 16 above) 24.

these factors, or from other methods.[82] It has been argued at national level that, because of the social nature and structural diversity of the family, the law should not define this fundamental institution.[83] However, in guaranteeing social rights, the law requires workable definitions which will ensure legal certainty. What follows below are some pointers to ingredients which should be included in the definition.

Firstly, people make up family. With respect to a child, there should be an adult responsible for the child in the family. (Child-headed households are an exception to this requirement.) It is submitted that a contemporary definition of family should include 'two or more persons, one of whom must be an adult'. In so doing, the definition accommodates single-parent families and other reconstructed families.

Secondly, blood relationship is an apposite indicator of family relationship. However, it is important to delineate, depending on the cultural and customary dictates of a particular society, what degrees of consanguinity should evoke legal responsibility for a child (and what should not). Biological parents (who maintain their parental rights and responsibilities over a child) are an apparent inclusion in this regard.

A third ingredient is parental rights and responsibilities. These may be legally acquired through adoption or through parental rights and responsibilities agreements. Grandparents, aunts, uncles and older siblings now often assume parental responsibilities over 'parentless' children. All persons with such rights and responsibilities should be included in the definition of a family.

Fourthly, a unit or persons to whom a child is emotionally and psychologically attached and from whom the child enjoys material and physical security should be viewed as family in respect of that child. However, the inclusion of these needs should not be seen in isolation of legally-acknowledged parental rights and responsibilities of adult(s) in the group or unit over the child. A child's siblings should also be considered in the definition of family because they partake in socialisation which is also an important need for the development of the child.[84]

Permanence or intended permanence of the relationship with the child is relevant in identifying family. Thus, this should be a vital ingredient for the definition of family. (This requirement excludes most foster families from recognition as family in relation to the child.

---

82 As above.

83 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 10 BCLR 1253 (CC).

84 It is noteworthy that one of the factors in sec 7 of the South African Children's Act which must be considered when the best interest of the child standard is tested is 'the likely effect on the child of any separation from ... any brother or sister or other child ... with whom the child has been living' (sec 7(d)(ii)). This provision points to the need to maintain emotional and psychological attachments that may have developed in the child.

In countries where foster care is intended as permanent alternative care, this exclusion will not exist.)[85]

3 'Family' in terms of international instruments

CRC does not define family. However, the Committee on the Rights of the Child (CRC Committee) appears to favour a flexible definition of family. According to the Committee, while referring to the extended family and the community, CRC takes into account diverse family structures and cultural patterns which exist, and also emerging familial relationships.[86] The CRC Committee, and CRC, may be described as function-focused with regard to the family. According to the Committee, the family is the base for the development of human relations where a child acquires values and is socialised. Therefore, the family is important for the child's future.

A close attempt at defining the family is contained in the Resolution adopted by the UN General Assembly – A world fit for children.[87] This document acknowledges the existence of various forms of families,[88] and in article 44(19) refers to the responsibilities of 'family, parents, legal guardians and caregivers'. It creates the notion that there is family, other than parents, that may be responsible for the child. A much closer indication of the meaning of family is found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention on Migrant Workers) 1990 which defines 'members of the family' as[89]

> persons *married* to migrant workers or having with them a relationship that, *according to applicable law, produces effects equivalent to marriage*, as well as their dependent children and other *dependent persons* who are *recognised as members of the family by applicable legislation* or applicable bilateral or multilateral agreements between states concerned.

The interpretation of the latter part of this definition rests within the province of applicable national legislature (or agreements between states).

At the regional level, the African Charter emphasises the importance of the family as the natural unit and basis of society.[90] In terms of this provision, family is the foundation of African society. The African

85 In Western Europe and Scandinavia, foster care is intended to be permanent.

86 CRC Committee (1994) Day of General Discussion 'Role of the Family in the Promotion of the Rights of the Child' para 2.1; CRC Committee (2005) Day of General Discussion 'Children without parental care' CRC/C/153 para 644.

87 UN Resolution adopted by the General Assembly (2002) (on the report of the *Ad Hoc* Committee of the Whole (A/S-27/19/Rev 1 and Corr 1 and 2)).

88 Art 15 UN Resolution (n 87 above).

89 Art 4 UN Convention on Migrant Workers (my emphasis).

90 Art 18(1) African Charter.

Charter places an obligation on the state to protect the physical and moral health of the family.[91] It further describes the family as the 'custodian of morals and traditional values' which are recognised in African communities.[92] The family, in terms of the African Charter, can therefore be defined as that unit which founds the existence of, firstly, an individual, and secondly, any society. Although the African Children's Charter[93] does not define the concept 'family', it refers to family,[94] family environment[95] and family life.[96] This Charter, like CRC, recognises that the child should grow up in a family environment for his or her full and harmonious development.[97] In so doing, it acknowledges the family as the ideal base for the existence and the holistic development of the African child.

4 'Family' in terms of national laws in selected African countries[98]

The Nigerian Child's Rights Act of 2003 (CRA) expressly guarantees the right of the child to family life.[99] It offers a broad definition of family 'in relation to a child' to include 'a person who has parental responsibility for a child and a person with whom the child is living or has been

91 As above.

92 Art 18(2) African Charter.

93 Art 18 African Children's Charter.

94 Art 10 African Children's Charter, in relation to the right of the child not to be subjected to interference of 'privacy, family, home or correspondence'.

95 Preamble para 4 African Children's Charter, '[r]ecognising that the child occupies a unique and privileged position in the African society and that for the full harmonious development of his [or her] personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding'; and art 23(3), with regard to the refugee child, '[t]he child shall be accorded the same protection as any other child permanently or temporarily deprived from his [or her] family environment for any reason'.

96 Art 14(2)(f) African Children's Charter, in relation to 'family life education'.

97 Preamble African Children's Charter.

98 The national laws considered are the laws of South Africa, Nigeria and Kenya, within the African region. It is pertinent to note that these three jurisdictions have children's legislation which was *recently* enacted and give effect to key provisions in CRC and the African Charter. It is for this reason that these countries are the focus here.

99 Sec 8. Sec 37 of the Constitution of the Federal Republic of Nigeria, 1999, is entitled 'Right to private and family life' but the provisions of sec 37 state: 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.' This formulation does not provide clarity to the meaning 'family life'. The CRA, however, gives more clarity as it does not equate family life to the home as the Constitution appears to have done.

living'.[100] The Kenyan Children Act 8 of 2001 (KCA)[101] does not define family; it guarantees the child's right to parental care.[102]

The South African Children's Act 38 of 2005 provides a more workable guide to a definition of family. In section 1 it defines a child's 'family member' to be[103]

(a) a *parent* of the child;
(b) *any other person* who has *parental responsibilities and rights* in respect of the child;
(c) a *grandparent, brother, sister, uncle, aunt or cousin* of the child; or
(d) *any other person* with whom the child has developed a *significant relationship*, based on *psychological or emotional attachment*, which *resembles a family relationship.*

This legislation points out key characteristics of persons who are family to a child: parenthood (natural or adoptive) and blood relationship; acquisition of parental responsibility in respect of the child; and significant relationship,[104] akin to a family relationship, resulting from psychological and emotional attachment. Subsection (d) purports flexibility in understanding the family, away from traditional consanguineous relations. This definition appears to extend family membership to persons (excluding blood relatives to the second degree) who may have cared for a child for a period of time, and thereby became psychologically and emotionally attached to the child without necessarily acquiring legal rights and responsibilities in respect of the child. It is submitted that clarity regarding the types of relationships which may fall within the definition in subsection (d) depends on the definition given to 'family relationship'. The inclusion of 'resembles a family relationship' to subsection (d) may be yet another means of avoiding delineation of who is (or is not) family to a child.[105]

---

100 Sec 277 CRA.

101 Sec 45. The Constitution of Kenya, 2010, acknowledges family as the natural and fundamental unit of society and mandates the Kenyan Parliament to enact legislation which recognises 'any system of personal and family law under any tradition, or adhered to by persons professing a particular religion'. This legislative piece takes into account the importance of the family and the variety of family forms that must be considered when dealing with family rights.

102 However, the Act defines 'home' 'in relation to the child' as 'the place where the child's parent, guardian, relative or foster parent permanently resides, or if no parent, guardian or relative living and the child has no foster parent, the child's parent's or guardian's or relative's last permanent residence ...' This definition highlights persons who have responsibility over the child – biological or by operation of law.

103 My emphasis.

104 The meaning of 'significant' is subject to interpretation.

105 In its December 2002 Review of the Child Care Act Report, Project 110, the South African Law Reform Commission, acknowledging that the traditional nuclear family form is not the reality in South Africa, and noting the challenges that ensue, recommended a flexible relationship-based definition of family member to be included in the children's legislation thereby preventing children from becoming family-less.

5 Right to a family as a canopy for all other familial rights[106]

As highlighted in the introductory paragraph above, certain familial rights have found definition in international instruments and national legislation: the right to family care;[107] the right to family life;[108] the right to parental care;[109] the right not to be arbitrarily separated from parents;[110] and the right to grow up in a family environment.[111] Each of these rights depends on the existence of a 'family'. International agencies involved with child care acknowledge that 'all children have a right to a family'.[112] However, this exact formulation is not stated in international legal documents and national legislation pertaining to children. As a result, its existence depends on judicial interpretation.

The right of a child to a family exists as a right that may be interpreted in relation to (and in) other familial rights that have been expressed in treaties. It should be seen as the *sine qua non* for the realisation of other family rights pertaining to children.

The recognition of the right is important because it validates, firstly, the existence of a group to respect and protect,[113] and of a group from which duties (such as the duty to care for the child) are due. Secondly, it ensures legal certainty, thereby bringing to bay those arguments that challenge the existence of the right of the child to a family in international law. It is arguable that the explicit legal provision of the right of the child to a family will create unrealistic obligations on states to realise this right. Conversely, the acknowledgment of the right will promote the non-violation of this right by parents and other persons legally responsible for the child. Also, such acknowledgement will lend support to the CRC Committee's recommendations which require

106 It is important to stress that the best interests of the child remain the *primary consideration* when dealing with children's rights. Therefore, although a child has the right to a family, it will not be in the child's best interests to remain with a family where, eg, the child endures abuse and violence.

107 Sec 2 Children's Act.

108 Sec 8 CRA.

109 Sec 53(e) Constitution of Kenya; sec 2 Children's Act.

110 Art 9 CRC.

111 Para 6, arts 20(1) & 22(2) CRC; sec 2 Children's Act.

112 CRC, IRC, Save the Children, TdH, UNICEF, WVI, War Child UK and Plan International acknowledge this right in their document – Child Protection Working Group Guiding principles on accompanied and separated children following the Haiti earthquake January 2010 1.

113 K Jastram & K Newland 'Family unity and refugee protection' in E Feller *et al Refugee protection in international law: UNHCR's global consultation on international protection* (2003) 566.

that parties to CRC 'develop, adopt and implement' a comprehensive national policy on families and children.[114]

States must begin to consider parental or family care and protection of the child from the premise of the right of the child to a family. Each state should define 'family' for its purposes and within its cultural, economic and social circumstances, and explicitly acknowledge the child's right to a family and ensure the realisation of the right, thereby all other familial rights. It is proposed that the definition so developed should be revisited regularly and adapted to changing times and needs.

6 Right to a family within the African context

As highlighted in paragraph 3 above, the African Charter and the African Children's Charter do not contain an exact formulation of 'the right to a family'. However, it refers to family as the natural unit and basis of society. It is submitted that the child's 'right to a family' does not exist because 'family' has not been defined. (The right is often inferred from other familial rights.) This is because there is a disconnection between the idealisation of family and the perceptions of what family is and should be.[115]

Sloth-Nielsen, Mezmur and Van Heerden are of the view that 'a child does not have the right to a family in international law'. They explain that a child has the right to parental care or family care and to appropriate alternative care when removed from the family environment, but this is distinct from the child's right to a family.[116] In their view, the right to a family privileges inter-country adoption above other forms of alternative care. This argument appears unfounded. As noted by the CRC Committee:[117]

> Children's rights will gain autonomy, *but they will be especially meaningful in the context of the rights of parents and other members of the family* – to be recognised, to be respected, to be promoted. And this will be *the only way* to promote the status of, and the respect for, the family itself.

In South African case law,[118] the Constitutional Court in *In re: Certification of the Constitution of the Republic of South Africa, 1996,*[119]

114 CRC Committee (2005) Day of General Discussion 'Children without parental care' CRC/C/153 para 645.

115 Department of Social Development 2011 'Green Paper on Families 'Promoting family life and strengthening families in South Africa' 16.

116 J Sloth-Nielsen *et al* 'Inter-country adoption from a Southern and Eastern African perspective' (2010) March *International Family Law* 86-96.

117 CRC Committee (1994) General Day of Discussion 'Role of the Family in the Promotion of the Rights of the Child' para 198.

118 Sec 28(1)(b) 1996 Constitution.

119 1996 10 BCLR 1253 (CC).

while addressing objections to the non-recognition of familial rights in the 1996 Constitution, held that there has been no 'universal acceptance' of the need to expressly recognise the right to family life as being fundamental and 'requiring constitutional protection'.[120] The Court explained that '[t]he absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies'.[121] According to the Court, because families are constituted in a variety of ways, there is 'uncertainty' as to the outcomes of constitutionalising family rights. As a result, constitution makers would rather not regard the right to family life as a fundamental right appropriate for definition in constitutional terms.[122] The Court argued that, by providing for the right of the child to family care, the Constitution 'directly' deals with the right to family life of the child. (The right is 'expressly guaranteed' therein.)[123]

Legislation in Kenya also does not explicitly provide for the right (of the child) to a family. In its findings, the High Court of Kenya in Nairobi in *Republic v Minster of Home Affairs and 2 Others Ex-parte Leonard Sitamze*[124] held that the family is of vital importance to Kenyan society and that the right to a family is informed by the fundamental right to human dignity which is constitutionally recognised in Kenya.[125] Nigeria's Child's Rights Act states that the child has 'a right to family life'.[126]

In its *Green Paper on Families*,[127] the South African government, while recognising the centrality of the family for human progress, notes that the mere inference of family in many countries' policies means that 'many countries do not focus on the family as the first point of entry, with regard to policy implementation'.[128] As a result, socio-economic benefits do not directly impact on the family; rather, they filter down to the family.[129] In the government's view, focusing on the family would produce more extensive positive societal results than when individuals are targeted.

120 *Certification* (n 119 above) para 98.

121 Para 99 *Certification*.

122 As above.

123 Para 102 *Certification*. It should be noted that this part of the judgment responds to the objection that the right to family life (and not the 'right to a family') is not expressly recognised in the Constitution. The 'right to family life' and the 'right to a family' are two distinct familial rights. This judgment has been cited as an example because it addresses the issues of familial rights generally.

124 *Republic v Minster of Home Affairs & 2 Others Ex-parte Leonard Sitamze* (2008) eKLR. judgment delivered by Judge JG Nyamu.

125 *Sitamze* (n 124 above) 20.

126 CRA s 8.

127 Green Paper (n 115 above).

128 Green Paper (n 115 above) 14.

129 As above.

Children's rights, particularly their familial rights, depend on the existence of family and the recognition, respect and promotion of the rights of its members. In simple terms, for a child to enjoy the right to family care, the child must belong to a family in the first place. Therefore, it is important that states define family in relation to the child, as a *sine qua non* for the realisation of familial rights pertaining to the child. This will ensure legal certainty and prevent the legal limbo in which children often find themselves.

7 Conclusion

The African Charter recognises the family as the basis of society. From time immemorial, the family structure has evolved and been adapted to suit changing times. Contemporary family forms have become removed from the 'usual' nuclear or extended family structure. As has been stated by Van der Linde,[130] the rise in the number of 'restructured' families suggests an adaptation to changes in modern society rather than a decline in the importance of the family. The essence of a family should therefore not lie in its structure or form, but rather in the functions of family members, one to another, and the intention to establish permanence in the execution of such functions. With this in mind, a definition of the concept should be developed by states, in context, within their particular jurisdictions. It is proposed that the definition so developed should be revisited regularly and adapted to changing times and needs. Once a definition has been developed, express recognition of the right of the child to a family should be ensured to create legal certainty and promote the non-violation of this right by persons most likely to deprive children of their families.

130 Van der Linde (n 16 above) 27.

AFRICAN HUMAN RIGHTS LAW JOURNAL

South Africa, the African Union and the responsibility to protect: The case of Libya

Sandy Africa[*]
Associate Professor, Department of Political Sciences, Faculty of Humanities, University of Pretoria, South Africa

Rentia Pretorius[**]
Lecturer, Department of Political Sciences, Faculty of Humanities, University of Pretoria, South Africa

Summary

International relations are regulated by a system of norms and laws that has evolved over a long period. The responsibility to protect is an evolving normative framework shared by a significant number of international actors, but it failed to create normative cohesion and unity of action during the Libyan crisis in 2011 due to issues of interpretation and application. The article examines the application of the responsibility to protect framework when violence broke out in Libya. Contradictory strategies by the United Nations and the African Union divided the international community and rekindled old divisions and mistrust, resulting in claims by some within the AU – South Africa particularly – that the African effort was being undermined. The international community must urgently strengthen the common understanding and institutional framework for the responsibility to protect.

1 Role of norms in international relations

1.1 Introduction

Tension between the African Union (AU) and the United Nations Security Council (UNSC) over the Libyan conflict and the developments

* PhD (Witwatersrand); sandy.africa@up.ac.za
** MA (Pretoria); rentia.pretorius@up.ac.za

that had unfolded after the UNSC's passing of Resolution (UNSCR) 1973[1] formed the backdrop to a high-level UNSC meeting on 12 January 2012 which was convened by South Africa during its rotating presidency. Delegates focused on ways to strengthen the co-operation and partnership between the UN and the AU.[2] Kenya's Foreign Affairs Minister and Chairperson of the AU Peace and Security Council (PSC), Moses Wetang'ula, argued that the AU and UN should agree on a 'set of principles aimed at clarifying their relationship' and that, from an AU perspective, these principles should revolve around 'support for African ownership, the division of labour and sharing of responsibilities'. President Jacob Zuma of South Africa referred to the experiences of the Libyan crisis and identified the need for 'greater political coherence and a common vision between the African Union and the United Nations' as the main requirements for the resolution of conflicts in Africa. Ambassador Joy Ogwu of Nigeria added the requirements of 'comparative advantages, complementary mandates and optimal use of resources and capacities' as important prerequisites for a successful AU-UN partnership.[3]

These delegates were speaking after one of the most difficult episodes in the existence of the AU. No specific mention was made of Libya in UNSCR 2033 adopted unanimously at the end of the debate, although references were made to the UN-AU Mission in Darfur (UNAMID) and the AU Mission in Somalia (AMISOM). This is understandable, since there was never a UN mission in Libya. South Africa had an interest in placing the issue of co-ordination between the UN and the AU on the agenda, because it had gone through a particularly frustrating year balancing its options in Libya.

This article provides an assessment of the normative framework guiding the decisions and actions of the AU and, more specifically, South Africa, in dealing with the crisis in Libya in 2011. South Africa is singled out because it played a prominent role during the Libyan crisis. At the time, South Africa was a non-permanent member of the UNSC. The high-level *ad hoc* committee appointed by the AU to broker an agreement between the Libyan authorities and the rebel forces was also chaired by the President of South Africa. Both these roles must be seen in the context of South Africa's vocal stance on the need to reform the global governance system, particularly the UNSC. The Libyan crisis presented an opportunity for South Africa to demonstrate its political clout, both on the continent and in the

1 UN Security Council S/RES/1973, adopted by the Security Council at its 6498th meeting on 17 March 2011.

2 UN Security Council (SC 10519) 'Security Council commits to "effective steps" to enhance relationship with African Union in conflict prevention, resolution, with unanimous adoption of 2033 (2012)' 12 January 2012 http://www.un.org (accessed 5 June 2012).

3 UN Security Council (SC 10519) (n 2 above).

international arena. The AU struggled to implement a coherent and effective response to the Libyan crisis as it was confronted with both UNSCR 1973 and the decisions of the AU. South Africa was forced to make sense of being party to the differing strategic pathways of the two organisations; in the end the AU agenda of finding 'an African solution to an African problem' was frustrated by the military intervention which was ultimately to end Gadhafi's reign. The failure to implement the AU roadmap, in the public perception, has been interpreted as a blow to South Africa, given the prominent role the country played in promoting it.[4] This article asks whether the source of the differences was a divergence of underlying norms between South Africa and the AU, on the one hand, and those who supported the use of force in the resolution of the Libyan crisis, on the other hand. Finally, it asks what lessons must be learnt from the Libyan conflict and whether the sharp differences that divided the world can be avoided in similar scenarios in the future.

It is argued that success in implementing the responsibility to protect as a normative framework must be based on shared understandings and expectations. In particular, the framework must be able to impose predictability, co-ordinate behaviour and eventually produce binding decisions, which are common characteristics of normative frameworks, as we later discuss. The question is whether the responsibility to protect can evolve from a social norm to a legal norm which can impose legally-binding responsibilities, where 'the internal morality of the law serves as a check upon the powerful within the system'.[5] We agree with Brunée and Toope when they argue:[6]

> We should stop looking for the structural distinctions that identify law, and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behaviour.

Our point of departure is that norm formation and adoption take place in the context of real circumstances of international politics, civil strife and alliance formation, all of which are complex and mediated processes. The end result of this process should ideally be the existence of a framework of compatible, reasonable, predictable, transparent and binding legal norms.

---

4 E Mckaiser 'South Africa's response to the Libyan crisis: An analysis' http://www.politicsweb.co.za (accessed 1 November 2011).

5 J Brunée & S Toope 'International law and constructivism: Elements of an international theory of international law' (2000) 39 *Columbia Journal of Transnational Law* 19 49-50.

6 Brunée & Toope (n 5 above) 68 analyse the link between international law and constructivist theory and ask how law influences human behaviour. They provide an analysis of the conditions of internal rationality that distinguishes legal norms from social norms, ie compatibility of norms with one another, reasonable demands, predictability and transparency. The presence of these conditions is crucial for responsibility to protect to evolve into a binding legal norm (56).

1.2 Norms in international relations

Generally speaking, a norm can be defined as a 'standard of appropriate behaviour for actors with a given identity'.[7] International relations are regulated by a system of norms and laws that have evolved over a long period. International law codifies what is expected of states in their relations with the rest of the international community. There are a number of significant caveats to this relationship: Firstly, sovereign states can only be legally bound by an obligation if they 'have taken part in the process of developing it, or they must have accepted it'.[8] And secondly, given the decentralised nature of the international system, there is an inevitable relativism of international law, which can lead to 'a clash between the unilateral legal claims of states, as each state is free to assess the scope of the obligations it has assumed and is on an equal footing with every other state as regards the interpretation of its commitments'.[9]

Put differently, the norms and rules in the international system are not consistently and uniformly interpreted by the states who constitute it, even by those who supposedly subscribe to the same sets of rules; instead the different interpretations result in a 'jigsaw puzzle of subjective allegations and claims',[10] and it is these differences that often give rise to tensions over their interpretation. On top of this, the rules of international engagement are in an ongoing state of evolution, as states struggle to align their behaviour with a new normative structure based on the need to promote human security, before, during and after conflict situations.

According to Florini,[11] norms in international relations provide a blueprint for behaviour and are crucial for consistency and stability. They must also be able to facilitate change and to evolve with new conditions. Florini identifies three conditions for the successful creation and distribution of new norms: 'initial prominence, coherence and favourable environmental conditions'.[12] Three corresponding questions can be asked in relation to these variables: Firstly, is the norm powerful enough to take root? This is most likely if the norms are clear, shared and agreed upon by all members of a group. Secondly, there is the question of how well the norm interacts with complementary norms. The development of institutions often provides the framework

7 M Finnemore & K Sikkink 'Taking stock: The constructivist research programme in international relations and comparative politics' (1998) 52 *International Organisation* 891.

8 JAC Salcedo 'Reflections on the existence of a hierarchy of norms in international law' (1997) 8 *European Journal of International Law* 584.

9 Salcedo (n 8 above) 585.

10 As above.

11 A Florini 'The evolution of international norms' (1996) 40 *International Studies Quarterly* 363.

12 Florini (n 11 above) 374.

for such coherence. Third is the matter of how strong and persistent the external conditions which confront the norm are.

Applied to international relations, different norms interact in the international, regional and national arenas and the ability of new norms to take root, persist, become dominant and part of the legal framework, depends on their acceptance, their strengthening by complementary norms and their acceptance in all these arenas. The responsibility to protect is arguably such a normative framework, having emerged and having been adopted by a shocked and guilt-ridden international community after the 1990s, Africa's 'unprecedented decade of violence'.[13] Nevertheless, serious questions arise in relation to its persistence and universal acceptance and it falls short of the conditions of legal rationality that distinguish social norms from legal norms, as indicated by Brunée and Toope.[14]

1.3 Responsibility to protect: An emerging international norm

The responsibility to protect establishes a normative link between sovereignty and human rights at a time when controversy has clouded the practice of humanitarian intervention. Prominence was given to the responsibility to protect in December 2001 when the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS) published their report entitled *The responsibility to protect*.[15] This report identified three obligations on the part of the international community: the responsibility to prevent; the responsibility to react; and finally the responsibility to rebuild. The report indicated six requirements to be met before military action could be considered on humanitarian grounds. Military intervention should only be an option where there is *just cause*, based on actual or anticipated mass human suffering and evidenced by large-scale loss of life. Military intervention should also be governed by the *right intention*, meaning that the only motive should be to put an end to human suffering. The action should also involve '*proportional means*'; this refers to the scale of military intervention which can only be as a '*last resort'* and if there are '*reasonable prospects for success*'. The last requirement, *right authority,* involves authorisation by the UNSC as

13 T Murithi 'The African Union's evolving role in peace operations: The African Union mission in Burundi, the African Union mission in Sudan and the African Union mission in Somalia' (2008) 17 *African Security Review* 73.

14 Brunée & Toope (n 5 above).

15 International Commission on Intervention and State Sovereignty, the Responsibility to Protect (2001) http://www.iciss.ca/report-en.asp (accessed 13 August 2012); see also M Serrano 'The responsibility to protect and its critics: Explaining the consensus' (2011) 3 *Global Responsibility to Protect* 426.

the body which has the responsibility for addressing situations where international peace and security are threatened.[16]

The search for an acceptable normative structure for the protection of civilians continued to dominate debate in the UN and culminated in the *Report of the High-Level Panel on Threats, Challenges and Change*, submitted to UN Secretary-General, Kofi Annan, in 2004.[17] Endorsed and reframed in the World Summit Outcomes Document (2005),[18] the responsibility to protect is seen as comprising three 'pillars' in the prevention and reaction to four mass atrocity crimes – war crimes, genocide, ethnic cleansing and crimes against humanity. The three pillars are:

- the responsibility of the territorial state to protect its subjects against such crimes;
- the responsibility of the international community to assist states to fulfil these obligations; and
- the commitment by the international community to collective action in a timely and decisive manner consistent with the UN Charter.

The 2005 World Summit of the UN General Assembly and the passing of UNSCR 1674 in 2006 gave broad acceptance to the responsibility to protect as a guiding framework. UN Secretary-General Ban Ki-Moon identified three crucial elements of the responsibility to protect in his 2009 report.[19] The first is that all states should see it as 'an ally of sovereignty, not an adversary'. The 'narrow focus', with four crimes being specifically targeted, is the second element, whilst 'deep response', the third element, refers to the pool of measures and strategies that the framework provides.[20]

Whilst it does not have the status of a legally-binding norm – in fact, the UN avoids reference to it as a norm – the responsibility to protect has undoubtedly taken its place in the panoply of frameworks against which states in the international community measure and evaluate their own and other states' responses to international crises. Florini again provides us with a helpful tool to understand the evolution of norms when discussing norm reproduction as comprising two essential elements: 'vertical reproduction', which refers to the continuation of norms 'from one generation to another', and 'horizontal reproduction',

16 RJ Hamilton 'The responsibility to protect: From document to doctrine – but what of implementation?' (2006) 19 *Harvard Human Rights Law Journal* 289-291.

17 MW Matthews 'Tracking the emergence of a new international norm: The responsibility to protect and the crisis in Darfur' (2008) 31 *Boston College International and Comparative Law Review* 142.

18 UNGA World Summit Outcomes Document (2005) A/60/L.1.

19 Australian Red Cross 'The power of humanity' in Australian Red Cross *International humanitarian law and the responsibility to protect: A handbook* (2011) 11-12.

20 As above.

which results in major 'norm changes within one generation'. Horizontal norm changes take place when the external environment changes drastically, when the existing norms clearly fail to produce the necessary results or when new issues demand urgent action. Two phases can be identified in the process of horizontal norm changes. The first entails 'short-term discarding of old norms and the selection of new norms to prevent a gap in the normative framework and to maintain stability'. In the first phase, norm changes often occur as a reaction to disillusionment, the acceptance of failure and the need to face new challenges. The second phase, 'norm acceptance', is gradual, time-consuming and far more difficult than the first because of the nature of the international arena. This phase involves the acceptance of new norms as a guideline for action at the national, regional and international levels. It culminates in the transformation of new 'social' norms into rational 'legal' norms.[21]

Shared norms may be crucial for consistency in the interactions between actors in the global arena, but norms must fulfil basic requirements before they can enable, regulate, legitimise and galvanise effectively.[22] Norms must also be forceful in their impact, and must form part of a coherent, normative structure that provides consistency and predictability.[23] Another requirement relates to the acceptance of the norms by those who will be subjected to them. Finnemore and Sikkink in their discussion on the life cycle of international norms argue that these go through three phases: 'norm emergence'; 'norm acceptance' and, at a critical tipping point, 'norm internalisation'. The characteristic feature of the first phase, norm emergence, is 'persuasion by norm entrepreneurs', who attempt to persuade a critical mass to embrace the new norms. The main feature of the acceptance stage is that more and more actors subscribe to the norm. The reasons for this vary, ranging from the sheer moral weight that the norm may carry, to a more self-interested need by role players for acceptance and legitimation for fear of going against the tide. Norms take on a taken-for-granted capacity in the stage of 'norm internalisation'. By this time, it has become inconceivable that the group or a member of a group would consider acting outside of the normative framework.[24] A fourth stage can be added and that is the stage where the norm becomes part of the existing legal framework. Notwithstanding the standing of the 2005 World Summit Outcome Document, the responsibility to protect is a normative framework which has to some extent gained formal acceptance, but not by all those who are subjected to it. Moreover, its application is not widespread enough for it to be considered legally binding and an essential part of international humanitarian law.

21 Florini (n 11 above) 378. See also Brunée & Toope (n 5 above).

22 Florini (n 11 above).

23 As above.

24 Finnemore & Sikkink (n 7 above) 895.

1.4 Normative shifts in the international system

The changing normative landscape in the international system is illustrated by a cursory overview of world history. More than 360 years ago, the Treaty of Westphalia laid the legal foundation for the modern nation-state based on the principles of sovereignty, territorial integrity, non-intervention and self-determination. These norms became the standard of behaviour for all international actors and were enshrined in the 1945 Charter of the UN, as well as the 1963 Charter of the OAU. The end of the Cold War introduced profound norm shifts in the last decades of the twentieth century. The period of the Cold War had been a time of immense suffering as UN Secretary-General, Boutros Boutros-Ghali, reflected in his 1992 Agenda for Peace when discussing the consequences of the Cold War:[25]

> Since the creation of the United Nations in 1945, over 100 major conflicts around the world have left some 20 million dead. The United Nations was rendered powerless to deal with many of these crises because of the vetoes – 279 of them – cast in the Security Council, which were a vivid expression of the divisions of that period.

Unfortunately the end of the Cold War did not herald an era of peace. The new millennium forced the UN to reconsider its relevance in the lives of people. UN Secretary-General Kofi Annan provided a new moral vision when he declared that '[w]e must put people at the centre of everything we do'.[26] 'Freedom from want and freedom from fear' became the normative pillars guiding the UN; nevertheless, human rights violations at a mass scale followed in Somalia (1993), Rwanda (1994), Bosnia-Herzegovina (1995) and Kosovo (1999).

The doctrines of sovereignty, non-intervention and national security often provided autocratic and ruthless leaders with the necessary space to wage war against their own people. Decisions and action around humanitarian intervention became the breeding ground for debates between states in the global south, some of whom experienced intervention as imperialist strategies to dominate and undermine the sovereignty of weaker states, and the global north, which maintained that sovereignty was often used as an excuse to exonerate discredited governments when they violated the human rights of their citizens. There existed little trust and even less agreement on how governments should meet their obligations to protect their subjects. Humanitarian intervention was often perceived as being selective, guided by national interests and therefore riddled with 'irreconcilable controversy'.[27]

---

25 B Boutros-Ghali 'An agenda for peace. Preventive diplomacy, peacemaking and peacekeeping' Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992.

26 K Annan *We the peoples. The role of the United Nations in the 21st century. UN Millennium Report* (2000) 7.

27 Matthews (n 17 above) 140.

The new normative structure, built on human security, struggled to survive as it competed with the long-existing conflicting norms underlying sovereignty. The result was often the international community's inaction or delayed action, when confronted with the death and suffering of thousands.

It has already been implied that the responsibility to protect is an emerging normative framework, located at the intersection between the age-old norm of state sovereignty, and the relatively new one of human security. Deng argued that the dilemma confronting the international community in the post-Cold War period is not to be underestimated because, even though the state does not have the capacity to meet the demands of sovereignty in our complex world, 'it still has the primary responsibility to promote the security, welfare and liberty of the citizens, organising co-operation and managing conflict'.[28]

Deng underlined the fact that the notion of 'sovereignty as a responsibility' had for some time been a concern of the UN, citing statements by UN Secretary-General De Cuellar in 1991, and Boutros-Ghali in 1992.[29] He also drew attention to the call made by OAU Secretary-General, Salim Ahmed Salim, for a 'conflict prevention and resolution mechanism' in 1992, on the basis of the 'promotion of democracy, human rights and good governance'. Deng argued that Salim's proposals, which were to become the basis of the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA), illustrated similar concerns between the UN and OAU. He further outlined the context and the complexities thereof in which the need for intervention might be experienced in Africa:[30]

> Furthermore, it is not always easy to determine the degree to which a government of a country devastated by civil war can be said to be truly in control, when, as is often the case, sizeable portions of the territory are controlled by rebel or opposing forces. Oftentimes, while a government may remain in effective control of the capital and the main garrisons, much of the countryside in the war zone will practically have collapsed.

Under such conditions the vulnerability of the civilian population escalates and due to modification of the traditional notion of sovereignty – the state no longer has control over all of its territory and people – leaves the international community with no choice but to establish dialogue with non-governmental actors. Deng was writing with the conditions of humanitarian crises occasioned by internal displacement in mind, but there is often a link between the condition

28 See FM Deng 'Frontiers of sovereignty. A framework of protection, assistance, and development for the internally displaced' (1995) 8 *Leiden Journal of International Law* 250. Deng was the UNSG's Special Adviser on the Prevention of Genocide from 2007 to 2012.

29 Deng (n 28 above) 271.

30 As above.

of displacement and violent conflict between various parties within a territory that has brought these conditions about. The Libyan crisis brought similar dilemmas to the fore for the international community. There was little disagreement that the harsh response (or even the threats of a harsh response) by Gadhafi constituted a 'threat to international peace and security',[31] the basis for intervention in terms of the UN Charter. The AU too considered the unfolding conditions in Libya sufficiently grave for them to be given the highest priority in its deliberations and on its agenda from the beginning of the crisis.

What followed demonstrated the internal weaknesses of the UNSC and the AU as well as a lack of institutional synergy between these two bodies in reconciling their resolutions and strategies. The Libyan conflict highlighted just how embryonic and unevenly understood Deng's notion of sovereignty as a responsibility is.

2 South Africa and the African Union on the 2011 Libyan conflict

2.1 Outline of the issues

In order to understand the approach of the AU and that of South Africa, which played a prominent role in the AU's attempts to resolve the Libyan conflict, we need to assess the normative frameworks which shaped their stances and actions. Many AU member states have been vocal promoters of the responsibility to protect as it has taken shape at the UN, arguing that the concept has its contextual roots in Africa. They often cited the 1994 genocide in Rwanda, where the international community only acted after approximately 800 000 people had died, as a clear driver for the adoption of this principle by the AU when it was established in 2000.

As a member state, South Africa supports the AU's approach of the right to intervene, reflected in article 4(h) (Principles) of the Constitutive Act.[32] On 23 July 2009, in his statement during the UN General Assembly debate on the UN Secretary-General's report on implementing the responsibility to protect, Ambassador Baso Sangqu declared that South Africa welcomed the report and acknowledged the centrality of the UN, particularly the UN General Assembly, in developing the concept. On the other hand, Ambassador Sangqu was critical of the UNSC and declared that its failure to prevent mass atrocities and its inability to act on behalf of all humankind instead

31 Art 1(1) & ch VII art 42 United Nations Charter.

32 African Union Constitutive Act, entered into force 26 May 2001.

of a selected few had caused the demand for new measures.[33] As an example of the weakness of the UNSC, he cited the system of apartheid, a declared crime against humanity, which attracted 'three simultaneous vetoes' each time the question of measures against the apartheid regime was put to the vote in the Security Council.[34]

Yet South Africa, like the AU, displayed an ambivalent attitude when it came to the question of the use of coercive force in the context of the Libyan intervention. Initially supporting UNSCR 1973 which called on member states to use 'all necessary means' to end the conflict, and authorising the establishment of a no-fly zone over Libya in order to protect civilians, South Africa was later to question the interpretation of the resolution by members of the North Atlantic Treaty Organisation (NATO), saying it was using the resolution as a pretext for 'regime change'.

Our first question in this section, which seeks to understand the nature and functions of the normative structure underlying the AU's response to the Libyan crisis, asks: Does the AU have a coherent and solid normative structure with a clear blueprint to sustain its responsibilities as regional peacekeeper? Put differently, we might ask: Does the responsibility to protect provide a coherent normative framework for the AU to protect civilians in a state in which it seeks to intervene? A negative answer will demand the reasons for this normative defect, but an affirmative answer, on the other hand, will demand that we deliver a verdict on the role of the AU in the Libyan case. As a member state, we insert South Africa into that picture to assess its role in and commitment to the position espoused by the AU.

Our second question involves the relationship between the UN and AU and we ask: Are there clear guidelines for the responsibilities of the UNSC and the AU in responding to war crimes, genocide and crimes against humanity, the three elements of the responsibility to protect that fall within the remit of the AU in terms of article 4(h)? To answer this question, we have to determine the legal relationship between the AU and the UN. It is clear from the outset that the UN Charter provided for the exclusive responsibility of the UNSC in the maintenance of international peace and security (article 24 of the UN Charter). Yet, the UN itself has acknowledged the complementary role of regional bodies in securing peace, and is engaged in ongoing discussions with such bodies including the AU, to demarcate more clearly who should be responsible for what.

Our third question focuses on the basic requirement of successful reproduction of norms at a regional or local level and we ask: How successful was the acceptance of a common normative framework in

33 Statement delivered by Ambassador Sangqu, Permanent representative of the Republic of South Africa, during the General Assembly debate on the Secretary-General's Report on implementing responsibility to protect (2009).

34 As above.

the case of the AU's response to Libya, and can insufficient buy-in to a common normative framework be the main reason for the limited performance of the AU as peacemaker during the conflict? The background to this question is provided by South Africa's stance on the responsibility to protect as manifested in the role it played in the Libyan case. Finally, we ask: Can we determine patterns of conduct that must be followed or avoided from the Libyan experience or should we start afresh and revisit the viability of the responsibility to protect as a blueprint for action?

2.2 AU normative framework

The radical transformation of the OAU into the AU and the adoption of the AU Constitutive Act on 11 July 2000 not only provided the AU with a new security architecture and new confidence in its role as regional peacemaker, but it also gave the AU more prominence and legitimacy in the international arena. Along with a renewed commitment to embedded norms, such as the sovereign equality, independence and territorial integrity of member states, the AU also demonstrated a solidarity with the emerging normative concerns of the international community. The AU Assembly was granted 'the right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity'.[35]

It signified a shift from non-interference to the principle of non-indifference. The AU established the Common African Defence and Security Policy (CADSP) in 2002 and the Peace and Security Council (PSC) in 2003. The PSC became the most important organ for the maintenance of peace and security and formed, together with the Panel of the Wise and the African Standby Force, the core instruments in the AU peace and security architecture. These developments – the creation of instruments that could be invoked to bring force and influence to bear on recalcitrant member states – suggested an underlying normative structure for the AU that was quite different from the normative framework guiding the decisions and actions of its predecessor, the OAU. However, it was obvious from the start that the introduction of a new normative framework would result in its uncomfortable coexistence with competing or pre-existing norms or arrangements. The Constitutive Act of the AU simultaneously upheld the principles of 'sovereign equality' (article 4(a), 'non-intervention' by member states, 'non-use of force', 'rejection of unconstitutional changes of government', along with the 'right to intervene' in the internal affairs of member states in the event of gross human rights

35 Art 4(h) African Union Constitutive Act.

abuses).[36] In 2005, African governments adopted the Ezulwini Consensus, basically affirming the primary responsibility of the UN for the maintenance of international peace and security, whilst stressing the importance of 'African solutions for African problems'.[37] In such a complex amalgamation of normative claims, the scope for varying interpretation is vast. Indeed, member states were not unanimous in their responses to the Libyan conflict. Florini refers to three different scenarios in the case of coexisting but competing norms: Either one of the norms prevails and becomes the main regulatory norm, while the other disappears or becomes dormant for long periods or they both coexist for an extended period. Florini further argues that[38]

> [i]t is quite possible either for the population to be polymorphic (with some actors following one norm and some the other), or for an individual actor to pursue a mixed strategy, following one norm on some occasions and its competitor on others.

The capacity of the institutional framework to enforce new norms and the broad acceptance and successful localisation thereof demand that norms go through various processes such as modifying or 'pruning', filtering and often reinterpretation. In the case of the AU, the 'old' norms of sovereignty, non-intervention, territorial integrity and the non-use of force clash with the 'new' norms of non-indifference, good governance and human security.[39]

What then were the measures and stances adopted by the AU? The AU had been watching developments in Libya since February 2011 when its PSC issued a statement calling on the Libyan government to ensure the protection of civilians. The AU also dispatched a mission to assess the situation in Libya after the February 2011 meeting of the PSC. On 10 March 2011, a week before UN Security Council Resolution 1973 was passed, the PSC adopted a major decision on Libya. Whilst reaffirming its strong commitment to the territorial integrity of Libya, and rejecting any foreign military intervention, it proposed an 'African' solution which included the immediate cessation of all hostilities, co-operation with the Libyan administration to deliver humanitarian

---

36 Arts 4(a), 4(g), 4(e), 4(f), 4(i), 4(p) & 4(h) African Union Constitutive Act. See also M Dembinski & M Reinold 'Libya and the future of the responsibility to protect – African and European perspectives' PRIF Report 107 (2011) 8.

37 The common African position on the proposed reform of the United Nations: The 'Ezulwini consensus', adopted by the AU Executive Council on 8 March 2005 at the 7th extraordinary session in Addis Ababa, Ethiopia, http://www.responsibilitytoprotect.org/files/ AU_Ezulwini%20Consensus.pdf (accessed 13 September 2012).

38 Florini (n 11 above) 367 373.

39 T Murithi 'The African Union's transition from non-intervention to non-indifference: An *ad hoc* approach to the responsibility to protect?' (2009) http://library.fes.de/pdf-files/ipg/ipg-2009-1/08_a_murithi_us.pdf (accessed 29 October 2012). See also the references of the African Union Commission Chairperson, Alpha Konare, to the principle of non-indifference in Africa in A Baffour 'African Union: From non-interference to non-indifference' (2007) 460 *New African* 10.

assistance to those in need and the protection of all non-citizens in Libya. The PSC solution concluded with the implementation of the necessary reform measures to eliminate the causes of the violence.[40]

The AU also established a high-level *ad hoc* committee on Libya consisting of five heads of state and government, and the Chairperson of the AU Commission. President Jacob Zuma of South Africa was appointed Chairperson, with the heads of state of Uganda, the Republic of Congo, Mauritania and Mali being the other members. The Committee's mandate was 'to engage with all the relevant actors to facilitate dialogue' among the parties and to work with 'the UN, regional organisations such as the League of Arab States, the Organisation of the Islamic Conference (OIC) and the European Union (EU) to facilitate a non-violent resolution of the conflict'.[41]

The League of Arab States, however, had decided to rather request the UN to establish a no-fly zone over Libya, which is the context in which Resolution 1973 came about, and this created the basis for the use of force in the resolution of the matter.[42] The AU high-level committee's shuttling took place as military measures were being effected. President Zuma met with Colonel Gadhafi on 10 April 2011 and was initially encouraged by the latter's apparent acceptance of the Committee's plan; however, the Committee's meeting with the Libyan opposition on 11 April 2011 yielded a cool response. They saw Colonel Gadhafi as part of the problem and not part of the solution.[43] In the end, the roadmap failed to win genuine support for it from both sides of the Libyan crisis as well as from the UN.[44] On 14 June 2011, a delegation of AU Ministers of the countries on the high-level *ad hoc* committee met with the UNSC to discuss resolving the Libyan conflict in accordance with the roadmap. In addition, on 18 June, the chief executives of the AU, the Arab League, the OIC, the EU and the UN met in Cairo to co-ordinate efforts. But throughout these developments, the no-fly zone was maintained, and the conflict within Libya escalated. By June 2011 the Transitional National Council (TNC) was a reality. In a 26 June 2011 statement, the *ad hoc* committee called on the Libyan government and the TNC to commit themselves to

40 See AU press statement PSC/PR/COMM/CCLXII (23 February 2011) and Communiqué PSC/AHG/COMM.1(CCLXV) (10 March 2011) and PSC/MIN/COMM.2(CCLXXV) (26 April 2011).

41 Report of the Chairperson of the Commission on the activities of the AU high-level *ad hoc* committee on the situation in Libya AU PSCPR/2(CCLXXV) (26 April 2011).

42 Dembinski & Reinold (n 36 above) 10-11.

43 The rejection of the AU road map for peace in Libya followed the same path as AU efforts to end conflicts in Somalia, Madagascar and Côte d'Ivoire. See M Tran 'Libyan rebels protest over African Union peace mission' *The Guardian* 11 April 2011 http://www.guardian. co.uk/world/2011 (accessed 13 August 2012).

44 E Sidiropoulos 'Libya: A lost opportunity for the African Union' 31 August 2011 http://www.saiia.org.za/diplomatic-pouch/libya-a-lost-opportunity-for-the-african-union.html. (accessed 13 August 2012).

a cessation of hostilities and welcomed 'Colonel Gaddafi's acceptance of not being part of the negotiation process'.[45] This suggested that Gadhafi had accepted that there was no role for him in Libya's political future, though it was to be months of uncertainty before the outcome of the conflict was determined.

Throughout the crisis, the AU can be seen as responding to the initiatives of the UNSC, on the one hand, whilst simultaneously having to mediate the varying postures of its own leaders on the other. The heads of state of Zimbabwe and Uganda, for example, expressed support for Colonel Gadhafi, whilst Rwanda's head of state criticised the AU's limp-wristed response, arguing that the AU lacked unity.[46]

Kuwali argues that in keeping with the responsibility to protect, article 4(h) of the AU Constitutive Act 'obligates its [the AU's] members to prevent mass atrocity crimes'. He observes that '[t]he confluence of both humanitarian streams is shifting the paradigm from sovereignty as a right to sovereignty as a responsibility'.[47] Whilst the AU had previously intervened militarily in conflicts (Darfur and Somalia being examples), in the case of Libya, the AU took a decision that can only be interpreted as suggesting that whilst the conditions invited intervention, the threshold for military intervention, even on humanitarian grounds, had not been reached. To understand the context of this decision, the institutional structures established to give effect to the AU's peace and security framework have to be evaluated. Kuwali points out that the deficiencies in the AU's framework are in part traceable to the instruments in the international system from which they draw their authority:[48]

> Article 7(1)(e) of the PSC Protocol informs that the PSC shall recommend to the AU Assembly, intervention in a member state in respect of 'grave circumstances' under article 4(h) as defined in relevant international conventions and instruments. The AU is bound to adopt the definition of 'war crimes', 'crimes against humanity' and 'genocide' as enshrined in the Rome Statute of the International Criminal Court (ICC), the Genocide Convention, the Geneva Conventions and Additional Protocols or the tried and tested definitions in the Statute of the International Criminal Tribunals of Yugoslavia and Rwanda.

However, there is a *lacuna* in the understanding of thresholds for these mass atrocities to have taken place and this has resulted, along with the varying interpretations of other principles in the Constitutive Act, in internal divisions in the AU on what kind of intervention was appropriate and resulted in the different positions that were taken. It

45 Communiqué: Meeting of the AU high-level *ad hoc* committee on Libya, Pretoria, 26 June 2011, http://www.thepresidency.gov.za/ (accessed 10 July 2012).

46 Dembinski & Reinold (n 36 above) 11-13.

47 D Kuwali 'The end of humanitarian intervention: Evaluation of the African Union's right of intervention' (2009) http://www.hks.harvard.edu/cchrp/pdf/ACJR_vol9 (accessed 13 August 2012).

48 Kuwali (n 47 above) 53.

can be argued that the AU and, by extension, African states, failed to utilise article 4(h) to protect the civilian population from the massive attacks launched by both the Libyan government and rebels. The underlying principle of the responsibility to protect is that the states of the international community have a duty to protect all civilians, not only those in their own jurisdictions. The question must be asked whether the rebels would have been a legitimate target for intervention by the AU, especially if they were constituted, as popular reports strongly suggested, by ordinary citizens who had no alternative but to take up arms. In any event, the AU, apart from having chosen diplomacy as a solution, did not in fact have the means to protect civilians. The African Standby Force was still in the process of development and could probably not have been mustered to enforce any kind of peace agreement even if the appetite for one had been there.

2.3 South Africa's multiple normative stances on Libya

As with the AU, where there was initially a degree of normative ambiguity about what would constitute an appropriate response to the Libyan crisis (followed by the decision to seek an inclusive political solution), in South Africa there was also ambiguity among different sectors of society about where to draw the line between state sovereignty and human rights. Political opinion in South Africa was divided about the NATO action that followed UNSCR 1973, particularly as the TNC, established as an alternative administration to the Gadhafi regime, gained political mileage. When the South African government was accused by opposition parliamentary parties of showing no sympathy for the TNC and insisting instead on pressing ahead with the AU diplomatic initiative, Deputy Minister Ebrahim Ebrahim argued that 'South Africa not only campaigned for the suspension of Libya from the Human Rights Council in Geneva when the violence broke out', but that President Zuma had also informed Colonel Gadhafi that 'South Africa abhorred his government's violation of human rights'. Deputy Minister Ebrahim also referred to South Africa's active role in the adoption of the two UNSC resolutions as 'evidence of the country's determination to assist the people of Libya'.[49]

Whilst there were those who felt that the South African government was doing too little to see the end to the conflict, there were those who felt that it had in fact gone too far in supporting the UNSC. In the ruling party (the African National Congress) ranks, there was disquiet: The Youth League, for example, was of the view that South

49 Speech by Deputy-Minister Ebrahim Ebrahim on 'South Africa's position *vis-à-vis* recent UNSC resolutions on the Libyan crisis as a test of South Africa's leadership role on African solutions to African problems' 2 August 2011, http://www.info.gov.za/speech (accessed 13 August 2012).

Africa had been wrong to support UNSCR 1973.[50] An open letter, initiated by prominent South African academics and signed in July 2011 by influential Africans in the political and academic community, condemned the UNSC for undermining the ability of the AU to take the lead role. This letter expressed suspicion of how the responsibility to protect had been applied, and argued that the UNSC had produced 'no evidence to prove that its authorisation of the use of force under chapter VII of the UN Charter was a proportionate and appropriate response to what had in reality in Libya developed into a civil war'.[51] The open letter further accused the UNSC of 'outsourcing or subcontracting the implementation of its resolution to NATO', without putting in place any mechanisms to supervise the contractor or monitor or assess its actions. It also criticised the establishment of an 'unauthorised' contact group, which had displaced the UN as the authority with the legitimate responsibility to help determine the future of Libya.

South Africa was later to insist that it supported the stringent measures outlined in the two UN resolutions (UNSCRs 1970 and 1973) in good faith. Moreover, in an effort to preserve African unity, it had co-ordinated its position with Nigeria and Gabon, the other non-permanent members of the UNSC. In a statement issued on 18 March 2011, the South African government explained that it had decided to adopt UNSCR 1973 because it 'supported the UNSC's request that Colonel Gadhafi end the violence against the population, but that the Gadhafi administration defied this request'.[52] The South African government also acknowledged that the UNSC had to act and declared that 'the Security Council has responded appropriately to the call of the countries of the region to strengthen the implementation of Resolution 1970 and that the adoption of the additional measures outlined in Resolution 1973, which included negotiating a ceasefire and enforcing a no-fly zone, 'constitutes an important element for the protection of civilians and the safety of the delivery of humanitarian assistance to those most vulnerable and those desperately in need of such assistance'.[53] Deputy Minister Ebrahim, speaking on another occasion, said that South Africa's vote constituted support for the Arab League's request for a 'no-fly zone over Libya in order to protect civilians in keeping with established multilateral diplomacy principles'. South Africa had trusted that UNSCR 1973 was going to

50 See declaration by the ANC Youth League, 21 March 2011, objecting to South Africa voting in favour of UNSC 1973, http://www.ancyl.org.za/docs/pr/2011/pr0321.html (accessed 20 August 2012).

51 Concerned Africans 'Libya, Africa, and the new world order. An open letter to the peoples of Africa and the world 24 August 2011 http://mrzine.monthlyreview.org/2011/libya270811.html. (accessed 13 August 2012).

52 C Monyela 'South Africa welcomes and supports the UN Security Council's resolution on no fly zone in Libya' 18 March 2011 http://www.dfa.gov.za/docs/2011/liby0318.html (accessed 13 August 2012).

53 As above.

be implemented 'in good faith and in full respect for both its letter and spirit'.[54] Several commentators in South Africa, suspicious of the Western powers' intentions, were, however, extremely suspicious of NATO and suggested that the 'no-fly zone' from the start had the ring of regime change about it.[55] In April 2011 their suspicions were fuelled by the pledge of Presidents Obama (USA) and Sarkozy (France) and Prime Minister Cameron (Great Britain) to continue with military intervention until Colonel Gaddafi has been removed from office because it would be an 'unconscionable betrayal' if they were to give in to the demands for a ceasefire and a negotiated settlement.[56]

The South African government promoted its stance on Libya as a reflection of the normative bias and framework which underlie its own foreign policy. International humanitarian law provides the legal framework for South Africa's foreign policy. In the words of South Africa's Minister for International Relations and Co-operation, Ms Maite Nkoana-Mashabane, apart from being tied to South Africa's domestic priority of ensuring stability and prosperity for itself and its neighbours, are derived from a long-standing history, ideology and values that embrace:[57]

- the spirit of internationalism;
- the rejection of colonialism and other forms of oppression;
- our quest for the unity and political, economic and social renewal of Africa;
- the promotion and defence of the plight of the suffering masses and poor of the world; and
- our opposition to the structural inequalities and abuses of power in the global system.

It is now common knowledge that the South African government, as the conflict developed, expressed concern that the 'no-fly zone' of UNSCR 1973 was being used as a pretext by some powers to effect regime change, an agenda it was vehemently opposed to. South Africa accused the coalition of countries implementing the no-fly zone of deviating from the spirit of the UNSCR and also felt that the TNC, which the contact group backed, could not speak for all Libyans. There were those who, rightly or wrongly, had supported the government and any political solution had to include them. To support this position, President Zuma cited article 30 of the AU Constitutive Act which clearly states that '[g]overnments that come to power through

54 Ebrahim (n 49 above).

55 'SA group slams NATO attacks on Libya' 24 August 2011 *News 24* http://www.news24.com (accessed 10 August 2012).

56 A Stratton 'Obama, Cameron and Sarkozy: No let-up in Libya until Gadaffi departs' *The Guardian* 15 April 2011.

57 M Nkoana-Mashabane Speech by Minister of International Relations and Co-operation on South Africa's Foreign Policy 2 September 2011 23 http://www.dfa.gov.za (accessed 13 August 2012).

unconstitutional means would not be allowed to participate in the activities of the Union' and he also indicated his support for 'an inclusive transitional government'.[58]

These shifting responses to the Libyan conflict may be indicative of an unsteady normative base in South Africa's foreign policy. The coexisting values of a regard for sovereignty and the aversion to 'unconstitutional changes of power' were placed in uncomfortable proximity to the value of human dignity, and the right to life. The South African government found it difficult to adapt their normative base to complex circumstances and demands and to move from sovereignty as a right to control to sovereignty as a responsibility to protect. Undoubtedly, the South African authorities wanted to see an end to the suffering, but were constrained by their adherence to the rules they had been party to setting in both fora (the AU and the UN), and had the difficult task of navigating both solutions.

The fact that the UNSC did not wait for AU approval to consider the appropriateness of the NATO response once UNSCR 1973 had been passed was seen by the AU as a slap in the face.[59] For the UNSC, the approval of the Arab League provided sufficient legitimacy, rendering the AU's claim that Africa can find solutions for its problems null and void. Sidiropoulus agrees: 'Resolution 1973 makes only scant reference to the AU', but she also emphasises the important role of the Arab League 'in matters relating to the maintenance of international peace and security in the region'.[60] The AU and the South African government still clung to the possibility of a settlement negotiated under the auspices of the AU roadmap.

Nathan argues that the AU roadmap was doomed to fail, firstly because there was no 'mutually hurting stalemate' forcing both parties to the negotiating stalemate when the roadmap was launched. Both parties felt that they had some prospect of dominating the other through force. Secondly, the rebels had made up their minds that their actions were worth the effort if they spelt the possibility of freedom. Thirdly, argues Nathan, there was 'little trust in the AU as a non-partisan peacemaker' because Gadhafi funded the AU and 'it had long tolerated his systematic and gross violations of the African Charter on Human and Peoples' Rights'. The AU even appointed Gadhafi as AU Chairperson in 2009. A fourth reason Nathan puts forward for why the AU's plan was not viable relates to the dynamics surrounding ceasefires:[61]

---

58 J Zuma Speech 27 August 2011 http://www.info.gov.za/speech (accessed 25 July 2012).

59 See J Mahlahla 'AU: Time to wake up is now' 18 May 2012 http://www.zbc.co.zw/news (accessed 6 June 2012).

60 Sidiropoulus (n 44 above).

61 L Nathan 'Remarks at UP seminar on Libya 15 September 2011' (2011) 33 *Strategic Review for Southern Africa* 135.

> A cessation of hostilities is extremely dangerous for rebels: It allows the regime to consolidate; it provides a perfidious regime with the opportunity to destroy rebel forces and eliminate their leaders; it removes one of the few sources of leverage against the regime that the rebels have, namely organised violence; and it removes the rebels' basis for mobilising and organising popular support and gaining international attention.

2.4 The AU and the UN: Roles and responsibilities in executing the responsibility to protect

As discussed earlier when engaging with the frameworks proposed by Florini[62] and Finnemore and Sikkink,[63] norms interact in the international, regional and national arenas and are in constant revision. At times, the changes are horizontal and indicate modifications of an existing norm. At times, they are vertical and generational and mark a fundamental departure from a pre-existing norm. It is too early to predict where the responsibility to protect fits on this scale. The ability of new norms to take root, persist and become dominant depends on their acceptance and their strengthening by complementary norms in the national, regional and international arena. The launch in 2002 of the AU introduced a new Africa to the world and created a new window of opportunity for the continent. The AU's Constitutive Act laid the foundations for a new legal, institutional and normative framework characterised by the strengthening of long-existing pan-African ideals of unity and cohesion and 'African solutions to African problems', but also by the acceptance of new norms underlying the responsibility to protect.

The involvement of NATO in the Libyan case irked the members of the AU, but its own financial weaknesses and inability to provide the necessary logistical support forced the AU to accept the military involvement of a third party. The lack of political will of AU members to speak with one voice, and to create unity based on its new security structure and the norm of responsibility to protect were shown very clearly. This case tested the ability of the AU, and South Africa particularly, to fulfil their obligations to engage with all the parties to the conflict and to win their support as the designated and legitimate peace-broker. Ban Ki-Moon argued that there will inevitably be differences in the perspectives and approaches of the actors involved in the resolution of African conflicts, but 'what matters is the way they manage their differences'.[64]

62 Florini (n 11 above).

63 Finnemore & Sikkink (n 7 above).

64 UN Security Council (n 2 above).

Within the international system, the responsibility to protect does not yet have the status of a legally-binding norm. Fortunately, the responsibility to protect already has an African variant in article 4(h) of the AU Constitutive Act. This should be built on through further deliberation on what threshold needs to be reached before the extreme form of intervention, coercive military measures, is instituted. This talks to the need for a set of agreements guiding the behaviour of states in such instances.

The polarised approaches on how to end the conflict in Libya was a reflection that not enough thinking had been done within the AU to implement the emerging doctrine or norm of the responsibility to protect. Similarly, the fact that South Africa convened a UN meeting to discuss this vexed issue during its rotating presidency in January 2012 indicates that both the UN and AU acknowledge the seriousness of the normative divide. Moreover, the fact that NATO and the contact group were able to insert themselves into the equation suggests that there is a gap in the AU's implementation capacity and in its overall unity. Mezyaev argues:[65]

> The AU lacks the political will (and often the means) to play hardball with some of its recalcitrant leaders who flaunt the very principles that the organisation is meant to espouse.

Added to the inability of the AU to act as a unified body is the inadequacy of the AU's peace and security machinery to address a problem of this scale. Bellamy and Dunne agreed that 'prevention is always preferred over intervention because the latter only follows where lives have been lost and irreparable damage occurred'. They argue that military intervention is only one of many strategies that can be followed, and that 'combinations of different tools, applied by different actors, usually well outside the gaze of all but close followers of UN affairs or those connected to the relevant regions'.[66]

Reiff expressed a different view when he argued that the Libyan case demonstrated that military action could be decisive, that the decisions of the UNSC were successfully followed up by NATO and that it 'appears to be the most successful foreign humanitarian intervention since the quagmires in Afghanistan and Iraq'. However, he conceded that the Libyan intervention had done 'grave, possibly irreparable, damage to the responsibility to protect'.[67]

---

65 A Mezyaev 'Africa and the UN: An attempt to shatter "NWO" chains' 23 January 2012.

66 A Bellamy & T Dunne 'Syria: R2P on trial' *The Interpreter* 5 June 2012 (accessed 13 August 2012).

67 D Reiff 'R2P, RIP' *New York Times* 7 November 2011 http://www.nytimes.com (accessed 13 August 2012).

3 Conclusion

The intervention in Libya revived the mistrust of African states of the motives of Western nations when they intervene in African affairs. Africans experience these interventions as an 'inappropriate violation of their sovereignty',[68] a feeling strengthened by suspicion that Western powers were after Libya's oil reserves and Gadhafi's unpopularity in the Western media. What should concern us most is whether prevention of such a crisis was ever on the agenda. South Africa and the AU need to evaluate whether their newfound principle of non-indifference will only take effect when there is a crisis. Prevention can only happen if there is a common and high standard of good governance, accountability of elected leaders and sustained efforts to ensure prosperity for all citizens. The current approach of the AU is to have all inside of the Union and to persuade them to change their ways.

The hard work of rebuilding Libya from the ashes is something the international community now has to deal with. Building up the damaged infrastructure, the demobilisation of armed combatants, stopping the flow of arms in the region, promoting a political culture of tolerance, and holding inclusive elections: At least there was agreement that this was the way forward. The South African government has since recognised and met with the TNC to discuss how South Africa could contribute to the reconstruction efforts, but the failure of the AU roadmap has been a bitter experience.

What lessons can be learnt from the discordant application of the responsibility to protect in the Libyan crisis? It appears that the international community is experiencing a very similar dilemma to the one it faced then – about how to intervene effectively and decisively – in the case of the conflict in Syria. As in the case of Libya, South Africa in 2011 expressed concern about the violence in Syria. It condemned the violence against unarmed civilians, against the security forces and called on all sides to act with the utmost restraint and respect for human rights. South Africa in February 2012 reiterated its call for a Syrian-led peace process and welcomed the diplomatic efforts of the UN and the Arab League to send a special envoy, Kofi Annan, to Syria, to negotiate a settlement similar to the AU roadmap for Libya. Unfortunately, on 2 August 2012 Kofi Annan resigned from this assignment, disappointed at his inability to overcome the obstacles of what he called 'mission impossible', one of which the inability of the UNSC to reach a decision.[69] It would appear to be obvious that the Syrian situation is in need of drastic intervention and yet the UNSC is paralysed because the Permanent Five cannot agree on an appropriate

68 C Keeler 'The end of the responsibility to protect?' *Foreign Policy Journal* 12 October 2011 http://www.foreignpolicyjournal.com (accessed 18 July 2012).

69 R Gladstone 'Resigning as envoy to Syria, Annan casts wide blame' *New York Times* 2 August 2012 http:// www.nytimes.com (accessed 13 August 2012).

course of action. Given their active engagement in the conflict, would the Security Council be willing or justified in recognising the rebels as civilians, as was implied in the Libyan case, and what would be the implications? The following words of warning in 2003 from General Roméo Dallaire, force commander of the UN mission in Rwanda, cannot be ignored:[70]

> Human beings who have no rights, no security, no future, no hope and no means to survive are a desperate group who will do desperate things to take what they believe they need and deserve.

The conflict in Libya taught both the AU and the UN a lesson on the need to co-ordinate their actions and to overcome their differences. It is crucial to acknowledge the difficulty of deciding when and how to act. UN Secretary-General Ban Ki-Moon argued that co-operation between the UN and AU demands 'common strategic objectives and a clear division of responsibilities, based on shared assessments and concerted decisions of the two organisations'.[71] It is important to establish 'pre-agreed mechanisms for consultation that would allow the Secretariat and AU Commission to act and proceed together when a new crisis erupts'.[72]

70 R Dallaire *Shake hands with the devil. The failure of humanity in Rwanda* (2003) 521.

71 UN Security Council (n 2 above).

72 As above.

AFRICAN HUMAN RIGHTS LAW JOURNAL

A truth commission for Uganda? Opportunities and challenges

Prudence Acirokop[*]
Project Manager, Information, Counselling and Legal Assistance Project, Norwegian Refugee Council, Somalia; Doctoral candidate, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

Summary

The article addresses challenges and opportunities that a truth-telling process presents to Uganda after the two-decade-long conflict between the Lord's Resistance Army and the national army. The article specifically analyses the appropriate features of legislation regarding a truth-telling process that it argues account for its success. It makes reference to the National Reconciliation Bill, 2009, drafted by civil society groups in Uganda, which is the only comprehensive document relating to a possible truth-telling process in Uganda. The article argues that a truth-telling process will give Uganda an opportunity to confront its past, official denials and imposed silences, and will provide victims with public validation of their suffering and make unquestionable the state's obligation to provide integral reparations. The article, however, questions the extent to which individuals with state authority and state institutions will allow a truth-telling process to exercise its powers and publicly question their conduct with a looming threat of prosecutions. The article further questions whether the National Resistance Movement government will accept that its rule has been tarnished by decades of conflict and that state institutions are in need of reform, or whether it will set its sights on justifying policies, hiding complicity and rejecting blame. The article concludes that a political will and commitment are essential to ensure adequate investment in technical, material and financial resources and that non-interference of the government in the work of the Truth Commission will ensure success. It further finds that with such political will and commitment, and robust consultation with stakeholders, including victim groups, and the creation of alliances locally, nationally,

* LLB (Makerere), LLM (Human Rights and Democratisation in Africa) (Pretoria); pacirokop@gmail.com

regionally and internationally, a truth-telling process will lead to justice, truth, reparations, reintegration and reconciliation in Uganda.

1 Introduction

The peace talks that began in Juba in July 2006 between the Lord's Resistance Army (LRA) and the government of Uganda was viewed by many in Uganda and abroad as the best chance to a negotiated settlement to the two-decade conflict in Uganda. Although a comprehensive peace agreement was not reached, in some respects the talks were successful as the two sides recognised the grievances in Northern Uganda and the country at large and proposed ways forward.[1] In particular, the parties recognised the need for accountability for the grave violations of human rights and humanitarian law and the need for reconciliation. On 29 June 2007 the parties signed the Agreement on Accountability and Reconciliation (Agreement) and on 19 February 2008 signed an Annexure that set out the framework for implementing the Agreement.[2]

The parties further signed an accord on Disarmament, Demobilisation and Reintegration on 29 February 2008, leaving the signing of a comprehensive peace agreement itself as the last missing action. The mediator planned several ceremonies for the signing, but Joseph Kony, the LRA leader, repeatedly failed to appear to sign the deal.[3] Kony claimed that his negotiating team had misled him on the true nature of the agreement and suspended them.[4] On 11 April 2008 he declared that all the signed agreements were invalid, except the Cessation of Hostilities, which he agreed to extend for five days, marking the end to the peace talks.[5]

Nonetheless, the Juba talks ensured calm and stability in the affected areas of Uganda and ended a series of internal conflicts and gross human

1 T Allen & K Vlassenroot 'Introduction' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and reality* (2010) 17.

2 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, signed in Juba, South Sudan on 29 June 2007 and the Annexure to the Agreement signed 19 February 2008 (Annexure).

3 'Uganda rebels delay signing peace deal' *Reuters* 10 April 2008 http://www.france24.com/en (accessed 20 January 2009).

4 'Uganda rebels suspend talks, appoint new team' *Sudan Tribune* 10 April 2008 http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=26715 (accessed 20 February 2011).

5 'Uganda LRA fails to sign final peace deal in Riikwanbwa' *Sudan Tribune* 13 April 2008 http://www.sudantribune.com/spip.php?article26734 (accessed 17 August 2012).

rights violations that Uganda has experienced since independence.[6] The government of Uganda used the Agreement to pave the way for legislative arrangements to ensure domestic prosecutions, traditional justice, truth-telling and reparation processes in Uganda.[7]

At the same time, the International Criminal Court (ICC) that in 2003 received a referral of the LRA situation from President Museveni of Uganda, issued warrants of arrest in 2005 for top LRA commanders, including Joseph Kony, Vincent Otti, Raska Lukwiya, Okoth Odhiambo and Dominique Ongwen and continued with its investigations.[8] Further, to fulfil its commitment under the Agreement, the Ugandan government, through a legal notice, created a new division of the High Court of Uganda – the International Crimes Division (ICD) – to try persons for international crimes committed in the conflict.[9] The ICD is fully constituted and operational and begun its first trial in July 2011.[10] The ICD will co-operate with the ICC to ensure that those most responsible for crimes in the LRA conflict are prosecuted and will not assert jurisdiction over those already indicted by the ICC.[11]

In addition, the government of Uganda, through the Justice Law and Order Sector (JLOS), in 2008 established a high-level Transitional Justice Working Group (TJWG) to give effect to the provisions of the Agreement. The TJWG is comprised of five thematic sub-committees, including international crimes prosecutions, truth and reconciliation, traditional justice, sustainable funding and integrated systems that

6 High Court: The establishment of the International Crimes Division of the High Court http://wwww.judicature.go.ug/index.php?option=come_content&task=view&aid=117&Itemid=154 (accessed 17 August 2012).

7 Agreement clauses 2.1, 2.3 & 3.1.

8 *The Prosecutor v Joseph Kony, Vincent Otti, Okoth Odhiambo and Dominic Ongwen*, Situation in Uganda (ICC-02/04-01/05) arrest warrants issued on 8 July 2005 as amended on 27 September 2005 after Trial Chamber II was satisfied that there were reasonable grounds to believe that the persons named had ordered or induced the commission of war crimes and crimes against humanity in the territories of Uganda. Raska Lukwiya was killed in battle in 2006 and Vincent Otti is said to have been executed on the orders of Kony in 2008; the other indictees are at large.

9 The International Crimes Division was created in 2008 as War Crimes Division and in 2011 re-designated, International Crimes Division; Legal Notice 10 of 2011, The High Court (International Crimes Division) Practice Directions 2011, cl 3. The ICD is a permanent division of the High Court of Uganda.

10 *Thomas Kwoyelo Alias Latoni v Uganda* (HCT-00-ICD-Case 2/10). Thomas Kwoyelo was captured in the Garamba forests in the DRC in 2008 and his trial commenced on 11 July 2011 after several delays. A few months later, in a constitutional petition, Kwoyelo challenged his prosecution as amounting to unequal treatment before the law (Amnesty Act), claiming that he had been denied amnesty while similarly-situated individuals were granted it. The Constitutional Court agreed with Kwoyelo and ordered his immediate release – see *Thomas Kwoyelo Alias Latoni v Uganda* Constitutional Petition 036/11 (arising out of HCT-00-ICD-Case 2/10) Ruling of the Court, para 625 ordering the ICD to cease the trial of Kwoyelo. The state is set to appeal this decision.

11 Interview with Joan Kagezi, Senior Principal State Attorney in charge of international crimes prosecutions at the ICD on 18 January 2011.

meet regularly to discuss and work on policies around the thematic areas. Representatives from civil society and donors are invited to attend and contribute to these discussions.[12] In line with the Agreement that calls for wide consultations with all stakeholders,[13] JLOS in 2009 started a process of country-wide survey to get views on appropriate transitional justice forums.[14] Although a truth commission is not specifically mentioned in the Agreement, the survey found that overwhelmingly Ugandans desired truth, reconciliation and reparations as part of a comprehensive solution to the conflict.[15] It showed that 70 per cent of respondents thought that it was essential to know the truth of what happened in the war and that 76 per cent of the respondents indicated that Uganda needed a national truth-telling process for this purpose.[16] In addition, a report compiled by the Uganda Human Rights Commission (UHRC) and the United Nations Office of the High Commissioner of Human Rights (UNOHCHR) indicated that victims in Uganda overwhelmingly desired mechanisms to investigate the truth about past harms, to ensure effective steps to investigate human rights violations, and to provide reparation for violations and harms.[17]

Truth commissions give a country the opportunity to confront its past official denials and imposed silences, and provide victims with public validation of their suffering. Truth commissions make the state's obligation to provide integral reparations increasingly unquestionable.[18] Usually, victims are central in the work of truth commissions, and a lot of emphasis is put on their voices, giving those who have been excluded, persecuted or stigmatised an opportunity to participate in public life and to have their suffering acknowledged.[19] Equally important, attention is paid to the institutions and sectors of society that formed the structure of power for the regimes where gross human rights violations and abuses were perpetrated to clearly identify the 'why, how, what and where' of reforms that are needed.[20]

---

12 Interview with Ismene Zarifis, technical advisor, transitional justice with JLOS conducted on 24 February 2012 in Kampala, Uganda. The process is aimed at a comprehensive national transitional justice policy that will include national peace, traditional justice and truth-telling policies.

13 Agreement cl 2.4.

14 'Transitional justice in Northern, Eastern Uganda and some parts of West Nile region' (March 2008) JLOS.

15 n 14 above, 22.

16 n 14 above, 23.

17 '"The dust has not yet settled"', Victims' view on a right to remedy and reparations: A report from the Greater North of Uganda' Uganda Human Rights Commission and United Nations High Commissioner of Human Rights (2011) 60.

18 S Cohen *States of denial: Knowing about atrocities and suffering* (2001) 255-266.

19 P Smith 'Memory without history: Who owns Guatemala's past?' (2001) 24 *Washington Quarterly* 59-61 64.

20 Smith (n 19 above) 64.

A truth commission may well bridge the accountability gap that will be left by the other accountability measures in Uganda. There are many features of the LRA conflict that would not be accomplished through traditional justice or formal prosecutions. For instance, an investigation into the various strategies and rationales that the government has followed in handling the LRA conflict that led to one of the world's worst humanitarian crisis; an investigation into how and why both the LRA and UPDF involved children in the hostilities and atrocities committed by and against them during the conflict; an investigation into the different military offensives undertaken by the UPDF against the LRA and why they failed; an investigation into the various attempts at peace talks and the factors that led to their failure; and an investigation into abductions, disappearances, detentions, torture, murder and other offences committed both by the LRA and the UPDF.[21] These investigations transcend individual perpetrators and put emphasis on the role of government institutions and voices of victims.

In addition, the process will make recommendations aimed at addressing the root causes and outcomes of the conflict, thereby countering inequality in society and also identifying perpetrators and naming them individually. This will allow victims to pursue compensation against those identified through civil suits and will shame and bar such individuals from the position of public trust, thereby promoting justice. In addition, a truth commission would be best placed to recommend reparations for victims of the atrocities and legislative and institutional reform to ensure reconciliation and to prevent reoccurrence of violations.[22]

Since 2009, the TJWG has been undertaking a consultative process aimed at a policy on the operation of traditional justice, truth telling, reparations and reconciliation measures. The TJWG is also in the process of developing a comprehensive National Policy on Transitional Justice.[23] The process that began in 2009 has taken on a very slow

21 C Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Third World Law Journal* 371.

22 The ICD will not award reparations to victims of atrocities and the ICC reparations regime will only come into play if indictees are arrested and tried. Further, only a limited number of victims stand to benefit from the process. In addition, the ICD and ICC for the moment are concentrating on crimes committed by the LRA only, so victims of crimes committed by the UPDF may not receive reparations – a truth and reconciliation commission could deal with these limitations.

23 Interview with Ismene Zarifis, Transitional Justice Advisor of JLOS, conducted on 24 February 2012. The main complaint by civil society groups is that their involvement in the process is very limited and so is the consultation with the local population. This was further discussed during a meeting to ensure greater civil society involvement in the process organised by the African Institute for Strategic Research, Governance and Development hosting representatives from 27 different organisations that took place in Kampala, Uganda, on 26 August 2011.

pace. To date, there is yet to be a concerted effort on the part of the government of Uganda to document, investigate and provide victims with access to relevant information concerning the violations they and others in the region suffered due to the conflict. The Ugandan government is yet to make progress in the pursuit of justice regarding the mass atrocities perpetrated in the LRA conflict and there has hardly been any systematic information, outreach or consultation with victims on any development or planning for reparations mechanisms.[24]

In addition, a truth-telling process is not only the expressed desire of Ugandans, but the government has repeatedly expressed its commitment to accountability and reconciliation. This, together with the ongoing civil society and donor involvement, oversight and dialogue potentially will lead to a credible process.[25] This article, therefore, analyses the appropriate features of legislation of a truth commission that will account for the success of the process. The government of Uganda has not yet come up with a comprehensive document relating to a truth-telling process, but civil society groups drafted a National Reconciliation Bill, 2009 (Working Bill)[26] and JLOs have expressed the intention to use this Working Bill as a basis to commence dialogue on appropriate policy and legislation for a truth-telling process. It is likely that many of its provisions will be retained or modified, taking into account the ongoing consultative process.[27] This article therefore makes reference to the Bill and discusses the appropriate form, structure and composition, powers and functions, jurisdiction, amnesty provisions, relationship with formal prosecutions, and provisions on reparations and reconciliation, while paying close

24 UHRC & UNOHCHR (n 17 above) 61.

25 'Dialogue: The crossroads of amnesty and justice' keynote address by Frederick Ruhindu, State Minister for Justice and Constitutional Affairs and Deputy Attorney-General and closing speech by Hilary Onek, Minister of Internal Affairs (11 November 2011). Various stakeholders, including representatives from JLOS, UN bodies, development partners, key civil society actors and victims groups in Uganda attended this dialogue; the government expressed its commitment to accountability and reconciliation; UN and other civil society groups also expressed their support and commitment to this endeavour. However, there is a persistent complaint from civil society groups in Uganda that their involvement in the transitional justice processes is limited. This, eg, was the main agenda in a meeting organised by the African Institute for Strategic Research, Governance and Development (n 23 above).

26 The Working Bill was prepared by the Department of Peace and Conflict Studies and the Refugee Law Project of Makerere University. It is very much a working document that is continuously being improved. The drafters are aware of the political environment in Uganda that is hostile to a truth-telling process and are making all attempts to ensure that the government of Uganda endorses the Bill and presents it as a government Bill for discussion in parliament. Although great progress was made before the 2011 elections, discussions with the government are still ongoing (telephone discussion with Leandro Komakech of the Refugee Law Project conducted on 23 February 2012). Provisions of the Working Bill are cited in this article with permission of the drafters.

27 Informal discussion with Ismene Zarifis, conducted on 24 February 2012.

attention to the history, the political, social and legal realities in Uganda and lessons learned from other states. The article concludes that, with the right legislation, a political will and commitment, a truth commission could accomplish the desired accountability and reconciliation goals in Uganda.

2 Form, structure and composition

The Working Bill provides for different forums to operate on a national and regional level with support from existing institutions, including the UHRC, local government and traditional justice institutions.[28] The forum is to be composed of 13 members, all Ugandans,[29] with no less than seven women. A member is to be appointed from the existing Amnesty Commission, another from the UHRC, and others from academia, civil society and the four regions of Uganda.[30] A five-member 'selection committee', appointed by parliament, two of whom shall be women, with the composition that reflects a regional balance and comprises of highly-qualified persons of integrity drawn from academia, civil society organisations, faith-based institutions and cultural institutions are responsible for the selection of members.[31] The candidates are to be nominated by the public[32] and members selected by the selection committee are to be approved by parliament.[33]

Criteria for selection are high moral character, proven integrity and impartiality.[34] The process provided for in the Working Bill, if followed,

28 Working Bill part II(B).

29 An earlier draft of the Bill provided for a mixed national and international composition, but this provision was amended in the later draft because members of the public favoured a purely national composition. Guatemala and Sierra Leone both had mixed tribunals which was attributed to their success. Advantages put forward for mixed commissions include the fact that foreign members usually have experience from other countries that the commission can draw from and help enrich the process and that where the credibility of nationals is questioned, the presence of foreign members can to some extent give the public confidence in the process. Prof Henrietta Mensa-Bonsu, a former commissioner in Ghana and Liberia, suggests that if persons with the requisite credentials exist in Uganda, appointing nationals with the support of internationals at the technical level may be the best way to go (interview conducted via e-mail on 28 March 2011). See also Judge Thomas Buergenthal, lecture given on 17 October 2006 at Western Reserve University School of Law, 'Truth commissions: Between impunity and prosecution' transcript of the Frederick K Cox International Law Centre, Lecture in Global Legal Reform.

30 Working Bill part IV(B).

31 Working Bill part IV(A)(1).

32 The Working Bill does not clarify how the public nomination shall be done; this needs to be clearly spelled out to ensure that persons nominated meet the necessary criteria and are also representative of the people.

33 Working Bill part IV(B).

34 Working Bill part IV(C).

will ensure local ownership, credibility and the legitimacy of the members of the forum which is desirable for the success of the process. The drafters of the Working Bill are evidently conscious of Uganda's history – regional and gender marginalisation – and therefore see the need for regional and gender balance to give credibility to the forum. In addition, the forum is to be composed of an amnesty and investigative committee. Members of these committees, other than the Chairperson, need not be members of the forum.[35]

3 Powers and functions

The Working Bill seeks to empower the Truth Commission with powers to hold hearings, take statements, summon witnesses, conduct searches and seize relevant documents, issue warrants, preserve documents, determine eligibility and grant or deny amnesty, conduct investigations, including exhumations and forensic examinations, identify perpetrators and issue a final report and recommendations.[36] This list is inclusive and not exhaustive and gives the Commission all powers reasonable and necessary to carry out its mandate, but these powers can only be exercised if there is a political will not to interfere with the processes and to make the necessary financial, material and technical resources available to the Commission.

The question is: How likely will individuals with state authority and state institutions give room to a commission to exercise its powers and publicly question their conduct, with the looming threat of prosecutions? The Agreement provides for commitment of the parties to accountability,[37] but in respect of crimes by state actors, a proviso excuses them from measures envisaged under it.[38] Will the government of Uganda that expressly seeks to shield its officials from prosecutions by the ICD, be willing to subject those officials and its institutions to another investigative process? Uganda clearly departs from the 'transitional justice' paradigm as there is no regime change, certainly not in the traditional sense. The National Resistance Movement (NRM) government has been in power for the last 25 years and in February 2011 it won elections for another five-year term as Uganda prepares to undertake accountability measures with its apparent blessings and goodwill. Will these blessings, goodwill and co-operation be guaranteed to allow a commission to honestly deal with past abuses and violations to pave the way for reform and accountability? Will the Ugandan government accept that its rule has been tarnished by decades of conflict and that state institutions are in

35 Working Bill parts IV(H) & IV(I).

36 Working Bill part II(C)(1).

37 Agreement cl 2.

38 Agreement cl 4.1.

need of reform? Or will it set its sights on justifying policies, interfering with investigations, hiding complicity and rejecting blame? These are the odds that a truth commission will have to work against.

Co-operation of the state and a political will are crucial for the success of the process, but with the history of investigative processes in Uganda, it is far from guaranteed. For instance, the 1974 inquiry into the disappearance of people, established by President Idi Amin Dada in response to pressure to investigate disappearances effected by the Ugandan military since he came into power in January 1971,[39] did nothing to stop the brutality and human rights violations that characterised Idi Amin's eight-year rule in Uganda.[40] In addition, the 1986 Commission of Inquiry into Violations of Human Rights was created by President Museveni[41] with a mandate to investigate human rights violations by previous regimes from the time Uganda attained independence in 1962 to 1986 when President Museveni took over power in a *coup* did nothing to secure the prosecution of perpetrators. During the inquiry, files, audio and video recordings disappeared and the speculation is that the commissioners or other people working with the Commission of Inquiry had purposely destroyed evidence that would implicate them or their friends and family in heinous crimes. In addition, the Ugandan government did not allow any investigations into its actions during the 'bush war' that led to the *coup* in 1986, a clear indication that it is unable or perhaps unwilling to tolerate attempts to unearth violations that could implicate it.[42]

4 Period of operation

The Working Bill proposes a three-month preparation period upon establishment within which to facilitate activities necessary for the commencement of the core activities of the Commission.[43] These activities include determining operation guidelines and procedures,

39 Commission of Inquiry into Disappearance of People in Uganda since 25 January 1971, Legal Notice 2 of 1974 Cap 56 Laws of Uganda (Legal Notice 2, 1974); posted by USIP Library, available at Truth Commissions Digital Collection, Truth Commission in Uganda http://www.usip.org/publicatios/truth-commission-uganda-74 (accessed 2 November 2010).

40 PB Hayner 'Fifteen truth commissions – 1974 to 1994: A comparative study' (1994) 16 *Human Rights Quarterly* 612; R Carver 'Called to account: How African governments investigate human rights violations' (1990) 89 *African Affairs* 399 states that the Commission was successful in view of the practical difficulties it faced and highly unfavourable political climate under which it operated.

41 Legal Notice Creating the Commission of Inquiry into Violations of Human Rights, Commission of Inquiry Act, Legal Notice 5 (16 May 1986) Cap 56 Laws of Uganda (Legal Notice 5, 1986).

42 JR Quinn 'Constraints: The undoing of the Ugandan Truth Commission' (2004) 26 *Human Rights Quarterly* 413.

43 Working Bill part II(D).

the recruitment and training of staff, designing a witness protection mechanism, designing work schedules, work plans and a code of conduct,[44] and designing an outreach programme that will be necessary to ensure, local ownership and participation. Considering the duration and level of atrocities, the state of the roads, media and other infrastructure that it will rely on for its activities, three months is a short time for members to come up with credible, comprehensive, integrated and visible programmes and procedures. Sufficient preparation time should therefore be accorded to a commission in the founding legislation.

The Working Bill, in addition, proposes that after commencing with the preparation period, the Commission shall have five years within which to receive matters and will conclude all pending matters within six months of the end of the five-year filing period. It shall have one year beyond the end of the filling period to write and publicise its reports to Ugandans.[45] Provisions are made for the extension of time for an additional three months at a time by resolution of parliament.[46] This time limitation is sufficient and may well contribute to the success of the institution. A weakness of the Commission of Inquiry was that, although it was thought that its work would be completed within a period of three years, the Commission only tabled its final report eight years after it began its operations.[47] By that time public interest in its work had waned.[48] A clear articulation of the operation period is therefore very important.

5 Temporal jurisdiction

The Working Bill proposes the temporal jurisdiction of the Commission to be from 1962 when Uganda attained independence to the date of assent of the new legislation.[49] This is in line with the general opinion among the victim groups in Uganda,[50] but raises a few issues of practical concern. For instance, how will the Commission be able to finish its work in a timely manner if it has to sift through evidence of almost 50 years? One main reason cited for the failure of the 1986

44 As above.

45 Working Bill part II(D).

46 Working Bill part II(E).

47 The operation period was not spelled out in the legal notice creating the Commission, which was a weakness, but other reasons advanced for this duration is a lack of adequate financial and material investment by the Ugandan government. Therefore, the work of the Commission came to a standstill every few months; see JR Quinn 'The politics of acknowledgement: An analysis of Uganda's Truth Commission' (2003) 19 *York Centre for International and Security Studies* 22.

48 Quinn (n 42 above) 409.

49 Working Bill part III(A).

50 UHRC & UNOHCHR (n 17 above) 61.

Commission of Inquiry into Violations of Human Rights was its attempts to unveil 25 years of atrocities, under different regimes, with different groups of perpetrators and victims. In addition, what 'truth' can a new truth commission reasonably uncover that the 1986 Commission of Inquiry failed to unearth during its eight years of existence?[51] There is also the additional worry that digging up the past through such a comprehensive process would only serve to inflame the situation by rehashing old quarrels and reopening wounds.[52] A lot of people have the desire to move on and not to be dragged back to the past again and again, especially considering that nothing much came out of the Commission of Inquiry.[53]

Valid as these issues may be, victim groups in Uganda have stressed the need to have an inquiry into the conditions that led to the rise of the NRM government to power and violations by its troops.[54] Furthermore, there may be people or new evidence that were not available during the 1974 and 1986 investigative processes and which should be heard now. As well, there remains a need to comprehensively question and understand the root cause of conflicts in Uganda since independence for the Ugandan society to defeat the deep-rooted division that has paralysed the nation since independence.[55] To achieve this, credible, national investigations into the events, even prior to independence,

51 Quinn (n 47 above) 20-21, stating that during the operation of the 1986 Commission, thousands of people filled in questionnaires with regard to their recollection of events that had occurred in the past, many of which were then investigated in the field. At least 608 witnesses appeared before the Commission and the commissioners travelled to virtually every region of the country holding hearings and collecting testimonies. These testimonies are bound into 18 enormous volumes that are available at the Uganda Human Rights Commission's offices. The final report, 720 pages long, contains testimony, analyses and recommendations, along with a list of names of those subjected to torture and abuse. What are the chances that these people will want to go through such a comprehensive process again, since nothing much came out of the 1986 inquiry? In addition, the information collected is still available for reference for a new commission in Uganda.

52 Interview with Frank Onapito Ekomoliot, conducted on 14 January 2011 in Kampala, Uganda. This sentiment has been echoed by a number of Ugandans who do not clearly understand the difference a new truth commission will make in regard to 'truth' of what happened in the past – some have even suggested that going far back may derail the matter at hand – the abuses and violations perpetrated in the LRA conflicts with wounds still visible and suffering ongoing.

53 Quinn (n 42 above) 412; JR Quinn 'Dealing with a legacy of mass atrocity: Truth commissions in Uganda and Chile' (2001) 23 *Netherlands Quarterly of Human Rights* 391.

54 UHCR & UNOHCR (n 17 above) 65.

55 Quinn (n 47 above) 22.

must be done.[56] The establishment of another committee, the 'historical clarification committee' with the sole responsibility of creating an independent and objective historical record, is necessary. This committee would examine the underlying causes, nature, extent and manifestations of all conflicts in Uganda, the nature, causes, extent and manifestations of the north-south divide and violations and abuses, identifying perpetrators by name and recommending prosecutions and reforms in state institutions as necessary.[57] Evidence collected and recommendations by the Commission of Inquiry into Violations of Human Rights could inform the committee that could adopt or modify them as necessary.

6 Subject matter jurisdiction

The Working Bill broadly defines subject matter jurisdiction to include considering and analysing any matter relevant to violent conflict and to widespread or systematic violations or abuses of human rights, making recommendations on the appropriate mechanisms of reconciliation and reparations and initiating legal, institutional and other reforms.[58] The Working Bill, in the same part, spells out the manner in which a new commission may carry out its functions,[59] but its scope, subject matter and operations are largely undetermined. Pertinent issues, such as witness protection programmes and their relationship with existing commissions, are left for members of this forum to determine. As so often happens in the establishment of investigative commissions, this sweeping mandate may prove difficult to manage[60] and therefore needs revision.[61]

---

56 The necessity of a historical analysis is recognised in cl 3.2 of the Agreement on Accountability and Reconciliation. In addition, the Refugee Law Project has embarked on a country-wide national reconciliation and transitional justice audit to document all major conflicts and their legacies in Uganda, alluding to the need for a national reconciliation process in the country. For more on the audit, see http://www.beyondjuba.org/NRTJA/index.php (accessed 17 August 2012).

57 Agreement on Accountability and Reconciliation cl 3.2 recognises the need for historical analysis and clarification. Uganda's history since independence has largely been dominated by coups and other insurgencies, all characterised by gross human rights violations and abuse; the LRA conflict is the longest running one. Several other insurgencies cropped up since 1986 when President Museveni took over power and, according to him, in the 2011 presidential campaigns, the NRM quelled 32 insurgencies, many of which Ugandans do not seem to know about.

58 Working Bill part III.

59 As above.

60 Quinn (n 47 above) 7, referring to C Tomuschatt 'Clarification Commission in Guatemala' (2000) 23 *Human Rights Quarterly* 239-240.

61 Quinn (n 47 above) 5 states that one critical reason for the failure of the 1986 Commission was its very broad and vague mandate.

The only reference in the Working Bill to women and children is that 'particular attention to should be given to their experiences'.[62] Founding legislation should go further than that in clarity as the LRA conflict involved the large-scale use of children as soldiers, sex slaves, porters and domestic workers. In addition, atrocities committed by both parties to the conflict, like abductions, sexual violence, massive population displacement, disruption of education and health services, affected mostly children and men and women were affected differently. The investigative process must therefore give great emphasis to the experiences of women and children and the impact of the multiple levels of violations on them both as direct and indirect victims of the conflict.

The founding legislation must clearly spell out gender and children's rights issues, to examine their experiences in detail and also to ensure their participation and protection.[63] For example, the Liberian Truth and Reconciliation Act[64] goes furthest to set the stage for a concerted effort both to focus on the impact of the conflict on children and women and to involve children in its activities.[65] In its mandate, the Act provides for specific mechanisms and procedures to address the experiences of women, children and other vulnerable groups. It urges the commissioners to pay particular attention to gender-based violations and issues of child soldiers.[66]

The Act further provides that the Commission should take into account the security and other interests of women, children and other vulnerable groups and should design a witness protection programme on a case-by-case basis, and include special programmes for the group.[67] The Act further mandates the Commission to employ specialists in children's and women's rights and to ensure that special measures are employed that will enable them to provide testimony, while at the same time protecting their safety and not endangering or delaying their social reintegration or psychological recovery.[68] The clear articulation of children and women's important role in the mandate, operation, outcomes and the call for policies, procedures and operational concerns to secure their safe involvement in its work were significant achievements of the Liberian Truth Commission as they raised new challenges and responsibilities requiring human and

62 Working Bill part III(B)(1)(a).

63 UHRC & UNOHCHR (n 17 above) XVI-XXVII states that it is the desire of the victims that vulnerable groups, especially women and children, participate and that they are adequately protected.

64 An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, enacted by the National Transitional Legislative Assembly on 12 May 2005.

65 Liberia TRC Act art IV(4), VI(24) & VII(26)(n) & (o).

66 Liberia TRC Act art IV(4)(e).

67 Liberia TRC Act art IV(26)(n).

68 Liberia TRC Act art IV(26)(o).

financial resources, as well as a sustained commitment to give primary consideration to the safety and participation of children and women.[69]

7 Amnesty provisions

The Working Bill seeks to create an Amnesty Committee with powers to consider applications for the granting of amnesty.[70] Like in South Africa, the Amnesty Committee is empowered to grant amnesty in respect of those acts, omissions or offences for which the applicant has made full disclosure.[71] The Committee will, however, have no jurisdiction to admit for hearing and grant amnesty to persons who may have committed international crimes until such a time when the Director of Public Prosecutions advises that it will not prosecute such a person.[72]

Previously, the Amnesty Act of 2000 granted blanket immunity to all persons who renounced armed rebellion against the government of Uganda. This provision raised serious and complex questions in regard to accountability in conflict and post-conflict situations and, on 23 May 2012, the Minister of Internal Affairs declared the lapse of operation of Part II of the Amnesty Act.[73] Part II of the Amnesty Act regulated the provisions of the law relating to the granting of amnesty as well as the procedures for the granting of amnesty in accordance with section 2 of the Act. The declaration of a lapse therefore means that amnesty has ceased in Uganda and from 25 May 2012, when the lapse took effect, any person engaged in war or armed rebellion shall be investigated, prosecuted and punished for any crime committed in the course of the war if found guilty. On the other hand, persons already issued with amnesty certificates when the law operated shall not be subject to prosecution or any form of punishment for conduct during the war.[74] Therefore, there is a need for an immediate and comprehensive information campaign, especially targeting former combatants, so that people are assured that those that have already been awarded amnesty will not lose their certificates.

---

69 T Sowa 'Children and the Liberian Truth and Reconciliation Commission' in S Pamar *et al* (eds) *Children and transitional justice: Truth telling, accountability and reconciliation* (2010) 198.

70 Working Bill parts IV(H) & V(B).

71 Working Bill part V(B)(b).

72 Working Bill part V(A)(1).

73 Effected under Statutory Instrument 34 of 2012, signed and gazetted on 1 June 2012. This was by virtue of sec 16(3) of the Amnesty Amendment Act of 2006 that provides that the Minister may by statutory instrument declare the lapse of the operation of Part II of the Act.

74 Such persons are protected under the Constitution of Uganda that in art 28(5)(f) provides that no person shall be tried for a criminal offence if that person shows that he or she has been pardoned in respect of that offence.

In addition, the Minister extended the expiry period of Parts I, III, and IV of the Amnesty Act for a period of 12 months.[75] Part III of the Act, among other provisions, establishes the Amnesty Commission, a demobilisation and resettlement team, and elaborates its functions. The extension of this Part means that the Amnesty Commission will continue with its duties of demobilisation, reintegration, resettlement of reporters, and sensitisation of the public on the Amnesty Law and promote appropriate reconciliation mechanisms to affected communities. The Amnesty Commission and the demobilisation and resettlement team must complete these activities within the one year of the extension period.[76]

The Director of Public Prosecutions has indicated that his office will only seek prosecution of those responsible for international crimes and other gross violations of human rights and that preference would be to help those who were forcibly conscripted to reintegrate into their communities.[77] Therefore, there is an urgent need for an information campaign to assuage the fear in communities. In addition, although the reporters no longer receive amnesty certificates, they need to be informed that they will still get assistance for Disarmament, Demobilisation and Reintegration from the Amnesty Commission.

Amnesty was always perceived as a vital tool in conflict resolution and in longer-term reconciliation and peace within the specific context of Northern Uganda as it resonates with specific cultural understanding of justice.[78] In addition, due to the collective victimisation of children and other civilians by the LRA, who were forcibly trained to become soldiers and forced to commit crimes, many of them designed to alienate them from their communities, amnesty still has a vital role to play in their reintegration.[79] Therefore, an amnesty process that excludes certain crimes considered especially serious from the award of amnesty and adopts conditional amnesties which exempt lower-level perpetrators from prosecution if one applies for amnesty and satisfies certain conditions, such as acknowledgment of harm done, seeking an apology, full disclosure of the facts about the violations committed, and the willingness to co-operate with truth-telling procedures aimed

75 Effected under Statutory Instrument 35 of 2012, signed and gazetted on 1 June 2012. This was done by virtue of sec 16(2) of the Amnesty Amendment Act of 2006.

76 Interview with Judge Onega, Chairperson of the Amnesty Commission, conducted on 11 July 2012 in Kampala, Uganda.

77 Interview with Joan Kagezi, conducted on 15 June 2012 in Kampala, Uganda.

78 L Hovil & Z Lomo 'Whose justice? Perceptions of Uganda's Amnesty Act 2002: The potential for conflict resolution and long-term reconciliation' (2005) 15 *Refugee Law Project Working Paper* 15.

79 This has been extensively documented. See, eg, Human Rights Watch 'Stolen children: Abduction and recruitment in Northern Uganda' http://hrw.org/reports/2003/uganda0303 (accessed 14 February 2009); Human Rights Watch *Abducted and abused: Renewed conflict in Northern Uganda* (2003) 15 (12A) 14-28.

to promote reconciliation, resonates with the aspirations of Ugandans and aims of accountability.[80]

8 Relationship with formal prosecutions

Uganda is considering prosecutions and a truth-telling process as complementary measures and their work will no doubt overlap as they have similar objectives. The co-existence in Sierra Leone of the TRC and Special Court for Sierra Leone (SCSL) is especially instructive for Uganda and demonstrates some tensions and the feasibility of the co-existence of these institutions.[81] The SCSL was mandated to prosecute persons who bear the greatest responsibility for international crimes and crimes under domestic law committed in the territory of Sierra Leone since 30 November 1996,[82] while the TRC was mandated to look into human rights violations from 23 March 1991, when the conflict in Sierra Leone began, to the signing of the Lomé Peace Agreement on 7 July 1999.[83] These two institutions never came to a formal agreement on how they would co-operate; instead they exercised respectful relations with each other.[84] According to Schabas, one of the commissioners of the TRC, concerns about overlapping mandates and jurisdictions did not actually play out in any significant way as the day-to-day work of the TRC and the Court shared little common ground.[85]

Schabas argues that, although many Sierra Leoneans did not appreciate the distinction between the TRC and the SCSL, what was significant was that the people understood that the institutions were working towards accountability for the atrocities suffered during the war and suggests that the failure of people to grasp the distinctions between the two institutions did not represent a significant problem.[86] This could have been because, while the SCSL prosecutor began to issue indictments in March 2003, actual trials only began in June 2004, at which point the TRC's work was nearly complete.[87] This

80 Joint Leadership and Steering Committee 'Presentation by Hon Justice Gidudu, Chair Transitional Working Group' (18 May 2012) http://www.jlos.go.ug/page.php? (accessed 10 July 2012).

81 WA Schabas 'Truth commissions and courts working in parallel: The Sierra Leone experience' (2004) 98 *American Society of International Law* 198.

82 Art 1(1) Statute of the Special Court for Sierra Leone.

83 Art 2 Truth and Reconciliation Act of Sierra Leone.

84 WA Schabas 'A synergistic relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' in WA Schabas & S Darcy (eds) *Truth commissions and courts: The tension between criminal justice and the search for truths* (2004) 191.

85 WA Schabas 'The relationship between truth commissions and international courts: The case of Sierra Leone' (2003) 25 *Human Rights Quarterly* 1035.

86 As above.

87 Schabas (n 81 above) 190.

certainly will not be the case in Uganda where the ICC has already issued indictments and the ICD has begun operations while a truth process is still only an idea.[88] It is therefore very important that during the consultation process, the stakeholders must ensure that Ugandans understand and that there is no confusion about the different roles and functions, including the purpose of investigations, hearings and statements taken by the different institutions and consequences as relating to each.

Another area of concern is sharing information that potentially will deter perpetrators and witnesses from giving testimony before a truth commission out of fear that such information will be used to prosecute them or others and that they may be required to give evidence in court. The Working Bill provides that the forum shall have the discretion to grant use immunity from prosecutions so that testimony given before it cannot be used in subsequent criminal proceedings as evidence, although a proviso states that the Director of Public Prosecutions may use such statements to develop leads or background for its cases.[89] In Sierra Leone, the TRC publicly stated that it would not share confidential information with the SCSL, and the SCSL prosecutor stated that the Court would not use evidence presented by the TRC.[90]

There is disagreement among commentators on the impact of this. While Schabas argues that the willingness of perpetrators to participate in truth-telling processes has little to do with the threat of criminal trials or the promise of amnesty,[91] Kelsall argues that the presence and work of the SCSL were factors deterring witnesses from giving testimony before the TRC.[92] A truth commission should not withhold information critical to prosecutions in the performance of its functions, but it should make use of its discretion not to divulge information that could for instance be obtained by a court from another source to allow the institutions to function autonomously without being affected by each other's operations.[93]

Another related issue is whether persons being prosecuted could give testimony to a truth commission. The Working Bill does not restrict

88 The Constitutional Court of Uganda ordered the ICD to cease the first trial of its first case and the ICC indictees are at large.

89 Working Bill part V(D)(8).

90 A Tejan-Cole 'The complementary and conflicting relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission' (2002) 5 *Yearbook of International Humanitarian Law* 326.

91 Schabas (n 84 above) 192.

92 T Kelsall 'Truth, lies, ritual: Preliminary reflections on the Truth and Reconciliation Commission in Sierra Leone' (2005) 27 *Human Rights Quarterly* 361 381.

93 M Wierda *et al* 'Exploring the relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone' (2002) *The International Centre for Transitional Justice* 3; Rules of Procedure and Evidence of the International Criminal Court for the Former Yugoslavia, rule 54*bis*.

members from taking testimony from anybody[94] and that should extend to persons indicted both nationally and internationally to give the TRC room to fulfil its mandate of creating an impartial historical record.[95] In Sierra Leone, several detainees of the SCSL, including Sam Hinga Norman of the Civil Defence Forces (CDF), Augustine Gbao and Issa Sesay of the Revolutionary United Front (RUF), approached the TRC about giving public testimony. This request provoked the only public tension between the institutions. While the TRC intended to receive testimony from the detainees, the SCSL prosecutor opposed public testimony. The matter was brought for determination before a trial chamber of the SCSL by detainee Sam Hinga Norman and the TRC. The trial judge refused the request to conduct a public hearing of the detainee in the interests of justice and to retain the integrity of proceedings of the Court. The Judge was careful to point out that the TRC Act allowed the TRC to receive testimony from victims, witnesses and perpetrators and that none of the categories properly defined an accused.[96]

On appeal, a common ground allowing the accused to give private rather than public testimony to the TRC was reached.[97] This matter must be considered carefully in the founding legislation of a truth commission in Uganda to avoid such collision and, to deal with potential issues of conflict and rivalry during operations, regular meetings between liaison staff of the different institutions should be encouraged to ensure smooth operations.[98] Negative perceptions can be ironed out by a robust outreach programme categorically stating the different functions and autonomous role of the processes, the purpose of evidence collected and a clear spell of confidentiality guarantees. The success of the institutions, above all, will depend on the high calibre of officials and staff and their ability to deal wisely with challenges that will inevitably arise.[99]

94 Working Bill part III(A)(1) extends the jurisdiction of the truth process to all nationals and all atrocities committed within the geographical limits of Uganda.

95 Wierda *et al* (n 93 above) 3-4.

96 *Prosecutor v Sam Hinga Norma*n Case (SCSL.2003.08.PT), Decision on Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Sam Hinga Norman JP (29 October 2003) para 3.

97 *Prosecutor v Sam Hinga Norman* Case (SCSL.2003.08.PT) Decision on Appeal by the Truth and Reconciliation Commission (TRC) of Sierra Leone and Sam Hinga Norman JP Against the Decision of His Lordship Mr Bankole Thompson delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing with Sam Hinga Norman JP (28 November 2003) para 47.

98 Wierda *et al* (n 93 above) 19.

99 As above.

9 Reparations

Reparations are defined in the Working Bill as any remedy or any form of compensation, symbolic or *ex gratia* payment, restitution, rehabilitation or recognition, reconciliation, satisfaction or guarantee of non-repetition made in respect to victims,[100] in effect encompassing the definition as enumerated in the Van Boven Principles.[101] The Commission is tasked with making recommendations to the Ugandan government and other actors with regard to the most appropriate modalities for implementing a regime of reparations and rehabilitation, taking into account the needs of victims and perpetrators.[102]

The government of Uganda has made some timid effort towards compensation, specifically through the Acholi War Debt Claimants Association, a victim lobby group, created in 2005, advocating for comprehensive compensation for the loss of human life, livestock and other property destroyed during the war. This body and the Ugandan government reached an out-of-court settlement, where the government agreed to pay 38 trillion shillings for property lost during the war due to government action. So far, the government has only paid 2,1 billion.[103] There is a further and huge need for a coherent reparations plan for the millions of victims of the LRA conflict that could be implemented through a truth commission.[104]

Harm that victim groups feel they must be compensated for includes murder; torture; sexual violence on both men and women; forced displacement; abductions and forced recruitment; pillage; slavery; and forced marriage, committed by both the LRA and the UPDF, and land expropriated by the Ugandan government.[105] There is an overwhelming conviction among victim groups that the government should be the main entity responsible for awarding reparation, although some people feel that compensation should also be recovered from the LRA leadership.[106] There is a further conviction that the international community should maintain oversight in the

100 Working Bill part I(B)(18).

101 The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005).

102 Working Bill part III (B)(13).

103 See http://savenorthernuganda.org/about_us.html (assessed 1 March 2012); several victims are dissatisfied with this compensation that has been limited to cattle lost during the war. The victims state that while they lost hundreds of herds, they have been compensated for the loss of one or two cattle.

104 'Government compensation to Acholi war claimants not enough' *Daily Monitor* 23 November 2011.

105 UHRC & UNOHCHR (n 17 above) 29-53 provides detailed accounts of the crimes that victim groups in Uganda feel that they must receive a remedy for.

106 There is no evidence to suggest that the LRA leadership has property and money stashed somewhere to enable it to pay reparations.

process.[107] The Working Bill, however, does not clearly state the government's reparation responsibility, other sources for funds or guidelines on how to go about securing funds.

The founding legislation must clearly define the duties on the state to make reparations and the possibility for victims to seek reparations from the perpetrators.[108] The legislation should include a clause requiring reparations to be financed through the state budget, a model used in Argentina, Brazil and Chile, which has been effective in procuring the necessary financial resources for reparations.[109] There is a further need to make provision for urgent interim reparations in cases where victims are unable to wait for the final outcome and recommendation of a truth commission.[110] The budget line for reparations should be permanently established to respond to reparation needs that may arise in future. The founding legislation should further require the government to raise additional and separate funds from external donors, well-wishers and other development partners to support its efforts. Any such support from externals should be treated as a separate fund and not replace the government's contribution. The fund should be channelled through the national body responsible for implementing reparations.[111]

Unfortunately reparations are often perceived to be a luxury that only affluent states can afford, therefore governments limit their responsibility. For instance, in South Africa, although the Reparations and Rehabilitation Committee (RRC) noted that reconciliation was not possible without reparation, it was not as visible as the amnesty and reconciliation committees and did not have an independent budget, except for a small amount used as urgent interim measures like medical attention for those who testified at hearings.[112] In the performance of its role, the RRC was criticised for not being adequately inclusive and participatory since only those willing to give testimony were

107 UHRC & UNOHCHR (n 17 above) 15.

108 The set of Principles for Protection and Promotion of Human Rights Intended to Strengthen Action to Combat impunity UN Sub-Commission for Prevention of Discrimination and Protection of Minorities (29 June 1996) (Joinet Principles) principle 31.

109 I Cano & PS Ferreira 'The reparations in Brazil' in P de Greiff (ed) *A handbook on reparations* (2006) 102; E Lira 'The reparations policy for human rights violations in Chile' in P de Greiff (ed) *A handbook on reparations* (2006) 55; MJ Guembe 'Economic reparations for grave human rights violations: The Argentinean experience' in De Greiff (above) 21.

110 See eg South Africa Policy Framework for Urgent Interim Reparation Measures 1995.

111 Uganda Victims' Foundation c/o Africa Youth Initiative Network 'Statement on the Need for Reparations and Guiding Principles for Victims of Crimes Perpetrated in Uganda' (6 May 2011) 5.

112 CJ Colvin 'Overview of the reparations programme in South Africa' in De Grieff (n 109 above) 176.

entitled to compensation.[113] Whilst the range of reparations proposed by the RRC was comprehensive, financial compensation was fairly conservative[114] and there was no requirement for reparations from perpetrators.[115] The RRC recommendations exist in varying degrees of implementation and community reparations, and have not been fully developed as the government insists that victims should avail themselves with the existing government services.[116]

In Colombia, by law, the government created a victim's reparation fund to consist of all illegal goods and properties from the demobilised individuals subjected to the law, augmented by international and public funds within the limits authorised by the national budget.[117] Colombia's plan relied on judicial determinations for individual, collective or symbolic reparations, putting the burden of seeking reparations on victims who had to present claims before courts and could only receive reparations after establishing responsibility for and circumstances surrounding the human rights abuse.[118]

Meanwhile, in Peru, the TRC proposed detailed reparation measures for different types of abuses, including the restitution of rights for political detainees and economic benefits for the disabled, the families of those who had disappeared, and victims of rape. The President took the necessary steps and asked for forgiveness in the name of the state from all victims, but rejected calls for individual compensation, citing Peru's scarce resources.[119] These examples show that there is a need for governments to appreciate that reparations are a necessity, a matter of legal obligation, and therefore a priority, and

113 B Goldblatt 'Gender and reparations in South Africa' International Centre for Transitional Justice and International Development Research Centre http://www.ictj.org/static/Africa/SAfrica/ SouthAfricaExecsSum.pdf (accessed 15 November 2010).

114 MR Amstutz *The healing of nations: The promise and limits of political forgiveness* (2005) 196-197. The RRC principle recommendation was that the government should grant all victims monetary reparations and recommended equal financial compensation to all qualified victims regardless of need or level of suffering of US $20 000 over the next six years. In April 2003, the government promised instead to pay US $3 900 to each of the victims' families. Considering that this amount was intended to serve not just as compensation, but also to contribute to a better quality of life for survivors, it is a very conservative sum which is yet to be paid.

115 LS Graybill *Truth and reconciliation in South Africa: Miracle or model?* (2002) 6-8.

116 Goldblatt (n 113 above).

117 LJ Laplante & K Theidon 'Transitional justice in times of conflict: Colombia's Ley de Justicia Y Paz' (2007) *University of Michigan Law School* 95, referring to arts 10, 11, 54, 55.1 & 56 of Justice and Peace Law of Columbia, 975 of 22 July 2005.

118 Laplante & Theidon (n 117 above), referring to art 8 of Justice and Peace Law of Columbia, 975 of 22 July 2005.

119 The International Centre for Transitional Justice and the International Development Research Centre 'Repairing the past: Reparations and transitions to democracy, perspectives from policy, practice and academia' Symposium Summary (Ottawa Canada) 11-12 March 2004 http://www.ier.ma/IMG/pdf/REPARATIONsymposium_report_.pdf (accessed 15 November 2010).

to resist the temptation to substitute normal development measures for reparations to preserve the integrity of the link between violations and obligations.[120]

The examples highlighted only scratch the surface of the problem and clearly show that establishing a successful reparations programme is not easy and requires a great deal of commitment from governments.

In addition, provisions on reparations should be informed and sensitive on gender needs to facilitate the effective and meaningful participation of females. Females are more disadvantaged within societies before, during and after the war and for socio-economic, physical and psychological reasons, they experience violations and outcomes differently.[121] The effects and outcomes of particular violations affect them adversely and differently from males and some forms of violence specifically target them.[122] Therefore, a reparation programme should consider this and address the disproportionate effects of the crimes and violations on women and girls, their families and their communities.[123]

The Nairobi Declaration that comprehensively provides for a gender-just understanding of the right to a remedy and reparations should be used as the guiding document on any reparation policy in Uganda. In addition, due to stigma, victims of sexual crimes, both male and female, are usually reluctant to come forward to claim reparations. The founding legislation should therefore include measures to enable them to come forward even after a formally-prescribed period has expired.[124] In addition, trained specialists should be made available

120 n 119 above; stating that in Peru, President Toledo proposed a Peace and Development Plan worth US $ 820 million to support reconstruction in the areas most affected by the conflict. This fund is not specifically linked to the actual abuse suffered, therefore its reparatory effect may be extremely limited.

121 R Bubio-Marín 'Introduction: A gender and reparations taxonomy' in R Rubio-Marín (ed) *The gender of reparations: Unsettling sexual hierarchies while redressing human rights violations* (2009) 2-3.

122 Several international instruments recognise and reflect in their provisions how violence and other abuses affect girls and women adversely and differently from males, eg CRC and the two Optional Protocols on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution and Child Pornography; the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children that Uganda is a party to. In addition, several policy outcomes of intergovernmental processes have reached consensus on this issue, eg, the Beijing Platform for Action (1995); the Outcome of the Twenty-Third Session of the General Assembly (2000); The International Conference on Population and Development (1994); the World Summit for Children (1990); the Millennium Declaration (2000) that led to the Millennium Development Goals (2005); as well as the various Security Council Resolutions such as Resolution 1325 on Women Peace and Security; Resolutions 1261, 1314, 1379, 1539 & 1612 on Children and Armed Conflict.

123 Preamble Nairobi Declaration on Women's and Girls' Rights to Remedy and Reparations 22 May 2007 (Nairobi Declaration).

124 Cl 3(g) Nairobi Declaration.

to victims of sexual violence to help with administrative procedures necessary to obtain reparations.[125]

Most importantly, the reparations programme should provide an indication to victims and others that the government takes human rights violations and abuses seriously and that the government is determined to contribute to the quality of life of victims. To the extent that reparations programmes may become part of a political agenda that enjoys broad and deep support, they might even have a positive impact not just on social trust between citizens and the institutions of the state, but also among citizens.[126] If integrated and implemented within a comprehensive accountability process, reparations might provide beneficiaries with a reason to think that the institutions of the state take their well-being seriously, that they are trustworthy. This in turn will create an environment conducive for reintegration and reconciliation.

10 Reintegration and reconciliation

As the title of the proposed Bill suggests, one of the aims of the Truth Commission is to ensure reconciliation in Uganda.[127] Broadly speaking, the mandate of the forum is to promote national peace, unity and reconciliation.[128] The Working Bill comprehensively provides for how reconciliation will be promoted to include designing reconciliation initiatives, conducting symbolic reconciliation activities in collaboration with relevant institutions and facilitating inter-communal reconciliation initiatives.[129] However, challenges to reintegration as communities in Northern Uganda move back to the homes of origin are already immense. In 2008 the government issued Camp Phase-Out Guidelines, which included plans for the gradual demolition of abandoned huts as internally-displaced persons (IDPs) moved to decongestion camps. The camp phase-out plans focused exclusively on return without other options for those who were forced to or those who chose to stay in the camps. The majority of those forced to stay are the most vulnerable groups, including orphaned children who do not know their original homes, children heading households and could not build huts in their original homes and the

125 UHRC & UNOHCHR (n 17 above) 28.

126 Office of the United Nations High Commissioner for Human Rights 'Rule of law tools for post-conflict states: Reparations programmes' (2008) 30-31.

127 The proposed Bill is titled the National Reconciliation Bill 2009.

128 Working Bill part III(B).

129 Working Bill part III(B)(14).

elderly.[130] In 2009 the government phased out camps, basic services were discontinued, ensuring *de facto* return. Those who could not leave were left to negotiate a way forward with landowners, with no involvement of government.[131]

According to aid workers and local government officials, the majority of the population in Northern Uganda have returned to their original homesteads, while others have settled in originally-unoccupied land,[132] but there are still many scattered groups of vulnerable people, especially children and the old in the camps who live at the mercy of the landowners. Yet, many youths find the transition from life in the camps to life in villages challenging as the majority lack any agricultural skills, which is the main way of life in the villages. This has led to an increase in the number of street children in the larger towns and an increase in the number of robberies, alcohol and drug abuse in the region, a severe impediment to reintegration.[133]

As a measure to ensure return and reintegration after decades of displacement and insecurity, the government and its development partners developed the Peace Recovery and Development Plan (PRDP) and Northern Uganda Social Action Fund (NUSAF) as part of the framework for rebuilding the affected areas, ensuring reintegration of the displaced, former abductees, and returned rebels. The first phase of the PRDP was completed, but the government extended the implementation to cover 40 districts instead of the original 14 districts affected by the conflict. This was done without any increase in funding and significantly reduced the intended impact of the PRDP in the affected districts.[134] In addition, the PRDP and NUSAF and other programmes of the developmental partners have emphasised the construction of schools and health centres without the necessary equipment and personnel to keep them running. As a result, a number

130 According to the Durable Solutions Officer of the Norwegian Refugee Council (NRC); NRC and other NGOs stepped in to construct houses for some of the vulnerable children who knew their original homes, but those who did not have land were left out of this programme.

131 Interview with NRC officials that specifically handled camp management in Northern Uganda.

132 Land has become a major source of conflict in Northern Uganda; several people have lost claims to clan land that has been taken by the more powerful families and the government; its officials, including officials with security organs, are cited as the major land grabbers in the region.

133 Interview with local government officials and staff of civil society organisations, including Save the Children in Uganda, the Norwegian Refugee Council and CARITAS, conducted in Gulu from 19 to 25 October 2011.

134 Interview with officials working with the NRC; Save the Children in Uganda and local government officials in the Gulu district.

of newly-built schools and health centres lie dormant. This creates a further negative impact on the rebuilding and reintegration process.[135]

Several children have lost parents during the conflict and have assumed adult roles of heading households and caring for younger siblings – often these children drop out of school to undertake this role. Traditionally, the extended family would step in to take care of such children but, due to poverty, families are no longer willing or able to do so, yet, some children lost their extended family in the conflict. There is hardly any data on the number of child-headed households in Northern Uganda, but according to local government officials there could be thousands.[136] These children face a number of difficulties, often in securing physical safety, shelter, food, health and education for themselves and their siblings.[137]

Although several of the government officials and aid workers interviewed state that stigma has reduced, the formerly-abducted and returned rebels say they are subject to stigma and ridicule and several are alienated from their families. Families of victims expose many formerly-abducted children to potential dangers such as revenge and stigma that keep them away from school and the villages of their birth; instead, they seek life on the street.[138] A great number of street children in Gulu are formerly-abducted children. According to an official with World Vision, 'several of the children are traumatised and have behavioural problems including habitual recourse to violence which they use as a survival strategy. This makes it difficult for them to reintegrate into normal life.'[139] As evidence of this, 'at least 70 per cent of juvenile offenders in Gulu prison are formerly-abducted children facing charges of rape, defilement, assault, theft and different degrees of robberies'.[140]

Formerly-abducted girls face a more precarious situation; many were subjected to forced marriages and have had children as a result. These girls or women and their children usually have nowhere to go. Going back to their families is not always an acceptable option since, according to the patrilineal nature of societies in Northern Uganda,

135 This information was consistent among all interviewees. However, there seems to be no data showing the actual number of child-headed households in Northern Uganda.

136 Discussion with the probation and welfare officer in the Pader district conducted on 22 October 2011.

137 John Bosco Oryema, a 15 year-old boy living in the former camp in Acholi Bur with his four siblings, gave this information.

138 A great number of street children in Gulu are former abductees and they cite stigma, ridicule and alienation from families as the reason why they left their villages.

139 Interview with an official at the World Vision Reception Centre in Gulu, conducted on 21 October 2011. The officer added that there were no reported cases of former abductees or rebels that had been killed.

140 Information from the probation and social welfare officer in the Gulu district.

children belong to their fathers. A culturally-appropriate place for female returnees with children is to resettle in the communities of the father of their children, but several of these men are still active within the LRA. These women may be unaware where these men's villages are and, where they know, they may not be recognised as 'wives' or their children recognised as belonging to the family and clan. There is a general reluctance to accept children born in the 'bush' or due to war-time rape into lineages, especially so as it will give these children claims over clan land.[141] In addition, gendered hierarchies have been flaunted and those who can have demanded and continue to demand various kinds of recompense. Ownership of property, especially land, will be bitterly contested and will divide families. As already evidenced, a large number of children and young adults born in the 'bush' or born out of war-time rape have not been accepted into clan lineages.[142]

At the national level, there is also a need to overcome ethnic, religious and regional divisions and tensions dating back to the colonial era, which have been cited as major causes of the LRA conflict.[143] At the start of his rule, President Museveni and the NRM embarked on an ambitious programme of popular inclusion that aspired to transcend all divisions and promised fundamental change in the politics of the country.[144] Like his predecessors, he has so far failed at the process of national integration and there are now serious doubts about the ability or desire of the NRM government to resolve longstanding antagonisms and divisions.[145]

The once-promising democratic transition has weakened and power has become increasingly centralised and concentrated in the

141 T Allen *Trial justice: The International Criminal Court and the Lord's Resistance Army* (2006) 171.

142 Allen (n 141 above) 171-172.

143 Several studies have assessed the causes of the LRA conflict and conclude that it is rooted in the history of ethnic politics in Uganda dating back to the colonial era. See eg A Branch 'Exploring the roots of LRA violence: Political crisis and ethnic politics in Acholiland' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and reality* (2010); C Dolan *Social torture: The case of Northern Uganda* (2009); S Finnström *Living with bad surroundings: War, history and everyday moments in Northern Uganda* (2008); A Branch 'Neither peace nor justice: Political violence and the peasantry in Northern Uganda 1986-1998' (2005) 8 *African Studies Quarterly* 1; C Mbazira 'Prosecuting international crimes committed by the Lord's Resistance Army in Uganda' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 197.

144 International Crisis Group (ICG) 'Uganda: No resolution to growing tension' Africa Report 187 (5 April 2012) 7, referring to YK Museveni 'Ours is a fundamental change' in YK Museveni (ed) *What is Africa's problem? Speeches and writings on Africa* (1992) 21; YK Museveni *Selected articles on the Uganda resistance war* (1985) 46. The initiatives the government introduced to solve the longstanding divisions and broaden NRM support included the national 'no party' structure, broad-based government and a process to adopt a constitution through extensive popular consultations.

145 ICG (n 144 above) 8-9.

President's hands. Power plays by President Museveni have included the removal of constitutionally-mandated term limits to allow him an unlimited term in office and the arrest of political opponents prior to elections and increasing harassment and intimidation of political opponents. State policies have created a more personal, patronage-based, executive-centred and military-reliant regime. Many state policies enrich the President's inner circle, intensifying resentment.[146] Popular protests are on the rise. For instance, the 'walk to work' protest that started after the re-election of the President in 2011, ostensibly over the rising cost of living, is clearly directed at Museveni's rules and continues in Kampala and other urban centres despite a violent crackdown. These frequent demonstrations and violent crackdowns by the government indicate that many sectors of society are deeply dissatisfied and the government's methods of resolving the dispute are far from satisfactory.[147]

Further, Uganda confirmed significant oil reserves, predominantly located in the Lake Albert region on the border with the DRC (estimated at 2,5 billion barrels) for commercial extraction in 2006, that many fear is a curse rather than a blessing as it may become an additional source of division.[148] If extracted, these resources would put Uganda among the top 50 world oil producers, which could be quite a boon for Uganda, doubling or tripling its current export earnings, but it is also likely to exacerbate social and political tensions. The oil may ensure President Museveni's control by enabling him to consolidate his system of patronage and will increase corruption. If President Museveni gains access to substantial oil revenue, the combination of considerable oil funds and strong presidential powers could increase the ability of his government to remain in power indefinitely.[149]

Indeed, President Museveni is reported to have stated categorically that he discovered the oil and that it is his duty to ensure that it benefits all before he leaves power. This is a ploy to secure a life presidency that can only be sustained through an expensive patron-client system, and the construction of a state security machinery to intimidate and harass those who dare to oppose or question government's dealings.[150] This inevitably will involve an increase in corrupt behaviour and a reduction in government transparency in oil and tax revenue management that can only be accomplished through an increasing autocratic relationship

146 ICG (n 144 above) 1.

147 As above.

148 The fears that abundant natural resources are a curse are unscientifically drawn from Nigeria, Sierra Leone, the DRC and Sudan, among others, that have all experienced at one time or another different levels of armed conflict due to poor institutional and governance quality that allows national elites to become corrupt and give maximum advantage to foreign mining companies to reap huge profits.

149 J Kathman & M Shannon 'Oil extraction and potential for domestic instability in Uganda' (2011) 12 *African Studies Quarterly* 27.

150 W Okumu 'Uganda may face an oil curse' *Africa Files* 1 June 2010.

with public and political opponents. This unfortunately is a reality that Uganda will face, as already witnessed through the October 2011 parliamentary revolt over the lack of transparency in oil contracts and alleged resulting large payments in bribes to government ministers.[151]

In addition, the Lake Albert region is an ecologically-sensitive area with an enormous amount of biodiversity. If not properly managed, oil extraction could lead to environmental degradation that could, in turn, lead to local strife.[152] Further, there are indications that social unrest could be on the rise in the region. As news of the oil deposits spread, large numbers of people from outside the region began to move into areas that they expect to be rich in oil with the goal of obtaining oil rents from the government. This has generated animosity among the Banyoro people who are the longstanding inhabitants of the region on the Ugandan side of Lake Albert. In addition, given that the oil reserves were discovered under what is largely Bunyoro land, the Bunyoro kingdom has called for a greater share of the oil revenues as compensation for hosting the oil extraction infrastructure. Yet, such an agreement is likely to exacerbate the existing ethnic and regional conflict and produce further unrest due to migration to the oil-rich region.[153]

The foregoing clearly shows that it is dangerous to assume that reintegration and reconciliation will be an easy process in Uganda. On the contrary, it will be a long, painful and difficult process and violent incidences may be anticipated. The success of the process will depend largely on a political will and readiness to overcome social, political, ethnic and regional divisions. Nonetheless, the recognition that grave wrongs have been committed in the past, that people have been severely victimised and that individuals, groups and institutions have been identified as perpetrators underlines a new moral regime and gives victims the confidence required for their re-entry into civic processes of negotiation.

In addition, truth telling and the acknowledgment and coming to terms with the past are necessary for societal recovery and

---

151 See, eg, 'Top ministers took bribes from Tullow Oil – Parliament told' *The Independent* 11 October 2011; 'Oil bubble burst' *Monitor* 11 October 2011; 'MPs demand halt in government oil deals citing bribery' *Monitor* 11 October 2011; Kutesa & Onek 'Willing to step aside, Mbabazi stays put' *Monitor* 12 October 2011; 'Here is what is at stake with Uganda's oil' *Monitor* 12 October 2011; 'Accused ministers deny corruption' *Monitor* 12 October 2011; 'MPs order ministers to resign over alleged oil bribes' *Monitor* 12 October 2011; 'MPs collect signatures to censure ministers named in saga' *New Vision* 12 October 2011; 'Oil saga – Museveni speaks out' *New Vision* 12 October 2011.

152 Kathman & Shannon (n 149 above) 24.

153 Kathman & Shannon (n 149 above) 29-30. In addition, the Lake Albert region is a politically-sensitive area that lies between Uganda and the DRC that has had a violent history and border disputes. In addition, the region has also been vulnerable to rebel activities, eg the ADF in the 1990s and the LRA after the failure of Operation Iron Fist in 2002.

reintegration and provide the best ground for reconciliation. It is, however, unwise to assume that these will automatically lead to reconciliation. The lesson from South Africa is very instructive for Uganda in this regard. One major critique of the South African Truth and Reconciliation Commission (TRC) was that, although South Africans were far from satisfied, the TRC lectured that South Africans had forgiven perpetrators and were reconciled.[154] Reconciliation is not an event but a process and the work of the TRC is just the beginning of such a process that may take several years to complete.

11 Recognition of the regional dimension of the conflict

It is the expressed desire of victim groups in Uganda to have an inquiry into the regional dimension of the LRA conflict, including the role of the government of Sudan and the Diaspora that funded, supported and fuelled it.[155] In addition, the conflict spread from Uganda to the tri-border area of the DRC, South Sudan and the Central African Republic and scores of people in the region have been victimised by the LRA and other fighting forces in the region.[156] The spread of the conflict alludes to the disastrous and interrelated nature of conflicts in the Africa Great Lakes region, where the legacy of colonialism, ethnic conflict, weak state structures and the illegal exploitation of natural resources have given rise to a vicious cycle of violence, displacement and institutional collapse that sometime spills across borders.[157] It

154 See eg N Valji 'Race and reconciliation in a post-TRC South Africa' paper presented at a conference entitled Ten Years of Democracy in Southern Africa (May 2004) organised by the Southern African Research Centre and Queen's University.

155 UHRC & UNOHCHR (n 17 above) 66.

156 J Spiegel & J Prendergast 'A new peace strategy for Northern Uganda and the LRA (Strategy Paper)' *Enough Project* 18 May 2008 http://www.enoughproject.org/publications/new-peace-strategy-northern-uganda-and-lra (accessed 17 January 2012).

157 M Mamdani *When victims become killers: Colonialism, nativism, and the genocide in Rwanda* (2011) 36, indicating that the genocide in Rwanda found roots in the invasion of Rwanda by the Rwanda Patriotic Front (RPF) from Uganda with support of the Ugandan government and that, by providing this support, Uganda exported its first political crisis since coming into power in 1986 to Rwanda; 'Evaluating peace and security in the DRC and US policy in the Great Lakes region' *Africa Faith and Justice Network* http://afjn.org/focus-campaigns/promote-peace-d-r-congo/30-commentary/788evaluating-peace-and-stability-in-the-rdc-and-us-policy-in-the-great-lakes-region.html (accessed 22 November 2011), indicating that from 1996, Rwanda, Uganda and Angola supported the rebel group, Alliance of Democratic Forces for the Liberation of Congo, until the overthrow of the then President, Mubotu Sese Seko. In addition, the Congo War (1998 to 2003) drew in eight African nations, including Rwanda, Uganda, Sudan and 25 armed groups becoming the deadliest conflict since World War II, killing an estimated 3,8 million people; millions were displaced and millions sought refuge in neighbouring countries such as Uganda, Tanzania, Rwanda and Burundi.

therefore follows that the problems in Uganda can only be addressed effectively if the regional dimension of the conflict is acknowledged and dealt with.

In addition, countries in the region have actively extended military, logistic, economic and financial support to irregular forces operating in the neighbouring territories which has led to suspicion and mistrust. For instance, immediately after the LRA arrest warrants were unsealed by the ICC, the Ugandan government announced its intention to re-enter the DRC to 'hunt down' the LRA leadership and hand them over to the ICC, a move that was resisted by the Congolese government.[158] The UPDF had prior to this invaded the DRC with a stated mission of protecting its borders from the militias in the DRC, but were later accused of aggression, massive looting and atrocities against Congolese civilians.[159] A truth-telling process in Uganda should therefore open doors to a regional inquiry that establishes support, determines motive and violations and ensures reparations for all victims.[160]

12 Conclusion

A truth commission gives Uganda the opportunity to know the truth about the many armed conflicts, an opportunity to amend wrongs through reparations and the identification of perpetrators, and may clear the path for institutional reform to ensure the non-recurrence of conflict and human suffering. These processes will, however, be a wasted opportunity without a political will and commitment to ensure the adequate funding and sincere participation of government and

158 'Museveni wants to hunt LRA in Congo' *New Vision* 19 June 2006.

159 Case Concerning Armed Activities on the Territory of Congo (*Democratic Republic of Congo v Uganda*) ICJ (19 December 2005) *ICJ Reports* (2005) 168. The DRC alleged that Uganda committed the crime of aggression against it and violated its sovereignty and territorial integrity. Uganda disputed the claim and counter-claimed that the DRC had committed acts of aggression towards it when it attacked its diplomatic premises and personnel in Kinshasa as well as other Ugandan nationals. The ICJ observed that instability in the DRC has had negative security implications for Uganda and some other neighbouring states and that by actively extending military, logistic, economic and financial support to irregular forces operating in the territory of DRC, Uganda had violated the principle of non-use of force in international relations and the principle of non-intervention. The ICJ also decided that there was credible and persuasive evidence to conclude that officers and soldiers of the UPDF were involved in the looting, plundering and exploitation of Congo's natural resources and that the military authorities did not take any measures to put an end to these acts.

160 The regional governments recognised the interrelatedness of conflict in the region and started a process aimed at devising means to deal with violations and the abuse of human rights and humanitarian law in the region through the International Conference on the Great Lakes Region. For more, see https://icglr.org/index.php (accessed 31 August 2012).

security institutions as well as politicians – individually and collectively. This is the biggest challenge that a truth commission will have to overcome. It is important to remember that, although guns have been silent for a while, the peace in Northern Uganda is illusionary and could be shattered, thus creating a sensitive environment that may be hostile to a truth-telling process. Victims and witnesses have to be given adequate protection so that their involvement and participation in the truth process do not endanger them any further. A political will and commitment, together with ongoing consultations, will ensure the local ownership, credibility and legitimacy of a truth commission. If members selected have the desired integrity, experience and if their selection ensures a regional and gender balance, the Working Bill (including amendments as recommended in this article) will go a long way in ensuring the desired goal of truth, justice and reparations, paving the way to institutional reform and reconciliation in Uganda.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal

Ronald Naluwairo[*]
Lecturer, School of Law, Makerere University, Kampala, Uganda; Research Fellow, Advocates' Coalition for Development and Environment

Summary

The United Nations Human Rights Committee has emphasised that the right to a fair trial (which includes the right to an independent and impartial tribunal) applies in full to military courts as it does to the ordinary civilian courts. Based mainly on Uganda's military justice legal framework, this article critically examines the compliance of the country's military courts with the right to an independent and impartial tribunal. It is established that Uganda's military courts fall far short of meeting the essential objective conditions for guaranteeing the right to an independent and impartial tribunal. First, they do not have adequate safeguards to guarantee their institutional independence, especially from the military chain of command. Second, the judge advocates appointed to Uganda's military courts do not have adequate security of tenure. Third, the judge advocates and members of Uganda's military courts do not have financial security. To address these deficiencies, a number of recommendations are made, including establishing the office of an independent principal military judge to be in charge of appointing judge advocates to the different military tribunals; establishing the office of an independent director of military prosecutions to be in charge of prosecutions within the military justice system, including appointing

* LLB (Makerere), LLM (Cambridge), PhD (London); rnaluwairo@law.mak.ac.ug. I thank Prof Mashood Baderin who supervised my PhD research from which much of the analysis in this article has been drawn. I am also indebted to the two anonymous reviewers for their insightful comments on the earlier draft of this article.

prosecutors to the different military tribunals; providing the judge advocates with security of tenure; and prohibiting the performance of a judge advocate or member of a military court from being used to determine his or her qualification for promotion or rate of pay.

1 Introduction

The role that military courts play in the overall administration of justice in Uganda cannot be over-emphasised. Military courts play a vital and unique role in the administration of criminal justice with respect to people subject to military law.[1] Although originally designed to try serving members of the armed forces for suspected infractions of military law, and in particular the commission of military offences, the jurisdiction of Uganda's military courts has expanded significantly over the years. Military courts in Uganda now have jurisdiction over both military personnel and civilians, although in the latter case their jurisdiction is limited. Uganda's military courts also have jurisdiction over a number of crimes, many of which have no bearing on the military and, in ordinary cases, would fall under the jurisdiction of civil courts.[2] Unfortunately, despite the role that Uganda's military courts play in the overall administration of justice, the issue of whether they comply with the minimum international human rights standards for the administration of justice (such as the right to an independent and impartial tribunal) remains an area that rarely receives serious scholarly attention.

The right to an independent and impartial tribunal is recognised and protected by several regional and international human rights instruments to which Uganda is party. Key among these is the International Covenant on Civil and Political Rights (ICCPR)[3] and the African Charter on Human and Peoples' Rights (African Charter).[4]

---

1 Military law is a body of rules which regulates the conduct of members of the armed forces. The major objective of military law is to ensure discipline and good order in the armed forces. See AB Dambazau *Military law terminologies* (1991) 75.

2 See generally sec 179 of the Uganda Peoples' Defence Forces Act 7 of 2005 (UPDF Act). It is not possible to establish exactly how many cases are handled by Uganda's military courts. However, between 1992 and 2009, it was reported that the General Court Martial registered 554 cases, out of which 391 were disposed of. See *The Monitor* 3 August 2009. In addition to the General Court Martial, Uganda's military courts consist of the Court Martial Appeal Court, eight division courts martial and 70 unit disciplinary committees. See R Tukachungurwa 'The legal and human rights implications of the trial of civilians in military courts in Uganda: A comparative analysis' unpublished LLM dissertation, Makerere University, 2012 11.

3 International Covenant on Civil and Political Rights, adopted 16 December 1966; GA Res 2200A (XXI) UN Doc A/6316 (entered into force 23 March 1976). Uganda acceded to ICCPR on 21 June 1995.

4 The African Charter on Human and Peoples' Rights, adopted 27 June 1981 (entered into force 21 October 1986). Uganda ratified the African Charter on 10 May 1986.

Regarding the former, the United Nations (UN) Human Rights Committee – the international body charged with the responsibility of interpreting and enforcing ICCPR, has emphasised that the right to a fair trial (which includes the right to an independent and impartial tribunal), as provided for in article 14 of ICCPR, applies to military tribunals in full just as it does to the civilian and other specialised tribunals.[5] It has stressed that the guarantees of the right to a fair trial provided for in article 14 of ICCPR 'cannot be limited or modified because of the military or special character of the court concerned'.[6] The African Commission on Human and Peoples' Rights (African Commission) has also forcefully stressed that 'military tribunals must be subject to the same requirements of fairness, openness, and justice, independence and due process as any other process'.[7]

It is therefore clear that in the administration of military justice, military courts must comply with the right to an independent and impartial tribunal. This article analyses the compliance of Uganda's military courts with the right to an independent and impartial tribunal as understood in international human rights law. Before doing this, it is necessary first to examine briefly the nature and scope of the right to an independent and impartial tribunal.

2 Nature and scope of the right to an independent and impartial tribunal

Like most international agreements, ICCPR (which is the main human rights instrument providing for the right to an independent and impartial tribunal) is drafted in generic terms. Although it provides for the right to an independent and impartial tribunal, it does not elaborate upon the content, nature and scope of this right. What is clear is that, as the Human Rights Committee (HRC) has emphasised, it cannot be left to the sole discretion of domestic law to determine the essential content of the guarantees contained in the right to a fair trial (which includes the right to an independent and impartial tribunal).[8] Consequently, the nature and scope of the right to an independent and impartial tribunal can only be ascertained from a careful examination of the various human rights documents in which

5 See para 22 Human Rights Committee General Comment 32: Right to equality before courts and tribunals and to a fair trial CCPR/C/GC/32.

6 As above.

7 *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) para 44. See also Principle 2 of the Draft Principles Governing the Administration of Justice through Military Tribunals (Principles on Military Justice) UN Doc E/CN.4/2006/58 (2006).

8 Para 4 General Comment 32 (n 5 above).

it has been expounded and the jurisprudence of the major human rights supervisory bodies and courts.

2.1 Right to an independent tribunal

The right to an independent tribunal is perhaps the most important guarantee in ensuring a fair trial and possibly the most important canon in the administration of justice in any democratic society. It is a major prerequisite for access to justice, without which justice remains illusory. Only an independent tribunal is able to render justice impartially on the basis of law.[9] Further, the right to an independent tribunal is critical for securing the rule of law. Without independent courts, there can hardly be any rule of law.[10] The right to an independent tribunal is also indispensable in the protection of other human rights and fundamental freedoms. It is important to emphasise in this respect that the right to an independent tribunal is protected in international human rights law, not so much for the benefit of the persons who exercise judicial power. Rather, it is protected to ensure that the persons who hold judicial office uphold the rule of law and the rights and freedoms of accused persons without fear and interference. It is for these reasons, *inter alia*, that the right to an independent tribunal occupies a central place in international human rights law. Its centrality is reflected in the fact that, along with the right to a competent and impartial tribunal, it is an absolute right,[11] meaning that it is not subject to any exceptions.

The right to an independent and impartial tribunal is guaranteed by both the Universal Declaration of Human Rights (Universal Declaration) and ICCPR.[12] Although the African Charter does not explicitly provide for the right to an independent tribunal, article 26 imposes an obligation on state parties to ensure that their courts are independent. In Uganda, the right to an independent and impartial tribunal is firmly secured in article 28(1) of the Constitution, which provides that in the determination of civil rights and obligations or any criminal charge, 'a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law'. In *Uganda Law Society and Jackson Karugaba v Attorney-General*,[13] referring to articles 28(1) and 128 of

9 Office of the High Commissioner for Human Rights *Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers* (2003) 115.

10 S Trechsel *Human rights in criminal proceedings* (2005) 46.

11 Para 19 General Comment 32 (n 5 above).

12 See arts 10 & 14(1) respectively.

13 Constitutional Petitions 02 of 2002 and 08 of 2002 (unreported).

the Constitution,[14] the Constitutional Court held that as part of the judicial system of Uganda, military courts must be independent and impartial.

What then are the essential attributes or requirements of the right to an independent tribunal? It is clear from existing jurisprudence that the notion of the independence of a tribunal involves individual as well as institutional aspects.

2.1.1 Institutional aspects of the right to an independent tribunal

Institutional independence as an aspect of the right to an independent tribunal requires, first of all, that courts should have adequate safeguards to protect them from political and other interferences, especially with respect to matters that relate to their judicial function.[15] In the context of military justice, it requires that military tribunals must be free from interference, especially from the executive and the military hierarchical command with respect to matters that relate to their judicial function. They must not only be self-governing as regards their administrative and operational matters, but must also be independent in their decision making. Decisions of military courts, like those of the ordinary civil courts, should also never be subjected to revision by a non-judicial establishment.[16]

The basic principle upon which both the institutional and individual independence of military tribunals may be guaranteed is to ensure that members of military courts and other critical staff in the administration of military justice (like the judge advocates and prosecutors) have a status guaranteeing their independence in particular *vis-à-vis* the military hierarchy and command.[17] One of the important prerequisites for ensuring the institutional independence of military tribunals is that the authority that appoints members of a tribunal must not be the same one that appoints prosecutor(s). In *R v Généreux*,[18] where this was the case, delivering the judgment of the Supreme Court of Canada, Chief Justice Lord Lamer emphasised that[19]

---

14 Art 128(1) of the Constitution provides the guarantees for ensuring the independence of Uganda's courts. Among these guarantees are included the requirements that the courts should not be subject to the control or direction of any person or authority; that the judiciary should be self-accounting; and that the salaries, allowances, privileges, retirement benefits and other conciliations of service of judicial officers should not to be varied to his or her disadvantage.

15 Para 19 General Comment 32 (n 5 above). See also Principle 3 of the Basic Principles on the Independence of the Judiciary, adopted 6 September 1985; UN Doc A/conf./121/22/Rev 1 1B.

16 Basic Principles on the Independence of the Judiciary (n 15 above) Principle 4. See also *Morris v United Kingdom* (2002) 34 EHRR 52 para 73.

17 See Principle 13 of the Principles on Military Justice (n 7 above).

18 *R v Généreux* [1992] CanLII 117 (SCC) 1.

19 *R v Généreux* 62.

> [i]t is not acceptable that the convening authority, ie the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as triers of fact.

He stressed that, at a minimum, 'where the same representative of the executive, the "convening authority", appoints both the prosecutor and the triers of fact, the requirements of s 11(d) will not be met'.[20]

To avoid a scenario where members of military courts and prosecutors are appointed by the same authority, Ireland amended its military law in 2007 to separate the functions of convening military courts and appointing the prosecutors. Under Ireland's Defence (Amendment) Act,[21] convening general courts martial and limited courts martial, including appointing the panel members, is the responsibility of the court martial administrator.[22] In the performance of his or her duties, the independence of the court martial administrator is guaranteed.[23] The appointment of prosecutors, on the other hand, is the responsibility of the Director of Military Prosecutions.[24] The independence of the Director of Military Prosecutions is also protected.[25]

It is also an essential requirement for ensuring the institutional independence of military tribunals that those persons who preside as judge advocates must be appointed by an independent establishment.[26] In *R v Généreux*, while holding that the appointment of the judge advocate by the Judge Advocate-General undermined the institutional independence of the general court martial, Chief Justice Lamer observed that '[t]he close ties between the Judge Advocate-General, who is appointed by the Governor in Council, and the Executive, is obvious'.[27] He emphasised that the effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence of the tribunal.[28] He stressed that, in order to comply with the right to an independent tribunal, the appointment of military personnel to sit as judge advocates at military tribunals should be in the hands of an independent and impartial judicial officer.[29]

To address the concerns raised in the foregoing paragraph, Canada in 1991 amended its National Defence Act and the Queens Regulations

---

20 As above. Sec 11(d) of the Canadian Charter of Rights and Freedoms provides for the right to an independent tribunal, among other things.

21 Act 24 of 2007.

22 Sec 184B(4).

23 Sec 184A(4).

24 Secs 184C(1) & 184F(1).

25 Sec 184E(2).

26 Judge advocates are the persons who advise military courts on issues of law and procedure.

27 *R v Généreux* (n 18 above) 63.

28 As above.

29 As above.

and Orders for the Canadian Forces. These amendments took away the power to appoint judge advocates from the Judge Advocate-General and vested it in the Chief Military Trial Judge whose independence was guaranteed.[30] Commenting on this development, the Supreme Court of Canada expressed satisfaction that these changes had remedied the defect in the old military justice legal regime.[31]

2.1.2 Aspects relevant for ensuring independence of individuals

As is the case with civilian judges, the three factors considered key for ensuring the individual independence of military judges are the manner of appointment, security of tenure and financial security. The Human Rights Committee has thus stressed that states should take specific measures protecting judges from any form of political influence in their decision making through the constitution or adoption of laws establishing clear procedures and objective criteria for 'the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary'.[32]

Regarding the manner of appointment of persons to judicial office, two points must be emphasised. First, the method of judicial selection must safeguard against judicial appointments for improper motives and must ensure that only individuals of integrity and ability with appropriate training are appointed.[33] The Draft Principles Governing the Administration of Justice through Military Tribunals (Principles on Military Justice) thus state that the persons selected to perform the functions of judges in military courts 'must display integrity and competence and show proof of the necessary legal training and qualifications'.[34] It is explicitly stated that[35]

> [t]he legal competence and ethical standards of military judges, as judges who are fully aware of their duties and responsibilities, form an intrinsic part of their independence and impartiality.

In *Media Rights Agenda v Nigeria*,[36] the African Commission held that the selection of serving military officers, with little or no knowledge of law, as members of the special military tribunal that tried Malaolu, contravened Principle 10 of the Basic Principles on the Independence of the Judiciary. In *Incal v Turkey*,[37] the European Court of Human Rights (European Court) observed that the status of the military judges

30 See art 111.22 of the Queen's Regulations and Orders for the Canadian Forces.

31 *R v Généreux* (n 18 above) 58.

32 Para 19 General Comment 32 (n 5 above). See also Principle 11 of the Basic Principles on the Independence of the Judiciary (n 15 above).

33 Principle 10 Basic Principles on the Independence of the Judiciary (n 15 above).

34 Principle 13 Principles on Military Justice (n 7 above).

35 Para 47 Principles on Military Justice (n 7 above).

36 (2000) AHRLR 262 (ACHPR 2000) para 60.

37 *Incal v Turkey* (2000) 29 EHRR 449 para 67.

who were required by law to undergo the same professional (legal) training as their civilian counterparts provided certain guarantees of independence and impartiality to the national security court in question.

Second, the appointment of military personnel to judicial office must ensure their protection *vis-à-vis* the military hierarchy, avoiding any direct or indirect subordination, whether in the organisation and operation of the military justice system itself or in terms of career development.[38] In *Incal v Turkey*,[39] the European Court held that among the issues that made the Izmir National Security Court's independence questionable was the fact that it was comprised of servicemen who still belonged to the army, which in turn took orders from the executive. The Court was concerned that such members remained subject to military discipline and that assessment reports were compiled on them by the army for that purpose.[40]

The essence of security of tenure as an important aspect in securing the individual independence of judges is that their tenure must be secured against interference by the executive or other appointing authority in a discretionary or arbitrary manner. The Basic Principles on the Independence of the Judiciary accordingly provide that '[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists'.[41] An important requirement for guaranteeing security of tenure is that, once appointed or elected judge, one should only be dismissed on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.[42] The judge affected must be afforded a full opportunity to be heard. In *Mundyo Busyo and Others v Democratic Republic of Congo,*[43] where 315 judges were dismissed by the President without following established procedures, the HRC held that these dismissals constituted an attack on the independence of the judiciary.

Another key factor in ensuring security of tenure is the duration of the term of office of the judges. The HRC has previously noted that '[t]he election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality'.[44] In *Incal v Turkey*, where the major complaint was that the Izmir National Security Court, which was comprised of military judges, was not

38 Para 46 Principles on Military Justice (n 7 above).

39 *Incal v Turkey* (n 37 above) para 68.

40 As above. See also the concerns expressed by the European Court in *Findlay v United Kingdom* (1997) 24 EHRR 211 paras 75 & 76.

41 Principle 12 Basic Principles on the Independence of the Judiciary (n 15 above).

42 Para 20 General Comment 32 (n 5 above).

43 Para 5.2 UN Doc CCPR/C/78/D/933/2000 (2003).

44 Para 8 HRC Concluding Observations: Armenia CCPR/C/79/Add 100.

independent, the European Court held that among the aspects that made the independence of those judges questionable was that their term of office was only four years and subject to renewal.[45]

The final major essential condition for ensuring the independence of judicial officers is the issue of financial security. As was well explained by the Supreme Court of Canada, the essence of financial security as an essential condition for securing the independence of a tribunal is that 'the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence'.[46] In *R v Généreux*,[47] it was held that the requirement of financial security will not be satisfied if the executive is in a position to reward or punish the conduct of members of the military tribunal and the judge advocate by granting or withholding benefits in the form of promotions and salary increases or bonuses. Salaries, allowances, pensions and other remunerations and benefits of military judges, like their civilian counterparts, must not therefore depend on the grace or favour of the executive or the military hierarchy. As required by Principle 11 of the Basic Principles on the Independence of the Judiciary, they must be adequately secured by law. They must be secured in a way that does not allow the executive or its representative to influence or manipulate the judges.

To guarantee the financial security of the judge advocates and members of military courts, jurisdictions like Canada prohibit an officer's performance as a member of a military court or as a military trial judge from being used to determine his qualifications for promotion or rate of pay. In *R v Généreux*,[48] the Supreme Court of Canada commented that this prohibition was sufficient to guarantee the financial security of judge advocates and members of the military courts.

A key question that may be posed is the following: With all the above factors in mind, what constitutes a legitimate test for determining the independence of a particular tribunal? This was succinctly stated by Lamer CJ as follows:[49]

> An individual who wishes to challenge the independence of a tribunal ... need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent ... The perception must, however ... be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

45 *Incal v Turkey* (n 37 above) para 68.

46 *Valente v Queen* [1985] 2 SCR 704.

47 *R v Généreux* (n 18 above) 58.

48 *R v Généreux* 60.

49 *R v Généreux* 36.

The European Court has also stated in a series of cases that, in determining whether there is a legitimate reason to fear that a particular tribunal lacks independence or impartiality, the standpoint of the accused is important without being decisive. It has stressed that what is decisive is whether the doubts of the accused can be held to be objectively justified.[50]

One last important question to ask here is: In the context of military tribunals, do all the requirements of the right to an independent tribunal apply to the members of the tribunal as they do to the judge advocates? In *Holm v Sweden*[51] the European Court explicitly stated that the principles established in its case law regarding the independence and impartiality of tribunals 'apply to *jurors* as they do to professional judges and *lay judges*'.[52] From this perspective it is possible to conclude that the general rule is that all the requirements of independence of tribunals apply to the members of military courts as they do to judge advocates. This is important because both the judge advocates and the members of a military court play judicial roles and they therefore need to be independent. While the judge advocates advise and rule on issues of law and procedure, the members of the court decide the guilt or innocence of the accused and, if found guilty, the sentence.

Nonetheless, depending on the organisation of a particular country's military justice system and the safeguards it provides for the different players, the guarantees for securing the independence of judicial officers may not have to apply equally (or) to all players in the system. At the end of it all, the ultimate test is to establish whether, taken as a whole, a tribunal can be said to be independent. With respect to the issue of security of tenure, the general position taken by the European Court, for instance, is that the members of military courts, like the jurors in the civil courts, do not necessarily require security of tenure to guarantee their independence as long as there are other effective safeguards to secure their independence.[53] Although from the European perspective, the European Court has good reasons for taking this general position where, for instance, the safeguards offered by a particular military justice system are not adequate to secure the independence of the judge advocates, and their role in the proceedings and decisions of court is not significant as is the case in countries like Uganda,[54] the issue of security of tenure

50 See eg *Incal v Turkey* (n 37 above) para 71 and *Gunes v Turkey* (Application 31893/96) judgment of 25 September 2001, para 46.

51 *Holm v Sweden*, judgment of 25 November 1993, Series A 279-A para 30. See also *Cooper v United Kingdom* [2003] EHRR 48843/99 para 123.

52 My emphasis.

53 See eg *Cooper v United Kingdom* (n 51 above) paras 120-125.

54 R Naluwairo 'Military justice, human rights and the law: An appraisal of the right to a fair trial in Uganda's military justice system' unpublished PhD thesis, University of London, 2011 171.

of the members of military courts becomes important. At the end of it all, the question will be whether, taken as a whole, a tribunal can be said to be independent.

2.2 Right to an impartial tribunal

Closely related to the right to an independent tribunal is the right to a tribunal which is impartial. The right to an impartial tribunal is protected as part and parcel of the right to a fair trial by both the Universal Declaration and ICCPR.[55] The requirement for impartiality of a tribunal has two aspects. First, the tribunal must be subjectively free of personal bias. The HRC has thus stated that persons who exercise judicial power must not be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them.[56]

Second, the tribunal must also appear to reasonable observers to be impartial.[57] In *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria,*[58] the African Commission was faced with the issue of a special tribunal which consisted of one retired judge, one member of the armed forces and one member of the police force. While observing that the tribunal was composed of persons belonging largely to the executive branch of government, the same branch that passed the Robbery and Firearms Decree, the African Commission held that '[r]egardless of the character of the individual members of such tribunal, *its composition alone creates the appearance, if not actual lack, of impartiality*'.[59] As a result, it held that the tribunal in question violated article 7(1)(d) of the African Charter which guarantees the right to an impartial tribunal.[60]

The requirement that a tribunal must appear to reasonable observers to be impartial is the embodiment of the important principle in the administration of justice that 'justice must not only be done, but should manifestly and undoubtedly be seen to be done'.[61] This principle is very important for instilling public confidence in the ability of the tribunal to execute its functions in a neutral manner. The European Court has emphasised that the appearance of a tribunal is important because 'what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings'.[62]

---

55 Arts 10 & 14(1) respectively.

56 Para 21 General Comment 32 (n 5 above).

57 As above.

58 (2000) AHRLR 180 (ACHPR 1995).

59 *Constitutional Rights Project* case (n 58 above) para 14 (my emphasis).

60 As above.

61 *Dictum* by Lord Hewart in *R v Sussex Justices ex parte McCarthy* (1924) 1 KB 256 259.

62 See *Daktaras v Lithuania*, judgment of 10 October 2000, para 32. See also *Valente v The Queen* (n 46 above) 689.

With specific regard to military judges, the international community generally recognises that the concept of impartiality is a complex one. It is acknowledged that parties to proceedings before military tribunals have good reason to view the military judge as an officer who is capable of being 'a judge in his own cause' in any case involving the armed forces as an institution.[63] That is why it is critical that everything should be done to minimise any doubts as to the impartiality of military judges and therefore of the tribunals over which they preside. It is submitted that guaranteeing the independence of military courts, as discussed above, is one strong factor that can help in this respect. The presence of civilian judges in the composition of military tribunals is also considered to be an important factor that can help reinforce the impartiality of military tribunals.[64]

3 Compliance of Uganda's military courts with the right to an independent and impartial tribunal

From a structural point of view, Uganda's military courts comprise of a summary trial authority, unit disciplinary committees and courts martial.[65] Under courts martial, the Uganda Peoples' Defence Forces Act (UPDF Act) provides for a four-tier military court system, that is, field courts martial; division courts martial; the general court martial; and the court martial appeal court.[66] The relevant details about these courts will be examined in the analysis that follows.

3.1 Compliance with the right to an independent tribunal

As pointed out in section 2.1.2, the test for assessing compliance of any tribunal with the right to an independent tribunal is an objective one. The key question is whether, given the essential objective conditions of judicial independence analysed above, an informed and reasonable person can perceive the tribunal to be independent.

3.1.1 Institutional independence of Uganda's military courts

It was confirmed in section 2.1 that the notion of institutional independence requires that military courts enjoy a status or have sufficient safeguards which guarantee their independence from the military hierarchy and the executive with respect to matters that relate directly to their exercise of judicial function. A critical analysis of Uganda's military justice legal framework, however,

63 Para 46 Principles on Military Justice (n 7 above).

64 As above.

65 Sec 2 of the UPDF Act (n 2 above) defines 'military court' to mean a summary trial authority, a unit disciplinary committee or a court martial.

66 See the definition of 'court martial' in sec 2 of the UPDF Act.

reveals that the executive and the military hierarchy are in a position to determine or influence certain administrative aspects of military tribunals that relate directly to the exercise of their judicial function. For instance, the law does not protect judge advocates and members of military courts against redeployment or transfer to non-judicial military duties during their term of office. It is submitted that, through the unfettered discretion and power to redeploy or transfer judge advocates and members of the military courts to non-judicial functions at any time and replacing them with reserve members,[67] the military leadership and the executive can technically within certain limits determine who actually finally sits on a court to hear particular cases. This is an administrative matter that relates directly to the exercise of judicial function by military courts. One of the ways in which this shortcoming can be addressed is to amend Uganda's military law and require that, except in cases of military exigencies, judge advocates are not redeployed or transferred to non-judicial functions which would affect the carrying out of their judicial responsibilities. In case of military exigencies, the transfer of a judge advocate to non-judicial functions should be approved by the Principal Military Judge (proposed below) who must satisfy himself or herself as to whether the situation necessitates redeployment.

Another issue that puts the institutional independence of Uganda's military courts in serious doubt concerns the appointing authority of the key players in the country's military justice system, namely, the prosecutors, the judge advocates and the members of military courts. It is apparent from the examination of Uganda's military justice legal framework that members of military courts and prosecutors are appointed by the same authority, namely, the High Command which is a representative of the executive.[68] It is also the High Command which appoints the advocates/para-legals who serve as judge advocates at the different military courts.[69] Moreover, the High Command,

67 Under sec 198 of the UPDF Act, in the case of division courts martial and the general court martial, the High Command is given powers to appoint reserve members, any of whom may be called upon to sit as a member of the court for the purposes of constituting a full court or realising a quorum.

68 See secs 194, 197(1) & 202(c) of the UPDF Act. The High Command is comprised of mainly the top military hierarchy of the UPDF. According to sec 15(1) of the UPDF Act, it is comprised of the President; the Minister responsible for defence; members of the High Command on 26 January 1986; the Chief of Defence Forces; all service commanders; the Chief of Staff; all Service Chiefs of Staff; all Chiefs of the Services of the Defence Forces; all commanders of any formations higher than a division and all Division Commanders, *inter alia*. A disturbing issue with this composition is that the law entrenches certain individuals as members of the High Command, ie members of the High Command on 26 January 1986. The names of these individuals are listed in the third schedule to the UPDF Act. While the contribution of these individuals to the liberation of Uganda is highly appreciated, in a true democracy, it is not acceptable to entrench individuals in legal frameworks.

69 See sec 202(b) of the UPDF Act.

which appoints members of military courts, the judge advocates and prosecutors, also has the power to convene military courts at any time.[70] Given this arrangement, Uganda's military courts cannot be said to be institutionally independent.

To address Uganda's military courts' institutional problematic issues highlighted above, two major recommendations can be made. First, it is proposed that Uganda establishes the office of an independent Principal Military Judge (PMJ). The power to appoint judge advocates to the different military tribunals should vest in this office. To safeguard the independence of the office of the PMJ, the PMJ should enjoy sufficient security of tenure and should be insulated against the military chain of command. The PMJ could be appointed for a fixed term of ten years and should only be removable from office on the same conditions and following the same procedure governing the removal of a High Court judge.[71] During his or her tenure, the PMJ should not be eligible for promotion and should not be subject to army performance-related reports. Appointment as PMJ should be the last posting in one's military career.

Second, it is also recommended that Uganda's military system should establish the office of an independent Director of Military Prosecutions (DMP) along the lines of the Director of Public Prosecutions (DPP). It is this office that should have the power to appoint prosecutors to the different military tribunals and undertake decision making in respect of the prosecution of criminal and quasi-criminal matters in the military justice system. The DMP should enjoy sufficient security of tenure and should be insulated against the military chain of command, as has been proposed in respect of the PMJ. If successfully undertaken, these recommendations can go a long way to addressing the unfortunate situation where the High Command (which is a representative of the executive) appoints the prosecutors, judge advocates and members of military courts. A number of countries, including the United Kingdom, Ireland, Canada and South Africa, have undertaken similar reforms to secure the institutional independence of their military tribunals.

3.1.2 Independence of judge advocates and members of military courts

One of the major guarantees for ensuring the independence of a tribunal as analysed above is security of tenure. As was pointed out, this means tenure, whether until the age of retirement, for a fixed term

70 Sec 196(1) UPDF Act.

71 According to art 144 of the Constitution, a High Court judge can only be removed from office on recommendation of an independent tribunal (comprised of three persons being either judges, former judges or advocates of at least ten years' standing) that he or she is unable to perform the functions of his or her office arising from infirmity of the body or mind, misbehaviour or misconduct, or incompetence.

or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner. Going by the jurisprudence from the European Court referred to earlier,[72] in the context of military justice, the question of security of tenure is most relevant for judge advocates. It is therefore important to first examine whether Uganda's judge advocates enjoy sufficient security of tenure to guarantee their independence, in particular, and that of the military courts in general.

Surprisingly, the UPDF Act and its regulations are silent about the issue of the tenure of judge advocates. This silence of the law on such an important question *prima facie* means that judge advocates in Uganda do not enjoy any security of tenure and can therefore not be said to be independent. Although in practice it is said that the tenure of judge advocates is the same as that of the members of military courts to which they are appointed, and that this is usually made clear in the instrument of appointment,[73] as will shortly be argued in respect of the members of military courts, this kind of tenure cannot guarantee their independence. To guarantee their security of tenure, it is proposed that judge advocates should be appointed for a renewable fixed term of six years and this should be clearly stated in the law. The law should also explicitly spell out the conditions under which the tenure of a judge advocate can be renewed.

Another aspect concerned with security of tenure of judge advocates worth pointing out is that the country's military justice legal framework is completely silent on the circumstances, let alone the procedure and manner in which they can be removed or suspended before expiry of their tenure. This means that the appointing authority enjoys absolute discretion in the matter. This is a major loophole. To address this shortcoming, it is recommended that the law should clearly spell out the circumstances and manner under which judge advocates can be removed prematurely. It is proposed that these circumstances should be similar to those pertaining to the removal of judicial officers in the civilian justice system, namely, they should only be removed prematurely from their offices for inability to perform the functions of their offices arising from infirmity of the body or mind, misbehaviour or misconduct unbecoming of a judicial officer, or incompetence.[74]

Given the finding that Uganda's judge advocates do not have sufficient security of tenure to guarantee their independence, it becomes important to establish whether the members of military courts have security of tenure which, if taken together with other safeguards, can guarantee their independence and that of the courts to which they are appointed. Unfortunately, the security of tenure of the members of Uganda's military courts, including the Chairpersons,

72 *Cooper v United Kingdom* (n 51 above).

73 Informal discussion with a former member of the Court Martial Appeal Court.

74 See art 144(2) of the Constitution.

is also not guaranteed. Starting with the members of Uganda's top-most military court, namely, the Court Martial Appeal Court, the UPDF Act and all other regulations made thereunder are silent about the issue of tenure of these members. This *prima facie* means that, inconsistent with the right to an independent tribunal, members of the topmost military court in Uganda do not enjoy any security of tenure. They serve at the pleasure of their appointing authority, namely, the Commander-in-Chief of the UPDF who is also the President of Uganda.[75] Members of the Court Martial Appeal Court cannot therefore be said to be independent.

Although it may be argued that members of Uganda's military courts and judge advocates are full-time military officers who enjoy security of tenure as military officers, this argument is not tenable. The requirement in international human rights law is that security of tenure must be in respect of their judicial office and not as military officers. The security of tenure of members of military tribunals as military officers cannot guarantee their independence as they remain subject to military discipline and dependent on the military chain of command and the executive for promotions and other benefits. Dismissing the reasoning that military judges already have a practical equivalent of tenure since they can normally serve out a career leading to retirement by reason of longevity, Fidell argues that '[t]hat is like saying a civilian judge would be sufficiently protected if he or she were assured of a non-judicial civil service job until eligible for retirement'.[76] He rightly points out that 'banishing a judge to a billet that pays the same but does not involve judging is no way to protect either the substance or the appearance of judicial independence'.[77] It is not enough that the instruments of appointment of the members of court and the judge advocates may stipulate their tenure. The right to an independent tribunal requires their tenure as persons who exercise judicial power to be '*adequately secured by law*'.[78]

With respect to members of the general court martial, the division courts martial and the judge advocates appointed to those courts, these are appointed for a period of one year.[79] While it is appreciated

75 Regulation 3(1) of the UPDF (Court Martial Appeal Court) Regulations, Statutory Instrument 307-1. It is worth observing that many important aspects of the Court Martial Appeal Court are not stipulated in the principal legislation (ie the UPDF Act), but are instead provided for in the regulations. One of the major implications of this arrangement is that many aspects of this court can be changed at any time by the Minister responsible for defence without parliamentary oversight or approval.

76 ER Fidell 'Military judges and military justice: The path to judicial independence' (1990) 74 *Judicature* 18-19.

77 Fidell (n 76 above) 19.

78 Principle 11 Basic Principles on the Independence of the Judiciary (n 15 above) (my emphasis).

79 See secs 197(1) & 194 of the UPDF Act and n 75 above.

that the tenure of members of military courts and judge advocates need not necessarily be the same as that of civilian judges, it is submitted that a period of one year is too short to secure their independence. As the United Nations Special Rapporteur on the Independence of Judges and Lawyers pointed out, even a term of five years is too short for security of tenure of judges.[80] The fact that all the members of the general courts martial and division courts martial are eligible for re-appointment makes the problem even worse as the criterion for re-appointment is unknown.[81] It could be that, given their short tenure, members would work towards pleasing their superiors and the appointing authority so as to secure their re-appointment.

As is the case with the Court Martial Appeal Court, there is no stipulated tenure for the members of the unit disciplinary committees. *Prima facie*, this means that they do not enjoy security of tenure and, as such, cannot be said to be independent. The fact that half of the members of the unit disciplinary committees are members by virtue of their offices in those units makes no difference in terms of ensuring their independence.[82] In fact, it may be argued that this very fact compromises their independence even further. It follows from the above submissions, therefore, that members of the unit disciplinary committees, like those of the Court Martial Appeal Court, the general court martial and division courts martial, can also not be said to be independent as they do not have security of tenure. In *Uganda Law Society and Jackson Karugaba v The Attorney-General*,[83] the Constitutional Court rightly concluded that it was 'not possible for Uganda's military courts to be independent and impartial given the current laws under which they are constituted and the military structure within which they operate'. The Court emphasised that in order for these courts to be independent and impartial, they 'must have security of tenure and other privileges enjoyed by other judicial officers in the Uganda[n] judiciary'.[84]

With respect to the question of financial security as another essential condition for guaranteeing the right to an independent tribunal, this was considered in *R v Généreux* to be relevant for both judge advocates and members of military courts. In this case it was held that the requirement of financial security will not be satisfied if the executive is in a position to reward or punish the conduct of

80 Para 169(c) Report on the Mission to Guatemala, UN Doc E/CN.4/2000/61/Add.1.

81 According to sec 198(a) of the UPDF Act, all members of the division courts martial and the general court martial are eligible for re-appointment.

82 According to sec 195(1) of the UPDF Act, a unit disciplinary committee is comprised of the Chairperson who should not be below the rank of captain, the administrative officer of the unit, the political commissar of the unit, the regiment sergeant major of the unit, two junior officers and one private.

83 n 13 above.

84 As above.

members of the military tribunal and judge advocates by granting or withholding benefits in the form of promotions and salary increases or bonuses.[85] The pertinent issue to address, therefore, is whether, according to Uganda's military legal framework, the executive and the military hierarchy are in a position to reward or punish the conduct of judge advocates and members of military courts by granting or withholding benefits in the form of promotions and salary increases or bonuses.

In addressing this question, it is important to highlight the fact that the judge advocates and members of military courts are first and foremost serving members of the UPDF. As members of the UPDF they are then assigned judicial functions in the different military courts. The salaries and other financial benefits of members of the UPDF, like in many other armed forces, are largely determined according to status and rank in the army. The question of promotion therefore becomes pertinent to the issue of salaries and other financial benefits of soldiers. According to the UPDF Act, one of the major considerations for promotion and therefore an increase in salary and other benefits is performance. Performance is to a large extent determined according to evaluation reports by the commanding officers of the respective soldiers.[86] In *R v Généreux*, delivering the majority decision of the Supreme Court of Canada, Justice Lamer correctly noted that '[a]n officer's performance evaluation could potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial'.[87] He emphasised that, by granting or denying a salary increase or bonus on the basis of a performance evaluation, the executive might effectively reward or punish an officer for his or her performance as a member of military court.[88] In light of this authority, the following can be noted about Uganda's military justice legal framework.

First, there is no formal prohibition in the legal framework against evaluating an officer on the basis of his or her performance at a military court, so that nothing stops a commanding officer from exactly doing that, something that they may actually be doing. After all, performance evaluation reports are confidential.[89] The failure of Uganda's military justice system to formally and expressly prohibit evaluating soldiers for promotional purposes based on their performance at military courts is a big shortcoming in terms of guaranteeing the financial security of those members. This deficiency can be addressed by including a specific provision in Uganda's military law to prohibit an officer's performance as a judge advocate or member of a military court from being used to determine his or her qualifications for promotion or rate

85 *R v Généreux* (n 18 above) 58.

86 Sec 55(1)(f) UPDF Act.

87 *R v Généreux* (n 18 above) 59.

88 As above.

89 Sec 55(1)(f) UPDF Act.

of pay. This is what countries like Ireland and Canada have done. In *R v Généreux*, the Supreme Court of Canada was satisfied that such a provision was adequate to guarantee the financial security of judge advocates and panel members of military courts.[90]

Second, other than the specific lack of a prohibition against evaluating members of military tribunals on the basis of their performance at military courts, there are generally no specific measures in Uganda's military justice legal framework for the determination of conditions of service for judge advocates as judicial officers, as is required by the right to an independent tribunal.[91] To address this shortcoming, it is recommended that Uganda should establish a Military Judicial Service Committee to determine the conditions of service of persons appointed to judicial office in the military justice system. This committee should preferably be a committee of the Judicial Service Commission.

3.2 Compliance with the right to an impartial tribunal

It was highlighted in section 2.2 that the test for impartiality of a tribunal is both subjective and objective. It is subjective in the sense that a tribunal must be free of personal prejudice or bias. It is objective in the sense that a tribunal must appear to reasonable observers to be impartial. A tribunal must offer sufficient guarantees to exclude any legitimate doubts.[92] By its nature, the subjective test depends on each particular case. As the analysis in this article is mainly based on the military justice legal framework and not individual cases, the impartiality of Uganda's military tribunals from the subjective point of view is not part of the assessment that follows. Suffice it to emphasise that, however subjectively impartial a tribunal is, it cannot comply with the right to an impartial tribunal if, from an objective point of view, it cannot be said to be impartial.

Regarding the objective test, one of the important factors to consider in assessing the impartiality of tribunals is their appearance. In the *Constitutional Rights Project* case, where members of a special tribunal consisted of one retired judge, one member of the armed forces and one member of the police force, the African Commission held that '[r]egardless of the character of the individual members of such tribunal, *its composition alone creates the appearance, if not actual lack, of impartiality*'.[93] This is because the tribunal was essentially composed of persons belonging to the executive branch of government (which passed the decree in question) whose legal competence was also in doubt.

90 *R v Généreux* (n 18 above) 60.

91 Basic Principles on the Independence of the Judiciary (n 15 above) Principle 11.

92 *Findlay v United Kingdom* (n 40 above) para 73.

93 *Constitutional Rights Project* case (n 58 above) para 14 (my emphasis).

The pertinent question to pose at this point is: Given the structure and composition of Uganda's military courts, to what extent can they be said to be impartial? From the conclusion that Uganda's military courts do not sufficiently meet the requirements of the right to an independent tribunal as analysed in section 3.1, it is very unlikely that a court which is not independent can be impartial. Courts which are institutionally not independent from the executive and the military chain of command, whose members and judge advocates are military personnel subject to military discipline and whose tenure and financial security are not guaranteed, cannot be said to be impartial. In *Gunes v Turkey*,[94] after concluding that the military judges and the army officer in question had satisfied some of the conditions necessary to ensure an independent and impartial tribunal, the European Court nonetheless held that other aspects of their status called into question their independence and impartiality. As is the case with judge advocates and members of Uganda's military tribunals, the Court pointed out that the military judges in question were servicemen who still belonged to the army, which in turn takes orders from the executive, and that they remained subject to military discipline and assessment reports were compiled on them for that purpose.[95] On this basis, the Court argued that military judges needed favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion.[96] Finally, as is the case with members of Uganda's military tribunals, the European Court pointed out that decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army.[97]

Apart from the above issues, there are also other aspects that call into question the impartiality of Uganda's military tribunals. For instance, the fact that Uganda's military justice legal framework does not ensure that military courts are sufficiently legally competent,[98] casts more doubt on their impartiality. A question can thus be raised whether courts, whose judge advocates and members are not independent and whose legal competency is questionable, can impartially administer fair justice. There is little justice that can be expected from such courts.

Also, the fact that Uganda's military courts, which are all composed of military personnel, have jurisdiction to try civilians[99] creates

94 *Gunes v Turkey* (n 50 above).

95 *Gunes v Turkey* (n 50 above) para 43.

96 As above.

97 As above.

98 Naluwairo (n 54 above) 171-174.

99 Sec 119 of the UPDF Act gives military courts jurisdiction over many categories of civilians. In *Uganda Law Society v Attorney-General of the Republic of Uganda*, Constitutional Petition 18 of 2005 (unreported), the Constitutional Court held by a majority of three to two that the trial of civilians by military courts was not inconsistent with the right to an independent and impartial tribunal as protected in art 28(1) of the Constitution. With respect to the justices of the Constitutional

reasonable doubts as to their impartiality in cases involving civilians. In *Incal v Turkey*, the National Security Court in question, composed of two civilian judges and a military judge, tried the applicant who was a civilian. While emphasising that the Court attached great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces, the European Court held that the applicant could legitimately fear that, because one of the judges was a military judge, it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.[100] Accordingly, the Court held that there had been a breach of article 6(1) of the European Convention on Human Rights which guarantees the right to an independent and impartial tribunal.[101] It can therefore safely be concluded that, from an objective point of view, Uganda's military courts cannot be said to be impartial.

4 Conclusion

The right to an independent and impartial tribunal constitutes one of the most important guarantees for ensuring a fair trial in a democratic society. Through the various objective standards it sets, it ensures that justice is not only done, but is also manifestly seen to be done. Regrettably, this article has established that Uganda's military courts cannot be said to be independent and impartial. They do not guarantee the essential objective conditions for ensuring the independence and impartiality of a tribunal. They are institutionally not independent and their members and the judge advocates do not have adequate tenure and financial security to guarantee their independence and impartiality.

Given the shortcomings of Uganda's military justice system, one wonders why countries like the United States of America are increasingly relying on Uganda's army (including providing their military personnel as part of the contingents) to undertake different military missions, especially in Africa. Are these countries not concerned about subjecting their military personnel to justice systems that do not meet the minimum international standards? It is worth noting that, when these countries contribute their forces as part of contingents to undertake joint military missions across the globe,

Court, this cannot be a correct decision. This article has firmly established that, under Uganda's current military justice legal framework, the country's military courts cannot comply with the right to an independent and impartial tribunal.

100 *Incal v Turkey* (n 37 above) para 72.

101 As above.

under the Status of Forces Agreements,[102] they normally ensure that their military personnel remain subject to the jurisdiction of their national military justice system.

In sum, there is an urgent need to reform Uganda's military justice system to ensure that the people standing trial in the country's military courts enjoy their internationally and constitutionally-protected right to an independent and impartial tribunal. This article provides the measures that can be undertaken to achieve this.

102 Status of Forces Agreements are bilateral or multilateral agreements which establish the framework under which military personnel of one country operate in another country. For a good discussion of Status of Forces Agreements, see RC Mason 'Status of Forces Agreement (SOFA): What is it, and how has it been utilised' 12 March 2012 http://www.fas.org/sgp/crs/natsec/RL34531.pdf (accessed 12 September 2012).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Nothing but a mass of debris: Urban evictions and the right of access to adequate housing in Kenya

Laurence Juma[*]
Associate Professor, Rhodes University, South Africa

Summary

The article explores the opportunities that the new constitutional dispensation in Kenya has created for the protection against unlawful eviction of poor populations living in urban centres. It analyses the content of the right to accessible and adequate housing as provided for in article 43 of the Constitution of Kenya and articulated in various international instruments, and traces how this provision has been applied in the eviction cases that the Kenyan courts have decided. From this analysis, the article suggests that the new constitutional dispensation has opened up possibilities for rights enforcement that the courts as well as administrative organs should take advantage of. It also makes tangible suggestions on how to improve rights litigation in this regard, such as affirming the rights of access to courts and seeking further judicial oversight prior to any eviction and the promulgation of enabling legislation.

1 Introduction

On the morning of 12 November 2011, bulldozers tore into the Nairobi suburb of Syokimau and demolished all the houses said to have been

* LLB (Nairobi), LLM (Pennsylvania), MA (Notre Dame), LLD (Fort Hare); l.juma@ru.ac.za. I am indebted to Gustav Muller and to the two anonymous reviewers for their insightful comments.

built on land belonging to the Kenya Airport Authority.[1] A few days later, demolitions were also carried out near Wilson Airport and around Eastleigh airbase.[2] Like in all previous incidences, these evictions were violent, disruptive and involved a massive display of force. In their wake, property worth millions of shillings were destroyed or looted and residents, including women and children, were rendered homeless. Not surprisingly, the demolitions drew significant criticism from civil society, churches and the media. A lawyer writing in a daily newspaper termed it the 'battle of haves and have nots' and castigated the way in which those in power were using the law 'to protect the property they had stolen from government'.[3] Similarly, a government minister, incensed by the barbaric nature of the evictions, labelled the acts 'unconstitutional' and called on the government to compensate the victims.[4] In addition to the media furore, the evictions also spurred the usual stock of ponderous and ineffectual administrative and political responses, such as the formation of the Joint Parliamentary Committee to investigate the evictions, and dramatised high-level government statement promising investigations and stern action should any act of impropriety be found. Unfortunately, these responses never yielded any tangible benefit to the evictees, except to reveal, to no avail, the depth of corruption, malfeasance and pure incompetence in government departments charged with the responsibility of registering and issuing titles as well as those that regulate planning and approve new developments.[5]

---

1 See A Nyongesa 'More airport homes knocked down' *Daily Nation* Nairobi 13 November 2011 http://allafrica.com/stories/201111140346.html (accessed 15 November 2011); F Ayieko 'Questions linger over Syokimau demolitions' *Daily Nation* Nairobi 17 November 2011 http://www.nation.co.ke/Features/DN2/Questions+linger+over+Syokimau+demolitions/-/957860/1274186/-/topwvz/-/index.html (accessed 2 December 2011).

2 See W Oeri 'Hundreds left homeless in Nairobi demolition' *Daily Nation* Nairobi 19 November 2011 http://www.nation.co.ke/News/Hundreds+left+homeless+in+Nairobi+demolition/-/1056/1275716/-/2efc9i/-/index.html (accessed 2 December 2011); L Barasa 'Fury as homes near Nairobi military base pulled down' *Daily Nation* Nairobi 23 November 2011 http://allafrica.com/stories/201111230361.html (accessed 2 December 2011).

3 See A Abdullahi 'Demolitions: Battle of 'haves and have not'' *Daily Nation* Nairobi 20 November 2011 http://allafrica.com/stories/201111210053.html (accessed 2 December 2011).

4 See 'Minister condemns demolition as house team adjourns hearing' *Daily Nation* Nairobi 25 November 2011 http://allafrica.com/stories/201111251338.html (accessed 10 December 2011).

5 Among those who testified before the Joint Parliamentary Committee was the Commissioner of Lands who alleged that the title deeds held by Syokimau residents were 'fake'. See A Amran 'Commissioner of Lands admits Syokimau title deeds were fake' *East African Standard* Nairobi 25 November 2011 http://www.standardmedia.co.ke/InsidePage.php?id=2000047278&cid= 4&story=Commissioner%20of%20Lands%20admits%20Syokimau%20title%20deeds%20were%20fake (accessed

There is certainly not a great deal of disagreement on the fact that forced evictions of this nature violate human rights.[6] The consensus revolves around the universal recognition of the right to adequate housing and the possibilities that the rights regime, in general, presents for eliminating obstacles to the full realisation of fundamental dignity for all human beings. Therefore, the assumption that strengthening the enforcement of relevant rights, at the domestic level will ameliorate the suffering of evictees and improve their situation is indeed warranted, not least because it provides an entry point to analytical evocation of what could be regarded as the rights-based approach to the eviction question in Kenya. However, an approach based on this assumption must necessarily unravel a number of expectations that often determine the effectiveness of a rights-protection regime in a domestic system. The first, obviously, is the basic expectation that international standards will positively influence the adjudication of rights by domestic courts. This expectation arises from the generally-uncontested view that human rights principles will have optimum effect if adopted into domestic law and enforced through local courts;[7] secondly, that the compartmentalisation that we have seen in judicial approaches to socio-economic rights, where courts defer to the executive in matters that they consider to fall within their competence, will not postpone rights adjudication or defeat it altogether, and that the barriers to justiciability will be overcome by the entrenchment of

2 December 2011); V Kimutai 'Lands boss says fraudster paid Sh 1.3million to legitimise Syokimau deals' *East African Standard* 1 December 2011 http://www.standardmedia.co.ke/business/InsidePage.php?id=2000047591&cid=4& (accessed 10 December 2011). See also D Opiyo 'Lands officials sent packing in shake-up' *Daily Nation* Nairobi 4 December 2011 http://allafrica.com/stories/201112040025.html (accessed 10 December 2011).

6 In para 18 of UN Committee on Economic Social and Cultural Rights General Comment 4, UN Doc E/1992/23, adopted on 12 December 1991, the Committee affirmed that 'instances of forced evictions are *prima facie* incompatible with the requirements of the [International Covenant on Economic, Social and Cultural Rights] and could only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law'.

7 See eg R Oppong 'Re-imaging international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2006) 30 *Fordham International Law Journal* 296 (arguing that trends seem to be changing in favour of the application of international law in domestic courts in Africa); T Collingsworth 'The key human rights challenge: Developing enforcement mechanisms' (2002) 15 *Harvard Human Rights Journal* 183 (discussing the enforcement of international human rights law through the Alien Torts Claims Act (ATCA) in the domestic United States courts); M Ruteere 'Politicisation as a strategy for recognition and enforcement of human rights in Kenya' (2006) 7 *Human Rights Review* 6 (suggesting that socio-economic rights can only become a reality at the domestic level if politicised); JO Ambani 'Navigating past the "dualist doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 25.

these rights in the domestic constitution.[8] Thirdly is the capacity issue – the hope that domestic systems will have the necessary capacity to deal with rights claims and render positive outcomes.

In addition to these general expectations, there is a more substantive one which calls for the subordination of the property rights regime to a constitutional rights system. This expectation draws on the proposition that evictions reflect the asymmetrical power relations between parties. The party with the legal mandate to evict is often the one who is in control of a 'bundle of rights', that include the right to capital, the right to possess, the right to use, the liability to execution and immunity from expropriation.[9] The expectation that constitutional rights could tamper any rights within the bundle is revolutionary in a way, but not entirely unfathomable. In some jurisdictions, human rights have been held to constitute a new addition to the bundle, thereby conditioning the property rights holder to the observance and the respect of constitutional values.[10] It may be arguable whether such an approach is conceivable in Kenya, given the slew of legislations yet to be enacted and the plethora of adjustments needed to align the existing statutes with the new constitutional dispensation. But this notwithstanding, the idea alone that property rights are not absolute and must succumb to higher goals of society should in itself lend credence to this expectation.

The claim I make in this article is that the degree of fulfilment of both the general and substantive expectations correlates with the manner in which the constitutional guarantee on the right to housing is elaborated, interpreted and ultimately infused into the domestic property governance systems. I argue that the current constitutional dispensation in Kenya offers some opportunity for the fulfilment of these expectations and, therefore, the realisation of the rights to adequate housing within the framework of protection underwritten by international human rights law. This article is not meant to be a brief on the limitations of the current framework of human rights law *per se*, rather an exploration of opportunities that the new constitutional dispensation now provide for enhancing the protection for victims of forced evictions within the rubric of the right to adequate housing.

---

8 See eg M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882.

9 This is what 'ownership' entails in property law. See AM Honoré 'Ownership' in AG Guest (ed) *Oxford essays in jurisprudence* (1961) 112-124; see the disputing thesis in J Penner 'The bundle of rights picture of property' (1995) 43 *UCLA Law Review* 711.

10 The notion of 'constitutional property' is well developed in South African law. See the cases of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South Africa Revenue Service* 2002 4 SA 768 (CC); *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC). See also AJ van der Walt *Constitutional property law* (2011).

Therefore, it outlines the nature and content of standards established by international regimes and assess how the new constitutional dispensation in Kenya has responded to these standards. It is against this background that the article then discusses the phenomenon of forced evictions in urban areas and isolates its implications for the effective protection and enjoyment of the right to housing. In the end, the article suggests that a rights-based approach, conceived within the framework of the constitutional right to housing, has the capacity to expand the protection regime for evictees by taking into account broader perspectives, such as the requirement for judicial oversight, and providing wider opportunities for rights litigation than had hitherto been the case. The whole discussion in this article is situated within the context of Kenya's transformational journey which begun by the enactment of the new Constitution in August 2010.[11]

2 Debating the relevance of the discourse on the right to housing

Advocating for a rights-based approach in dealing with reckless evictions and demolition of houses in Kenya has obvious benefits. First, it provides an opportunity for testing the practical utility of rights in a needs-based environment. Already, the 'basic needs' approach,[12] which recognises the fact that society can only develop if the fundamental needs of its people are met, has absorbed key human rights standards such as those established by the International Covenant on Economic, Social and Cultural Rights (ICESCR)[13] and the Declaration on the Right to Development.[14] Yet, the idea of needs, as it resonates with impoverishment and disempowerment of the vulnerable and economically-marginalised groups, still presents the greatest challenge to a rights regime, especially where governmental action is involved. This is because claims of individual rights are inevitably juxtaposed against the obligations to ensure public good, which then gives rise to the so-called 'public interest' argument. As

11 For a discussion of the reform process that culminated in the creation of the Second Republic, see L Juma & C Okpaluba 'Judicial intervention in Kenya's constitutional review process' (2012) 11 *Washington University Global Studies Law Review* 287.

12 See S Liebenberg 'Needs, rights and transformation: Adjudicating social rights in South Africa' (2006) 17 *Stellenbosch Law Review* 5.

13 International Covenant on Economic, Social and Cultural Rights, GARes 2200, A/21, UN Doc A/63/6 16 December 1966.

14 GA Res 41/128 (1986). See also F Stewart 'Basic needs strategies, human rights, and the right to development' (1989) 11 *Human Rights Quarterly* 347. See also B Hamm 'A human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005 (arguing that human rights and development are interdependent); and S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 137 (discussing the United States' persistent refusal to recognise development as a human right).

is always the case, whenever evictions occur and the civil society and human rights groups call for action against those involved, the ranks of Kenyan leadership routinely brandish the 'public interest' justification.[15] In Syokimau, the eviction was justified on the ground that ensuring security of the adjoining airport was in the public interest. Indeed, as the Minister of Transport was to confirm five days after the evictions, 'there was a programme of demolitions to clear people who are illegally or irregularly settled on land that they should not be residing on for security purposes'.[16] It should be noted, however, that the 'public interest' notion faces a considerable challenge in human rights discourse, because it often merely provides some latitude for elite manipulation of the political agenda.[17] While I do not dispute that there may be circumstances in which a public interest justification may be warranted, it must, nevertheless, meet a very stringent test. 'Public interest', if at all, must prioritise people's rights and allow for consultations among all the affected parties.[18] The test therefore is the extent to which the public have been involved in the decision-making process and have accepted the government's proposal to evict them.[19] None of the urban evictions seen in Kenya recently meets the test of public interest, however constructed, because the rights of evictees have never been considered. Moreover, these evictions occur against a backdrop of a culture of impunity often manifested in the persistent and routine disregard for individual rights and freedoms prescribed by both domestic and international law. Therefore, according to Ocheje, the 'public interest' rational is 'more of a myth than a credible explanation for forced evictions'.[20]

Be that as it may, the rights regime pierces the veil of public interest, to give voice to the voiceless and protection to the vulnerable. In a much wider perspective, the approach advocates for transparent

15 See P Ocheje 'In the public interest: Forced evictions, land rights and human development in Africa' (2007) 51 *Journal of African Law* 173.

16 See C Wafula 'Kimunya: I cannot promise end to demolitions' *Daily Nation* Nairobi 17 November 2011 http://allafrica.com/stories/201111160160.html (accessed 2 December 2011).

17 See generally G Schubert *The public interest: A critique of the theory of a political concept* (1960); W Leys 'The relevance and generality of "the public interest"' in C Friedrich (ed) *The public interest* (1967) 237. See also E Bodenheimer 'The use and abuse of the "public interest"' in Friedrich (above) 191.

18 At least, in South Africa the principle of 'meaningful engagement', which compels the public authority to engage with the community facing eviction and attempts to find a solution to the problems which the eviction sought could have solved, is now engrained in the law. See *Residents of Joe Slovo Community Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC).

19 See S K Bailey 'The public interest: Some operational dilemmas' in Friedrich (n 17 above) 96.

20 Ocheje (n 15 above) 205.

institutions, an inclusive and participatory decision-making process, and prioritising the needs of the most vulnerable.[21] For the reason that it is participatory in nature and prioritises needs, it can play the much-needed role of moderating demands to housing based on differing levels of needs. Recognising the diversity of people's needs is important for policy formulation as well as for designing strategies for addressing issues of poverty and other concerns. Given that instigators of evictions in Kenya are big businesses, local and central government, private developers, and even holders of foreign business interests,[22] the rights regime that confers entitlements to those affected by evictions will somewhat ensure that the needs of the vulnerable are not trampled by the economically powerful. Also worth noting is the fact that rights-based approaches have a social benefit in providing a useful rallying ground for organised resistance to forced evictions. For example, one of the key goals of the *Muungano wa Wanavijiji Maskini* (Federation of the Urban Poor), created in 1996 by poor communities around Nairobi and Thika, as stated in its mission, is to defend the *rights* of the urban poor.[23] Other organisations, such as *Kituo Cha Sheria* and *Hakijamii*, who have been active in campaigning against forced evictions, have all structured their mandate around the rights discourse.[24]

Secondly, the demand for the right to housing necessarily implicates government policy and law. The failure of government to develop rural areas has resulted in rural-urban migration. The population swell in urban centres has in turn led to the proliferation of slums and informal settlements.[25] Mwangi observes that the demand for housing by the increasing population in urban areas could only be served by informal settlements.[26] In Nairobi alone, there are over 168 informal settlements with a total population of about 2 million people.[27] The lack of sophistication in the planning and development of urban environments has often necessitated the removal and clearing of

21 S Liebenberg 'Human development and human rights, South Africa country study' Human Development Report 2000, Background Paper 11 http://hdr.undp.org/en/reports/ global/hdr2000/papers/sandra%20liebenberg.pdf (accessed 20 December 2011).

22 See K Otiso 'Forced eviction in Kenyan cities' (2002) 23 *Singapore Journal of Tropical Geography* 253; J Audefroy 'Eviction trends worldwide and the role of local authorities in implementing the right to housing' (1994) 6 *Environment and Urbanisation* 16.

23 Otiso (n 22 above) 262.

24 As above.

25 See R Stren 'Urban policy and performance in Kenya and Tanzania' (1975) 13 *Journal of Modern African Studies* 271. See generally M Lipton *Why poor people stay poor: A study of urban bias in world development* (1977); G Breeze *Urbanisation in newly developing nations* (1966).

26 See IK Mwangi 'The nature of rental housing in Kenya' (1997) 9 *Environment and urbanisation* 143.

27 Ocheje (n 15 above) 190.

informal settlements. As well, since the residents of these informal settlements are considered 'illegal and uncontrolled', their plight is not taken into consideration. Yet, the informal sector, sustained by these informal settlements, makes a significant contribution to the national economy.[28] Needless to mention, such a contribution is lost when eviction and demolition occur. The rights regime *should* be able to change this dynamic. According to Leckie, the rights approach elevates the debate on housing rights 'to the level of *de jure* and *de facto* governmental obligation', and also 'provides a coherent means of analysing and evaluating the effectiveness of a state shelter legislation and policies'.[29] The question to be posited in this regard is whether there is a link between the right to housing and sustainable development, employment, stability and health – the main concerns that governments often hold up to be the basis for limiting such rights in the first place. Obviously, if a significant portion of the population has no fixed abode, then their production and participation in the national economy will be compromised.[30] The rights regime not only protects against the destabilisation of informal economies, but also imposes a positive obligation to remove the vulnerabilities of those who participate in the informal sector.

Thirdly, regimes which guarantee rights to housing, or any other rights for that matter, which affect property relationships, purposely place the operation of rights above considerations of ownership, possession and any other status dictated by the common law. This is because they declare those rights as due to 'everyone', no matter their status. But that is, in fact, the essence of human rights – that we qualify to enjoy certain rights just because we are human beings. Thus, whether a person has property or not, is rich or poor, they are entitled to claim these rights and the state is bound to fulfil, respect and also protect these rights. This has tremendous implications for property relationships in general and the concomitant ownership regimes established under common law. The domestic jurisdiction must not only establish a framework for property relations that ensure harmony in the acquisition, appropriation and protection of ownership rights, but must also incorporate the human rights perspectives in that framework. In a constitutional environment where the bill of rights entrenches the right to housing, instituting such a framework is obligatory. Lastly, engaging the rights approach and giving the courts the opportunity to pronounce on rights ultimately improves the status

28 See K Macharia 'Slum clearance and informal economy in Nairobi' (1992) 30 *Journal of Modern African Studies* 221.

29 S Leckie 'The UN Committee on Economic Social and Cultural Rights and the right to adequate housing: Toward an appropriate approach' (1989) 11 *Human Rights Quarterly* 522 542.

30 See eg Human Rights Watch *Double standards: Women's property rights violations in Kenya* (2003).

of a nation as a member of the international community.[31] Thus, by establishing coherency in the law relating to access to housing and adopting international standards into domestic law we may achieve an important foreign policy objective, as well.

3 Nature and content of the right to housing under international law

Let us begin by examining the nature of the right to accessible and adequate housing with a view of isolating the elements within its content that indicate parameters of violations that have been associated with forced eviction. The right to housing is perhaps the most direct and immediate right that responds to the plight of evictees. However, this does not preclude the evocation of other rights depending on the circumstances and the nature of the eviction. Indeed, even the elaboration of the right to housing itself may be dictated by specific situations. For example, the standards required for the protection of internally-displaced persons may differ from those required to deal with urban evictions such as the ones earlier mentioned. But this caution does not rob the existing law of the stature it needs, nor does it suggest any lack of the necessary breadth to sufficiently cover instances of evictions that we have seen so far. As it is, the statement of the right in international instruments, together with guidelines established by the various UN organs, provides nations, Kenya included, with sufficient materials to develop effective regulatory frameworks for evictions within their systems. What then is the nature of the right? A preferred starting point in setting out the nature of this right is the Universal Declaration of Human Rights (Universal Declaration).[32] Article 25 provides that '[e]veryone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing ...' This right is further affirmed in article 11(1) of ICESCR which reads:

> The state parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.

31 See T Risse & K Sikkink 'The socialisation of international human rights norms into domestic practice: Introduction' in T Risse *et al* (eds) *The power of human rights: International norms and domestic change* (1999) 1.

32 GA Res 217A (III), UN Doc No A/810 71 (1948).

Leckie has noted that this provision 'establishes the most important principle of international law on housing rights'.[33] And whereas we may not agree on what constitutes the precise content of these rights, or the manner in which they should be articulated in response to any set of circumstances, the regime established by ICESCR indicates a veritable commitment by state parties to improve access to housing and to protect persons against any actions that may inhibit or deny the enjoyment of such rights. Moreover, article 2 of ICESCR enjoins state parties to guarantee the enjoyment of these rights without discrimination of any kind, 'including ... property and other status'. State parties are also obligated to commit 'maximum available resources' so as to 'progressively' ensure the full realisation of these rights. It is also significant that ICESCR invites state parties to institute administrative and legislative measures to realise these rights.[34] Nonetheless, the characterisation of the obligation that state parties have, especially with regard to the progressive realisation of rights, has implications for housing rights that I shall examine in some detail later. In the meantime, I need to mention that there are other rights guaranteed by international instruments which may be ancillary to the right to housing, and which become relevant from time to time, in the context of forced eviction, for example, article 17(1) of the International Covenant on Civil and Political Rights (ICCPR),[35] which extends protection to privacy and homes; and article 5(e)(iii) of the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[36] which prohibits discrimination with regard to the protection of the right to housing. The right to housing is also safeguarded under article 17 of ICCPR, which prohibits 'unlawful interference with privacy, family, home or correspondence'.

Although the right to adequate housing is not expressly provided for in the African Charter on Human and Peoples' Rights (African Charter),[37] the combined effect of article 4 (the right to life), article 14 (the right to property), article 16 (the right to health), article 18(1) (the right to a

33 S Leckie 'The right to housing' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 111.

34 There is a measure of achievement in this regard, among a range of states. Eg, in South Africa one might point to the Social Assistance Act 13 of 2004 and Social Security Agency Act 9 of 2004 and, in India, to the National Rural Employment Guarantee Act (2005) as legislative interventions that support socio-economic rights. See F Coomans 'Some introductory remarks on the justiciability of economic and social rights in a comparative constitutional context' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 7.

35 GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966).

36 GA Res 34/180,34 UN GAOR Supp (No 49) 193, UN Doc A/34/46 (1979).

37 OAU Doc CAB/LEG/67/3 re 5, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 29 (adopted 27 June 1981).

family life) and article 24 (the right of peoples to a 'general satisfactory environment favourable to their development'), would seem to affirm such right. This view was ventilated by the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*.[38] The complaint was based on the actions of Nigeria National Petroleum Development Company and Shell Petroleum Development Corporation in the Niger Delta region. It alleged that the military government had allowed these two organisations to extract oil in a manner that adversely affected the environment and that the government had abetted these actions by using the military to suppress, kill and destroy houses and property of the Ogoni people. The African Commission interpreted the African Charter to find an implied right to housing. It observed that when housing is destroyed, property, health and family life are adversely affected.[39] It also found that the government was in violation of the right to shelter by instigating forced evictions and destroying houses and villages. Importantly, however, the Commission found that the right to adequate housing encompassed the protection against forced evictions.[40] This decision also illustrates how, in the elaboration of the right to housing, the notion of the interdependence and mutually supportive nature of rights becomes important.

3.1 Contents of the right to housing

Giving content to the right to housing is crucial in this discourse for two reasons. First is the obvious necessity of delineating the essential elements of the right so as to give concrete definition of what the right is or should mean in the context of eviction. It is a truism that in Kenya, and perhaps in many other developing countries, a house should be perceived as more than just a dwelling place, but a space in which the conglomerate of family structures and livelihood are nurtured, used and even shared.[41] Thus, without a house, a person's dignity may be impaired apart from being deprived of a basic need. The Global Strategy

38 (2001) AHRLR 60 (ACHPR 2001) (*SERAC*). This decision has been reviewed by many commentators. See eg D Shelton 'Decision regarding Communication 155/96 (*Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria)'* (2002) 96 *American Journal of International Law* 937; G Bekker '*The Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria'* (2003) 47 *Journal of African Law* 107; D Olowu *An integrated rights-based approach to human development in Africa* (2009) 62; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010).

39 *SERAC* (n 38 above) para 60.

40 *SERAC* (n 38 above) para 63.

41 In South Africa, the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35 stated that adequate housing meant 'more than bricks and mortar'. See G Miller 'Impact of section 26 of the Constitution on the eviction of squatters in South African law' unpublished dissertation, University of Stellenbosch, 2011 75.

to year 2000 (GSS), adopted by the United Nations (UN) Commission on Human Settlement, invited the community of states to view shelter in much broader terms than just a roof over one's head. In the GSS report, the meaning of shelter was broadened to include 'adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic structure and adequate location with regard to work and basic facilities – all at a reasonable cost'.[42] It is this same understanding of shelter that the community of nations affirmed at the second UN Conference on Human Settlement held in Istanbul in 1996.[43] At the Conference, member states committed themselves to[44]

> [p]roviding legal security of tenure and equal access to land to all people, including women and those living in poverty ... Ensuring transparent, comprehensive and accessible systems in transferring land rights and legal security of tenure ... Increasing the supply of affordable housing, including through encouraging and promoting affordable home ownership and increasing the supply of affordable rental, communal, co-operative and other housing through partnerships among public, private and community initiatives, creating and promoting market-based incentives ...

Thus, housing rights have implications for other rights as well. As Stone notes, the right is built on 'recognition that the political and civil rights ... have little practical meaning or utility for those among us whose material existence is precarious'.[45] In providing context to the right and elaborating on its features, the Committee on Economic, Social and Cultural Rights (ESCR Committee), which has the responsibility of monitoring the implementation of rights under ICSECR, has listed seven essential components of the right to housing.[46] These are legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. Of most relevance to us is legal security of tenure. It is common knowledge that access and enjoyment of rights to housing would not be possible unless a person is guaranteed security of tenure. Among the factors that induce insecure tenure are poverty, ineffective or non-existent normative regimes, corruption and poor governance. The insecurity is mostly felt among the slum populations in urban areas.[47] A common feature of the phenomenon would be

---

42 The Global Shelter Strategy to the Year 2000, Report of the Executive Director, UN Comm on Human Settlement, UN Doc H/C11/3 para 9 7 (1988).

43 See United Nations Report of the United Nations Conference on Human Settlement (Habitat II) (1996), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/025/00/PDF/G9602500. pdf?OpenElement.

44 n 43 above, para 40(b).

45 M Stone *Shelter poverty: New ideas on housing affordability* (1993) 314.

46 General Comment 4 para 8.

47 See A Durand-Lasserve 'Informal settlements and the Millennium Development Goals: Global policy declaration on property ownership and security of tenure' (2006) 2 *Global Urban Development* 1 http://www.globalurbandevelopment.org/GUDMag06Vol2Iss1/Durand-Lasserve% 20PDF.pdf (accessed 15 December 2011).

insecure housing structures and dense occupation, both of which attract eviction by urban authorities and unscrupulous land grabbers.

Ordinarily, we associate legal security of tenure with property rights and therefore struggle to find how persons with no right in the property in which they are living should be accorded such security. But legal security of tenure for purposes of the right to housing should be understood to exist in two forms: legal security of tenure and *de facto* security of tenure.[48] Legal security of tenure embodies the benefits in the bundle of rights that would, presumably, shield an owner of property from forced eviction. *De facto* security of tenure, on the other hand, may entail factors such as 'illegal occupation of a dwelling or land and acquisition of security of tenure in practice as a result of prohibition against eviction, provision of basic services, support from local politicians, customary rituals'.[49] According to the ESCR Committee, security of tenure could take many forms, including 'rental (public and private), accommodation, co-operative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property'.[50] The idea seems to be that all persons should have some form of security that guarantees them legal protection against forced eviction. This means that the right to housing places a positive obligation on states to ensure that informal settlements are secure places of residence and that persons living there are protected. For a country like Kenya, this envisages the development of housing programmes that may involve a lot more than just implementing property regimes inherited from colonial days. Back in 2005, the government admitted in its strategy for upgrading slums in Nairobi that a lack of security of tenure was the greatest threat to persons living in these informal settlements.[51] It then undertook to 'regularise land for purposes of integrating the settlements into the formal physical and economic framework for urban centres'.[52] This plan was never implemented, and the recent evictions in Syokimau and Eastleigh are a testimony to the failure of government in this regard.

The other side to this argument is that even in situations where forced evictions are mandated by some other law, legal security of tenure places an obligation on the authorities concerned to ensure that rights are not violated. Thus, it creates a layer of protection, the components

48 See generally UN Habitat *Enabling shelter strategies: Review of experience for two decades of implementation* (2006) http://ww2.unhabitat.org/programmes/housingpolicy/documents/HS-785.pdf (accessed 15 December 2011).

49 UN Habitat (n 48 above) 161.

50 Para 8(a) General Comment 4.

51 See Amnesty International, Kenya *The unseen majority: Nairobi's two million slum dwellers* (2009) http://www.amnesty.ca/dignity/resources/Slums_Kenya_AFR32005009.pdf (accessed 20 December 2011).

52 As above.

of which may dictate the procedures to be employed in the eviction process and the fulfilment of conditions that have implications on the rights regime as a whole. I will elaborate on this view when discussing the manner in which the constitutional framework could be elaborated to extend protection to victims of forced evictions.

3.2 Right to housing in Kenya's new constitutional dispensation

Article 43 of the Constitution guarantees a right to 'accessible and adequate housing' for 'everyone'. Further to the declaration of the right, the Constitution places the usual responsibility on the state to 'observe, respect, protect, promote and fulfil' these rights, and to take 'legislative and policy' measures to achieve the 'progressive realisation' of rights.[53] In doing this, however, the state must take into consideration the special needs of 'vulnerable groups within society' and ensure that its international obligations are met.[54] Among these vulnerable groups are women, the elderly, persons with disabilities, children, young persons, minority or marginalised communities, and certain ethnic religious or cultural communities.[55] This is not unusual. At the continental level the need to protect the rights to housing of the vulnerable is affirmed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[56] which provides:[57]

> Women shall have the right of access to housing and to acceptable living conditions in a healthy environment. To ensure this right, states parties shall grant to women, whatever their marital status, access to adequate housing.

Ultimately, what matters in the domestic arena is the justiciability of the rights guaranteed under article 43. Justiciability refers to the ability of courts to adjudicate and enforce rights.[58] The idea is that a court should be able to provide a remedy if it finds that there has been a violation.[59] Traditionally, socio-economic rights have been perceived as falling within the domain of second generation rights and, therefore,

---

53 Arts 21(1) and (2) Constitution of Kenya, 2010.

54 Art 21(3) Constitution of Kenya, 2010.

55 As above.

56 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, CAB/LEG/66.6/Rev 1 (2003). For discussions on key aspects of the Protocol, see M Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40.

57 Art 16 African Women's Protocol (n 56 above).

58 See SBO Gutto 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79.

59 See F Viljoen 'National legislation as a source of justiciable socio-economic rights' (2005) 6 *ESR Review* 6.

they should not be automatically enforced by the courts in the same manner as civil and political rights.[60] Central to the justification of this perception is the argument that socio-economic rights impose positive obligations on the state and therefore affect the allocation and management of resources, a function that falls within the exclusive competence of the executive arm of government.[61] Therefore, when courts pronounce on such rights, they may undemocratically violate the doctrine of separation of powers.[62] To counter this argument, which is obviously inimical to the human rights project, the international community rejected this classification of rights in 1993 at Vienna. In a statement, which is worth reciting here, it said:[63]

> All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote all human rights and fundamental freedoms.

In Africa, we have come a long way since then, thanks mainly to the South African Constitutional Court.[64] Although doubts still linger and justiciability is still contested in some jurisdictions, trends indicate that courts within Africa are gradually accommodating international standards in adjudicating claims of rights violations.[65] Nonetheless, the notion of indivisibility and interdependence of rights have a particular relevance to forced evictions. This is because in every instance, a multiple of rights are implicated: the right to life, dignity, education, health, adequate food and even the right to privacy and the protection of family life. Moreover, the right to housing is often a precondition for

60 See A Eide & A Rosas 'Economic, social and cultural rights: Universal challenge' in Eide *et al* (n 33 above) 15; P Hunt *Reclaiming social rights: International and comparative perspectives* (1996) 7.

61 See eg V Sripati 'Towards fifty years of constitutional and fundamental rights in India: Looking back to see ahead 1950-2000' (1998) 14 *American University International Law Review* 413.

62 Sripati (n 61 above) 451; J Cassels 'Judicial activism and public interest litigation in India: Attempting the impossible' (1989) 37 *American Journal of Comparative Law* 495; E Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court' (2006) 38 *Columbia Human Rights Law Review* 321.

63 See Vienna Declaration, World Conference on Human Rights, Vienna, 14-25 June, UN DOC A/CONF, 157/24 (Part I) 1993.

64 See M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383; M Kende 'The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective' (2003) 6 *Chapman Law Review* 137.

65 See generally T Maluwa 'The incorporation of international law and its interpretational role in municipal legal systems in Africa: An exploratory survey' (1998) 23 *South African Yearbook of International Law* 45.

the enjoyment of all other rights.[66] Thus, the compartmentalisation of rights only serves the purpose of assisting states to pick and choose the rights that they want to protect or promote.

The issue of justiciability also hinges on another important imperative: the availability of resources as a justification for the permissible infringement of rights. Obviously, the provision of housing for all needy Kenyans may be challenging and does demand proper planning and a lot of resources. Given these challenges, when should a state be compelled to guarantee and respect all other rights associated with it? Like other socio-economic rights, the obligations should be fulfilled 'progressively'. This means that the fact alone that the state does not have resources is not an excuse for limiting rights. There must be an objective criterion for determining whether rights cannot be fulfilled in a particular case. But the development of such a criterion has been controversial. The ESCR Committee in General Comment 3 suggested that states should aim to fulfil the 'minimum core obligations' of any right[67] and that

> [i]n order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposition to in an effort to satisfy, as matter of priority, those minimum obligations.

For lack of space, I will not go into the debate on whether trimming rights to their absolute core is the best way to ensure justiciability.[68] Perhaps what may be worth mentioning is that the South African courts have rejected the minimum core approach and have instead developed the test of reasonableness – that courts should establish 'whether the means chosen by the state are reasonably capable of facilitating the realisation of the socio-economic rights in question'.[69] According to Liebenberg, this approach allows the state some margin

---

66 See UN Habitat The Right to Housing, Fact Sheet 21 (2009) http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf (accessed 30 September 2012).

67 Para 10 General Comment 3 (5th sess 1990) The Nature of States Parties Obligations (art 2(1) of the Covenant) UN Doc E/1991/23.

68 For these debates, see K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113. See also D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484; D Bilchitz 'Towards a reasonable approach to minimum core: Laying foundations to future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of minimum core' (2006) 22 *American University International Law Review* 163.

69 Liebenberg (n 38 above) 151. The test is established in the cases of *Grootboom* (n 41 above) and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC). See also A Sachs 'Judicial enforcement of socio-economic rights: The *Grootboom* case' (2003) 56 *Current Legal Problems* 579.

of discretion – some sort of presumption of diligence on the part of the state – that relies on the objective belief that states will want to do the best for their citizens.[70]

Given these imperatives, what promise exists for the enforcement of article 43 of the Kenyan Constitution? Interestingly, the Constitution anticipates limitations on the implementation of article 43 based on a paucity of resources. Section 20(5) of the Constitution provides some guidelines to the court in cases where the state has claimed a lack of resources to be the reason for not implementing rights. Basically, the Constitution takes the view that, whereas the state enjoys some 'margin of discretion' in line with the requirement of progressive realisation of socio-economic rights decreed by ICESCR, that discretion is not unfettered. Thus, it establishes three broad principles that will guide the court in making a determination as to whether the state has met its obligations or not: that it is the responsibility of the state to show that it lacks resources; that in allocating resources, the state ensures the widest possible enjoyment and takes into account vulnerable sections of the community; and that the court should not interfere with decisions of the state or its organs 'solely on the basis that it would have reached a different conclusion'.[71] It seems to me that what this article has done is to override the 'minimum core obligations' approach and to adopt in its place the 'reasonableness' approach preferred by the South African courts. The courts in Kenya cannot therefore construct the core of any right and impose it on the state without considering the 'reasonableness' of the state's action. The import of section 20(5)(c) is to provide the state with a 'margin of discretion' that the minimum core approach eliminates.

4 Forced evictions

The phenomenon of forced evictions is almost synonymous with landlessness and poverty. This link has a historical presence that dates back to colonial days. Thus, what happened in Syokimau and Eastleigh in November last year were not isolated incidences. They represent a pattern in government's approach to land reform and urban management that has been in place for years. Although Kenya is in its fiftieth year of independence and its politics and even demographics have changed, a lot less has changed in terms of its agrarian policy and physical planning in urban spaces.[72] Likewise, legal frameworks

70 Liebenberg (n 38 above) 151.

71 Arts 20(5)(a), (b) and (c) Constitution of Kenya, 2010.

72 See eg L Onyango & R Hume 'Land law, governance and rapid urban growth: A case study of Kisumu, Kenya' in R Hume (ed) *Local case studies in African land law* (2011) 39 40 (arguing that the colonial legacy and regulatory systems in Kenya have shaped the current urban forms).

that govern property relations have also remained the same despite a few cosmetic changes, such as changes in dispute settlement and the creation of racial parity in land ownership. Given these imperatives, the law and policy that have abetted forced evictions must be understood in the context of their historical formations and, of course, the stubborn reality of the failure of decolonisation.[73] It is therefore fitting to begin the discussion in this section by highlighting some of these formations, but mainly focusing on the evolution of 'squatterdom', a phenomenon that represents the true impact of the segregation policy, and the programme of land divesture that rendered a majority of Africans in areas designated for white settlement landless.

4.1 Historical origins of 'squatterdom'

It all began with the land alienation programmes instituted by the British colonial administration at the close the eighteenth century that were aimed at removing indigenous African populations from the 'white highlands' – areas thought to be most suited for European settlement – to create room for white settler communities.[74] Through this programme, Africans were violently and inhumanely evicted from their ancestral lands and forced into high-density squatter settlements known as reserves.[75] Land in the reserves remained the property of the government and therefore permission was required from the commissioner to erect a dwelling house, cultivate certain kinds of crops or even keep animals.[76] Moreover, the maximum portion that a family could get was only five acres (2,023 hectares). Unfortunately, the population in the reserves began to swell, as landless Africans jostled to find accommodation in these confined spaces while consolidating their claim to land. This constituted a security threat to the European settler community and the colonial enterprise as a whole. Thus, the Resident Native Labourers Ordinance of 1937 was passed, which effectively transferred power over squatters from the commissioner to settler-controlled district councils.[77] These councils were given the

73 See G Wasserman 'Continuity and counter-insurgency: The role of land reform in decolonising Kenya 1962-1970' (1973) 7 *Canadian Journal of African Studies* 133.

74 The 1897 East African Order in Council that applied the Indian Transfer of Property Act of 1881 and Indian Land Acquisition Act of 1894 to Kenya allowed the Commissioner of the Protectorate to grant permission for European occupation of land. See MPK Sorrensen *Origins of European settlement in Kenya* (1965). See also W Morgan 'The White Highlands of Kenya' (1963) 129 *Geographical Journal* 140; N Carey Jones 'The decolonisation of the White Highlands of Kenya' (1965) 131 *Geographical Journal* 186.

75 See D Ellis 'The Nandi protest of 1923 in the context of African resistance to colonial rule in Kenya' (1976) 17 *Journal of African History* 555.

76 See S Wanjala *Essays on land law* (2000) 9.

77 See D Anderson & D Throup 'Africans and agricultural production in colonial Kenya: The myth of the war as a watershed' (1985) 26 *Journal of African History* 327 333.

authority to regulate squatter cultivation and to organise and carry out the eviction of the so-called 'excess population' from time to time.[78] It is noteworthy that eviction in these instances was legitimised by law – the Crown Lands Ordinance of 1902 (as amended in 1915), the same law that had facilitated the divesture of ownership of land from Africans and vested it in the European settlers. The ordinance characterised African land rights as based on occupancy – a usufruct arrangement that would allow for land to be declared 'waste or unoccupied' when such occupation ceased.[79]

The divesture was complete when the Kenya Annexation Order-in-Council and the Kenya Colony Order-in-Council of 1921 were promulgated and Kenya formally declared a British colony. All Africans then became tenants-at-will of the Crown.[80] The effect of the divesture is summarised in this passage from a colonial court's judgment:[81]

> The effect of the Crown Lands Ordinance 1915 and the Kenya (Annexation) Order in Council 1920, by which no native private rights were reserved and the Kenya colony order in Council 1921 ... is clearly *inter alia* to vest land reserved for the use of the native tribes in the Crown. If that be so, then all natives' rights in such reserved land, whatever they were, disappeared and natives in occupation of such Crown lands became tenants-at-will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances an land cultivated by the occupier. Such land would include fallow. Section 54 of the Ordinance puts a specific embargo on any alienation by such a tenant.

It meant that the security which Africans had in land was completely extinguished and that they were subject to eviction or displacement whenever the colonial government thought it appropriate to do so. Worth mentioning here is that the displacement and erosion of security in land resulted in great poverty, the effect of which is still being felt today. Indeed, many scholars attribute the rise of the Mau Mau liberation war to the existence of a large pool of deprived youth who could neither find land to cultivate nor employment in European establishments.[82] Poverty and depravation within rural communities also resulted in the youth migrating to urban areas to look for work.

---

78 As above. See also B Berman *Control and crisis in colonial Kenya: The dialectic of domination* (1990) 305.

79 Secs 30 & 31 of the Ordinance. See also S Wanjala 'Land and resource tenure, policies and laws: a perspective from East Africa' paper read at the Pan-African Programme on Land and Resource Rights inaugural workshop, Cairo, Egypt, 25-26 March 2002.

80 See generally HWO Okoth Ogendo *Tenants of the crown: Evolution of agrarian law and institutions in Kenya* (1995).

81 *Isaka Wainaina v Murito* (1922) 9 KLR 102 (the plaintiffs had claimed ownership of a parcel of land on the basis that they had purchased it from the Ndorobo tribe before the European settlement).

82 The details about the revolt and the politics behind it can be found in F Furedi *The Mau Mau in perspective* (1989); T Kanogo *Squatters and the roots of Mau Mau 1905-63* (1987); W Maloba *Mau Mau and Kenya: An analysis of a peasant revolt* (1998).

Land ownership regimes existing in 'white highlands' were extended to urban areas and, therefore, in special areas reserved for African population, such as Pumwani in Nairobi, all properties belonged to the Crown.

4.2 Formalisation and entrenchment of 'ownership'

However, the formalisation of ownership of land, as modelled on British colonial law, came by way of the Swynnerton Plan of 1955, which laid the basis for the registration of individual titles and the creation of private property rights. The plan, although presented as a panacea to fragmentation and the less productive African tenural system, was mainly aimed at curtailing the ubiquitous rise of native opposition to European encroachment, racial policies and law regulating the access and use of land.[83] Nonetheless, the plan yielded a much more concerted programme of tenure reform which involved the adjudication of clan and individual rights, consolidation of fragmented holdings and the registration of individual freeholds.[84] The ultimate aim was to confer private and absolute rights of ownership to title holders for the reason that this might encourage the efficient and more productive use of land among Africans. The independent government adopted this land reform strategy and sought to implement the colonial programme more widely across the country. Legislation such as the Registration of Titles Act (Cap 281), Land Adjudication Act (Cap 284) and Registered Land Act (Cap 300), consolidated the movement towards individualisation of ownership. For example, section 23 of the Registration of Titles Act provides that '[c]ertificates of titles issued by the registrar to a purchaser of land ... shall be taken by all courts as conclusive evidence that the person named in it as the proprietor of land is the absolute and indivisible owner'. But despite such efforts, land reform based on acclamation of private ownership rights was haphazardly implemented, resulting mostly in landlessness among the poorer sections of society (as they were forced to sell their land to the rich) and unequal distribution.[85] Moreover, the reform strategy merely entrenched the historical injustices that existed at independence and, in some cases, even magnified them. For example, in a recent report compiled by the Ndungu Commission, the skewed structure of land

83 See P Karanja 'Women's land ownership rights in Kenya' (1991) *Third World Legal Studies* 109 121; J Haberson 'Land reform and politics in Kenya' 1954-70' (1971) 9 *Journal of Modern African Studies* 231 233.

84 A Haugerud 'Land tenure and agrarian change in Kenya' (1989) 59 *Africa* 61 63.

85 See generally HWO Okoth-Ogendo 'African land tenure reform' in SN Hinga & J Heyer (eds) *Agricultural development in Kenya: An economic assessment* (1976).

ownership resulting from this reform process was documented.[86] So, whereas political and legislative changes after independence may have removed racial segregation in many aspects of life, the African elite who stepped into the shoes of their colonial masters merely perpetuated the inherently unequal systems of acquisition and distribution of land.

Placing the current experiences of violent evictions and the demolition of property in this historical perspective enables us to appreciate why the rights regime is indeed crucial in redressing the underlying problems that make evictions the preferred method of giving effect to land management policies in Kenya. Also, it assists us to construct a proper meaning of rights themselves in a context where the operation of common law rules of property ownership may give rise to debilitating consequences for the poor. The rights regime provides a platform upon which historical injustices that are entrenched in laws governing land ownership inherited from the colonial days can be confronted and redressed. This has an important economic and political benefit. Through the years, Kenyans have witnessed many conflicts arising from grievances relating to land and these have undermined national cohesion and efforts to consolidate political gains after independence.[87] However, before I examine how the rights regime confronts the reality of forced evictions, it may be useful to draw some link between the trajectories of forced evictions that we see in urban areas with the overall scheme of property relations that history has bequeathed to us.

4.3 Urban evictions

Forced evictions and demolitions of property in urban areas show how ownership rights are being constructed in spaces poisoned by vile politics, poor management of resources and corruption. That is why, in Nairobi, and perhaps most urban centres in Kenya, forced evictions of middle and low-income earners have been used to create space for the wealthy to expand their investments.[88] In most cases, the prospective owners were allocated the land by government to reward political patronage.[89] Ochola gives the example of the Kingston village, where land inhabited by about 2 000 residents was allocated

86 See Government of Kenya Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Public Land (GoK, Nairobi, 2004) (Ndungu Report). See also R Southall 'The Ndungu Report: Land and graft in Kenya' (2005) 103 *Review of African Political Economy* 142.

87 See eg L Juma 'Ethnic politics and the constitutional reform process in Kenya' (2002) 9 *Tulsa Journal of Comparative and International Law* 471.

88 See D Satterthwaite 'Evictions: Enough violence, we want justice' (1994) 6 *Environment and Urbanisation* 3.

89 See J Klopp 'Pilfering the public: The problems of land grabbing in contemporary Kenya' (2000) 47 *Africa Today* 7.

by government to a private individual who subsequently sold the property at a pittance to a developer.[90] The developer secured a court order and evicted the residents, since they were causing him 'great financial difficulty'. Forced evictions may also occur to create space for 'economic development'. But evictions have served other purposes too. During the Moi regime, eviction and reckless demolitions of dwelling houses were part of the official government policies of containment and urban management.[91] The violent Muoroto eviction of 1990 is perhaps the most remembered because of the bloody battles that were fought between the police and the residents and the loss of lives that occurred as a result.[92] In the same year, 30 000 residents of Kibagare village in Kangemi were forcefully evicted and their houses demolished. In 1996, 20 000 residents of Mukuru kwa Njenga were threatened with eviction but the threat was never carried out.[93] The Moi government also used forced evictions as a political tool. His government is reputed to have incited ethnic violence in the Rift Valley to drive out the non-Kalenjin communities so as to consolidate support for the ruling party in the province.[94] In the Kibaki era, the same system has continued but with a mixed promise of streamlining city planning, invoking appropriate norms for sustainable resource use and environmental protection and, of course, security. For example, in January 2004, palatial homes in the Kitisuru area and sections of Kibera slums were demolished to create room for a public road. Also in the books are the famous Mau evictions of June 2005 which were largely attributed to the need to preserve the natural environment.[95] Nonetheless, there have also been widespread cases of urban evictions that serve the interests of the elite.[96] And, as one commentator has

90 L Ochola 'Eviction and homelessness: The impact on African children' (1996) 6 *Development in Practice* 340.

91 See J Klopp 'Remembering the destruction of Muoroto: Slum demolitions, land and democratisation in Kenya' (2008) 67 *African Studies* 295.

92 As above.

93 See H Charton-Bigot & D Rodriguez Rorres *Nairobi today: The paradox of a fragmented city* (2010) 48.

94 See O Oculi 'The role of economic aspirations in elections in Kenya' (2011) 35 *Africa Development* 13 19. See also Juma (n 87 above).

95 See K Oman 'Mau forest evictions leave Ogiek homeless' *Cultural Survival* 3 October 2005 http://www.culturalsurvival.org/news/karin-oman/mau-forest-evictions-leave-ogiek-homeless (accessed 15 December 2011); A Barume 'Indigenous battling for land rights: The case of Ogiek in Kenya' in J Castellino *et al* (eds) *International law and indigenous people* (2005) 365.

96 See C Bodewess & N Kwinga 'The Kenyan perspectives on housing rights' in S Leckie (ed) *National perspectives on housing rights* (2003) 221 223. Kenya is not alone in this regard. See United Nations Human Settlement Programme (UN-Habitat) report, *Forced evictions – Towards solutions* (2005).

lamented, the Syokimau and Eastleigh evictions of November last year were just a tip of the iceberg.[97]

Against this backdrop of an increasingly tumultuous urban environment, a sense of concern for marginalised groups – vulnerable communities in informal settlements who eke out survival from the very bottom of the economic chain – has emerged. Buoyed by the new constitutional dispensation and ongoing reform in the judiciary, the voices of those who want to see forced eviction become a thing of the past have become louder. But the overarching question still remains: Against the web of normative and institutional structures that respect private ownership, what possibilities exist for squatters (or persons without title but living on the property) to assert their rights of access to housing? What safeguards are there to ensure that persons without title will not be evicted arbitrarily or their property demolished in such an inhumane fashion as we have seen in Syokimau and other places in the recent past? Invariably, victims of forced evictions in urban areas are often the poor who cannot afford to buy land, who are neglected and whose views on the property they occupy do not count, and who are the most insecure as their areas are considered to be the dens of criminals. And, as already mentioned, their removal is often justified as being good for society and a necessary precondition for development.

5 Protection against forced evictions

The ESCR Committee defines forced evictions as[98]

> [t]he permanent or temporary removal against their will of the individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

The responsibility of state parties that flow from this definition, as elaborated by international bodies, is twofold: to prohibit forced evictions and to put in place measures aimed at protecting evictees. The two elements of prohibition and protection need some elucidation here. The first, which is the responsibility to prohibit forced evictions, is characterised by the term 'legal security of tenure'. The ESCR Committee in General Comment 4 decreed that '[n]otwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction,

97 See R Wangui 'Who is to blame for inhumane evictions?' *Daily Nation* Nairobi, 8 December 2011 http://allafrica.com/stories/201112080085.html (accessed 20 December 2011).

98 Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions and the right to adequate housing (16th session, 1997) UN Doc E/1998/22, annex IV 113 (1997) reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003).

harassment or other threats'.[99] The obligation of state parties in this regard is stated to be that of conferring legal security of tenure to those lacking such protection. In the same year that the ESCR Committee issued its comment, the Commission on Human Rights resolved that the practice of forced eviction constituted 'a gross violation of human rights and in particular the right to adequate housing'.[100] It urged governments to take measures that would ensure the elimination of the practice and to confer legal security of tenure on those threatened with forced eviction. There was bound to be some resistance to these regimes, given that national norms were at variance with the standards they sought to establish. Indeed, the expectation that national laws would conform to international standards was tested when the General Comment as well as the Resolution placed emphasis on the elimination of eviction rather than regulating it. That is why a further elaboration of this responsibility became necessary towards the end of that decade, in General Comment 7.[101] Later the Commission also adjusted its position to accommodate the regulatory approach.[102]

Before I examine exactly how this General Comment changed the landscape, let me say something about the other element of state parties' responsibility that deals with protection. The Resolution mentioned above demanded that state parties set up proper mechanisms for the protection of evictees that are based on 'effective participation, consultation and negotiations with affected persons or groups'.[103] Further, the Resolution called upon governments to provide restitution, compensation or alternative accommodation or land to victims.[104] Here the Resolution envisaged that national systems would establish and respect the rule of law and adopt a rights-based approach in dealing with the plight of evictees. But all these became clearer in General Comment 7. Here, the prohibitionist approach was replaced by a regulatory approach. The General Comment established five major criteria for regulation of forced evictions: substantive justification, consultation or alternatives, due process, the right to alternative accommodation and non-discrimination. This approach has found favour with both domestic and international treaty

99 Para 8(a) General Comment 4.

100 See para 1 Commission on Human Rights Resolution 1993/77, http://www.unhabitat.org/ downloads/docs/1341_66115_force%20evic%20chr1.htm (accessed 2 December 2011).

101 General Comment 7.

102 In the Preamble to Resolution 2004/28, the Commission *recommended* that 'all governments ensure that any eviction *that is otherwise deemed lawful* is carried out in a manner that does not violate any of the human rights of those evicted' (my emphasis).

103 n 102 above, para 3.

104 As above. See also para 43, UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, A/HRC/4/18, http://www2.ohchr.org/english/issues/housing/ docs/guidelines_en.pdf (accessed 24 September 2012).

monitoring bodies and has been widely regarded as the benchmark for determining the responsibility of states in this regard.[105] Its spirit has also guided the formulation of national law on evictions.[106]

6 Judicial approach to forced evictions in Kenya

In view of the international standards discussed above, it may be useful to examine how Kenyan courts have interpreted their government's responsibility. Worth noting is the fact that the new Constitution only came into force in August 2010. This has not allowed enough time within which to assess the judicial approach to the rights indicated above or to the law on forced evictions. Moreover, given the publicity and the gravity of loss suffered from the recent Syokimau and the Eastleigh evictions, there is bound to be some jurisprudence emanating from the courts which will further elaborate these rights, since as of writing a few complaints have already been filed and are awaiting trial. Nonetheless, what we could probably do is predict what might become of the law given the few glimpses we have seen thus far.

6.1 *Susan Waithera Kariuki v The Town Clerk, Nairobi City Council*[107]

The applicants in this case were squatters living in an informal settlement and on a road reserve in the Kitisuru area of Nairobi. In October 2010, officers from the Nairobi City Council delivered eviction notices to them, requiring them to vacate their homes within 24 hours. The next day, at night, the agents of the City Council together with administration police demolished all their houses. They had nowhere to go so they put up temporary structures and in the meantime went to court to seek a conservatory order. Their application was based on claims that the Nairobi City Council had violated their rights under articles 43 and 47(2) of the Constitution, by forcefully evicting them from their homes without giving ample notice and not providing them with an alternative site for settlement. The Council disputed this claim, alleging that the area in which the applicants were living was a road reserve and that they had not obtained the permission to settle there; secondly, that it had no mandate or capacity to allocate land to the homeless or to settle them. And since the Council had been

105 See eg African Commission in *SERAC* (n 38 above); European Committee on Social Rights in *ERRC v Greece* (Complaint 15); Constitutional Court of South Africa in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) and more recently in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 2 SA 104 (CC).

106 A few examples here include the South African prohibition of forced eviction from homes provided for in art 26(3) of the Constitution of the Republic of South Africa, 1996, and South Korea's Relocation Assistance Statute Act 9595 of 2009.

107 High Court of Kenya, Nairobi, Petition 66 of 2010 (2011) KLR 1, http://kenyalaw.org/Downloads_FreeCases/80847.pdf (accessed 20 December 2011).

charged with the responsibility of planning developments within the city, it was merely performing its duties and that could not amount to a violation of rights.

The court acknowledged that the Constitution guaranteed the rights to housing in article 43, but observed that it did not define what 'adequate' housing means. Therefore, the court resorted to international law as mandated by articles 2(5) and (6).[108] The court then found that article 11 of ICESCR and all other elaborations of the right by international bodies, which guarantee the rights of access to adequate housing, also apply to forced evictions. The right is reinforced by 'national values and principles embedded in the Constitution, such as dignity, equity, social justice and protection for the marginalised'. Therefore, the rights to housing and the protection against forced eviction must override the duty of physical planning that the city might have in respect of the property in question. The court then went on to deal with the more problematic aspect of balancing property rights as against constitutional rights and fundamental freedoms. Here the court relied on leading decisions from the South African Constitutional Court, such as *Grootboom*[109] and *Modderklip Boedery v President of Republic of South Africa*,[110] to pronounce that forced evictions in circumstances where the petitioners were rendered homeless because no alternative land or accommodation was provided by the City violated their right to housing. The court relied on the fact that the petitioners had been living on that land for close to four decades and that the state had a positive obligation under article 43(b) to ensure, 'within its available resources', that reasonable housing was available to its citizens. The latter depended on the demonstration that the government had put in place a policy that 'responds reasonably to the needs of the most desperate'. On the issue of 'reasonableness' of the government's policy, the court adopted the criteria set in *Grootboom*, which included the expectation that the policy would be comprehensive, coherent and effective, have sufficient regard for the social, economic and historical contexts of widespread deprivation, have sufficient regard for resources, make short, medium and long-term provision for housing needs and also give special attention to the needs of the poorest and most vulnerable.

---

108 Art 2(6) now provides that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.

109 2001 1 SA 46 (CC).

110 2003 6 BCLR 638 (T). In the discussion, the judge refers to the Supreme Court of Appeal judgment. This is an error which needs to be corrected. The Supreme Court of Appeal judgment is reported in 2004 6 SA 40 (SCA), and the correct title of the case is *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd*. Note that this matter went all the way to the South African Constitutional Court and the judgment is reported in 2005 5 SA 3 (CC). Also, the Constitutional Court decision was on the right of access to justice.

6.2 *Ibrahim Osman v The Minister of State for Provincial Administration and Others*[111]

Judgment in this case was delivered by the High Court sitting in Embu on 16 November 2011, just three days after the Syokimau evictions in Nairobi. The case arose out of the eviction of residents from the Bulurika, Bulamedimna, Sagarui, Naima, Bulanagali and Gesto (commonly known as Medina) areas in Garissatown, carried out by the provincial administration to create space for the construction of a public road. The land in question is unalienated public land in respect of which no titles have been issued. However, the residents had lived there since the 1940s. The eviction was carried out between 24 and 31 December 2010. The residents petitioned to court for an injunction restraining the respondents from further removing them from the land and for an award of aggravated, punitive and exemplary damages on the basis that their rights had been violated. They claimed that the forcible violent and brutal eviction through the demolition of homes was in violation *inter alia* of their rights to property under articles 40(1), (3) and (4) of the Constitution and their rights to accessible and adequate housing under article 43(1) as read together with articles 20(5) and 21(1), (2) and (3) of the Constitution.

Unfortunately, the government did not contest these allegations despite having been served with court papers. Whether it is because of its usual indolence or because it considered the merits of the claim and saw that no useful means would be served by raising a defence to the claims, is not at all clear. Perhaps the Attorney-General's office is waiting to take the matter on appeal. All these remain to be seen. What was left was for the judge to consider the merits of the claim based on the affidavit of the petitioner and the arguments of their lawyers. Thus, he analysed the standards for protection of the rights in question under international law by first acknowledging that Kenya had acceded to ICESCR in May 1972 and was therefore bound by its provisions. It then found that the petitioners were entitled to 'the fundamental rights of accessible and adequate housing and to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education' guaranteed under article 43 and made the following ruling:

> I consider that this forced eviction was in violation of the fundamental right of the petitioners to accessible and adequate housing as enshrined in article 43(1)(b) of the Constitution of Kenya 2010. More important, the eviction rendered the petitioners vulnerable to other human rights violations. They were rendered unable to provide for themselves. The eviction grossly undermined their right to be treated with dignity and respect. The petitioners were thrown into a crisis situation that threatened their very existence.

111 High Court of Kenya, Embu, Constitutional Petition 2 of 2011 (unreported).

The court then proceeded to order that the respondents return the petitioners to the land in question and bear the cost of reconstructing their homes. In addition, the court awarded a global sum of Ksh 200 000 to each petitioner as special damages.

6.3 Future prospects

The two cases discussed above shed some light on the conversations that the new constitutional dispensation has engendered. What is pertinent is that there seems to be space to expand the protection available to persons or communities that are likely to be forcefully evicted in the manner that has become the norm in Kenya. Three indicators may be worth mentioning here. The first is the obvious prominence of international legal principles in Kenya's rights litigation. Worth noting in this regard is that in both cases, the courts have applied principles of international law as part of Kenya's domestic law. This is a huge improvement from the previous position where the courts were impervious to the direct application of international law.[112] This change has been brought about by article 2(6) of the Constitution.[113] However, this article refers to 'treaties and conventions', which then leaves the question as to how the court should treat soft law instruments such as pronouncements of UN treaty bodies or other elements which we associate with international law.[114] Perhaps one could argue that article 2(5) of the Constitution, which stipulates that the 'general rules of international law' shall be part of Kenya's law, is good enough authority for applying resolutions of UN treaty bodies and other pronouncements. However, this position could be controversial because there is neither an indication as to what constitutes 'general rules' nor a definition of the substantive prerequisites for the application of these rules. One way of looking at it is to limit these rules to customary international law – rules that have passed the *opinion juris* and *usus* tests and are recognised as law by civilised nations. Moreover, this approach would in effect recognise the common law nature of rules of customary international law, considering that the court would have to determine their application depending on the circumstance of the case.[115] Apparently, the court in *Susan Waithera*

112 See eg *Pattni & Another v Republic* (2001) KLR 262 where the courts, although willing to 'take account of the emerging consensus of values' embodied in the international human rights instruments, maintained that such laws were only of persuasive value.

113 See Ambani (n 7 above); T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of South Africa* 293.

114 For some in-depth discussion of what constitutes international law, see H Thirlway 'The sources of international law' in M Evans (ed) *International law* (2007) 115.

115 See eg D Klein 'Theory of the application of customary international law of human rights by domestic courts' (1998) 13 *Yale Journal of International Law* 334.

did not give this matter any serious thought and therefore treated the pronouncements of a UN treaty body as though they were treaties or conventions. And because it did not care to explain why it was doing so, no explicit meaning can be attributed to article 2(5) at this stage. All the court did was to cite a document allegedly produced by the UN High Commissioner for Human Rights dealing with forced evictions and apply it as part of domestic law.[116] This notwithstanding, the prominence of international law seems set to increase rather than decrease, and all indicators seem to suggest that principles of international law will continue to influence domestic litigation in Kenya.[117] Indeed, this development seems to be concomitant with trends on the continent.[118] Perhaps the impetus is coming from the intensification of reform movements within countries such as Kenya, the re-emergence of regional and sub-regional frameworks for the administration of justice and the mobility and cross-pollination of rights practice across nations. Nonetheless, the general momentum that is swinging rights litigation towards accommodating international standards is a welcome development.

The second factor relates to the first and concerns the use of foreign jurisprudence, especially South African cases. The courts have shown a tendency to readily apply South African cases, mainly those interpreting constitutional guarantees, when dealing with eviction matters. While in certain respects the provisions of the law in question may be similar, in others they are not. For example, section 26 of the South African Constitution and article 43 of the Kenyan Constitution both guarantee the right of access to adequate housing. However, the South African Constitution has more elaborate provisions regarding eviction from homes, which the Kenyan version does not have.[119] Moreover, there are several legislations that clarify obligations under section 26 of the South African Constitution which the courts take into account as well, such as the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. When Kenyan courts adopt South African decisions, we are fast-forwarded to the present. While this may be a good thing, generally, our legislature should be reminded of the need to give effect to these rights by creating guidelines that answer

116 Here again, one cannot help but lament a lack of proper referencing that makes the judgment hard to read and the court's reasoning difficult to follow.

117 An additional constitutional measure that supports this proposition is found in art 132, which enjoins the President to ensure that 'the international obligations of the Republic are fulfilled through actions of the relevant cabinet secretaries'.

118 See Maluwa (n 65 above).

119 Eg, sec 26(3) of the South African Constitution provides that '[n]o one may be evicted from their home, or have their home demolished, without an order of the court made after considering all relevant circumstances'. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

to our specific conditions. This need was identified by Justice Musinga in *Susan Waithera* and articulated as follows:[120]

> Kenya should develop appropriate legal guidelines on forced evictions and displacement of people from informal settlements so that if people have to be evicted from such settlements, the act is done without violating people's constitutional rights and without causing extreme suffering and indignity to them.

Apart from the courts, there have been calls from civil society and the media reminding our parliamentarians that the implementation of the new Constitution requires that appropriate statutes putting into effect guidelines and procedures for rights realisation be enacted. A suggestion has been put forth by a consortium of non-governmental organisations (NGOs) and civil society groups that the government should enact an eviction and resettlement law and discussions with the Ministry of Lands are currently ongoing.[121]

7 Towards an expanded rights protection regime

The prospects discussed above indicate that there is an opportunity to solidify the elements of protection of the right to housing and thereby create a more humane and rights-friendly regime for evictions. This opportunity has been created by the Constitution. Given that the trend favours the regulation rather than prohibition of forced evictions, a rights-based approach to the improvement of the framework for evictions must necessarily build on that jurisprudence. I suggest, therefore, that a liberal interpretation of rights that expand their reach in line with experiences from other parts of the world is desirable. Even without amending the Constitution so as to create specific thresholds for the realisation of the right to housing and regulation of forced evictions, an approach that recognises the primacy of the rights of access to the court and the concomitant notions of judicial oversight, provisions of alternative accommodation or land for evictees, and the establishment of an elaborate scheme for restitution or compensation may still be possible within the current framework. What may be needed is an activist judiciary and a legal fraternity willing to take up eviction cases and challenge the government's position. Apart from judicial oversight, the other consideration that may be implicated is that of the right to counsel for indigent evictees. If we accept that further judicial oversight is mandatory and that parties must seek courts' approval for eviction to occur, then all parties should necessarily have equal capacity to litigate

120 *Susan Waithera* (n 107 above) 9.

121 See H Ayodo 'Slum dwellers now demand decent housing' *East African Standard* 28 October 2011 http://www.standardmedia.co.ke/InsidePage.php?id=%2020000045793&cid=159&story=Slum%20dwellers%20now%20demand%20decent%20housing (accessed 2 December 2011).

the matter. As we have seen, cases with tremendous impact coming from India, South Africa and even Kenya have been litigated through the help of international NGOs or other civil society bodies. One can then imagine the great number of other cases where parties, because of resource constraints, are unable to litigate their claims. Considering, too, that most evictees are poor and vulnerable, the right to counsel in eviction cases raise particular concerns that must be addressed.[122] Despite the compelling need, this article will not delve into this concern because it raises a whole lot of issues that demand ample space. What I would like to focus on, for now, is the right of access to court and the notion of further judicial oversight.

7.1 Right of access to court

The debate on the recent evictions in Syokimau and Eastleigh has been dominated by issues of ownership – whether the titles obtained by the residents were valid – rather than the legality of the procedures employed by the government to evict the residents.[123] This is understandable given the history of Kenya's land reform programmes which have emphasised registration and documentation of ownership. As I have indicated already, the right to housing is made up of many elements that work together, therefore it must be construed in broad terms for it to be effective. Moreover, the right attaches to everyone irrespective of their ownership status. The expectation therefore would be that, before eviction is undertaken, a reasonable and justifiable limitation of the right or any of its elements should be established. And this can only be achieved through a judicial enquiry. It could be argued that the Constitution had anticipated such enquiry and that is why it established the right of access to justice in article 48. This provision enjoins the state to 'ensure access to justice for all persons'. The implication is that any administrative action that denies

122 In the United States, serious concerns have been raised about the possibility of indigent persons faced with prospects of eviction being denied equal access to justice. See M Rabiee 'Activists push for right to counsel in US civil cases' *Voice of America* 2 December 2011 http://www.voanews.com/english/news/usa/Activists-Push-for-Right-to-Counsel-in-US-Civil-Cases-134933063.html (accessed 15 December 2011). See also R Kleinman 'Housing Gideon: The right to counsel in eviction cases' (2004) 31 *Fordham Urban Law Journal* 1507; A Scherer 'Why people who face losing their homes in legal proceedings must have right to counsel' (2004) 3 *Cardozo Public Law Policy and Ethics Journal* 699. In Europe, however, the right to counsel in civil cases has been recognised largely due to the interpretation that the European Court of Human Rights has given to the fair hearing provisions (art 6) in the European Convention on Human Rights (4 November 1950). See J Frowein 'Recent developments concerning the European Convention on Human Rights' in J Sundberg (ed) *Laws, rights and the European Convention on Human Rights* (1986) 11 24.

123 See S Kangara 'Syokimau: Real estate professionals, lawyers and surveys highly culpable' *Daily Nation* 8 December 2011, http://allafrica.com/stories/201112080078.html (accessed 20 December 2011).

persons affected by it the opportunity to ventilate their rights in court violates the Constitution. Moreover, as observed by one commentator, '[t]he very legitimacy of the court system is dependent upon access to justice that all courts are supposed to afford to ordinary folks'.[124] And this would go for any Act of parliament that provides for summary procedures or unilateral action by one entity against the other that bypasses the courts or other tribunals mandated to exercise judicial powers. This provision will have a huge impact on the way government performs its functions, especially if the courts in Kenya adopt a liberal interpretation similar to that which the Constitutional Court of South Africa has given to a similar provision in their Constitution.[125] In South Africa, the Court interpreted this provision to abrogate legislation that allows the bank to recover a debt from a defaulting customer through attachment and sale without seeking a court order (*Chief Lesapo v North West Agricultural Bank*;[126]) and declared the attachment and sale of a debtor's immovable property to recover a debt unconstitutional because the processes did not afford the debtor an opportunity for 'further judicial oversight', especially because the property involved were the applicants' homes (*Jafta v Schoeman; Van Rooyen v Stolz*[127] and *Gundwana v Stoke Development CC*[128]). It will be interesting to see how Kenyan judges deal with this provision in the future. Already, the issue of access to justice as provided for in this article was argued before Justice Muchelule in *Ibrahim Osman*, but there no pronouncement was made in this regard. Nonetheless, the judge seemed to place much emphasis on absence of sufficient engagement with the petitioners before eviction was carried out, indicating that pre-conditional factors are important enough to attract the court's attention.

The right of access to court is also envisaged in dealings in public property. Article 40, which embodies safeguards against the public expropriation of property, has the following provision:[129]

> The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –
>
> ....
>
> (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –

124 P Hoffman 'To judge the judgments' *Mail & Guardian* 2 December 2011 32.

125 Sec 34 of the South African Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. See also L Juma 'Mortgage bonds and the right of access to housing in South Africa: *Gundwana v Stoke Development* 2011 (3) SA 608' (2012) 37 *Journal of Juridical Science* (forthcoming).

126 2000 1 SA 409 (CC).

127 2005 2 SA 140 (CC).

128 2011 3 SA 608 (CC).

129 Art 40(3) (my emphasis).

....
(ii) allows any person who has interest in, or right over, that property a *right of access to a court of law.*

Here, the right of access to court is mentioned in relation to specific statutes that may decree judicial oversight before the state exercises its rights of eminent domain. However, it is a clear indication that the drafters were well aware that judicial oversight is an important component of the right to property. Moreover, an argument could be made that the right of access to court also exists by virtue of the fact that the latitude for enforcement of rights contained in the Bill of Rights should be expanded rather than constricted. The Preamble to the Constitution states the commitment to nurturing and protecting the well-being of Kenyans to be an overriding value. Such a commitment is amplified in article 43. The role of the court in protecting and enforcing the rights thereunder is articulated in expansive rather than restrictive language. Thus, a court faced with claims of socio-economic rights provided for in article 43 have obligations to 'develop the law' and to 'adopt the interpretation that most favours the enforcement of a right'.[130] The court also has an obligation to interpret the Bill of Rights in a manner that promotes 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom'.[131] In the same vein, a right may only be limited 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.[132] This apart, one would suppose that the disclaimer in article 40(6), which abrogates rights on account of the property in question being 'found to have been unlawfully acquired', begs the question as to how such a status may be determined, if not through the courts.

In my view, the argument in support of the right of access to courts, which is most compelling, is based on the content of the right to housing itself. As already mentioned, housing rights should be considered not just in terms of the positive obligation of states to fulfil the right, but also in terms of the state's policing role and its intervention in the private sphere to ensure that rights are not violated. The obligation to ensure that evictions conform to the law and respect the rights of the evictees is one that a state cannot avoid. If the eviction is to be carried out by the government or any of its agencies, then the obligation should extend to the requirement that it seeks judicial oversight of its actions and affords the citizens an opportunity to contest the move. In this case, the mere giving of notice will not suffice. The state must do more in terms of facilitating an active and transparent engagement

130 Art 20(3).
131 Art 20(4).
132 Art 24(1).

with residents. If this process does not result in voluntary movement out of the property, a court order must necessarily be sought before eviction is instituted.

7.2 Factors to be considered

I have argued elsewhere that the purpose of further judicial oversight is to provide the party at risk of losing their home an additional layer of protection beyond that offered by the common law or the exiting land laws governing property relations.[133] This layer of protection derives its legitimacy from the Constitution and can be articulated within a framework of the right to housing. This makes it possible to advance the argument that an eviction process that has not been validated through a court order violates the rights to housing. If this argument is preferred, then the next question would be what factors a court exercising its judicial oversight role should consider before it allows or prohibits eviction. The Constitution does not provide any guidelines in this regard. What one has to do is piece together various elements within the Bill of Rights and construct some benchmarks or thresholds against which the conduct of parties could be weighed or evaluated. In South Africa, the Constitution refers to these benchmarks and thresholds simply as 'all relevant circumstances' and leaves it to the court to make the determination.[134] In my view, the factors to be taken into account must be those that go to the heart of the rights in question, and they must be of a nature that, if not met, the benefits to be derived from the right will be completely meaningless or the right will be rendered futile. This notwithstanding, each case will present its own peculiar factors and so the courts must be wary of creating a template for the assessment of the circumstances to be considered. Given the manner in which evictions in Kenya have been carried out and the underlying interests that often come to light after the fact, several general factors could be identified. The factors which I discuss here include the need to investigate whether there were other options; the provision of alternative land or accommodation; and the relationship between the parties and in relation to the property.

7.2.1 Other options

Obviously the place to begin is the consideration of whether the evicting authority could have achieved its purpose other than through eviction. In almost all eviction cases, the government, the evicting person or entity, does not avail itself of the considerations of other alternatives. Once the cabinet or a municipal council has made the decision, all minds are often directed towards planning the assault.

133 See Juma (n 126 above).

134 See sec 26(3) Constitution of the Republic of South Africa, 1996.

A court in this instance will need to be persuaded that the evicting authority had considered other options. Another way of looking at this is by investigating the level of participation of all parties involved, including those to be evicted, in finding alternatives. Ignoring the opinion of those who are settled on the land may contribute to acrimony between the public authority and community sought to be removed. Indeed, various instruments now consider this factor to be a necessary prerequisite to eviction. The UN Committee's review of Kenya's implementation of the right to housing report of 1993 noted that there were widespread 'practices of forced eviction *without consultation*, *compensation* or *adequate resettlement*' especially around Nairobi.[135] This important imperative necessitates joint consultations with the residents and making them aware of the proposed plans beforehand and inviting their input into the discussions.

7.2.2 Provision of alternative land

A rare debate in Kenya's parliament occurred in June 1999 when a member of parliament asked the Minister of State in the President's office if he was aware that residents of the slum areas of Jangwani, Korogocho and Mathare, among others in Nairobi, were being threatened with eviction and whether the government could provide an alternative site to resettle the evictees.[136] The Minister in his response vehemently stated that those residents were occupying the lands belonging to Nairobi City Council illegally and that the government had no plans to resettle them. However, when pressed, he admitted that the government would look into the matter. Twelve years later, the court in *Ibrahim Osman* found that the absence of any indication that the petitioners would be moved to some alternative settlement, or not providing such alternative settlement, exposed them to violations of other rights. According to the court, 'the petitioners were merely thrown out, as it were, without care about where they were going. The eviction threw them into an open, hostile and shelterless environment where there was no single basic necessity of life.' Similarly, in *Susan Waithera*, the court found that the City of Nairobi had 'a constitutional obligation to provide them [applicants] with alternative housing'.[137]

The obligation to provide alternative accommodation may become acute depending on the length of time which the squatters have been living on the land. In *John Samoei Kirwa and 9 Others v Kenya Railways Corporation,*[138] a much earlier decision, the judge was emphatic:[139]

135 See para 16 Conclusions and Recommendations of the Committee on Economic Social and Cultural Rights, Kenya, UN Doc E/C.12/1993/6 (1993) (my emphasis).

136 See Question 257 *Kenya National Assembly Official Hansard* 30 June 1999.

137 Waithera (n 107 above).

138 High Court of Kenya, Bungoma, HCCC 65 of 2004 (unreported).

139 As above.

> I am of the view that [if] squatters ... [have] settled and have been in existence for a long time, say for twenty years or more, and ... have improved and developed the land on which they stand [and that land] is required for a public purpose ... alternative site or accommodation should be considered ...'

The length of stay also affects any compensation that might be necessary to resettle the evictees in their new home. In some cases, it might be necessary to provide them with shelter, schools for their children and even medical care immediately so that their lives are not completely disrupted.

What is suggested here is not far-fetched, even for a developing economy such as Kenya. In fact, trends worldwide indicate that many municipalities are willing to offer alternative sites for the settlement of evictees.[140] Although statistics also show that such offers are often rejected because the new areas are too far from their places of employment, and there is a lack of or minimal infrastructure, the idea is seemingly gaining support.[141] A relocation project in Phnom Penh, for example, was found to have increased transportation expenses, diminished the capacity of women to engage in meaningful economic ventures, and increased the costs of putting up shelters.[142] Recently, the South African Constitutional Court affirmed that a local authority has the obligation to provide an alternative site for occupation by victims of eviction carried out by a private property owner.[143] It is apparent, therefore, that local authorities must now begin to take the obligations to provide shelter seriously. Also, they must now be proactive in regulating how settlements occur rather than wait until communities are settled and then evict them.

7.2.3 Relationship between the parties

The relationship between the parties is an important factor to consider because it enables the court to determine whether the claim for rights is not being made to disguise a failure to honour commitments already made. Obviously, if the occupation was contingent on some legal arrangements such as a lease, then the claim for access to justice or judicial oversight can only be made within the law regulating

140 Audefroy (n 19 above) 18. See also J Kim 'The displaced resident's right to relocation assistance: Towards an equitable urban redevelopment in South Korea' (2010) 19 *Pacific Rim Law and Policy Journal* 587 for a discussion of how legislative intervention together with a renewed urban development approach have improved access to housing in South Korea's major cities.

141 D Clark 'The World Bank and human rights: The need for greater accountability' (2002) 15 *Harvard Human Rights Journal* 205 (suggesting that resettlement programmes cannot adequately compensate for the losses that evictees suffer).

142 Clark (n 141 above) 20.

143 See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* (n 105 above).

such arrangement.[144] In cases where the occupation is threatened by public need and the government is compelled to exercise its power of eminent domain, then the obligations are clearly spelt out in article 40 of the Constitution, and the court's supervisory role will be subject to ensuring that the rights thereby assigned are not violated.

This apart, the relationship that exists in cases of evictions that we now see in urban areas exposes both the asymmetry of power between the parties and circumstances of vulnerability that the rights regime should redress. As we have seen from the judgments discussed here, the courts are more likely to stop evictions in situations where those adversely affected are the weaker party and the methods used to evict are clearly underhand or burdensome. Even before the new Constitution came into effect, mass evictions of squatters by property owners or government had to satisfy a very high threshold, especially where the squatters would be rendered destitute and homeless. For example, when granting an order restraining the Kenya Railways Corporation against evicting squatters who were living on railway reserve, the court in *John Samoei*[145] stated as follows:[146]

> The humbler the dwelling, the greater the suffering and more intense the sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done.

Secondly, procedure has clearly been a matter of concern. In all the cases that we have discussed thus far, the courts have been less appreciative of the kinds of notices given to the evictees. But notice alone is not sufficient. It was found in *Susan Waithera* that the notices that were served on the petitioners neither gave sufficient time nor contained reasons why the action was being taken. Article 47 of the Constitution now provides that '[i]f a right or fundamental freedom of a person has been, or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action'. The judge in *Susan Waithera* was categorical that the right to fair administrative action, embodied in article 47 of the Constitution, may be violated if ample time is not given and reasons for evictions are not discussed with those likely to be affected by the eviction.

144 There are restrictive measures that are imposed by legislation such as the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301), which regulates tenancies in business premises, and the Rent Restriction Act (Cap 296), which deals with rental policies, controls practices in residential housing and sets out the legal rights and obligations of both landlord and tenant. See Mwangi (n 26 above) 141 148.

145 *Samoei* (n 144 above).

146 As above.

8 Conclusion

The discussions in this article have shown that the new constitutional dispensation in Kenya has created some opportunities for safeguarding and protecting the rights of victims of forced eviction because its framework for the protection of rights answer to the expectations that I posed at the beginning, to be the key to the realisation of the right to adequate housing. However, these opportunities must be seized by the courts and administrative organs if the right to housing and other ancillary rights are to be concretised into tangible benefits for evictees. Thus far, the jurisprudence has indicated positive movements towards rights enforcement, and the courts are more readily applying international standards given that inhibitions hitherto imposed by the dualist orientation of the last constitutional order have now been removed.[147] While it may still be too early to determine what effect the new dispensation will have on forced evictions, the spirit of a new era abounds and the government had better be prepared to deal with its consequences.

147 See, generally, Ambani (n 7 above).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Press freedom and democratic governance in The Gambia: A rights-based approach

Aboubacar Abdullah Senghore[*]
Dean, Faculty of Law, University of The Gambia

Summary

The article explores the relationship between democratic governance and the free and independent press in The Gambia since the inception of the Gambian First Republic in 1970. It supports the rights-based approach which perceives the issues of democracy, good governance, and a free and independent press as related to the concept of human rights and fundamental freedoms. Put differently, a free and independent press is not only a mirror of good governance, but also one of the essential elements of democratic governance. This article represents a modest contribution to the existing literature on the questions of governance, democracy, press freedom and human rights, with particular reference to The Gambia.

1 Introduction

Press freedom is a prerequisite for the establishment of a functioning democratic system of government and fundamental human rights. Embodied in the principle of freedom of expression, press freedom is a concern and principle of international and national human rights law and a basic norm of civilised behaviour. It is viewed by many as a fundamental necessity for democratic governance. Thus, governments are expected to permit the press, and particularly the private press, to function responsibly without undue obstruction. Press freedom is not only an indispensable pillar of democracy, but it is also important for the long-term sustainability of social and economic development.

* PhD (Malaysia); aasenghore@utg.edu.gm

The press has become central to democratic discourse worldwide. The advent of broadcasting dramatically extended the reach, influence and scope of the media. The scale of media operations further increased from the 1980s onward through the use of global satellite communications and fibre optics technology. Our new millennium, therefore, is characterised by a revolution in the media that is bound to reshape society through the increased use of personal computers, the internet and others forms of social media. As the media reveals the democratic culture of a given country, its study is central to the question of democracy, human rights and good governance.

There is a paucity of work on the media and democracy in The Gambia. Bensouda[1] and Johnson[2] undertook in-depth studies of the history of the media and the law in The Gambia since colonial days. However, these authors did not establish the critical link between press freedom, democracy, good governance, on the one hand, and human rights, on the other. The most ambitious project to study and monitor progress in the practice of democracy and good governance in The Gambia was undertaken by a group of scholars of the University of The Gambia.[3] The research team produced a document that touches upon various aspects and dimensions of the governance system in The Gambia. The document discussed issues such as social inclusion in political participation and integral governance, checks and balances in the 1997 Constitution, respect for human rights and the rule of law, and the restrictive nature of the human rights provisions of the 1997 Constitution. However, on the subject of respect for civil and political rights, the document makes only a situational analysis of government's attitude toward the subject. It peripherally addresses the links between good governance, respect for human rights and the autonomy and freedom of the press. Although the section on the media establishes the fact that an independent media is an indispensable element for good governance, the human rights dimension of free media participation in the polity and its significance in the democratisation process is not illuminated.

This article attempts to study the link between democratic governance and press freedom in The Gambia from a human rights perspective. The aim of the article is to contribute to the existing literature on the issues of democracy, human rights, governance and press freedom in the country. In writing this article, the author relied on interviews with media houses, court cases and newspaper publications as well as on a very limited number of books and academic articles.

---

1 A Bensouda *The law and media in The Gambia* (1998).

2 NG Johnson *The story of the newspaper in The Gambia: An interpretive account of the history and development of newspaper journalism* (2004).

3 F Sulayman *et al Monitoring progress in the practice of good governance in The Gambia: A consultancy report* (2004).

The next section of this article deals with conceptual issues. That is followed by a section on the relevant laws relating to private media practice and press freedom across government's interaction with the independent media. It includes a brief account of the historical development of the private press and a detailed description of the incidents, types and methods of alleged violations of press freedom in the country. The third section of the article addresses the human rights dimension of press freedom in The Gambia. The article concludes with a set of suggestions and recommendations on the way forward for the mutual co-existence between the government and media practitioners as a way of sustaining democracy and human rights.

2 Conceptual issues

The article adopts a rights-based approach to democracy or democratic governance. By the term democracy is understood a political system that adheres to the principles of constitutional rule; respect for human rights and fundamental freedoms, particularly freedom of expression and press freedom; respect for the rule of law; the independence of the judiciary and the legal profession; free and fair participation of multiple political parties in the political life of the state; free and fair elections organised at regular intervals; direct or indirect involvement of the populace in the affairs and political process of their country; the principles of accountability and transparency; and the separation of powers between the three main organs of government.

Governance has three major components, namely, process, content and delivery. Factors such as transparency and accountability are included in the process component, while values such as justice and equity are included in the component of content. The element of delivery ensures that citizens, especially the poorest, have the basic needs and live life with dignity. It needs to be stressed at this juncture that being able to deliver does not, by itself, constitute good governance. There is no doubt that a dictatorship that delivers basic needs to citizens is better than a dictatorship that does not, but this is not enough to constitute good governance.[4]

Good governance, on the other hand, implies an administration that is sensitive and responsive to the needs of the people and is effective in coping with emerging challenges in society by strictly adhering to and implementing the principles of democracy discussed above. For the World Bank, good governance is epitomised by predictable, open and enlightened policy making, a bureaucracy imbued with a professional ethos, an executive arm of government accountable for its actions and a strong civil society participation in public affairs and all

4 H Mander & M Asif *Good governance resource book* (2004) 15.

behaving under the rule of law.[5] This description of good governance epitomises the democratic principles of transparency, accountability, participation, respect for the rule of law and the separation of powers. The European Union (EU) stresses that[6]

> in the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for equitable and sustainable development.

This definition envisages a situation where there are clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in managing and distributing resources and capacity building for elaborating and implementing anti-corruption measures. The government of The Netherlands added the elements of security, decentralisation and the participation of civil society to the EU's definition of good governance. It argues that good governance must allow[7]

> a responsible economic and financial management of public and natural resources for the purpose of economic growth, social development and poverty reduction in an equitable and sustainable manner, with the use of clear participatory procedures for public decision making, transparent and accountable institutions, primacy of law in the management and distribution of resources, effective measures to prevent and combat corruption, support for leadership and empowerment of men and women.

These definitions of good governance by the EU and the government of The Netherlands have substantially incorporated the principles and basic characteristics of democratic governance already alluded to.

From an African perspective of governance, article 32 of the African Charter on Democracy, Elections and Governance (African Democracy Charter) outlines eight principles through the operation of which the state in Africa will achieve good political governance. These principles include 'accountable, efficient and effective public administration; strengthening the functioning and effectiveness of parliaments; and an independent judiciary'. Article 33 of the African Democracy Charter highlights the principles of good economic and corporate governance in an expansive way as being inclusive of 'effective public sector management; promoting transparency in public finance management; equitable allocation of the nation's wealth and natural resources; poverty alleviation; and developing tax policies that encourage investment'.

The African approach to the concept of good governance is thus more elaborate than the definitions of the World Bank, the EU and the government of The Netherlands highlighted above. The African Union

5 Mander & Asif (n 4 above) 15-16.

6 As above.

7 As above.

(AU)'s definition recognises the clear destination between the systemic and the managerial aspects of governance and acknowledges that, in order to ensure governance, the two aspects must both be adequately addressed. The elaborate provisions of the African Democracy Charter have revealed that a huge gap exists between the theory and practice of good governance in many African countries.

However, it is obvious from the exposition of both 'democratic' and 'good governance' that sometimes emphasis is placed on the managerial aspect of governance, while at some point the focus is on the systemic aspect. The former is a characteristic of the definition of good governance, while the latter is a natural outcome of the definition of democratic governance. Whatever the case may be, for the government of the day to be both 'good' and 'democratic', the two aspects of governance (systemic and managerial) must be adequately enforced. In other words, the system within which one governs must be based on the core values of democracy, while the style and manner of managing the resources and affairs of a country are not only transparent, accountable or effective but also equitable, sustainable and responsive to the needs of the people.

3 Law related to press freedom in The Gambia

3.1 The Constitution

The principle of constitutional rule as a core element of a democratic system can be effective only if the constitution enjoys supreme status within the legal and political system of the country. The concept of constitutional supremacy holds that the constitution is the supreme law of the land and all other laws, executive decisions and administrative activities of the government of the day must be in conformity with the constitution, otherwise they are declared null and void by a court of competent jurisdiction. Constitutional supremacy also ensures a more conducive environment for the observance of the rule of law and the independence of the judiciary. This principle has been established in section 4 of the 1997 Constitution of the Second Republic of The Gambia. In 2005 the Supreme Court of The Gambia, in *Sabally v Inspector-General of Police*,[8] nullified several provisions of the Indemnity (Amendment) Act 2001 for contravening the human rights provisions of the 1997 Constitution of the Republic of The Gambia and article 7 of the African Charter on Human and Peoples' Rights (African Charter), which guarantees the fundamental right of the individual to access the courts of the land.

8 *Sabally v Inspector-General of Police & Others* (2001) 2 GR 883. See also sec 4 of the 1997 Constitution of the Republic of The Gambia; *a*rt 7 of the African Charter on Human and Peoples' Rights.

The principle of constitutional supremacy as used here applies only to the relationship between the Constitution of the Second Republic of The Gambia and the ordinary laws of the land. As far as international law is concerned, constitutional supremacy cannot apply the way it is understood and applied in today's perspective of constitutionalism. The Gambian Constitution does not indicate whether the country adheres to a dualist or monist theory of international law. However, recent practice seems to indicate that The Gambia embraces the theory of dualism in the relationship of its domestic law with international law in the sense that a treaty is first ratified and must then be incorporated or legislated into domestic law. The most recent example of this is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), which was signed on 11 September 2003, ratified on 25 May 2005 and legislated into Gambian law in 2010.[9] Similarly, the Convention on the Rights of the Child (CRC) was signed on 5 February 1990, ratified on 8 August 1990 and domesticated on 2 August 2005. Furthermore, there is some judicial authority from the country's highest court indicating that in the event of conflict, domestic law shall give way to international law, as substantiated in the case of *Sabally v Inspector-General of Police*. Violating article 7(1)(a) of the African Charter was one of the main reasons the Indemnity Act was invalidated by the Supreme Court of The Gambia. The Court made direct reference to the African Charter and a decision of the African Commission on Human and Peoples' Rights (African Commission) of 1999 as principles of international law, which The Gambia is under an international obligation to respect.[10] In this particular case, the Supreme Court was in a position to enforce that respect.

The framing of section 219 of the Constitution should not be used by The Gambia to evade its international obligations or to lower its responsibility to respect international law. Section 219 of the 1997 Gambian Constitution states as follows:

> The state shall endeavour to ensure that in international relations it
> (a) promotes and protects the interests of The Gambia;
> (b) seeks the establishment of a just and equitable international economic and social order;
> (c) fosters respect for international law, treaty obligations and the settlement of international disputes by peaceful means; and
> (d) is guided by the principles and goals of international and regional organisations of which The Gambia is a signatory.

The expression 'shall endeavour' is as solid and binding as any other obligation because the Constitution uses the terminology 'shall' and not 'may' or 'will'. The expression 'shall' is understood to be binding in legal constitutions unless specifically otherwise indicated. The

9 Act 12 of 2010.

10 *Sabally* (n 8 above).

terminology 'endeavour' might have been used in recognition of the slow or sometimes highly-politicised nature of effecting a country's international obligations such as the processes of signing, ratification and incorporation of international treaty obligations.

In all the cases referred to above the message is very clear, namely, that a country cannot rely on provisions of domestic law to evade its international law obligations.

The Gambia's political system has, since the inception of the First Republic in 1970, to some extent adhered to the democratic principles highlighted above. The country's degree of adherence and commitment to such principles varies from one principle to another and, as the next section shows, the performance of successive governments of the two republics in the area of press freedom has been fluctuating and is sometimes very weak, for several reasons. At this juncture, a brief examination of The Gambia's democratic credentials in the light of the remaining values of a democratic system is undertaken.

Since independence, The Gambia has been governed by written constitutions both under the First and Second Republics. (Between 22 July 1994 and 31 December 1996, The Gambia was under military rule. In that period, the country was governed through decrees that were passed and applied from time to time by the former Armed Forces Provisional Ruling Council (AFPRC)).

The Constitution of the First Republic (1970-1994), which enjoyed supreme status, had 134 articles and its chapter III guaranteed the protection of human rights and fundamental freedoms. The Constitution also had provisions for free participation of multiple political parties in the political life of the state and for holding free and fair elections at regular intervals. Free and fair elections were indeed held after every five years' interval, with the last elections under this Constitution taking place in 1992. The Constitution recognised the doctrine of separation of powers and guaranteed the rule of law and the independence of the judiciary. Article 42 vested the executive powers of The Gambia in the President, while article 56 vested the legislative powers of the country in Parliament, and part I of chapter 8 entrusted the judicial power of the republic to the courts of the land. The country had during this period maintained many legislative enactments passed by the colonial administration and enacted many other laws to support the Constitution in the governance process. All this is true in theory, but in practice the chief executive officer of the nation, like many other African presidents, during this period usurped all other arms of government and became the most powerful man in the country.

Despite that, and as court cases of the period have shown, the judiciary was largely independent and human rights were generally respected and protected. There were many instances in which the executive lost court cases to individuals and private organisations. The courts also invalidated legislative instruments and executive orders for

violating the Constitution. One example is when the Court of Appeal, in its judgment dated 11 May 1981 in the *Momodou Job* decision, invalidated sections 7, 8, 9 and 10 of the Special Criminal Court Act 1979 for violating the constitutional rights of the appellant.[11]

All that has been said about the nature and extent of formal democratic governance in the First Republic is generally identical with and applicable to the Second Republic. From 1997 onwards, The Gambia has been governed by a written Constitution, defined by section 4 as being the supreme law of the land to which all laws, government policies, executive orders, decisions and all other governance activities should conform. The remaining democratic values of the protection of human rights and fundamental freedoms, observance of the rule of law, the independence of the judiciary, multiple political party participation in the political process of the country, free and fair periodic elections, the doctrine of separation of powers, and transparent and accountable government, are guaranteed by the 1997 Constitution of the Second Republic of The Gambia.[12]

The new Constitution also introduced additional institutions that could only strengthen Gambian democracy under the Second Republic. These include a permanent independent electoral commission, a judicial service commission, the High Court system and the office of the Ombudsman.[13]

3.2 The judiciary

Despite several attempts to intimidate and interfere with the work of the judiciary, the courts have largely asserted their authority and maintained their independence. Recently, the government lost important court battles involving high-profile cases to political opponents and individuals. In June 2005, the High Court, in a highly-controversial murder case filed by the government, acquitted and discharged the main opposition leader, Ousainnou Darboe, and four others who were accused of murdering a supporter of the ruling party in 2000.[14]

In July 2003 the High Court in Banjul dismissed another high-profile case brought by the state against six men. In this case, Ebrima Barrow, Momodou Ousman Saho (Dumo), Momodou Marena, Ebrima Yabo, Lieutenant Lallo Jaiteh and Lieutenant Omar Darboe, all accused of treasonable offences and taken to court, were acquitted and accordingly

11 *Momodou Jobe v The Attorney-General* (1984) AC 689. See also *Kaba Jallow v The Attorney-General* 1972 (unreported).

12 Secs 4, 7, 17-38, 60, 139-159, 76, 100 & 120 1997 Constitution of The Gambia.

13 Secs 42-45, 145-148, 131-133 & 163-165 1997 Constitution of The Gambia.

14 AA Senghore 'The judiciary in governance in The Gambia: The quest for autonomy under the Second Republic' (2010) 27 *Journal of Third World Studies* 215-248.

discharged by the High Court.[15] In his ruling, Justice Ahmed O Belgore noted that there was no evidence, direct or circumstantial, linking the accused persons to the case filed against them. There was therefore no ground for the Court to consider any of the counts contained in the information sheet upon which the accused persons were charged and he thus acquitted and discharged them.

In June 2005, the High Court in Banjul dismissed a highly-controversial murder case filed by the government against the main opposition leader, Ousainu Darboe, and others.[16] In this case, the government accused Darboe and his co-accused of murdering a supporter of the ruling party while campaigning for the 2001 presidential elections. Despite the fact that senior politicians within the ruling party wanted to see Darboe and some key members of his party locked up, the High Court did not hesitate to dismiss the case because the prosecution failed to establish a case against them.

In September 2005, leaders of the four opposition parties in the country obtained a crucial victory in an important court case they filed against the state shortly before the 29 September 2005 bye-elections scheduled to be held in four constituencies.[17] The Independent Electoral Commission (IEC) made a decision that it was going to allow voters whose names did not appear on the list of the main register of voters to vote at the bye-election if they came with valid voters' cards. The opposition cried foul and argued that such a practice would not ensure genuine elections and, therefore, took the matter to court. On 28 September 2005, just a day before the bye-elections, the High Court gave a landmark ruling on the practice. While nullifying the practice, the High Court in Banjul held that 'the decision of the first respondent' (the IEC)

> will permit holders of voters' cards to vote even if their names do not appear on the register of voters, will not ensure a genuine election and will therefore be an infringement of the right of the applicants herein to stand at a genuine election as guaranteed by section 26(b) of the 1997 Constitution of The Gambia.

Consequently, the Court ruled against the executive. This is because holders of voters' cards, whose names do not appear on the main register of voters, could be holding forged cards and this violates the principle of a genuine election, which in the opinion of the Court is

15 *The State v Messer Ebrima Barrow, Momodou Ousman Saho, Momodou Marraneh, Ebrima Yabo, Lieutenant Lallo Jaiteh & Lieutenant Omar Darboe*, High Court judgment, July 2003, not yet reported (quoted in Senghore (n 14 above) 232).

16 *The State v ANO Ousainou Darbor & Others*, judgment of the High Court, June 2005, not yet reported (also quoted in Senghore (n 14 above) 232).

17 *National Alliance for Democracy and Development v The Independent Electoral Commission*, judgment of the High Court, 2005, not yet reported (quoted in Senghore (n 14 above) 232).

a fundamental right of anyone contesting, voting in or standing for election.

In July 2006, the High Court in Banjul invalidated an executive order issued by the Minister for Local Government and Lands dismissing the Mayor of Banjul, Pa-Sallah Jeng.[18] The High Court ordered that the Mayor be reinstated with immediate effect.

In all these and many other cases that have not been mentioned here, the Gambian judiciary had to take a bold stand to assert its authority and independence to uphold the principles of justice, equity, the rule of law and fair play in the governance process. However, as the next section indicates, the cost of fighting to maintain judicial autonomy and independence in The Gambia has been quite significant.[19]

It is against this background that a conclusion is drawn on the independence of the Gambian judiciary over the past years. I am well aware of the heavy criticism from various circles, both at home and abroad, against the Gambian judiciary, particularly in view of the latest judgments handed down by non-Gambian judges in a number of cases, such as *The State v Amadou Scared Janneh*,[20] *The State v Lang Tombong Tamba* (the former Chief of Defence Staff of the Gambian armed forces),[21] and *The State v Ensa Badjie* (the former Inspector-General of Police).[22] However, none of those cases has yet fully exhausted local remedies and completed the judicial process. Many are on appeal, either before the Court of Appeal or before the Supreme Court. The only case which has not gone on appeal is that of Dr Scared Janneh who was pardoned by the President after the intervention of American civil rights campaigner, Reverend Jesse Jackson. Further, the current batch of non-Gambian (mainly Nigerian) judges who have occupied and seem to have dominated the Gambian judiciary, and who handed down judgments that attracted heavy criticism against the Gambian judicial system, occurred only in the past four or five years. To conclude that The Gambia's judiciary is not independent or is subject to the executive's manipulation before the final outcome of the appeal processes that have already been started or on the basis of a few controversial judgments, as compared to those cited above, will be an overly-hasty conclusion.

The above discussions seek to establish that, despite serious lapses in the area of press freedom as shown below, The Gambia under the

18 *Pa Sallah Jeng v The Minister of Local Governance and Lands*, High Court judgment, 2006, not yet reported (quoted in Senghore (n 14 above) 232-233).

19 As above.

20 *The State v Amadou Scared Janneh & 2 Others*, High Court judgment, January 2012, not yet reported.

21 *The State v Lang Tombong Tamba and Co*, High Court, July 2010, not yet reported (also quoted in 'Ruling in ex- *CDS Tamba and Co* case today' *The Point* 19 October 2012).

22 *The State v Ensa Badjie*, High Court judgment 29 July 2011, not yet reported (also quoted in 'Life sentence for Ensa Badjie' *Foroyaa* 1-2 August 2011).

First and Second Republics has been generally governed by law and, therefore, has been largely democratic.

3.3 Press freedom: A fundamental right or a political privilege?

The concepts of press or media freedom, free speech and freedom of information are synonyms that all come down to freedom of expression, which is a fundamental principle of both international and domestic human rights law. Human rights and fundamental freedoms, including freedom of expression, are inherent in a person's humanity and are not created by the legal system. The law's role is to guarantee their promotion and protection by way of providing mechanisms and institutions for their actualisation and enjoyment by all and for them to be remedied in the event of any violation.

In the First Republic, article 22 of the 1970 Constitution guaranteed the right to freedom of expression, which included the right to hold an opinion, and to receive and communicate ideas and information without any interference. Under section 25(1)(a) of the current (1997) Gambian Constitution, '[e]very person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media'. The provisions of the two Constitutions form part of the fundamental law of the land to which all legislative, executive or administrative and judicial activities of the state must conform.

In 1998 the High Court in Banjul quashed a judgment of the Kanifing Magistrate's Court in which an executive order closing down a privately-owned radio station and forfeiting its apparatus to the state was upheld. The High Court viewed the government's action as a serious violation of the appellant's right to freedom of expression in general and press freedom in particular. The High Court then made the following pronouncement:[23]

> It is an undeniable fact that the quest for knowledge and information through the media has become the hallmark and pattern to healthy democracy in all civilised society throughout the whole world.

This pronouncement has not only confirmed the rights aspect of press freedom, but it has also recognised such freedom as a prerequisite for a genuine democratic system and that an independent and free press has a crucial role to play in the area of seeking and dissemination of knowledge and information as part of the process of democratic governance.

Similarly, the underlined objective of regulating media practice in the form of legislation, as is the case with the Newspaper Act, the Telegraphic Stations Act and even with the defunct Media Commission Act, is to facilitate and protect the work and persons of media practitioners in the country. At the international level, The Gambia,

23 *Baboucarr Gaye v The IGP* (2000) WLR 200.

as a sovereign independent state and a member of the international community of civilised nations, is under an obligation under international law to respect, promote and protect press freedom and freedom of expression in general.

Gambian media practitioners, legal and judicial experts, opposition politicians and intellectuals of the post-independence era have always perceived and considered private media practice and press freedom as matters of right and not mere political privilege. In the fundamental laws of the two republics, press freedom has been guaranteed and protected because it is a fundamental human right of the citizens on whose behalf the state exercises sovereignty and jurisdiction.[24]

Thus, it will be fair to conclude from the above exposition that the state is not and cannot be ignorant of the status of press freedom as of right. In fact, the government of The Gambia and many Gambians continue to argue that the proliferation of privately-owned media houses and independent media organisations in The Gambia is clear evidence of the government's strong commitment to respecting and allowing press freedom and free speech in the country. There are currently a large number of privately-owned print and broadcast media organisations legally and freely operating in The Gambia.[25] At this juncture, one can only assume that the Minister was well aware of the fact that press freedom is a fundamental right and that her government is compelled by international law to respect, promote and protect that right.

However, the conclusion that the proliferation of private media houses in The Gambia is a sign of government's commitment to respecting press freedom could be seriously questioned in the light of recent setbacks in the relationship between the independent media and the government of The Gambia. This will be elaborated upon later in this article.

3.4 Specific legal instruments relating to media freedom in The Gambia

The print media in The Gambia is governed by the Newspaper Act of 1944. The registration, printing, publication and distribution of newspapers in The Gambia continue to be governed by the Act ever since the First Republic.[26] Section 2 of the Act defines 'newspapers' as

> any paper containing and reporting any public news, intelligence or occurrences or any remarks, observations or comments thereon printed and published for sale in The Gambia periodically or in parts or numbers but does not include any such paper published by or under the authority of the government.

24 Sec 25 1997 Constitution of the Republic of The Gambia; art 22 1970 Constitution of the Republic of The Gambia.

25 See para 4.1 below.

26 Secs 3, 4 & 5 The Newspaper Act of 1944.

According to this definition, government-controlled or owned papers are not newspapers. Thus, the Act is intended to govern the privately-owned print papers. Despite a 1990 amendment, the main provisions of the Act remained the same throughout the First Republic. Section 7 of the Act provided for a mandatory registration fee of only 1 000 Dalasis (about US $40) for anyone who wished to establish a newspaper. Similarly, section 13 imposes a maximum of 1 000 Dalais fine for an offence under the Act.

In 1996 the Armed Forces Provisional Ruling Council (the then military government of Captain Yahya Jammeh which ended the the First Republic in a bloodless *coup* on 22 July 1994), introduced a drastic amendment to the Act. This amendment, known as Decree 71 of the Newspaper Act Amendment 2, 1996, increased the registration fee from D1 000 (Gambian Dalasis) to D100 000 (US $3 500) for anyone wishing to establish a newspaper. This was a crucial turning point in the relationship between the new military government that had set out to establish the Second Republic and the independent media.

As for the broadcast media, there was no specific legislation regulating private radio and television stations. From the inception of the First Republic until 2005, the privately-owned broadcast media continued to be governed by the provisions of the Telegraphic Stations Act 1913, which was very fairly favourable to the independent broadcast media.

In July 2001 the Gambian Parliament, which was dominated by the ruling party, passed a highly-controversial law, the National Media Commission Act. The press cried foul and argued that the new law was too draconian and that it violated the 1997 Constitution. The government argued that the passage of the new law was a significant gain in the country's democratisation process as it would not only regulate media practice as a profession and a means of communication and expression, but it would also ensure better protection of freedom of the press, including free speech and press freedom in The Gambia.[27]

The Gambia Press Union then filed a lawsuit before the Supreme Court of The Gambia challenging the constitutionality of the new Act. Among the most controversial clauses of the Act was a provision on annual licensing of journalists, which also gave the Commission powers to renew or not to renew the operating licences of journalists and media houses. Other controversial provisions were the power of the Commission to force journalists to reveal their sources of information; that all decisions of the Commission are not contestable in any local court; that the new regulations would not be applicable to the government-owned or controlled media; and that the composition of the Commission had among its 11 members only two persons with a media background, which included the Director-General of the

27 See generally written comments submitted by Article 19 'Global campaign for free expression on the National Media Commission Act' (2002) 58.

Gambia Radio and Television Services (GRTS).[28] Media houses in The Gambia refused repeatedly to comply with different deadlines set by the Commission for their registration.

On 19 October 2004, the state television announced the government's intention to repeal the Act during the November sitting of the National Assembly. During December 2004, the National Assembly finally repealed the National Media Commission Act 2001. The provisions of the Constitution which had provided for the setting up of the Commission were subsequently repealed.[29]

Repealing the National Media Commission Act did not bring an end to the struggle by authorities to use the law to control the private media. Instead, the National Assembly further amended the Newspaper Act and the Criminal Code Act late in December 2004 and July 2005 respectively. This latest amendment to the Newspaper Act has increased the registration fees of newspaper publishers and managers of broadcasting institutions from D100 000 to D500 000 (about US $18 000). This increase in a country where the average salary of a civil servant ranges between US $40 and US $70 is deemed by many as unfair and unreasonable. It is fair to argue at this juncture that its constitutionality can be challenged successfully before the Supreme Court of The Gambia under whose jurisdiction the interpretation of the Constitution falls. Sections 3 and 4, as amended, have brought broadcasting institutions (radio and television stations) into the jurisdiction of the Newspaper Act.

Like the 1944 Act, the 2004 Act (Amendment) has excluded broadcasting institutions owned or operated by or under the authority of the government from the application of the Act. Similarly, section 7 was amended to include broadcasting stations. Now no person is allowed to operate a broadcasting station or cause it to be operated unless he or she registers in the office of the Registrar General a bond in the sum of D500 000 with such surety or sureties as may be required and approved by the Attorney-General. Section 7(a) cancelled any bond given and executed before coming into effect of the newly-amended Act in the sum of D100 000. Furthermore, the Criminal Code (Amendment) Act 2004 introduced mandatory prison terms for seditious publications, libel and defamation without the option of a fine.[30] As for the 2005 amendment of the same law, it provides for a fine of not less than D50 000 and not more than D250 000 or imprisonment of a term of not less than one year or both

28 Johnson (n 2 above) 413-416. See also sec 52 of the National Media Commission Act of 2001 (repealed).

29 Sec 210 1997 Constitution of the Republic of The Gambia.

30 Sec 52 Criminal Code Act 18 of 2004.

fine and imprisonment for anyone who is found guilty of a seditious publication.[31]

Similarly, sections 46 to 52A of the Criminal Code can have restrictive consequences when strictly applied. Section 46, for instance, deals with publications in general, while section 47, on the other hand, deals with the power of the Minister to prohibit the importation of publications that are contrary to the public interest. Section 48 defines offences relating to section 47. According to section 48, a person who imports, publishes, sells, offers for sale, distributes or reproduces prohibited publications or posses publications the importation of which is prohibited, commits an offence for which, if convicted, he or she could be sentenced to a fine of D1 000 (about US $35) or a prison term of three years, or a fine of D500 (about US $18) or one year imprisonment with regard to the possession of a prohibited publication. Another interesting section to briefly look into is section 50 of the Act, which gives power to the Managing Director of Gambia Postal Services Corporation or any other official of the Corporation to be nominated in writing by the Inspector-General of Police to detain, open or examine packages or articles suspected of containing prohibited publications under section 48.

Sections 51 and 52 deal with seditious intention and the penalty for such intention respectively. According to section 5(1), seditious intention includes an intention to bring into hatred, contempt or excite dissatisfaction against the person of the President or against the administration of justice in The Gambia or to raise discontent or dissatisfaction against the inhabitants of The Gambia or to promote feelings of ill-will and hostility between different classes of the population in The Gambia.[32]

Other provisions of the Criminal Code that could have a restrictive impact on and the private media are sections 178, 179 and 181A of the Code. Sections 178 and 179 provide elaborate provisions on the definitions of libel and defamatory matters respectively. Section 181A discusses false publication and broadcasting. According to this section, any person who, wilfully or negligently or recklessly or having no reason to believe that it is true, publishes or broadcasts false news, commits an offence punishable on conviction with a minimum fine of D50 000 or a maximum of not more D200 000 or imprisonment for a term of not less than one year. Section 181A further provides that the fact that the person did not know that the information or the news was false is not a defence unless he or she had taken adequate

31 Johnson (n 2 above) 236-238. See also S Conateh 'Press freedom in The Gambia', paper presented at a seminar in Banjul (2000).

32 An offence under sec 51 above carries a minimum fine of D50 000.00 or a minimum prison term of not less than one year. The maximum fine for this offence should not exceed D200 000.00. Sec 52A provides the power of the court to order for the confiscation of a printing machine used to print or produce prohibited publications upon conviction in court.

measures to verify the information. All these provisions of the press laws in The Gambia could be used to control the private media.[33]

This brief survey of press laws in The Gambia has shown that neither successive governments of The Gambia nor the people recognise or are necessarily conscious of the rights dimension of press freedom and of the fact that it is a prerequisite for a democratic system. Many human rights activists and media men have argued that the use of restrictive laws by the state to control the private media is one of the main reasons why press freedom is very limited in The Gambia.

4 Freedom of expression in The Gambia in practice

4.1 Profile of the 'independent' media

By 'independent media' reference is made to both the print and broadcast media that are not owned, controlled or in any way influenced by the government of the day or by a political party, a pressure group or any other ideologically-based organisation. To be truly independent, an independent press should be able to distance itself from both the government and the opposition parties.

Currently there are several daily, weekly and bi-weekly publishing tabloids, namely, the *Daily Observer*, *Foroyaa*, *Gambia Info*, *The Independent*, *Point*, *Daily Express*, *Today*, *Voice*, *The Standard* and *Daily News*. The only tabloids that fit into the definition of independent media are *The Independent*, *Today*, *Voice*, *The Standard* and *Daily Express*. However, *The Independent* and *Daily Express* are currently not in circulation. They are serving an indefinite suspension or closure. Despite this, given the status of *The Independent* as the most independent newspaper in the country, this article focuses a lot of attention on that paper. This tabloid took a tougher stance against the government of the day than rival papers and inclined to put greater emphasis on exposing the shortcomings of the government than highlighting its achievements. This argument does not necessarily discredit *The Independent*, as the reason for this attitude might be the absence of vibrant opposition in The Gambia. Similarly, the nature and style of government that governs the Second Republic may be another factor.

The *Daily Observer* is known to be a pro-government newspaper, while *The Point*, though independent, is not critical enough in the way it addresses crucial issues. *Gambia Info* is government-owned while *Foroyaa* is owned, controlled and heavily influenced by the political ideology of its founders. However, it is important at this juncture to consider Nyamnjoh's criticism of the independent press or

33 For more about Gambian press law, see the Information and Communication Act 2009 Cap 74i03, Laws of The Gambia.

newspapers in Africa today. According to him,[34] many of the so-called independent press or newspapers are not truly independent, and in some cases they might actually be mouthpieces of opposition parties. While highlighting the shortcomings of the liberal democratic theory for the African media, he argues that the private press have assumed either a partisan, a highly-politicised or a militant role. There is a growing obsession with the politics of belonging, nationality and citizenship. Consequently, identity politics have become central to the political process, even with the media. This criticism by Nyamnjo of the independent press in Africa does not in any way defeat the purpose of this study, which examines the relationship between the independent media and democratic governance in The Gambia, because no matter how the private media are described, the fact that they operate as independent or private media organisations remains a reality of modern-day politics in Africa in general and in The Gambia in particular.

In the period after independence, particularly during the last two and a half decades, the private press in The Gambia has been very vocal about human rights violations and bad governance, but this has not happened without a heavy price both in terms of human and considerable material losses. Media houses, writing and publishing equipment, including a printing press, occasionally were burnt. Private radio stations closed down, and journalists were physically assaulted and in some cases murdered.

In mid-December 2004, unknown assailants murdered a leading and highly vocal journalist from *The Point* newspaper, Deyda Hydara. Hydara, once editor of the newspaper, was shot dead under mysterious circumstances and all investigations into his assassination have been fruitless. Around the same period, the government promulgated the Newspaper Amendment Act 2004 and the Criminal Code Amendment Bill 2004. The newly-amended Acts cancelled all the licences that had been issued previously to the news media and forced them to re-register, while at the same time increasing the cost of a publishing licence five-fold, from 2 600 Euro to 13 000 Euro (US $3 000 to US $17 000). It also forced journalists to adopt a strict code of conduct within six months and imposed sanctions on violators of the new law. Reporters Without Borders, after learning that a new press law had been promulgated on 28 December 2004, appealed to the international community to put pressure on the government of The Gambia to stop what it called 'its mounting crackdown on Gambia's independent media'.[35]

34 FB Nyamnjoh *Africa, media, democracy and the politics of belonging* (2005) 235-237.

35 *BBC Focus on Africa* 27 December 2004.

I now move on to highlight some of the problems that were allegedly faced by the former *The Independent* newspaper and some of its shortcomings.

4.2 Case of *The Independent*

The method of using intimidation, physical assault or arbitrary arrest and detention, death threats or arson attacks and assassinations against media practitioners of the independent press in The Gambia, as claimed by the former independent newspaper, is mainly a phenomenon of modern times. *The Independent*, which was believed and considered by many to be the most independent and most critical of all the privately-owned media organisations in The Gambia during that time, has had the biggest share of those incidents of alleged attacks, arrests, detentions and interference with press freedom over recent years.

Since its inception in 1999, the paper complained about many problems with the government of the day. According to *The Independent*, its editors and reporters were repeatedly arrested and detained, beaten up and otherwise physically assaulted. In an exciting brain-storming session, which lasted for more than one hour, between the former editor-in-chief of *The Independent* and some of its senior reporters and the author, the defunct company was unable to provide an exact figure of such incidents. However, with the help of the paper's past issues, which were carefully kept in its archives, we were able to come up with a good picture of the nature and type of incidents the newspaper had been complaining about and the circumstances leading to some of those incidents.[36]

Registered on 5 July 1999, *The Independent*, a breakaway from the *Daily Observer*, allegedly had suffered more attacks than any other Gambian private media organisation. In September 2003, the newspaper's offices were set on fire by unknown arsonists. The biggest onslaught on the weekly newspaper was the burning down of its printing press in April 2004 by unidentified culprits, leading to damage of around US $50 000.

The newspaper claimed that in the past, Mondays and Fridays (the days of publication) were considered bad days for journalists at its headquarters as security men would be looming around. The paper had its first onslaught a few days after it started operations. Its staff reporter, NB Daffeh, was arrested and briefly detained by police at the

36 See generally the following issues of the *Independent* newspaper: 23-25 July 1999; 19-22 August 1999; 21-23 & 28-30 July & 27-30 November 2000; also 16-19 & 20-22 July 2001; 17-19 August & 23-25 November 2001; also 13-16 January & 22-25 September 2003; and 16-18 January & 8-11 April 2004; also 24-27 October 2005. This list is not an exhaustive one. Rather, it is only an example of all the issues surveyed, which gave a detailed account of the newspaper's confrontations with the executive.

Bundung police station for investigating a story entitled 'Handicaps decry immigration maltreatment'.

One month later, state security agents allegedly raided the offices of *The Independent* and arrested all six staff present. The agents also ransacked the office and retracted its official registration papers, thus forcing it to close down publication for three weeks. It was accused of defying an order from the Registrar of Companies to not publish the paper.

Exactly 12 months after operations began, *The Independent* experienced its fourth arrest. In these cases of arrests and detentions, the editors and reporters bore the brunt. In June 2000, there was another complaint by *The Independent* that state security agents questioned the nationalities of its founding fathers and proprietors, Baba Galleh Jallow and Alagi Yorro Jallow. The following month, Baba Galleh, chief editor, and a staff reporter, Alagie Mbye, were arrested. In June 2000, Alagie Mbye was threatened by gunmen who dropped a letter at his house.

In July 2001, another reporter was allegedly attacked by a group of soldiers and in August of the same year, another was arrested and detained for three days by the National Intelligence Agency (NIA). In November 2001, a senior reporter of the paper was allegedly arrested and detained for one week, while in January 2003 *The Independent* received death threats from unknown callers. Furthermore, around the middle of the same month Alagi Yorow Jallow received a death threat.

The latest onslaught on the paper allegedly occurred in October 2005 when its former editor-in-chief, Musa Saidykhan, was arrested by the NIA for inviting President Thabo Mbeki of South Africa to help find a solution to the killing of Deyda Hydara, a former journalist of the *Point* newspaper. The agents conceived this as hypocrisy because the matter was a purely national affair and therefore would not need international involvement. The editor's nationality and that of his wife and parents were questioned before he was finally released.

In 2010 the Court of Justice of the Economic Community of West African States (ECOWAS) held that Mr Saidykhan's arrest and subsequent detention allegedly by the authorities violated his right to personal liberty and a fair trial as provided for by articles 6 and 7 of the African Charter. These rights are also provided for under sections 19 and 24(3) and (4) respectively of the 1997 Constitution of the Republic of The Gambia. The ECOWAS Court therefore awarded Mr Saidykhan US $200 000 as compensation.[37]

This picture of mistrust, suspicion and intolerance presented by *The Independent* newspaper as having dominated the relationship

37 DAS Kyi & S Hessel 'Steadfast in protest' Annual Report of the Observatory for the Protection of Human Right Defenders (OBS) of the International Federation for Human Rights (FIDH) and World Organisation Against Torture (2011) 84-85.

between the government of the day and the private media represents the views of a small but very vocal minority in academia and other circles.

These complaints of abuse and violation of press freedom made by *The Independent* newspaper against the Second Republic of The Gambia have never been independently verified or proved, nor were they admitted by the government of the day. In fact, critics of *The Independent* totally disagreed with such complaints and describe them as baseless and politically-motivated allegations with the sole objective of tarnishing the image of the government. Some moderate but sound academics and researchers admit that *The Independent* newspaper had suffered from one major shortcoming, namely, that the paper mainly focused its attention on the failures, rather that the positive achievements, of the Jammeh administration. This was perhaps the main reason for the poor relationship that existed between the government and *The Independent*. The paper's critics further argued that despite some lapses of the government of the Second Republic in the area of press freedom, the government in The Gambia has always been largely democratic.[38] The country is being governed by a clean and democratically-structured Constitution as the supreme law of the land.[39] The Constitution provides in chapter 4 for comprehensive and adequate guarantees of fundamental human rights; it recognises the doctrine of separation of powers; and guarantees an independent judicial system.[40]

The political and governance system of The Gambia under the Second Republic has also incorporated the democratic principles of transparency, accountability and popular participation. Thus, all the essential principles of democratic governance which constitute a democratic system of government in the modern time are not only incorporated into the state, political and governance system of The Gambia, but, most importantly, they are practised on a daily basis in the process of governing the country.[41]

4.3 Attacks on other private media houses

The end of 2004 was marked by the tragic killing of a leading editor and veteran journalist, Deyda Hydara. On the night of 16 December, Hydara was driving home from his office when he was shot three times in the head by unidentified gunmen. Hydara was the managing editor and co-owner of *Point* newspaper, an independent bi-weekly

38 Senghore (n 14 above) 215-248.

39 Sec 4 1997 Constitution of the Republic of The Gambia.

40 Ch 4 1997 Constitution of the Republic of The Gambia.

41 Senghore (n 14 above) 215-248. See also AA Senghore 'The contribution of the human rights revolution to the promotion of gender development and equality' unpublished conference paper (2005).

publishing tabloid. He was also a correspondent for Agence-France Press, a former president of the Gambia Press Union and a known critic of administrative malpractice by successive governments in The Gambia. The reason for Mr Hydara's killing is not yet known and his killers are yet to be identified. However, his death came only a day after he and a group of Gambian journalists opposed the passing of the controversial National Media Commission Act already alluded to in this article.

In 2011, in *Deyda Hydara Jr and Others v The Gambia*, this matter was taken to the ECOWAS Court of Justice where it was argued that the state was required to conduct a thorough, rigorous and independent investigation into the untimely death of Hydara. This could be the best way of ascertaining the circumstances of his shooting in 2004, and also of identifying and punishing the actual perpetrators of this barbarous act.

Likewise, on 15 August 2004, Ebrahima Sillah, former BBC Banjul correspondent, suffered an arson attack on his home in Banjul. In the early hours of that day, unidentified armed attackers broke several windows of his home and poured petrol into his living room before setting it on fire. Sillah escaped injury but the fire caused extensive damage to his property. This attack was a serious warning to the independent press in The Gambia as only three days before the attack, the Gambia Press Union received a threatening letter that was thought to have come from a pro-government militia group called The Green Boys. The letter accused the private media in The Gambia of being Western agents bent on sabotaging the development programme of the government of the day. The letter then read that they 'planned to teach a GPU journalist a lesson very soon'. This arson attack, too, was not successfully investigated and the culprits are still at large.[42]

In 2000 *Radio 1 FM* had its own share of arson attacks. The premises of the station were attacked and burnt down by unknown arsonists who earlier on dropped death threat letters into the private room of one of its programme managers, Alieu Bah.

In 2006, Chief Ebrima Manneh, a reporter of the pro-government *Daily Observer*, was arrested and disappeared under mysterious circumstances. Since his disappearance, Chief Manneh's whereabouts have remained unknown. The Ghana-based media rights NGO, Media Foundation for West Africa, GPU and other media rights organisations continue to show concern about Manneh's unresolved disappearance. However, the government of The Gambia has completely distanced itself from the disappearance of Manneh. On 6 August 2009, the

42 Report of the International Press Institute *World Press Freedom Review* December 2004 31-32.

former Attorney-General and Minister of Justice, Marie Saine Firdawes, told Parliament:[43]

> I have enquired from the Director-General of the NIA, the Inspector-General of Police and the Commissioner of Prisons and to the best of their knowledge, information and belief, Chief Manneh is not in their custody.

What all these alleged series of attacks have established is that there was an atmosphere of mistrust and intolerance hanging over the relationship between the government of The Gambia and the independent media in the country. This overall relationship of mistrust have not only weakened the country's performance in the area of press freedom as an essential ingredient of democratic governance, but it has also seriously weakened and marginalised press freedom as a fundamental human right. Perhaps this explains why the African Editors Forum meeting on 15 October 2005 in Johannesburg, South Africa, placed The Gambia, together with Togo, Côte d'Ivoire, Burkina Faso and Sierra Leone, on top of the list of countries in Africa with deplorable records of press freedom violations.[44] However, this state of affairs between the government of The Gambia and the private media has changed and the country's performance in the area of press freedom as a principle of democratic governance has improved.

The improvement in the relationship between the state and the private media was dealt a severe blow in 2012 with the unexpected closure of three major independent media organisations by the government. The latest crackdown affected the *Daily News*, *The Standard* and the *Taranga FM* radio station of Sinchu Alagie of the West Coast region of The Gambia. In June and July 2012, three journalists were arrested and subsequently detained and later released. Abdulhamid Adiamah, editor and owner of *Today* newspaper, Lamin Njie, the deputy editor of the *Daily* newspaper, and Sidiq Asemota, a senior legal correspondent with the *Daily Observer* newspaper, were all arrested between June and July 2012 on contempt of court charges while they were reporting court proceedings for their respective media houses. Both Njie and Asemota were pardoned and released,

43 Quoted in Media Alert – West Africa 2009 Annual State of the Media Report 26-27 and 46-47.

44 This conference took note of the current poor relationship between the independent media and the government of The Gambia. Participants noted with particular interest what was described as the deteriorating human rights treatment of media practitioners in the country, particularly the murder of Mr Deyda Hydara, editor and co-founder of the private newspaper *The Point* under mysterious circumstances and the disappearance of Mr Ebrima Manneh, a former journalist of the *Daily Observer*. DAS Kyi & S Hessel 'Steadfast in protest' annual report of the Observatory for the Protection of Human Right Defenders (OBS) of the International Federation for Human Rights (FIDH) and World Organisation Against Torture (2011).

but Adiamah was charged with contempt of court, convicted and sentenced to a fine of D100 000 (about US $13 215) in June 2012.[45]

In September 2012, two journalists were arrested and detained at the Banjul police headquarters. The two media men, Omar Ceesay of the *Daily News*, who is also the Vice-President of the Gambia Press Union (GPU), and Baboucar Saidykhan, a freelance journalist, had been 'invited' to the police headquarters in Banjul, where the two allegedly had been detained, in relation to their application for permission to hold a peaceful protest against the latest execution of death row inmates.[46]

The two journalists remained in police custody until 10 September 2012, when they were charged with 'conspiracy to commit felony' after the police had dropped their initial charges of 'incitement to violence'. They were later granted bail in the sum of D250 000 (about US $27 000).

Article 19 strongly condemns this latest wave of arrests and detentions of journalists of the privately-owned media organisation. It argues that such action amounts to neglecting the very essence of the rights to freedom of expression and peaceful assembly both of which are guaranteed by international human rights conventions, including the African Charter, and the 1997 Constitution of the Republic of The Gambia. Section 25 of the 1997 Constitution has specifically recognised the right of the people to hold peaceful demonstrations. This right is also guaranteed and protected by all the international human rights instruments signed and ratified by The Gambia.

The closing down of these privately-owned media houses represents a serious setback for a long-standing troubled relationship that had just began to enjoy some significant improvement in recent years.

4.4 Independent broadcast media

Currently about 30 radio stations are legally operating in The Gambia and most of these are privately owned. There are several of them in the greater Banjul area, while others operate in various towns and urban centres in the provinces. These include the stations in Brikama, Kerewan, Farafenni, Sapu, George Town or Janjangburreh and Brikamaba. There are stations in Basse, the provincial centre of the Upper River region, in Jarra Soma, which is a major town in the Lowe

45 See Article 19 'The Gambia: Arresting and detaining court reporters damages public trust in the judiciary' http://www.article19.org/resources.php/resource/3397/en/the-gambia:-arresting-and-detaining-court-reporters-damages-public-trust-in-the-judiciary (accessed 31 October 2012).

46 'GPU calls on the state to drop charges against journalists' *Foroyaa* 25 September 2012.

River region, Bwiam in the West Coast region and elsewhere in the country.[47]

Some of the private radio stations are temporarily closed down by the authorities. *Citizen FM* and *Sud FM* are among those that are affected and the validity of the move to close the latter is yet to be challenged before the courts. This has been the second time that the former has been closed down by the authorities. About ten years ago *Citizen FM* was closed down by the government but reopened after a High Court ruling to that effect.[48]

Most of the private stations are purely commercial while the rest are community stations sometimes engaging in commercial activities as well. *Radio Syd* was the first independent station to be established, not only in The Gambia but also in the West African region. It was established in 1970, broadcasting 20 hours a day with mainly music programmes in English and the local languages. It also provides tourist information in Swedish.[49]

In 1990, *Radio 1 FM* was established in Serrekunda as an independent commercial radio station. The establishment in 1995 of another privately-owned radio station, *Citizen FM*, by a veteran journalist and a former BBC Banjul correspondent, the late Baboucarr Gaye, was another significant achievement by The Gambia in terms of increasing the privately-owned broadcast media organisations in the country. Like *The Independent* newspaper, *Citizen FM* has had a troubled history with the government of the Second Republic. This is discussed further in the next section.

Given the limited number of privately-owned radio stations in The Gambia during the First Republic, and that private broadcasting only started in the country in the 1970s, the practice of closing down independent radio stations as a method of interference with or obstruction of press freedom, was not as rampant as other methods were. Currently, there are only two significant cases worth mentioning and both have taken place under the Second Republic.

In 1990, *Citizen FM Radio*, belonging to a veteran journalist and a former BBC Banjul correspondent, the late Baboucarr Gaye, was closed down by the state and the proprietor taken to court on charges of operating without a licence contrary to section 5(7) of the Telegraph Stations Act 1913 and regulation 4 made under section 12 of the Act. The Kanifing Magistrate's Court, serving as the court of first instance, convicted Gaye and sentenced him to one month's imprisonment with hard labour with the option to pay D35 000 as fine. The Court

47 Brikama is the provincial capital of the country's West Coast region, while Kerewan is the centre for the northern region. Farafenni is an urban commercial centre in the northern region; George Town or Janjangburreh is the provincial centre of the Central River region, while Sapo is an agricultural training post in the same region.

48 See generally *Baboucarr* (n 23 above).

49 *Europa world yearbook* (1990) 1089-1094.

ordered the radio station forfeited to the state. Gaye appealed to the High Court in Banjul against his conviction and sentence and on 3 July 2000 the High Court reversed the Magistrate's Court's judgment.

In his ruling, the late Justice WG Grante decided that the principal magistrate had erred in law and therefore he quashed the conviction and sentence and the consequential order of forfeiture passed on Gaye. The High Court then ordered the state to restore to Babouccar Gaye his radio apparatus and property which had been forfeited within seven days for the radio to resume its normal operation. The High Court judge in the course of his judgment described freedom of expression not only as a fundamental right but also a basic necessity of a democratic system.

The High Court's ruling in this case is significant for various reasons. It illustrated that the Court was conscious of the rights dimension of independent media practice as a basic principle of a democratic system. It recognised the fact that the work of the media to freely seek and disseminate information was the cornerstone of a democratic country.[50] The case posed a serious challenge to the independence of the Gambian judiciary because it provided the latter with yet another golden opportunity to assert its authority and correct and check on an increasingly ever-powerful executive.

The second private radio station to be subjected to closure by the authorities was *Sud FM*, which is owned jointly by a group of Senegalese and Gambian entrepreneurs. The station was shut down early in November 2005, and is a subsidiary branch of the Dakar-based *Sud FM*, which the Senegalese government had shut down in October of the same year. The reasons for the closure of Banjul *Sud FM* was not indicated despite the fact that there is a consensus among media practitioners and the radio's audience in Banjul that during its eight years of operation in The Gambia, *Sud FM* had never had any problem with the government and the public at large. The station manager argued that Banjul *Sud FM* never had any problem with the Senegalese President, Mr Abdoulie Wade, but admitted that the Dakar station could have been closed down for its troubled relationship with the Wade administration.

Nevertheless, the *Sud FM* Banjul station manager thought that the closure of his radio, which happened immediately after the return of president Yahya Jammeh from a single-day official trip to Dakar, could have been the result of an understanding between the two presidents. Whatever reasons there might be, the closure of *Sud FM* in Dakar and Banjul does not only represent a violation of press freedom in the two countries, but also shows the vulnerability of private media organisations in the Senegambia region despite the obligation under

50 See generally *Baboucarr* (n 23 above).

international law to respect, promote and protect the right to freedom of expression and free speech.[51]

The crisis involving the closure of *Sud FM* had by the end of 2012 not yet been resolved. The Gambia Press Union was said to be negotiating with the government to reach a lasting solution to the crisis, but apparently to no avail. Although it was widely predicted that this case may finally go to court for a judicial solution, it seems that all parties have now lost interest in taking legal action for a judicial settlement of the case. Regardless of whether they reach a judicial or an out-of-court settlement, there is a need for all concerned to recognise and emphasise the human rights dimension of press freedom.

The proprietor of *Tangara Radio FM*, Mr Ismaila Ceesay, reported that in August 2012 some operatives from the country's international security organisation, the NIA, visited the radio station and told them that, based on an NIA directive, the radio station was ordered to immediately close down transmission. This is the second time that *Taranga Radio* had been closed down since its establishment in 2009. *Taranga Radio* has been praised frequently by people from all walks of life.

Finally, the government has always been sceptical about the motives and intention of some journalists and often accuse them of being mouthpieces of the opposition. However, in 2010 the government expressed its commitment to review some of the country's press laws to bring them in conformity with The Gambia's international obligations. On 12 November 2010, during the 48th ordinary session of the African Commission in Banjul, the then Attorney-General and Minister of Justice, Edward A Gomez, promised the human rights community that the government will review its laws that are not favourable to press freedom and bring them in line with international standards of free expression.[52]

5 Conclusion

5.1 A brief analysis of the data presented

Gambian media practitioners, statesmen and intellectuals have always understood and advocated press freedom as a right and not a mere political privilege. Press freedom is a fundamental human right the promotion and protection of which are guaranteed in the Constitution, the ordinary laws of the land and in international human rights conventions to which The Gambia is a signatory.

51 Art 9 Universal Declaration of Human Rights of 1948; art 9 African Charter; art 19 International Covenant on Civil and Political Rights of 1966.

52 Kyi & Hessel (n 37 above) 83.

Despite this, there frequently have been infringements on press freedom in The Gambia, such as unfavourable press laws, a lack of professionalism, and a lack of access to information by reporters. Examples include the amendment of the Newspaper Act by the government to increase registration fees for a private newspaper from D1 000 to D100 000 and finally to D500 000 (from US $40 to US $3 500 and finally to US $18 000). This latest increase in the registration fees of the private media has made it virtually impossible for the vast majority of Gambians to embark upon private media activities.

Despite all sorts of intimidation, violations and abuses of press freedom reported or claimed by *The Independent* and other private media organisations against the government of the day, there has been a proliferation of private media organisations in The Gambia over the past 10 to 15 years. There has been a huge increase both in number and type of private media organisations in the country. If these trends continue for the next 10 years, the country's ranking in terms of performance in the area of press freedom will definitely improve.

The significant increase both in number and type of private media organisations in The Gambia in recent years is a clear indication of a major improvement in the relationship between the independent media and the government. The fact that the vast majority of newspapers are independent and non-patrician clearly indicates that the culture of independent media practice has existed in The Gambia for more than a century and that many of the media practitioners of this period and before were somehow conscious of the human rights nature of independent media practice, particularly that of newspaper journalism. Unlike print media, the majority of broadcast media came into existence during the Second Republic.[53]

The improvement in the relationship between the Gambian government and the independent media has very recently suffered some serious setbacks after the closure of *Taranga FM* radio, and two privately-owned English language newspapers, the *Daily News* and *The Standard*. These closures of newspapers have left a big gap in the circulation of newspapers in The Gambia.[54]

In September 2012, journalists were charged with enticing violence and conspiracy to commit a felony. The GPU appealed to the government to drop the charges against the two journalists in the interests of national reconciliation, human rights, democracy and the rule of law.

When considering professionalism and the problem of hiding behind the media for political reasons, it is obvious from the style of reporting, headlining and judgmental writing that Gambian media

53 See Johnson (n 2 above) 281-333.

54 See 'IPI expresses concern at continued efforts to censor media' *Foroyaa* 25 September 2012.

practitioners are in dire need of training in the techniques and art of journalism. Most of them are taken directly from the classroom to newsrooms, television cameras or to the field to send news reports. Very often newspaper articles are quick to report rumours without any objective and well-researched analysis. Similarly, high-profile court cases involving top politicians, thieves or suspected murderers are common front-page headlines, and because of their inexperience, reporters are usually 'led only by the interest to report and then harvest being plentiful' without regard to quality.[55]

African governments' attitude toward the private press is a source of serious concern, especially the lack of adequate commitment on the African continent to allow press freedom and independent media practice. This is because an independent and free press is the most feared force to the autocratic rulers and arrogant and undemocratic administrators of the modern-day Africa. Politicians are reluctant to allow the media to report incidents of rampant corruption, abuses of power and administrative malpractices, which is a fundamental role for a well-functioning independent free press. This is reflected in statements such as the one made in 1972 by a former Attorney-General and Minister of Justice of the Jawara administration:

> We have a mandate to run this country and we will not allow one man with his pen to overthrow an entire government, what explanation we give to the people who gave us the mandate.

The African state is often influenced by an authoritarian theory that lays undue emphasis on loose and open-ended notions of protection of internal security and maintaining law and order to the detriment of press freedom. The question that arises is whether it is practically possible for one person to bring down an entire government with his or her pen. A former Master of the Superior Courts in The Gambia remarked as follows:[56]

> Instead of being a detractor or an adversary of government, a free press is an effective forum for public debate, a mechanism that facilitates an invaluable two-way communication between the people and their elected leaders. It is the very catharsis of discontent and an antidote to violence.

This quotation explains the deep-seated scepticism, suspicion and mistrust existing between some members of the government and the private media.

The early development of rights-consciousness in the minds of Gambian media practitioners may be a significant outcome of government's long-standing suspicious attitude to and intolerance

55 See Johnson (n 2 above) 386-406.

56 See Johnson (n 2 above) 281-334. See also AA Senghore 'Africa in a changing world: The major governance crisis in West Africa and the way forward' paper presented at an international conference on 'Africa: The present and the prospects for the future' held in Niamey, Niger, 20-22 December 2008.

of the independent media. It is only natural that when people are suppressed, they become more conscious of their rights and dignity. When The Gambia was placed under military rule in 1994 and throughout the period leading to the inception of the Second Republic, right through to the present day, human rights activism in the country intensified and civil society and rights advocacy organisations increased significantly.[57]

It is important to emphasise that the state can and should allow press freedom without necessarily undermining its authority or even responsibility to maintain law and order and effectively protect its internal security. Likewise, regulating media activity does not necessarily mean a violation of press freedom. In fact, if we are serious about recognising the media as the fourth estate, the Constitution and the other laws of the land should contain elaborate provisions on the composition, functioning, regulations, limitations, privileges as well as immunities and other governing rules of the media. In other words, society must be sensitive to the composition and to the whole question of handling the affairs of the media as it does to that of the judiciary as the third estate. As far as one can see, only people who are well educated in law are part of the judiciary, including both the bar and the bench. Furthermore, the essence of the rule of law is that government, civil society and NGOs and institutions, including private media organisations and individuals, are all subject to the supreme authority of the law so long as the law is reasonable, fair and just.[58]

In the case of The Gambia, the principle of fairness and reasonableness of the law is synonymous with that of constitutionality. In other words, laws aimed at regulating and governing the media must be in conformity with the 1997 Constitution, otherwise such a contravening law will be null and void.[59] It was for this reason that the repealed National Media Commission Act was viewed by many as draconian and subsequently challenged before the Supreme Court of The Gambia. In 2001 the Supreme Court invalidated several provisions of another controversial Act of Parliament known as the Indemnity (Amendment) Act for contravening the 1997 Constitution of The Gambia and the African Charter.[60]

In 1964 William Dixon Colley, a former editor in Bathurst, was quoted as saying:[61]

> In a country where people have no facilities to express opinion through the press or the radio, relations between the government and the governed are bound to be strained. Experience has shown that the liberty of the

57 See generally Senghore (n 34 above).

58 ECS Wade & G Philips *Constitutional and administrative law* (1997).

59 Sec 4 1997 Constitution of the Republic of The Gambia.

60 See *Sabally v Inspector-General of Police* (n 8 above).

61 See Johnson (n 2 above) 316.

people is insecure as long as the forces opposed to such liberty remain in power.

Thus, it is this feeling of insecurity that may force the people to revolt either physically or ideologically. Likewise, the advent of the modern international human rights system and the subsequent active involvement by The Gambia in bringing about the global and regional human rights revolution could be another significant contributing factor to the development of rights-consciousness in the minds of Gambian journalists of the post-independent period.

5.2 Recommendations for the future

The way forward for democratic governance and press freedom in The Gambia is for the government, the media and the rest of society to recognise and or take into account that a functioning, responsible and democratic governance system cannot be achieved without a free, efficient and objectively critical independent media. Objectively critical and responsible writing and reporting of events and issues help government see or know about its shortcomings, weaknesses or mistakes and it may therefore correct itself.

The current government is urged to relax the existing press laws and make them favourable to private media practitioners. This measure will definitely strengthen our democratic credentials in the area of press freedom.

For the media to take up its position as the fourth estate and effectively play its role in a democratic governing and nation-building process, it is high time for The Gambia to have a school of journalism of its own or a special department of that sort to be opened within the country's university. Gambian media practitioners should be trained on various aspects of media professionalism. These practitioners should know governance issues, the process of democratisation and democratic governance, human rights issues, the law, not only that part of it relating to the media, but also the general principles of the law and the important role the media has to play in the rocky and rough road to development and nation building. Although the University of The Gambia, which is still in its infancy, has not introduced a degree or even diploma programme in journalism and the country as a whole does not have a school of journalism of any kind, plans are in an advanced stage for the country's national university to introduce a comprehensive BA programme in journalism and mass communication. In the meantime, rudimentary training is necessary to provide a short-term remedy to the problem of a lack of professional training for Gambian journalists. The Gambia Press Union has a critical role to play towards achieving this objective. In 2003, a bold move was taken toward achieving this end with the establishment of the Gambia Media Training Institute through collaborative efforts of the GPU, GRTS, the UNDP, the Gambia

Technical Training Institute and UNESCO'S BREDA Division in Dakar. The training centre 'provided remedial courses covering functional English, communication theory, news writing, radio announcing, communication techniques and technology and computer-assisted reporting'.[62]

The government of The Gambia takes the credit for the bold initiatives and the Gambia Press Union through its former president, DA Jawo, highly welcomed the move and added that government's efforts to provide the necessary training for journalists will only serve to render them more professional in their compartment and delivery.[63]

Despite these laudable efforts, the author's visit to the institute and subsequent reading of events taking place there has revealed show that there still a lot to be done as far as the short-term objective of providing a basic and rudimentary training in journalism is concerned.

Finally, it remains important that private media organisations respect the laws of the land, the people's culture and all other norms and standards of responsible journalism. Gambian journalists must abide by the principles of objective, truthful and responsible writing and reporting, namely, responsibility, independence, sincerity, truthfulness, accuracy, impartiality, fair play, freedom of the press and decency. Journalists are human rights defenders and promoters of good governance, and governments across the African continent should continue to respect and abide by their international obligations to guarantee, promote and protect press freedom, human rights and human rights defenders.

62 See Johnson (n 2 above) 386-390.

63 Johnson (n 2 above) 388; *The Gambia News* and Report 2003.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Ballot or bullet: Protecting the right to vote in Nigeria

Basil Ugochukwu[*]
PhD Candidate and Legal Process Instructor, Osgoode Hall Law School, York University, Toronto, Canada

Summary

This article aims to construct a new paradigm for understanding the right to vote in Nigeria. Following strong indications that the 2011 Nigerian elections were managed better than in previous years, it is to be hoped that future elections can be built on its relative success. Therefore, as the country appears to have a handle on its electoral pathologies (albeit relatively speaking), the article examines one way of providing this assurance by placing the Nigerian voter at the centre and not the margins of the electoral process. It analyses the right to vote and what it means to the average Nigerian voter. Its starting position is that the right to vote is nowhere explicitly enshrined in the Nigerian Constitution or its electoral laws. Where, universally speaking, to vote is either a legal or constitutional right, the article argues that in none of those conceptions does such a right exist in Nigeria. Further, it shows how the Nigerian legal and electoral systems inordinately prioritise the rights of political parties and their candidates in elections over and above those of the ordinary voter, an issue which it is contended has to be satisfactorily addressed to meaningfully build upon the gains of the 2011 elections.

1 Introduction

As has been routine since Nigeria moved from military to civil rule in 1999, the country's 2011 general elections received early evaluations from various quarters. But the verdict this time was that the process and its outcome departed substantially from what transpired in 2007

* LLB (Abia State), LLM (Central European, Budapest); ugochukwubc@yahoo.com. I am grateful to Prof Faisal Bhabha for comments on an earlier draft of the manuscript.

and 2003.[1] In relative terms, the votes of Nigerians in 2011 counted perhaps more than ever since the transition from military to civil rule. Several authorities confirm and justify this conclusion. Both arms of the national parliament have a politically more diverse membership, unlike previously when the ruling People's Democratic Party (PDP) seemed to literally sweep the opposition off the political horizon by fair or, more often, crooked means.[2] Many states are now controlled by political parties other than the PDP. Quite significantly, the most important verdict on the election came from Nigerians themselves who, notwithstanding the unfortunate post-election violence in some states in the northern parts of the country, agreed that the elections to a great extent represented their will as voters.[3]

Nigerians have (and justifiably so) been asking questions about how it was possible to so significantly improve the credibility of the electoral process within a four-year span when the country in 2007 conducted perhaps its worst elections in history. What individuals or institutions should share the credit for this? Is what happened in the 2011 elections sustainable over time or is it a once-off event that would last only until retrograde politicians (so obviously tripped or surprised by it) regroup in the coming years and reverse the gains made? What should be done to ensure such a reversal, if attempted, is not achieved? If the lessons of history are anything to go by, is it not possible that the country will sleep on this relative success?

With the shortcomings of elections since the 1999 transition as helpful background, it is possible to contextualise the relative successes of the 2011 Nigerian elections and to place in perspective the factors that may have enabled that outcome. Without a doubt, two factors

---

1 See O Adeniyi 'Divided opposition as boon to African incumbents' http://www.wcfia.harvard.edu/ fellows/papers/2010-11/Paper_Adeniyi_final.pdf (accessed 10 May 2012); 'Nigeria's elections, despite alleged vote buying, was most credible since 1999' *Touch Base* http://www.touchbaseonline. ca/?p=1716 (accessed 10 May 2012), stating that '[c]ivil society watchdog groups, including the Abuja-based coalition known as the Elections Situation Room, say electoral reforms initiated under the leadership of elections commission chief Attahiru Jega have enabled greater transparency in the 2011 polls. International observer groups also said the polls were the most credible since 1999.'

2 The fraud-ridden elections of 2003 and 2007 coincided with PDP's near total dominance of the two arms of the National Assembly. In 1999 the party returned 59 members of a 109-seat senate and 206 members of a 360-seat house of representatives. In 2003 they returned 76 senators and 223 house members, while in 2007 the party had 87 senators and 263 house members. By 2011 its share fell to 71 senators and 202 house members. Ten parties are represented in the 2011 National Assembly, unlike previously when only a handful of the parties returned members. See, generally, P Lewis's Nigeria Country Report (Cape Town: Centre for Social Science Research, 2011) http://www. africanlegislaturesproject.org/sites/africanlegislaturesproject.org/files/ALP%20Nigeria%20Country%20Report_0.pdf (accessed 11 May 2012).

3 See eg H Ibrahim '2011 polls: NGOs give INEC pass mark' *Saturday Tribune* http://www.tribune.com.ng/sat/index.php/news/4080-2011-polls-ngos-give-inec-pass-mark.html (accessed 11 May 2012).

played a substantial role in this regard. The first is a welcome change in the direction of electoral management. Under a new leadership, Nigeria's Independent National Electoral Commission (INEC), which before now had been anything but independent, embraced a different conception of its role as an electoral umpire. The institution did not feel as beholden to the ruling party in the 2011 elections as had been the case previously. In the process, it did retrieve some of its lost credibility and legitimacy as a democratic public institution and introduced a new electoral management template upon which future progress may be established. Secondly, the incumbent President did not feel as entitled as the incumbent in 2003 and 2007 to press home the advantages of his position, especially in all non-presidential polls. He was rather willing to not manipulate INEC or the security forces (as had happened in past elections) to subvert popular will.[4]

Yet, this by no means is any indication that the 2011 elections were free of all negative incidents. Allegations that the election – especially the presidential ballot – was rigged, stood in contrast to the very positive evaluations stated above. In the northern parts of the country these complaints soon gave way to violent riots, leading to several deaths and the destruction of public and private property.[5] However, in addition to what the rioters may have perceived as the manipulation of the election, the subsequent violence was in part also blamed on 'inflammatory statements made by political leaders and public discourse in the media before, during and after the elections'.[6] The complaints of rigging and violent riots that ensued, though detracting from the major positives from the election, did only little to place it in the same situation as all other elections in the country since the 1999 transition.

However, although better election management and restraint in using incumbency powers may to consolidate Nigeria's electoral democracy in the short term, they still fall far below the requirements for ensuring the maintenance of that culture in the long term. They place undue emphasis on individual character and action in contrast to procedural effectiveness and institutional durability as objective qualities of a stronger electoral system. The question

4 See 'Sahara reporters interview prominent Nigerian activist Innocent Chukwuma' http://saharareporters.com/video/sahara-reporters-interviews-prominent-nigerian-activist-innocent-chukwuma (accessed 11 May 2012). Chukwuma, a former Chairperson of the Transition Monitoring Group, TMG, Co-ordinating Committee, stated that the INEC was 'arguably neutral' and that the incumbent President did not show an inclination to be particularly 'overbearing'.

5 See 'Nigeria election: Riots over Goodluck Jonathan win' http://www.bbc.co.uk/news/world-africa-13107867 (accessed 8 September 2012). See also Human Rights Watch 'Nigeria: Post-election violence killed 800' http://www.hrw.org/news/2011/05/16/nigeria-post-election-violence-killed-800 (accessed 8 September 2012).

6 PE Ofili 'Provocative discourse and violence in Nigeria's 2011 elections' (2011) 17 *The Africa Portal Backgrounder* 1.

here is: What happens in future, assuming that the INEC reverts to a leadership less concerned about organising credible elections than with its relationship to the ruling party or if an incumbent president emerges who would rather exhaust all advantages conferred by that incumbency position than worry about whether elections are fair? It is because of the fragility and subjectivity of an overt reliance on individual character that a different paradigm built on the strength and objectivity of institutions and procedures is desirable to sustain free elections and democracy in Nigeria.

In this article, I will approach the goal of constructing this new paradigm by placing the Nigerian voter in her rightful place in the electoral architecture. It may well be that the 2011 elections were a once-off anomaly unless strong assurances exist that future elections can be built on its relative successes. I therefore intend to analyse the right to vote and what that right means to the average Nigerian voter. Where, universally speaking, to vote is either a legal or constitutional right, I argue in this article that no such right exists in Nigeria. Further, I will show how the Nigerian legal and electoral systems inordinately prioritise the rights of political parties and their candidates in elections over and above those of the ordinary voter, an issue which I contend has to be addressed satisfactorily to meaningfully build upon the gains of the 2011 elections.

My starting position is that the right to vote is nowhere explicitly enshrined in the Constitution or the electoral laws. In the first instance, Nigerians tend to conflate the right to vote with the right to be registered as a voter. Besides, voters do not have any legal rights under the electoral law to challenge the outcome of elections. Thus, to the average Nigerian, to vote means no more than merely casting a ballot and exiting the polling station. If anything happens to the vote (for example if it is diluted, debased, made not to count or otherwise rendered ineffective), the Nigerian voter, whether legally or constitutionally, is left with absolutely no remedy. Therefore, even if assuming that the right to vote exists in Nigeria, it defies the popular *ubi jus, ibi remedium* (where there is a right, there is a remedy) doctrine. I proceed by analysing the presence or lack of legal protection of the right to vote in Nigeria. I refer to comparative practices from other jurisdictions in Africa and elsewhere to show how they compare to Nigeria's current regime, identifying shortcomings and making recommendations for a new regime that places the rights of voters where they truly belong. Most of these comparisons are drawn from Africa as they share political and social situations with Nigeria. In addition, these countries have written constitutions with a broad array of human rights guarantees, as is the case in Nigeria. Where I highlight the practices of jurisdictions outside Africa, it is to provide added analytical insight.

For purposes of clarity, it should be stated that my main concern is whether there is a right to vote in Nigeria *qua* constitutional right

that an ordinary voter could enforce like all other constitutional rights. It is likely that the right could be derived from other rights, such as the right to equality and freedom from discrimination. The Nigerian courts have sometimes in the past allowed such derivative protection of rights, for example, when it was decided that the right to a travel passport arises from the right to freedom of movement.[7] While it may be possible to derive the right to vote from other rights, it has not already happened. In the circumstances, my analysis is restricted to what the right to vote means presently in Nigeria and not so much what it might become in future.

In the next section of the article I provide a conceptual outline of the right to vote, while section 3 contains an analysis of whether the right to vote is a right or a mere privilege. In section 4 I turn my attention to the tendency in Nigeria to confuse the right to vote with the right to be registered as a voter. The fifth section examines the nature of the legal protection accorded the right to vote in Nigeria, again from a comparative perspective. In section 6 I provide justification for the contention that the right to vote in Nigeria has to be protected if democracy is to be consolidated. The last section contains some concluding reflections.

2 Conceptualising the right to vote

Though legal and political scholars alike disagree on the true meaning and ramifications of democracy as a form of government,[8] they are united at least on one of its core foundations: elections as a means of making popular voices heard and of putting practical effect to the description of that political form as government of the people, by the people and for the people.[9] In a sense, therefore, elections are

7 See *Olisa Agbakoba v Director, State Security Service* (1994) 6 NWLR (Pt 351) 475 (NCA). See also OC Okafor 'The fundamental right to a passport under Nigerian law: An integrated viewpoint' (1996) 40 *Journal of African Law* 53.

8 P Schmitter & TL Karl 'What democracy is ... and is not' (1991) 2 *Journal of Democracy* 75: 'For some time, the word democracy has been circulating as a debased currency in the political market place. Politicians with a wide range of convictions and practices strove to appropriate the label and attach to it their actions. Scholars, conversely, hesitated to use it – without adding qualifying adjectives – because of the ambiguity that surrounds it.' See also S Lindberg *Democracy and elections in Africa* (2006); M Halperin 'Guaranteeing democracy' (1993) 91 *Foreign Policy* 106.

9 Taken from an address by former United States President Abraham Lincoln delivered at Gettysburg, Pennsylvania on 19 November 1863, http://history1800s.about.com/od/abrahamlincoln/a/ gettysburgtext.htm (accessed 11 May 2012): 'It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion – that we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall

the oxygen that democracy breaths. Without elections or some other process by which it is possible for the people to effect the orderly renewal of the mandate or a peaceful replacement of political officials, democracy is empty. In fact, to speak of democracy without elections is a contradiction.

Once it is agreed that elections form the bedrock of democratic governance, we need also to agree on the value of the vote as an election marker. Universal suffrage is usually considered one of the most basic criteria for an election to be deemed democratic.[10] Among the seven conditions identified by Dahl as necessary for the existence of a polyarchy is the one that 'practically all adults have the right to vote'.[11] Yet, according to Gardner voting has no intrinsic value because even autocratic states hold elections in which the only candidate on the ballot is the incumbent autocrat. The results of this 'election' are then used to defend the political legitimacy of the autocratic regime.[12]

However, voters, and the political systems to which they belong, know how important it is that their votes are worth more than this. It is noted, for example, that an extensive body of voting rights law is devoted to the proposition that the denial of the vote – or the denial of an 'effective' vote – is presumptively bad. The question is: Why? 'What exactly is so important about the right to vote that its denial, or the perception of its denial, is so offensive?'[13] It is possible, therefore, that persons who claim its denial are actually claiming the following: They could be claiming that their exclusion from the franchise leaves them with an inadequate ability to influence the outcome of the governmental decision-making processes. They could also very well be saying that a denial of the vote constitutes an unacceptable form of exclusion from a validating social practice. In other words, they are claiming that exclusion from voting is, 'in effect, marks of inferiority, a consignment to a degrading form of second-class citizenship'.[14] In recognition of the above, the United States Supreme Court in the case of *Wesberry v Sanders*[15] held that '[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'

---

not perish from the earth.'

10 A Blais *et al* 'Deciding who has the right to vote: A comparative analysis of election laws' (2001) 20 *Electoral Studies* 41.

11 R Dahl *Democracy and its critics* (1989) 233.

12 JA Gardner 'Liberty, community and the constitutional structure of political influence: A reconsideration of the right to vote' (1997) 145 *University of Pennsylvania Law Review* 893 900. See also F Zakaria 'The rise of illiberal democracy' (1997) 76 *Foreign Affairs* 22.

13 As above.

14 As above.

15 (1964) 376 US 1 17.

Because of the importance of the right to vote in a democracy, societies which practise that form of government have devised various means of protecting it. Yet, while it is customary for all such countries to claim the existence of the right to vote, contextual variations exist across jurisdictions. Significantly, therefore, the right to vote does not have the same meaning or have the same degree of legal protection in all democracies; the mechanisms for securing and protecting it differ from country to country. Often the right to vote is shorn of its 'entitling' characteristics in which case it may be more appropriate to speak of it as being a privilege rather than a right. I will return to this point later. To illustrate the point about distinctive country preferences in the protection of the ballot, it is important as well to consider how the right to vote has evolved and the theories that have been applied to every level of its historical evolution.

Kirby identifies five stages in the historical evolution of the right to vote.[16] Among primitive peoples, in the city states of antiquity and during the Renaissance, the citizenship theory of the voting right prevailed. Under this theory, the right to vote was an attribute of citizenship. This theory holds true to this day, going by the practices of many countries which make the right to vote contingent upon citizenship. The second was the vested privilege theory in which the right to vote was distributed by reference to pure feudal principles. It was in this conception a vested privilege, an incident of a particular status and usually connected to land or other property ownership.[17] The third theory Kirby identifies is the natural rights theory in which the right to vote, like all other such rights, are abstract and founded on the basis of natural law, a consequence of a social compact and an incident of popular sovereignty.[18]

Under the government function theory of the right to vote, which is derived from modern principles of political science, Kirby states that in casting the ballot, a voter is performing a public function much like a legislator or judge. That therefore makes the voter an organ of government. The ethical theory, which is the last that Kirby identifies, suggests that the right to vote is essential to the development of the individual character, a condition necessary for the realisation of the full worth of the human personality.[19]

In historical terms, the development of voting rights in Nigeria followed a somewhat similar trajectory to Kirby's outline above from the period when efforts were concentrated on restricting or depressing the voting field and up to the time when those restrictions

16 J Kirby 'The constitutional right to vote' (1970) 45 *New York University Law Review* 996.

17 As above.

18 As above.

19 As above.

were lifted and the pool of voters increased. According to Ayaode,[20] the development of voting rights in Nigeria could be divided into three historical periods: 1922-1950, 1950-1958 and 1958-1966. Significantly, each of these periods engaged, in terms of the right to vote, a distinct theoretical framework, as we will see presently. The first period, 1922-1950, according to Ayoade, was the period in which the right to vote was a vested privilege as with Kirby's 'vested privilege theory' above. At that time, Ayoade informs us, the voting franchise was restricted both spatially and numerically. It was available in only two cities: Lagos and Calabar, which were both prosperous and commercially cosmopolitan. These cities also had the most educated inhabitants in the country at the time.

During this period regulations attached to the franchise limited the number of people qualified to vote. This privilege was given only to male citizens aged 21 and above. In addition to citizenship and residency requirements, the prospective voter also had to possess an annual income of not less than 100 pounds during the calendar year immediately preceding the year of the election. Ayoade concludes that for this period, these restrictions and a further one which placed the onus of registration on the prospective voter rather than the state appreciably cut down the number of voters.

Unlike the first period of mixed regulations, the second era of 1950-1958 saw the promulgation of ones universally applicable throughout the country. This apparent universality notwithstanding, the federal electoral regulations still took cognisance of regional diversities.[21] This framework was consolidated in the third era, 1958-1966, when a marked improvement in federal competence in the regulation of federal elections was established. For example, the Elections (House of Representatives) Regulations of 1958 stipulated that its provisions shall apply throughout the entire country.[22] However, in some areas, regional peculiarities still prevailed. It is therefore significant for our purposes that, while the above regulations endorsed universal adult suffrage in both the eastern and western regions, it approved only male suffrage in the northern region. These two periods seemed to recognise the right to vote in the east and west on the basis of the ethical and natural rights theories that Kirby discussed while maintaining its feudal characteristics in the north. The entire country later adopted universal suffrage in the years following independence in 1960.

20 J Ayoade 'Electoral laws and national unity in Nigeria' (1980) 23 *African Studies Review* 42.

21 As above.

22 As above.

3 Is the vote a right or privilege?

I stated earlier that there are variations across legal and political jurisdictions on the true nature of the franchise. While some view it 'as a mere civil right dependent on law', others see it as a 'fundamental political right'.[23] Unlike the position of the United States Supreme Court in the earlier referenced case of *Wesberry v Sanders*, in the case of *Re North Perth; Hessein v Lloyd*,[24] it was stated that 'the franchise is not an ordinary civil right, it is historically and truly a statutory privilege of a political nature being the chief means whereby the people, organised for political purposes, have their share in the function of government'.

Even if imagined as a right, Lardy still believes that the vote is different from all other rights because it is 'based upon a different theory of liberty from that which founds the traditional civil liberties'.[25] That writer goes on to argue that traditional civil liberties 'are essentially about guaranteeing liberty in the sense of non-interference by officialdom with individual choice and action'.[26] Further:[27]

> This theory of negative liberty forms, however, only a tangential part of the idea of the right to vote, and is always subsidiary to its essential concern with establishing and maintaining the democratic authority of voters. This authority constitutes a permission to participate in elections. It does more, though, than merely license voters to cast ballots if they so choose, as proponents of the right to vote effectively suggest. The democratic standing which the right to vote confers is fully intelligible only as the award of an entitlement to participate actively, rather than as a merely passive possessor of the franchise.

In addition to the above, there are other characteristics that differentiate the right to vote from other libertarian rights and for which reason some have questioned the tendency to sometimes describe it 'as a civil liberty, or even as a human right'.[28] Thus, the central function of the right to vote is to guarantee the entitlement of all qualified individuals to cast a vote as opposed to all other rights which are generally distributed to individuals without reference to their abilities or qualifications to perform the activity protected by the right.[29] In addition, those other rights are universal and are enjoyed by all within the jurisdiction which has authority to enforce them. On

---

23 E Azinge 'The right to vote in Nigeria: A critical commentary on the open ballot system' (1994) 38 *Journal of African Law* 173.

24 Cited by Azinge (n 23 above).

25 H Lardy 'Is there a right not to vote?' (2004) 24 *Oxford Journal of Legal Studies* 311.

26 As above.

27 As above.

28 As above.

29 As above.

the contrary, the right to vote, even though often described in terms of universal suffrage, is not by any means universal as typically only citizens qualify to vote while other requirements (residence, capacity and good behaviour) often come into play.[30]

The above view perhaps provides a foundation for the opinion that to vote 'might be a mere political right, privilege or civil right to be given or withheld at the exercise of the law-making powers of the sovereign' and that 'in the absence of an express constitutional grant, [it] is not a vested, absolute or natural right of which a citizen cannot be deprived and it is not vested absolutely in any citizen'.[31] According to Kirshner, there are four different categories of constitutions in terms of how they treat the right to vote.[32] Firstly, there are those in which there is no affirmative constitutional right to vote and there is no legislation of similar weight. Among countries he placed in this category are Australia, the Bahamas, Bagladesh, Barbados, Belize, India, Indonesia, Nauru, Samoa, the United States and the United Kingdom.[33]

Secondly, there are constitutions that establish universal suffrage for the election of sovereign bodies – such as parliament. Kirshner places Nigeria in this category, which also includes countries such as Germany, Jamaica, Russia, New Zealand, Senegal, Sweden, South Korea, and others.[34] Since this chapter is on Nigeria, I will later show how this categorisation is erroneous, being that it conflates the right to be registered as a voter with the right to vote. Thirdly, there are constitutions that provide a general and independent right to vote and, fourthly and finally, there are constitutions that not only provide for a right to vote, but also specify a government obligation to facilitate citizen participation and those that limit the kinds of restrictions the state can place on who is eligible to vote.[35]

Regarding the language in which the right to vote could be constitutionally textualised, drawing from contemporary comparative constitutional provisions governing the subject, there are two major ways this could be accomplished. Any one of the above four categories of constitutions can express the text of the voting right in any of these two ways. On the one hand, there are constitutions broadly establishing the right of citizens to vote for constitutionally-defined

30 As above. See also Blais *et al* (n 10 above) 43-58.

31 Azinge (n 23 above) 174.

32 A Kirshner 'The international status of the right to vote' http://www.demcoalition.org/pdf/ International_Status_of_the_Right_to_Vote.pdf (accessed 11 May 2012).

33 As above. For an analysis of the dilemma in India, see R Kadambi 'Right to vote as a fundamental right: Mistaking the woods for trees. *PUCL v Union of India*' (2009) 3 *Indian Journal of Constitutional Law* 181.

34 As above. Taking the South Korean Constitution as sample, it provides in art 41 that '[t]he National Assembly is composed of members elected by universal, equal, direct, and secret ballot by the citizens', while art 67 thereof provides that '[t]he President is elected by universal, equal, direct, and secret ballot by the people'.

35 Kirshner (n 32 above) 8.

electoral positions, and on the other hand there are constitutions which not only guarantee universal suffrage, but also stipulate that this fundamental right exists at every level of government. Constitutions in the second category could also curb the ability of the government to reduce the size of the electorate.[36] It is, however, by evaluating the next quality of the voting right that one could tell whether indeed it is an enforceable right or a mere privilege. Kirshner says that constitutional right to vote articles provide individuals with a powerful tool with which to challenge a state action or state inaction that impedes voters. He recognises, though, that the right to vote is not a prescription that cures all.[37]

The aforegoing offers an excellent background for my analysis of the nature of the right to vote in Nigeria. It has been claimed that the right to vote in Nigeria is conferred by the Constitution and therefore constitutional.[38] In support of this assertion, sections 65, 77, 106, 117, 131 and 132(1), (4) and (5) of the Nigerian Constitution of 1999 have been mentioned.[39] As I stated earlier, I will contest these claims on two grounds. In the next section, I canvass those grounds in greater detail.

4 Nigeria: Between the right to register as a voter and the right to vote

I will now expand my contention that those who describe the right to vote in Nigeria as one guaranteed under the Constitution are making a mistake by not distinguishing the right to register to vote in an election from the right to vote itself. To support this view, I will examine more closely the constitutional provisions they rely upon to advance that error. In this section as well, an analysis of how the Nigerian provision compares to other constitutions will be undertaken.

The first provision usually mentioned is section 65 of the Constitution, which is clearly off the mark because it deals only with qualification for election as a member of the Nigerian National Assembly. The next is section 77 which is also not helpful. This provision deals with the process of electing senators and members of the house of representatives as well as those who could qualify to be registered as voters for legislative houses elections. For clarity, let me reproduce the entire provision:[40]

36 As above.

37 As above.

38 Azinge (n 23 above) 174.

39 A Omakoji 'The role of the courts in the enforcement of electoral rights through election complaints: A comparative study of Nigeria and the United Kingdom' LLM dissertation, Central European University, 2009 http://goya.ceu.hu/search (accessed 10 May 2012).

40 My emphasis.

(1) Subject to the provisions of this Constitution, every senatorial district or federal constituency established in accordance with the provisions of this part of this Chapter shall return one member who shall be directly elected to the Senate or the House of Representatives in such a manner as may be prescribed by an Act of the National Assembly.
(2) Every citizen of Nigeria, who has attained the age of eighteen years residing in Nigeria at the time of the registration of voters for purposes of election to a legislative house, *shall be entitled to be registered as a voter* for that election.

Section 106 of the Constitution, usually highlighted by some as one of those provisions from which a right to vote could be constitutionally supported in Nigeria, is in similar terms as section 65 above, and section 117 is worded exactly as section 77. The only difference, however, is that, while sections 65 and 77 relate to elections into the National Assembly, sections 106 and 117 only deal with elections to the State Houses of Assembly. The similarities in the text of these provisions would therefore provide a sufficient indication that, as with sections 65 and 77, sections 106 and 117 do not help an understanding of the constitutional nature of the right to vote in Nigeria.

In the same manner, sections 131 and 132 of the Constitution, touted as providing a constitutional foundation for the right to vote in Nigeria, do not remotely come close to doing so. While section 131 deals with qualification for election into the office of President, section 132 is only significant for the manner in which subsection (5) is created. It provides there that '[e]very person who is registered to vote at an election of a member of a legislative house shall be entitled to vote at an election to the office of President'. Sections 177 and 178(5) make similar provisions with respect to who can qualify to stand for election as a state governor and who would be qualified to vote at such an election. Although these provisions contain the words 'shall be entitled to vote', they cannot be taken out of the context in which those words occurred. When they are taken together with all the other provisions already examined, one cannot escape the conclusion that they were not intended to express a constitutional or enforceable right to vote. To support this contention, I shall now look at a few examples of how the right to vote has been textualised in some comparative constitutions.

How do the Nigerian provisions compare to those of other African countries? Part 2 of the Kenyan Constitution of 2010 contains what it describes as 'rights and fundamental freedoms', among which are political rights, including the right of every adult citizen without unreasonable restrictions (a) to be registered as a voter; and (b) to vote by secret ballot in any election or referendum.[41] Equally significant is the constitutional provision that none of the guaranteed rights and fundamental freedoms shall be limited 'except by law, and then only

41 Sec 38(3).

to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[42] In the Kenyan context, therefore, the right to vote is easily enforceable when it is infringed.

The 1995 Ethiopian Constitution contains similar provisions. Its third chapter, like its Kenyan equivalent, enshrines fundamental rights and freedoms. While the first part of the chapter deals with 'human rights', the second part deals with 'democratic rights'. Included among democratic rights in article 38 is the right to vote and to be elected. Section 38(1) provides:

> Every Ethiopian national, without discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the following rights:
> (a) to take part in the conduct of public affairs, directly and through freely chosen representatives;
> (b) on the attainment of 18 years of age, to vote in accordance with law;
> (c) to vote and to be elected at periodic elections to any office at any level of government; elections shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors.

Again, as is the case in Kenya, Ethiopian voting rights are not unenforceable. This view is supported by the fact that article 13(1) of the Constitution charges all federal and state legislative, executive and judicial organs at all levels with the responsibility and duty to respect and enforce the provisions of the human rights chapter. It goes further to provide in article 13(2) that '[t]he fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights and international instruments adopted by Ethiopia'.

When comparing these constitutional provisions to those of Nigeria, one cannot avoid the conclusion that the right to vote does not seem to exist as such under the Constitution of Nigeria. The Constitutions of Kenya, Ethiopia and, as I will show later, Ghana, do not tie the right to vote to one's registration as a voter. In all these Constitutions the right is accorded the same force and recognition as other fundamental human rights. The conclusion that could be drawn from this, therefore, is that where a voter believes that the right has been tampered with, a consequential right to seek a judicial remedy is triggered. In the next section, I will discuss how judicial redress for the infringement of the right to vote adds to its significance as a right rather than a mere privilege.

42 Sec 24(1).

5 What legal protection exists for the right to vote?

The major reason I advance for my contention that the right to vote does not exist as such in Nigeria is the lack of any legal remedies available for voters if the right is breached or impeded. Yet, if indeed it is a constitutional right as claimed in some quarters, it means a correlative duty is imposed on institutions for its actualisation, failing which an entitlement to a remedy is triggered. For example, had the right to vote been included as one of the fundamental rights recognised under the Constitution,[43] it would have been obvious that, like all the other rights in this category, its denial could be remedied by a legal application to that effect. However, this is not the case. However, even more significantly, ordinary voters are not included in the category of persons who may question or complain about election results in an election tribunal established to handle such complaints.

The prevailing system in Nigeria is that after each election cycle, special tribunals are established to look into grievances and complaints arising from elections.[44] For unknown reasons, this practice was started in the country during the elections that heralded the transfer of power from the military to civilians in 1992. But the establishment of special election tribunals to deal with electoral complaints (in exception to the regular courts) has taken root and become a prominent feature of Nigeria's electoral practice. These tribunals are established under the Constitution,[45] but the procedure they adopt for their activities are prescribed in the Electoral Act.[46]

Not every person aggrieved by a result declared after an election in Nigeria is competent to launch a complaint before such a tribunal. Nigerian voters do not have such competence and are therefore barred from presenting any complaints if aggrieved by the results declared after an election. According to section 137(1) of the Electoral Act 2010 (as amended), '[a]n election petition may be presented by one or more of the following persons: (a) a candidate in an election; (b) a political party which participated in the election'. One therefore wonders about the effect of the so-called right to vote in Nigeria if voters are unable to exercise the legal right to question a denigration of that right. Again, this is a travesty when no particular remedy flows from the exercise of the right to vote if the vote is diluted or discounted.

However, treating the rights of Nigerians to exercise the franchise with derision has its roots in Nigeria's political and legal culture. With the constitutional shackles in place, as discussed earlier, there is restraint in the legal process as a mechanism for enforcing the right

43 Secs 33-46 of the 1999 Constitution, as amended.

44 See eg B Ugochukwu *Democracy by court order: An analytical evaluation of the 2007 election petition tribunals in Nigeria* (2009).

45 See sec 285 of the 1999 Constitution, as amended.

46 See sec 145 of the Electoral Act 2010, as amended.

to vote in Nigeria. One of the first cases related to this was decided a year after Nigeria's independence in 1960. In *Ojiegbe v Ubani*[47] the applicants claimed that, by fixing and holding elections on a Saturday, the government denied their franchise as well as violated their right to be free from discrimination. The applicants all belonged to the Seventh Day Adventists Christian denomination whose ethics, according to them, did not allow them to vote on a Saturday, which is their appointed day of worship.[48]

Two things are significant in the way in which the Nigerian Federal Supreme Court resolved the case. In the first instance, the denial of the franchise was subsidiary and marginal to the overarching claims of the applicants. Secondly, that portion of their application was not presented as a human rights enforcement claim as were the allegations of discrimination and violation of their freedom of conscience and religion. Nevertheless, it was on the basis of the denial of the franchise component of the claim that the Court disposed of it. In doing this, however, the Court demonstrated clearly how trivial it considered the claim. In its judgment, the Court came to the conclusion that, assuming all the members of the Seventh Day Adventist Church who alleged a denial of their franchise had voted in that election, the individual who was declared a winner would still have emerged victorious.

However, in my view, the Court made a serious error. The question before it was whether the complainants had been denied their right to vote. It was not whether or not their votes would have affected the electoral outcome. Clearly, the validity and potency of this right is not dependent on whether or not exercising it would affect the result of an election. This decision therefore detracted significantly from the right in question. I doubt that this was what the legislation intended.

This hurdle was erected for Nigerian voters immediately following independence, but since has been raised even higher with the provisions of the Electoral Act that I referenced above. The consequences of the current dispensation for voters who have complaints about the outcome of elections in which they participated were highlighted in the case of *Chuba Egolum v Olusegun Obasanjo and Others*.[49] This case arose from the presidential elections held in Nigeria in 1999. Egolum, a registered voter, was aggrieved by the announcement that Obasanjo was the winner of the election and decided to challenge it in court. As with the 2010 Electoral Act, the legal framework for that election provided that only candidates and political parties could legally challenge the results. How was the plaintiff to present his case in these circumstances?

47 (1961) 1 All NLR 277 (NFSC).

48 See T Abayomi 'Continuities and changes in the development of civil liberties litigation in Nigeria' (1990-1991) 22 *University of Toledo Law Review* 1035.

49 (1999) 7 NWLR (Pt 611) 355 (NSC).

Egolum claimed to have a right to contest the election in question. Yet, from all available evidence he had no such right and his petition was therefore doomed from the beginning to denial. He was not sponsored by any political party. The Court of Appeal, sitting as the first instance tribunal in this petition, dismissed it. On appeal to the Supreme Court, it was held that Egolum had an obligation to specify the nature of the right that entitled him to contest the election. To hold otherwise, the Court continued, was to permit any person not qualified under the provisions of the law to claim a right to contest an election. This would open the door of litigation to those the Court referred to as 'meddlesome persons', including non-citizens of Nigeria, under-aged persons and individuals not belonging to or sponsored by political parties.

It is obvious that Egolum's situation merits sympathy. As a registered voter and a person who voted in the election, he had every right to question its outcome if the right to vote in Nigeria meant no more than an empty promise. However, his options were limited by a law that prevented him *a priori* from presenting such a question in court. Clearly, it was for this reason that, rather than couch his claim from the position of a voter entitled to prevent an election producing the wrong outcome, he bizarrely claimed that he had a right to contest the election and to be returned as the winner. Yet, exercising the franchise engages an ends/means calculation. It has been argued that voting is not an end in itself but merely a means to an end – the end of implementing democracy.[50] In Egolum's case, he had exercised the means (voting) but felt that that had not served the end (ensuring the vote counted towards enhancing democracy). His claim in court was therefore to vindicate the 'end' component of the equation.

The Supreme Court's decision pointed to the reason that may have informed the ban placed on voters challenging the results of elections in Nigeria: that it would open the floodgates of litigation. This, however, is not an attitude of the Nigerian legal system specific to electoral cases. The same justification is often presented for discouraging all other kinds of litigation through strict standing requirements that diminish rather than broaden access to the courts for the aggrieved.[51] However, as I will go on to demonstrate later in this article, stopping persons with legitimate grievances about the handling of elections from acting on those grievances through the legal channel encourages impunity. It promotes recourse to extra-judicial methods, including violence, to address those grievances.

50 G Kateb 'The moral distinctiveness of representative democracy' (1981) *Ethics* 357. See also Gardner (n 12 above) 897.

51 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' (2000-2001) 26 *Brooklyn Journal of International Law* 527.

In order to show how inappropriate the lack of legal protection accorded the right to vote in Nigeria is, I draw comparisons with other jurisdictions. In doing so, it becomes evident that the fear of opening up the floodgates of litigation to 'meddlesome persons', as anticipated by the Supreme Court in Egolum's case above, is speculative and unfounded. As stated earlier, the United States falls in the category of countries without a constitutional right to vote.[52] This is a misleading categorisation because, even though the right may have been mentioned 'only in a backhanded way'[53] in the US Constitution, the right to vote in the US is accorded very robust constitutional protection.[54]

In *Harper v Virginia State Board of Elections*,[55] the claimant challenged a Virginian law requiring the payment of a poll tax as a precondition for voting. The question before the Supreme Court was whether this particular law violated the equal protection clause of the American Constitution. The Court answered the question in the affirmative and held that, although the right to vote in state elections was not specifically mentioned in the Constitution, it was implicit by reason of the First Amendment to the US Constitution. The Court also decided that, where fundamental rights and liberties (like the right to vote) are asserted under the equal protection clause of the US Constitution, classifications which might invade or restrain them must be scrutinised closely and carefully confined . Therefore, unlike in Nigeria, the right to vote in the US is tied to equal protection which is a fundamental constitutional entitlement in that context.

On the basis of this recognition of the fundamental character of the voting right under the US Constitution, it is possible to present a legal

52 Kirshner (n 32 above) 32.

53 P Karlan 'Ballots and bullets: The exceptional history of the right to vote' (2002-2003) 71 *University of Cincinnati Law Review* 1345.

54 The United States Supreme Court has, however, held consistently that art I(2) of the Constitution provides a legal basis for the right to vote in federal elections. See *United States v Classic* (1941) 313 US 299 ('The right of the people to choose ... is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.') See also *Harper v Virginia Board of Elections* (1966) 383 US 663. On the other hand, it has been suggested that the right to vote is only a 'fundamental interest' developed along with other similar interests by the US Supreme Court of the Earl Warren era. Apart from the right to vote, that Court also added others like the rights to criminal appeals and interstate travel. See G Gunther *Constitutional law* (1985) 588. However, whether seen as a right or interest, the same Court in *Reynolds v Sims* (1964) 377 US 533 561 held that '[u]ndoubtedly the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinised.' H Lardy 'The American Supreme Court and the right to vote: Early doctrine and developments' (1992) 23 *Cambrian Law Review* 69.

55 (1966) 383 US 663.

claim on the basis of vote dilution (the rendering of votes to count for less by political gerrymandering) so long as the claimant can prove not only intentional discrimination against an identifiable political group, but also the actual discriminatory effect on that group.[56] The same is true of voting schemes that invidiously minimise or cancel out the voting potential of racial or ethnic groups.[57] While these cases deal with electoral policies that target particular racial or ethnic groups, it has been stated that 'one of the vastly underappreciated consequences of the *Bush v Gore*[58] case is its recognition that the Constitution protects the right to vote from being arbitrarily infringed, for any reason at all, whether or not race is involved'.[59] However, of course this argument has no effect on the Nigerian practice of refusing individual voters to legally challenge the outcome of elections.

As well, unlike in the US, most other countries, although recognising the importance of the right to vote in any effective democracy, seem to confuse the 'means' of actualising the right (voting) with its 'end' (implementing democracy). As a result, most cases arising for consideration in those jurisdictions on the voting right turn only on the denial or potential denial of the vote and not on the tampering with the vote once it is cast. This is, however, not the case in Canada. Section 3 of the Canadian Charter of Rights and Freedoms provides that every citizen has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

In *Figueroa v Canada*,[60] the Canadian Supreme Court evaluated the ramifications of this provision and the nature of the protection it accords the right to vote. The Court understood that the provision was relatively narrow, granting citizens no more than the bare right to vote and to run for office in the election of representatives of the federal and provincial legislative assemblies. The Court's analysis, however, did not terminate with that finding. It held instead that, in their analysis of Charter rights, Canadian courts must look beyond the words of the section which the Court concluded intended more than 'the bare right to place a ballot in a box'.[61] According to the Court:

---

56 *Davis v Bandemer* (1986) 478 US 109.

57 *City of Mobile v Bolden* (1980) 446 US 55. The dilution which is alleged in such cases has been defined as a claim 'that the election structure when superimposed upon racially-oriented politics produces a situation that deprives them of the benefit of their numbers in the political process. They are thus deprived of the *value* voting.' See K Butler 'Constitutional and statutory challenges to the election structures. Dilution and the value of the right to vote' (1981-1982) 42 *Louisiana Law Review* 851.

58 (2000) 531 US 98.

59 R Pildes 'The future of voting rights policy: From anti-discrimination to the right to vote' (2005-2006) 49 *Howard Law Journal* 741 759.

60 (2003) 227 DLR (4th) 1.

61 *Figueroa* (n 60 above) para 19.

> The purpose of section 3 of the Charter is not equality of voting power *per se*, but the right to 'effective representation'. Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative.

If, according to the Court's interpretation, there is more to the right to vote than merely placing a ballot in a box, it follows, as has been argued elsewhere, that the right has 'an intrinsic value independent of the outcome of elections'.[62] The quality of the right therefore depends less on the extent to which a single ballot could actually influence the outcome of an election, but more on that single voter's belief that her vote could make a meaningful difference. This belief is truncated if, after casting the ballot, the voter for some legal reason cannot ask basic questions about what became of it. In the American and Canadian systems, the right of voters to keep track of the ballot has thus been incorporated into the right to vote.

However, while the position of the right to vote in both the United States and Canada represents its most vigorous expression, they may not be effectively extrapolated to the Nigerian political system without taking contextual factors into consideration. If that is the case, Nigeria may benefit from the experiences of countries closer to home. One such country is Ghana, now recognised generally as a thriving democracy. Section 42 of the 1992 Ghanaian Constitution is very clear on its protection of the right to vote. It provides that '[e]very citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda'.

In *Tehn Addy v Electoral Commissioner*,[63] the Ghanaian Supreme Court had an opportunity to pronounce on the boundaries of the right. That case challenged a voter registration policy requiring voters to register only within a specified time period. Relying on section 42 above, the Court held unanimously that the Electoral Commission could not refuse to register the plaintiff outside that specified time period and ordered the Commission to register him. In its judgment, the Court held that through the exercise of the right to vote, the citizen is able not only to influence the outcome of the elections and therefore the choice of a government, but it also places the citizen in a position to help influence the course of social, economic and political affairs thereafter.[64] The Court also surmised that 'whatever the philosophical thought on the right to vote, article 42 of the Constitution ... makes the right to vote a constitutional right conferred on every Ghanaian

62 Kirshner (n 32 above) 17.

63 (1997) 1 GLR 47.

64 *Tehn Addy* (n 63 above) 50.

citizen of eighteen years and above'.[65] The Ghanaian Constitution, like in all those systems where the right to vote flows from a constitutional source, is clear enough to permit any voter who fears that her ballot is being discounted to seek legal redress.

Drawing from my analyses, it is possible to split the legal protection of the right to vote into two parts. The first deals with the right to be entitled to vote which includes the right to be registered as a voter. This could accommodate voter disaffection with constituency delimitation, voting procedure, campaign finance and the behaviour of political parties during their primaries and which may have an adverse effect on voters. Collectively these are what I argue constitute the 'prospective' element of the right to vote. Nigeria accords protection to this element of the right to vote. I have noted this already and also stated that part of the struggle to properly conceptualise the right to vote in the country's electoral system is owing to the conflation of the right to register with the right to vote. But, however much these constitutive elements of the prospective component of the right to vote (whether taken alone or in conjunction with others) are significant, they cannot replace the right itself when fully conceptualised. Therefore, the difference lies with the second part of the right which is to vote and have the ballot counted. This part, to the extent that it concerns what happens to the ballot after it had been cast, is to my mind the 'retrospective' component of the right to vote. One major means of securing this element of the right is for the voter to be able to keep track of her vote and be legally permitted to challenge any action or policy that dilutes, tarnishes, debases or stultifies it. It is here, as I have stated already, that the Nigerian system is wanting.

As well, for the right to vote to enjoy meaningful legal protection, the mechanism to achieve this must couple both its prospective and retrospective cores. This could be accomplished in several ways, but most effectively through a constitutional recognition of the right to vote as a fundamental political/human right enforceable through the ordinary legal mechanisms of enforcing all other civil and political rights.

6 Why protect the right to vote?

Nigeria faced major challenges in the past when it attempted to organise elections that were free and fair, and that met international best practices. Most of these previous elections were poorly organised.

65 *Tehn Addy* (n 63 above) 52-53.

Violence, vote rigging and other malpractices marred them.[66] There is a way in which the poor legal protection of the right to vote in Nigeria relates to and incentivises questionable electoral practices. I discuss this below.

After the 2003 general elections in Nigeria, a coalition of Nigerian civil society organisations that monitored the elections issued a report with the instructive title 'Do the votes count?' It was the group's own way of expressing the dilemma of that year's elections in which voters were deceived by those intent only on practising and perpetuating electoral fraud. But if the 2003 elections were bad, those of 2007 were worse. Enthusiastic voters were in 2007 in most parts of the country denied the opportunity of casting their ballots and making them count.

The transgressions witnessed in those elections included stuffing electoral boxes with pre-marked ballot papers; violently hijacking voting materials; non-delivery of sensitive electoral documents like sheets for entering the scores of candidates (the sheets were then marked in secret locations outside authorised voting stations with fictitious scores); and shootings by thugs and compromised security personnel to scare voters away so they could carry out electoral fraud. Those who perpetrated these events did so in the secure knowledge that the voters had no effective mechanism of making them accountable for their actions. This is because voters lack a remedy if prevented from exercising their right to vote or of securing the integrity of the ballot where it is actually cast. In this section, I relate this to the larger goal of strengthening the electoral process and democracy in Nigeria. In doing so, I highlight the likely implications of perpetuating the current weak regime of ballot protection in the country.

The first obvious implication of not strengthening the legal protection of the ballot in Nigeria is that electoral violence will continue. Violence before, during and after elections in Nigeria is

66 B Rawlence & C Albin-Lackey 'Briefing: Nigeria's 2007 general elections: Democracy in retreat' (2007) 106 *African Affairs* 497; SJ Omotola '"Garrison" democracy in Nigeria: The 2007 general elections and the prospects of democratic consolidation' (2009) 47 *Commonwealth and Comparative Politics* 195; OO Emmanuel 'Nigeria's 2007 general elections and the succession crisis: Implications for the nascent democracy' (2007) 6 *Journal of African Elections* 14; A Agbaje & S Adejumobi 'Do votes count? The travails of electoral politics in Nigeria' (2006) 31 *Africa Development* 25; WA Fawole 'Voting without choosing: Interrogating the crisis of "electoral democracy" in Nigeria' in TL Kasongo (ed) *Liberal democracy and its critics in Africa: Political dysfunction and the struggle for social progress* (2005) 149; A Banwo 'Nigeria's 2007 elections: A great danger for future elections in Africa' in VO Okafor (ed) *Nigeria's stumbling democracy and its implications for Africa's democratic movement* (2007) 134; N Orji 'Responses to election outcomes: The aftermath of the 2007 elections in Nigeria and Kenya' (2010) 9 *African and Asian Studies* 443; S Osha 'The order/other of political culture: Reflections in Nigeria's fourth democratic experiment' (2011) 25 *Socialism and Democracy* 144.

a recurring problem.[67] The resort to violence is often born out of frustration with the normal channels of redressing electoral grievances, especially with the dominant role of incumbency considerations in the electoral process. Rarely are persons responsible for violence and crime in the course of elections arrested and brought to justice. This encourages the resort to self-help by those who feel cheated. It may further be argued that the presence of criminal laws mandating the prosecution of electoral offenders in Nigeria provides significant protection for the right to vote. However, this may not necessarily be the case, for two reasons. The first is that the enforcement of the law is weak, as I stated above. As significantly, where those charged with enforcement fail in that duty, the legal means to hold them responsible do not exist. Therefore, while criminalising behaviour that harms the vote may offer some form of protection, it cannot stand as a substitute for legally empowering voters to protect their votes.

In Nigeria this has since given rise to what in civil society circles is known as 'mandate protection'.[68] Groups that work in this area describe the mandate as involving the relationship between the people's votes and the outcomes of elections,[69] while to protect it involves the combination of mobilising and organising citizens to insist that election stakeholders operate within the law, as well as monitoring, exposing and challenging election fraud and abuse at every step of the electoral process.[70] When it is recognised that mandate protection became necessary because voters lack better alternatives to make their votes count, it also becomes clear how risky such protective activities are to those involved, especially if they are required to 'insist', not within legal boundaries, but by taking the law into their own hands.[71]

Not providing adequate legal protection for the right to vote obviously also leads to weak political parties. The worst that can happen in a democracy is for the impression to be given that people's votes do not count in the outcome of elections. The first implication is that it will affect voter enthusiasm and, second, political parties

67 E Onwudiwe & C Berwind-Dart 'Breaking the cycle of electoral violence in Nigeria' (2010) 263 *Special Report* 1 http://www.usip.org/files/resources/SR263-Breaking_the_Cycle_of_Electoral_Violence_in_ Nigeria.pdf (accessed 12 May 2012); E Obadare 'Democratic transition and political violence in Nigeria' (1999) 24 *Africa Development* 199 ('Politics and violence are like Siamese twins in Nigeria. Political activity has always featured a notable degree of violence...').

68 See BU Nwosu 'Civil society and electoral mandate protection in South Eastern Nigeria' (2006) 9 *The International Journal of Not-for-Profit Law* 20.

69 Global Rights *Election mandate protection toolkit 2006* http://www.globalrights.org/site/ DocServer/Election_Mandate_Protection_Toolkit_2006.pdf?docID=11083 (accessed 12 May 2012).

70 Global Rights (n 69 above) 8.

71 A Okoli & S Okobi 'Mandate protection: JDPC Mobilises 10 000' *This Day* http://www.thisdaylive.com/ articles/mandate-protection-jdpc-mobilises-10-000/75639/ (accessed 12 May 2012).

will have little incentive to invest in expanding their membership base. Both consequences are currently at play in Nigeria. The 2011 elections may have shifted the paradigm a little but before then, voters never really felt that they could make any real difference by voting in elections given their past experiences. At the level of political parties, this only compounded already-existing challenges. The rise of the political 'godfather'[72] who had the financial leverage to determine who won an election or lost it, led to consigning to an insignificant position the voter who had no such resources. Thus, political parties would rather invest in attracting political godfathers to their fold than ordinary voters. This was evident with the Nigerian ruling party – the PDP – which, as a prelude to the 2007 general elections, actually deregistered some of its members who had fallen out with the party hierarchy.[73]

As has been argued, there is an intimate connection between the activities of godfathers in Nigerian politics and the subversion of the electoral process or electoral fraud as well as poor governance of political society.[74] This is so as such fraud perpetrated by godfathers or their go-betweens deny voters control of a 'valuable political resource; the giving or withholding of their votes'.[75] Moreover, because of the unusual leverage godfathers have across the political spectrum, there is a tendency for them to act with impunity and thus subvert the rule of law. As part of this strategy, they are often given to using violent means to reach their goals. Even among the political opposition the objective is always to counter force with violence. A prominent opposition politician was reported to have told Human Rights Watch that '[i]f anyone tries to attack me, my boys will unleash terror'.[76]

Besides, the prominence accorded godfathers in party formations means that voters often count for little in electoral calculations. As a consequence, politicians would rather invest in cultivating godfathers

72 OA Adeoye 'Godfatherism and the future of Nigerian democracy' (2009) 3 *African Journal of Political Science and International Relations* 268 (defining the godfather as 'a kingmaker, boss, mentor, and principal'); S Hanson 'Nigeria's godfather syndrome' *Analysis Brief*, Council on Foreign Relations, 2007 http://www.cfr.org/nigeria/nigerias-godfather-syndrome/p13077 (accessed 11 May 2012) ('political elites who sponsor candidates [for elections] with the understanding that they will reap the financial benefits once the candidate takes office'); Human Rights Watch 'Criminal politics: Violence, "godfathers" and corruption in Nigeria' (2007) http://www.hrw.org/sites/default/files/ reports/nigeria1007webwcover_0.pdf (accessed 12 May 2012).

73 See Ugochukwu (n 44 above) 28.

74 OO Olarinmoye 'Godfathers, political parties and electoral corruption in Nigeria' (2008) 2 *African Journal of Political Science and International Relations* 66.

75 As above. See also JC Scott *Comparative political corruption* (1973). But for a more detailed understanding of the relationship between godfatherism and political violence, see IO Albert 'Explaining 'godfatherism' in Nigerian politics' (2005) 9 *African Sociological Review* 79.

76 See Hanson (n 72 above).

and capturing political party structures (that is, the party bureaucracy that plays prominent roles in choosing candidates to be on the ballot) than earning the confidence of voters. Without a strong and alert membership able to insist on due process and to hold the officials to strict levels of accountability, political parties are weakened and suffer an erosion of internal democratic practices. Their dictatorial orientations not only discourage and demoralise their members; they also threaten the foundations of democracy. Yet, voters could ignore both the powers of godfathers and the arbitrariness of the party bureaucracy if they were offered better protection of their votes. In that case, whatever the machinations of the godfathers and party officials, individual voters could take steps to safeguard their votes from theft, debasement or dilution. Rather, the current legal framework prioritises the rights of candidates (fronted by godfathers) and political parties to question the outcome of elections while denying voters the same right.

The above scenario can only lead to voter apathy. When voters – the most important actors in any democracy – lose interest in, and enthusiasm for, the electoral system, there is little doubt that it is in serious danger. If voters think they are less important than godfathers in the estimation of political parties and electoral candidates, they will obviously begin to question and doubt their own efforts and commitment. This scenario is compounded by voters' experiences as party members because, in choosing candidates to place on the ballot, Nigerian parties generally ignore the preferences of their members. Party primaries in Nigeria are therefore mere rituals because party leaders can subvert the will of their members by reversing, often without explanation, the outcome of nomination congresses.[77] Consequently, at both ends of the electoral spectrum voters need to have their position better secured as a foundation for a sustainable electoral system.

7 Conclusion

In this article I analysed the right to vote in Nigeria and the need for it to be protected more vigorously in order to consolidate Nigeria's fledgling democracy. For Nigeria's electoral democracy to grow and be stabilised, the ordinary voter must be given a prominent place in the electoral system. The strength of the system rests on the popular participation of society. I reckon, therefore, that the level of prominence

77 See Ugochukwu *(*n 44 above) 39. See also *Onuoha v Okafor* (1983) NSCC 494, where the Nigerian Supreme Court held that questions about the choice of candidates by political parties are non-justiciable political questions. This judgment gave complete control of candidate nominations to party leaders who wielded that power arbitrarily.

given to ordinary voters is inversely proportional to the degree of legal protection that the vote is accorded by the legal system.

My critique of the current system in Nigeria is based on three points. The first is the tendency to confuse the right the vote with the right to be registered as a voter. My conclusion is that they are not the same thing. Secondly, without the protection of the right to vote, there is a likelihood for a disconnect between the votes cast by voters and the outcomes produced. Thirdly, even where voters are allowed access to the polls, political interference renders that access meaningless unless there is an understanding that the law will be on the side of voters to challenge such interference.

Having the above in mind, it is recommended that the right to vote in Nigeria be made a fundamental human right to be enforced like all other rights under the Constitution. This will not only confer appropriate constitutional legitimacy on the right, but also comply with the practices of several other jurisdictions, even those in Africa. It will further show Nigeria's openness to international and comparative best practices. In addition, the electoral law should be amended to allow voters the legal right to challenge the outcomes of elections where they do not represent their will as voters.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the *Nubian Children* communication

Ebenezer Durojaye[*]
Senior Researcher and Co-ordinator, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, South Africa

Edmund Amarkwei Foley[**]
Senior Researcher and Co-ordinator, Children's Rights Project, Community Law Centre, University of the Western Cape, South Africa

Summary

The article analyses the Nubian Children *communication, the very first case to be finalised by the African Committee of Experts on the Rights and Welfare of the Child. It critically reviews the progressive approach of the Committee of Experts with regard to its interpretation of the exhaustion of local remedies. The Committee ruled that the best interests principle should serve as an exception to the exhaustion of local remedies rule. While the approach of the Committee is commended, it is argued that this progressive approach should be lauded with caution. Further, the article argues that the African Committee of Experts' approach to the indivisibility of human rights guaranteed under the African Children's Charter in the Nubian children communication is progressive and capable of advancing human rights, particularly socio-economic rights, of children in the region. While this decision serves as an important precedent for advancing children's rights in the region, it misses an opportunity of adopting a gender-sensitive approach in the interests of the girl child.*

* LLB (Lagos), LLM LLD (Free State); ebenezerdurojaye@gmail.com
** LLM (Pretoria); efoley@uwc.ac.za

1 Introduction

The need to develop a region-specific treaty on children's rights in Africa culminated in the much-lauded adoption of the African Charter on the Rights and Welfare of the Child (African Children's Charter)[1] in 1990 and its entry into force in 1999. It was considered unique in that it established a communications procedure to strengthen the protection of children's rights, close to that provided in the African Charter on Human and Peoples' Rights (African Charter).[2] This procedure, however, remained untested until the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts) received a communication filed by the Centre for Human Rights of the University of Pretoria against the Republic of Uganda in 2005 on behalf of children caught up in the conflict in Northern Uganda. The African Committee of Experts received a second communication submitted jointly by the Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent in Kenya against the Republic of Kenya (*Nubian Children* communication) in March 2009. The African Committee considered the *Nubian Children* communication fully on its merits and gave its decision on 22 March 2011. The decision serves as a significant development in the advancement of children's rights on the continent as well as the African Committee's role as the principal protector of children's rights under the African human rights system. The decision makes a strong first impression with innovative approaches to the rule on the exhaustion of domestic remedies, finding the child's right to nationality at birth and the affirmation of economic and social rights of the child as enshrined in the African Children's Charter.

The article examines the African Committee of Experts' decision and highlights key aspects of its approach to admissibility and substantive arguments put to it by the authors of the communication. It critically reviews the progressive approach of the Committee of Experts with regard to its interpretation of the exhaustion of local remedies. The Committee had ruled that the best interests principle should serve as an exception to the exhaustion of local remedies rule. While the approach of the Committee is commended, it is argued that it should be lauded with caution. Further, the article argues that the African Committee's approach to the indivisibility of human rights guaranteed under the African Children's Charter in the *Nubian Children* communication is progressive and capable of advancing the human rights, particularly socio-economic rights, of children in the region. While this decision

1 OAU Doc CAB/LEG/24.9/49 (1990).

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

serves as an important precedent for advancing children's rights in the region, it misses an opportunity to adopt a gender-sensitive approach to the interests of the girl child.

2 Background, facts and arguments

In present-day Kenya, the Nubians are the descendants of the Sudanese Nubian members of the British colonial forces in East Africa known as the King's African Rifles (KAR).[3] At the end of World War II, these Nubian soldiers requested that they be repatriated to their homeland but the British government refused to do this. Instead, the British government allocated parcels of land to them at Kibera near Nairobi without any formal land title documents.[4] Since independence, successive governments of Kenya refused to recognise the Nubians as Kenyan citizens as well as their claims to the land in Kibera. Thus, having lived in Kenya for more than a century, Nubians are not recognised officially as one of the Kenyan tribes and are not considered by the government to merit citizenship because they do not have any entitlement to land or have any indigenous connection to Kenya. The vast majority of the Nubian population have continued to encounter difficulties having access to land due to their statelessness.

Following unsuccessful attempts by the Nubian community in Kenya to affirm their right to Kenyan nationality through the Kenyan courts, IHRDA and OSJI in 2006 jointly filed a communication on their behalf before the African Commission on Human and Peoples' Rights (African Commission), alleging violations of the right to freedom from discrimination and other rights, the combined effect of which rendered Kenyan Nubians stateless.[5] In the course of developing the communication before the African Commission, IHRDA and OSJI identified certain violations which impacted more heavily on Nubian children, such as their low level of access to education, the denial of access to higher education due to a lack of citizenship identification documents, and a lack of access to proper health and sanitation and discrimination.[6] Inspired by the fact that the African Children's Charter

3 See Open Society Foundation 'Nubians in Kenya appeal for their "right to existence"' 17 July 2005, http://www.soros.org/initiatives/osiea/news/nubians_20050630 (accessed 1 June 2012).

4 See MO Makoloo *Kenya minorities, indigenous peoples and ethnic diversity* (2005) 16, http://www.minorityrights.org/1050/reports/kenya-minorities-indigenous-peoples-and-ethnic-diversity.html (accessed 1 June 2012).

5 The African Charter does not have a specific provision on the right to nationality. However, the effect of the denial of nationality results in the violation of the freedom from discrimination and other related rights, forming the basis of the communication submitted to the African Commission.

6 'Building a case for Nubian children' (2007) IHRDA case memorandum. Edmund Amarkwei Foley, co-author of this article, obtained a copy in the course of his duties as a legal officer at IHRDA.

provided for the child's right to nationality in article 6, IHRDA and OSJI commenced work to gather more evidence specific to Nubian children in order to develop a communication for submission to the African Committee of Experts. The choice of the African Committee by the authors of the communication was also to strengthen its protection mandate since its communications procedure had been grossly under-utilised.

Kenyan birth certificates carry a *caveat* that '[p]ossession of a birth certificate does not constitute proof of nationality'.[7] At 18 years of age, all Kenyans are required by law to be registered as citizens and be issued with a national identity card as proof of such citizenship. Whereas all other Kenyan children have a legitimate expectation of obtaining an identity card at the age of 18 years, in view of the security of their parents' citizenship, Nubian children cannot boast of the same expectation because their parents' citizenship is suspect. To verify their status, Nubians go through a process of vetting before an identity card is issued to them. The onerous requirements for vetting and the tedious process have resulted principally in discrimination and violations of economic, social and cultural rights of Nubians in Kenya. This, in turn, has limited Kenyan Nubian children's access to educational and health facilities and services.

From the evidence gathered,[8] IHRDA and OSJI alleged violations of the right to freedom from discrimination;[9] the right to nationality;[10] the right to education;[11] the right to health care and services;[12] and the right to adequate housing[13] under the African Children's Charter. IHRDA and OSJI urged the African Committee of Experts to find violations of all these articles and therefore recommend that Nubian children had a right to Kenyan nationality and the fulfilment of the rights related thereto.

On the basis of evidence it was argued that the systematic denial of Kenyan nationality to Nubian children by the Kenyan government, even though Nubians satisfied the constitutional and statutory requirements, was a violation of article 3 of the African Children's Charter, which prohibited discrimination on grounds of ethnic group,

7 IHRDA & OSJI '*Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Kenyan Nubian Minors v Kenya* – Submissions on admissibility' (2009) para 7 (copy of submissions on file with authors).

8 The evidence included sworn affidavits from Nubian children and/or their guardians, reports of United Nations agencies and the Kenyan Commission for National Human Rights as well as independent studies conducted on the lives of Nubians in Kenya in general and Kibera in particular.

9 Art 3 African Children's Charter.

10 Art 6(3) African Children's Charter.

11 Art 11(3) African Children's Charter.

12 Arts 14(2)(b) & (c) African Children's Charter.

13 Art 20(2)(a) African Children's Charter.

national or social origin or other status.[14] In addition, it was alleged that the denial of Kenyan nationality to Nubian children constituted a violation of articles 6(2) on nationality; 11(3) on education; and 20(2) on housing of the African Children's Charter.

Having been formally notified of the communication in April 2009, the African Committee of Experts was seized of the communication and requested IHRDA and OSJI to submit arguments on admissibility. A brief was submitted to the 14th session of the African Committee in November 2009 in which IHRDA and OSJI argued that all the requirements for admissibility as per the Committee's guidelines on the consideration of communications had been met.[15] On the question of exhaustion of local remedies, the brief argued that the Nubians had filed a case on their right to nationality in the Kenyan High Court which had by then been pending for over six years with no substantive consideration, thus making the remedy delayed and ineffective. At its 15th ordinary session in April 2010, the African Committee admitted the communication on the basis that the suit in the High Court had been unduly delayed, as argued by IHRDA and OSJI.[16]

Before a formal request was made for further arguments, IHRDA and OSJI submitted a full brief on the merits in June 2010 to enable the African Committee to expedite its consideration of the communication.[17] The government of Kenya was informed and invited to participate at every stage of the consideration of the communication, but no response was received by the Committee of Experts, the Nubian community or the authors of the communication.[18]

The African Committee invited IHRDA and OSJI to present oral arguments during the 17th ordinary session held in Addis Ababa from 22 to 25 March 2011. A team from both institutions presented the arguments. A representative of the United Nations High Commission for Human Rights (UNHCR) also submitted a paper in support of the communication. At the conclusion of the session, the African

14 '*Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) on behalf of the Nubian Children in Kenya v Republic of Kenya* – Arguments on the merits of the communication' (2010) 15-28 (copy on file with the authors).

15 African Committee of Experts on the Rights and Welfare of the Child 'Guidelines for the consideration of communications provided for in article 44 of the African Charter on the Rights and Welfare of the Child' ACERWC/8/4.

16 African Committee of Experts on the Rights and Welfare of the Child '15th session of the African Committee of Experts on the Rights and Welfare of the Child, 15-19 March 2010, Addis Ababa, Ethiopia – Report ACERWC/Rpt. (XV)' (2010) para 48, http://www.acerwc.org/wp-content/uploads/2011/03/ACERWC-Session-15-report-English.pdf (accessed 1 June 2012).

17 IHRDA and OSJI (n 14 above).

18 15th session of the African Committee of Experts on the Rights and Welfare of the Child, 22-25 March 2011, Addis Ababa, Ethiopia – Report ACERWC/Rpt (XVII) (2010) para 35 http://www.acerwc.org/wp-content/uploads/2011/03/Report-17th-session-ACERWC_Eng.pdf (accessed 1 June 2012).

Committee adopted a decision in its session report, finding Kenya in violation of all the articles alleged and promised to deliver its reasons within a month.[19] The authors received an official copy of the decision in September 2011. At the end of its decision, finding Kenya to have violated all the articles so alleged, the African Committee of Experts concluded as follows in paragraph 69:[20]

> For the reasons given above, the African Committee finds multiple violations of articles 6(2), (3) and (4), article 3, articles 14(2)(b), (c) and (g); and article 11(3) of the African Children's Charter by the government of Kenya, and:
>
> 1 Recommends that the government of Kenya should take all necessary legislative, administrative and other measures in order to ensure that children of Nubian decent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.
> 2 Recommends that the government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.
> 3 Recommends that the government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative and other measures to ensure that children of Nubian descent are registered immediately after birth.
> 4 Recommends that the government of Kenya should adopt a short-term, medium-term and long-term plan, including legislative, administrative and other measures, to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.
> 5 Recommends to the government of Kenya to report on the implementation of these recommendations within six months from the date of notification of this decision. In accordance with its Rules of Procedure, the Committee will appoint one of its members to follow up on the implementation of this decision.

3 Best interests versus exhaustion of local remedies

Before discussing the approach of the African Committee of Experts to some of the human rights issues raised in this communication, it is important to first examine the reasoning of the Committee in addressing the exhaustion of local remedies. The provision on

19 African Committee of Experts on the Rights and Welfare of the Child (n 18 above) para 36.

20 African Committee of Experts on the Rights and Welfare of the Child, Decision on the communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Government of Kenya (2011) para 69 http://www.acerwc.org/wp-content/uploads/2011/09/002-09-IHRDA-OSJI-Nubian-children-v-Kenya-Eng.pdf (accessed 1 June 2012).

the need to exhaust local remedies is not peculiar to the African Children's Charter, but can be found in virtually all international and regional human rights instruments.[21] As correctly noted by the African Committee, the reason for this provision is to ensure that a state which is alleged to have violated human rights is informed of such violations and given the opportunity to remedy them.[22] This is to avoid a situation where regional and global human rights bodies are made courts of first instance. It should be noted that the African Children's Charter, unlike the African Charter, does not contain a provision relating to the admissibility of communications before the African Committee. Consequently, in the *Nubian Children* communication, the African Committee relied on its guidelines for the consideration of communications and sought guidance wholly from the admissibility provision in article 56(5) on the exhaustion of local remedies of the African Charter in arriving at its decision. The African Commission over the years has developed a rich jurisprudence regarding the conditions contained in article 56 dealing with the admissibility of communications. Although the African Commission has emphasised in a number of cases the importance of this provision, in some situations the Commission has adopted a flexible or generous approach to interpreting the provision.[23]

In the *Nubian Children* communication, the African Committee noted that the Nubian community had filed a case before a High Court in Kenya which had been pending for six years but that no decision had yet been reached. It was further noted that within 15 months of filing the case, five different judges had attempted without success to preside over the case.[24] Given the long period this case has been in court and considering the fact that children are among the victims of the human rights violations experienced by the Nubian people, the African Committee decided to adopt a progressive, albeit purposive, approach to redefine the need for the exhaustion of local remedies to take account of the underlying principles of children's rights. In arriving at its decision, the African Committee invoked the best interests of the child principle in article 4 of the African Children's Charter as part of its justification for finding that local remedies were unduly prolonged and hence ineffective.

According to the African Committee, one year in the life of a child means a lot; hence the delay by the High Court in Kenya to resolve the case instituted by the Nubian community has resulted in grave consequences for the rights of Nubian children. In the African

21 See eg art 56(6) African Charter.

22 See para 26 of the decision (n 20 above).

23 See eg *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Civil Liberties Organization v Nigeria* (2000) AHRLR 186 (ACHPR 1995); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

24 See para 20 of the decision (n 20 above).

Committee's view, this is a clear indication that no effective local remedy exists in Kenya. The Committee relies extensively on the *Jawara* communication[25] to illustrate its point. In that case, the African Commission had noted that 'only local remedies that are available, effective and adequate (sufficient) need to be exhausted'. The African Commission further reasoned that a remedy is considered available if the complainant can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint.[26] Based on this decision, the African Committee then concludes that the local remedies rule is not etched in stone.[27]

The African Committee proceeded to distinguish the *Nubian Children* communication from a similar communication decided by the African Commission, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*,[28] where the Commission declined to hear a communication in which a claim had been filed but not yet resolved by domestic courts in Nigeria. In justifying its position, the African Committee notes as follows:[29]

> [I]t cannot be in these children's best interests (a principle domesticated by the Children's Act of 2001) to leave them in a legal limbo for such a long period of time in order to fulfil formalistic legal procedures. As an upper guardian of children, the state and its institutions should have proactively taken the necessary legislative, administrative and other appropriate measures in order to bring to an end the current situation children of Nubian descent in Kenya find themselves in.

The African Committee of Experts, echoing the decision of the African Commission in the *Jawara* case, further reasons that an unduly prolonged remedy cannot be said to be 'available, effective and sufficient'. Hence it submits:[30]

> [T]he unduly prolonged court process in the present communication is not in the best interests of the child principle (article 4 of the Charter), and warrants an exception to the rule on exhaustion of local remedies.

There is no doubt that the progressive approach by the African Committee in interpreting the provision on the exhaustion of local remedies is commendable as it is capable of advancing the rights of children under the African Children's Charter. The problem of delay in the administration of justice is not peculiar to Kenya, and applies to

25 *Jawara v The Gambia* (n 23 above).

26 As above.

27 See para 28 of decision (n 20 above).

28 (2000) AHRLR 186 (ACHPR 1995).

29 See para 29 of the decision (n 20 above).

30 See para 32 of the decision (n 20 above).

many other African countries.[31] Experience has shown that in many African countries, cases take an unduly long period before they are resolved. Consequently, courts of law, that ought to be beacons of hope and justice for the disadvantaged and marginalised, have become a nightmare. Given this situation, one tends to share the concern and sentiment of the African Committee. This is even more so given the disadvantaged position of children. Therefore, the expansive interpretation of the 'best interests principle' by the Committee is a welcome development. The interpretation is capable of realising access to justice for African children whose rights historically have not been given attention. However, this approach should be applauded with caution.

As noted earlier, the purpose of the exhaustion of local remedies clause is to ensure that a state that is alleged to be in violation of human rights has been given the opportunity to deal with the case domestically before an international or regional human rights body assumes jurisdiction. This is very important bearing in mind the doctrine of state sovereignty under international law. More importantly, the rule is founded on the premise that 'the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level'.[32] While it is admitted that a rigid approach to this rule should be avoided, at the same time the rule should not be too relaxed so as to defeat its purpose. The invocation of the best interests of the child principle to evade the exhaustion of local remedy rule should only be based on the peculiarity of a case and should never become a general rule of the African Committee. Otherwise, the best interests of the child principle may become a 'magic wand' to prospective litigants who may jettison the need to exhaust local remedies before approaching the Committee for redress for human rights violations.

4 Indivisibility of human rights

An interesting aspect of the *Nubian Children* communication is the fact that it touches on both the violations of civil and political rights, on the one hand, and social and economic rights, on the other. The African Committee of Experts deserves commendation for its faithfulness to the indivisibility, interdependence and interrelatedness

31 A report has shown that in many parts of Africa a delay in the administration of justice is one of the major barriers to access to justice for vulnerable and marginalised groups.

32 See NJ Udombana 'So far, so fair: The local remedies in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 8.

of human rights guaranteed in the African Children's Charter. In the African Committee's view, the displacement and denial of the right to registration of birth to Nubians by the Kenyan government can have implications for the right to health of Nubian children as guaranteed in article 14 of the African Children's Charter. This approach coincides with a growing consensus under international human rights law. In the Vienna Programme of Action,[33] the international community agreed that all human rights – civil, political, social and economic rights – are indivisible, interdependent and interrelated. Prior to this declaration, most countries have tended to treat social and economic rights with less attention compared with civil and political rights. Some of the arguments to justify this neglect relate to the fact that social and economic rights are vague and often require the availability of resources for their proper implementation.[34]

However, recent developments, including clarifications by treaty-monitoring bodies and decisions of national courts and regional human rights bodies, have tended to debunk this claim and have reaffirmed that all human rights, whether civil and political or social and economic, are equally important. For instance, the Human Rights Committee, charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has explained in its General Comment 6[35] that the right to life guaranteed under ICCPR should not be interpreted narrowly but should be defined broadly to include the rights to food, housing and health. Also, the Committee on Economic, Social and Cultural Rights (ESCR Committee), in General Comment 14 on the right to health[36] has explained that the enjoyment of the right to health is dependent on other rights, such as the rights to dignity, life, privacy and non-discrimination.

At the regional level, the African Commission in a number of cases has supported the indivisibility, interdependence and interrelatedness of human rights in its decisions. For example, in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[37] the Commission found the Nigerian government in violation of the right to life, health, non-discrimination, a healthy environment, food and housing when it failed to prevent environmental degradation and wanton destruction of property of the Ogoni people by multi-national oil companies. Thus, for the first time the African Commission adopted a broad and purposive interpretation of the rights guaranteed under the African Charter. Again, in *International Pen and Others (on behalf of Saro-Wiwa)*

33 Vienna Programme of Action UN Doc A/CONF 157/24 Part 1 ch III.

34 See eg L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353; DP Fidler *International law and infectious diseases* (1999).

35 'The right to life' UN GAOR Human Rights Committee 37th session Supp 40.

36 'The right to the highest attainable standard of health', UN ESCR Committee General Comment 14, UN Doc E/C/12/2000/4 para 12.

37 n 23 above.

v Nigeria,[38] the African Commission found that the appalling living conditions in prisons and the lack of medical attention for prisoners were not only threats to their right to health, but also the rights to life and human dignity guaranteed under the African Charter. The Commission reasons that the right to life will be almost meaningless if a prisoner is denied access to medical attention when in need. In summing up its position, the African Commission notes as follows:

> The protection of the right to life in article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of article 4.

These decisions are clear indications of the African Commission's commitment to affirming the indivisibility, interdependence and interrelatedness of all the rights guaranteed under the African Charter.

Furthermore, the Indian Supreme Court has applied the indivisibility approach to a case involving *Pachim Banga Khet Majoor Samity v State of West Bangal.*[39] In that case, the plaintiff suffered an injury arising from an accident and was rushed to hospital but was denied treatment. He brought an action to challenge this denial of treatment. The Indian Supreme Court held that a denial of access to emergency treatment would result in the violation of the right to life guaranteed under article 21 of the Indian Constitution. This creative approach tends to infer the violation of socio-economic rights by relying on civil and political rights.

In the Nubian case, the African Committee of Experts reasons that the inability of Nubian children to live a worthy life like every other child due to their displacement and non-registration at birth amounted to a violation of their rights to non-discrimination, dignity and health. In finding the Kenyan government in breach of its human rights obligations under international law, the African Committee adopted a progressive and purposive approach to interpreting the provisions of the African Children's Charter. The African Committee adopted the indivisibility, interdependence and interrelatedness of human rights guaranteed in the African Children's Charter to hold that the Kenyan government's lengthy displacement of the Nubian people was in violation of the right to health of Nubian children as guaranteed in article 14 of the Charter. This is a commendable approach given that children who have been excluded from registration at birth may experience difficulties in accessing health care services. This can in turn pose a grave threat to their physical and mental well-being. It must be noted that the ESCR Committee in its General Comment 14[40] stated

38 (2000) AHLR 212 (ACHPR 1998).

39 [1996] AIR (SC) 2426.

40 General Comment 14 (n 36 above).

that the enjoyment of the right to health is dependent on other rights, such as housing, food and dignity. Moreover, one of the underlying determinants of the right to health is that states should ensure access to housing and potable water to the people.

The ESCR Committee further notes that access to health care services must be guaranteed to vulnerable and marginalised groups, including migrant workers, women, children and people with disabilities. Children who have been excluded from registration at birth or accorded citizenship by their host country will no doubt be considered vulnerable and marginalised. Therefore they deserve special attention and must be treated with dignity. As the ESCR Committee noted, the enjoyment of the right to health must be guaranteed on a non-discriminatory basis. Indeed, ensuring that discriminatory practices are avoided in the provision of health care services is one of the core contents of the right to health. A state may not be able to justify a policy that encourages disparity or double standards in the provision of essential services. Considering the fact that registration at birth is crucial for the enjoyment of many other services, the Nubian children would seem to have been implicitly excluded from benefiting from some of the essential services they ordinarily should have been entitled to.

Furthermore, the African Committee found that the displacement of Nubian children and their non-registration could implicate their right to education guaranteed under article 11 of the African Children's Charter. The Committee is of the view that denying the right of registration to Nubian children has adversely affected their right to be educated. Given the importance of education to the development of a child, it is incontestable that any impediment to access to education will amount to human rights violations. The obligation to respect the right to education requires a government to refrain from interfering with the enjoyment of this right. In the *Nubian Children* communication, the non-registration of the Nubian children by the Kenyan government is an indirect interference with their right to education. According to the Limburg Principles on the Implementation of Socio-Economic Rights, a state should refrain from adopting any policy that may interfere with the enjoyment of socio-economic rights.[41] Coomans argues that states have both negative and positive obligations as regards the right to education.[42] He notes that states must not only refrain from interfering in the enjoyment of this right, but must also ensure a supportive legal and policy framework environment, which will guarantee access to education to all without discrimination.

41 Limburg Principles E1991/23 annex III.

42 F Coomans 'In search of the core content of the right to education' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 159-182.

The indivisibility approach in this case is not only faithful to the spirit of the Convention on the Rights of the Child (CRC) and the African Children's Charter, but can also strengthen the protection of children's rights across the region. It should be noted that in many countries in Africa, socio-economic rights remain unenforceable, thereby limiting the rights of children to education, health and housing. By invoking the indivisibility and interrelatedness of rights, the African Committee of Experts would seem to be laying a good foundation towards advancing the human rights of African children in general and socio-economic rights in particular.

5 Gaps in the decision

Whilst the radical and progressive stance of the African Committee in the *Nubian Children* communication has been applauded, it is important to note that the African Committee of Experts fails to adopt a gender-sensitive approach in its judgment. Much as it is agreed that the rights to health and education of all Nubian children may be adversely affected by non-registration at birth, it is crucial to state that the consequences of such denial are far greater for girls than for boys. Experience has shown that access to health services for the girl child is difficult in many African countries due to a number of reasons, including cultural or religious beliefs, the requirement of parental consent and judgmental attitudes on the part of health providers.[43]

Understanding the social position of girls and young women within societies and population sub-groups is crucial to identifying strategies for the effective provision of essential services to all children, especially the girl child. In many African societies where a belief in male supremacy co-exists with restrictive social structures that limit women's economic, social and legal independence, men often maintain strong control over female sexuality.[44] This predisposes the girl child to sexual ill-health and further undermines their right to equality.[45] Equally, studies have shown imbalances in school enrolment between girls and boys across the region. Also, studies have shown that girls often drop out of school due to a number of reasons, including poverty, sexual violence, early pregnancy and domestic

43 International Women's Health Coalition *Young adolescents' sexual and reproductive health and rights: Sub-Saharan Africa* (2007) 3.

44 MN Kisekka *The culture of silence. Reproductive tract infections among women in the Third World* http://www.iwhc.org/docUploads/CULTUREOFSILENCE.PDF (accessed 11 April 2012).

45 S Singh *et al* 'Evaluating the need for sex education in developing countries: Sexual behaviour, knowledge of preventing sexually-transmitted infections/HIV and unplanned pregnancy' (2005) 5 *Sex Education: Sexuality, Society and Learning* 307-331.

responsibilities.[46] The denial of access to health and education services for the girl child can have serious implications for their development, including sexual and reproductive well-being.[47] In particular, the denial of education opportunities to girls may not only perpetuate the low status of women and girls, but may also lead to the vicious cycle of poverty. This can almost be aggravated by statelessness.

In General Comment 1, the UN Committee on the Convention on the Rights of the Child (CRC Committee) noted that education directed towards the development of the child's personality must be gender-sensitive.[48] The Committee has also explained that discrimination against girl children often led to a denial of access to sexuality information and services.[49] Furthermore, the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) urged states to eliminate discrimination in health care services to women and girls in their jurisdictions.[50] This position has been reiterated in the Committee's concluding observations to state parties.[51] It is hoped that in future this oversight will be avoided.

While it may be argued that the rights of African children have generally been undermined in general in the past, the situation is even worse for female children who have had to put up with patriarchal traditions that threaten their rights. Therefore, a failure to consider this socio-cultural situation may further perpetuate gender inequality and undermine the right of the girl child in the region. The African Committee of Experts misses the opportunity to lend its voice to the need to pay greater attention to human rights violations experienced by the girl child and to end discrimination against them. More often than not, policies and programmes have been developed in Africa to address the needs of children without taking into consideration the peculiar situation of the girl child.

It should also be noted that, although the African Committee of Experts did refer to international human rights principles and standards in the *Nubian Children* communication, surprisingly it made little use of the General Comments of the CRC Committee, particularly General

46 PLAN International *Because I am a girl: The state of the world's girls 2012* (2012) 14.

47 Singh *et al* (n 45 above).

48 UN CRC Committee on the Rights of the Child General Comment 1: The aims of education, 17 April 2001, CRC/GC/2001/1.

49 General Comment 3 paras 7 & 8.

50 General Recommendation 24 on Women and Health.

51 See eg Concluding Observations to Burkina Faso 31 January 2000, UN Doc A/55/38 (2000); Equatorial Guinea, para 205, UN Doc A/59/38 (2004); Ethiopia, para 160, UN Doc A/51/38 (1996); Georgia, para 111, UN Doc A/54/38 (1999); Ghana, para 31, UN Doc CEDAW/C/GHA/CO/5 (2006).

Comments 1 on education, 3 on HIV/AIDS[52] and 4 on adolescent health.[53] Given the significance of these General Comments in clarifying the contents of the Convention and the nature of states' obligations, one would have expected the African Committee to draw more on the experience of the CRC Committee in interpreting the provisions of the African Children's Charter in the *Nubian Children* communication. In addition, the African Committee should have elucidated its decision on the rights to education and health by making reference to General Comments 13 (education) and 14 (health) of the ESCR Committee.

6 Conclusion

No doubt the African Committee of Experts made an important first impression in its decision in the *Nubian Children* case. The African Committee has demonstrated its willingness to adopt a purposive and progressive interpretation of the rights of children guaranteed under the African Children's Charter. Unlike certain regional human rights bodies, such as the African Commission, that started on a negative note,[54] the African Committee of Experts has shown its capacity to advance the rights of children in the region. It is worth noting that the African Committee ordered the Kenyan government to report back within six months on steps taken to implement this decision. One of the major challenges with decisions of human rights bodies has remained the poor implementation or enforceability on the part of states. To this extent, the Committee of Experts deserves commendation. However, there is an opportunity for improvement in the future. The African Committee can make better use of interpretative guidance such as the General Comments of the CRC Committee and it can adopt a gender-sensitive approach in its decisions.

52 CRC Committee General Comment 3: HIV/AIDS and the right of the child.

53 CRC Committee General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child.

54 The African Commission has been criticised by different authors for its false start at its earlier stage. See eg M Mutua 'The African human rights system: A critical evaluation' http://hdr.undp.org/en/ reports/global/hdr2000/papers/*mutua*.pdf (accessed 2 May 2012); R Murray 'The African Charter on Human and Peoples' Rights 1987–2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 1; GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The dearth of the rights of HIV-positive employees in Zambia: A case comment on *Stanley Kangaipe and Another v Attorney-General*

Mumba Malila[*]
Lecturer in Law, University of Zambia; State counsel and Advocate of the High Court of Zambia

Summary

Recent years have seen increased human rights litigation in Southern Africa in the areas of HIV and AIDS. Unfortunately, there has been virtually no litigation around the many human rights issues involving HIV and AIDS in Zambia. This has resulted in a virtual absence of relevant domestic jurisprudence around issues involving human rights and HIV and AIDS. The contribution comments on the first-ever successfully-litigated case in this area in Zambia. The case of Kangaipe v Attorney-General *necessitates commentary because for the first time a Zambian court added its voice to the chorus of recent obiter dicta from several jurisdictions in the African region which declared that HIV testing without consent is a violation of human rights as set out in international human rights treaties and other normative instruments. The article argues that the* Kangaipe *case has contributed to the expanding frontiers of human rights litigation in Zambia, particularly as far as HIV and AIDS are concerned, and that it was the perfect opportunity for the Zambian courts to develop and refine problems related to the applicability of local and foreign authorities. Regrettably, the court failed to exploit fully these opportunities. The article shows that, while some aspects of the approach by the court in* Kangaipe *are encouraging in principle, on balance the protection of the rights of people living with HIV and AIDS in an employment setting remains contingent on an innovative and activist approach by a trial court. Obstacles faced by practitioners in such cases remain considerable.*

* LLB (Zambia), LLM (Cambridge); mumbamalila@yahoo.com

1 Introduction

On 27 May 2010, the High Court of Zambia passed what is, by all accounts, a landmark judgment on an issue that has dominated the discourse on employees' human rights and the HIV question in Zambia, a country where HIV and AIDS are stigmatised. For the first time, the High Court had occasion in the case of *Stanley Kangaipe and Charles Chookole v Attorney-General*[1] to address the important question of whether the mandatory testing of an employee for HIV without his or her prior consent violated that employee's human rights. Also requested of the Court in that case was to determine and declare that the termination of an employee's contract of employment on account of his or her HIV status was a violation of the employee's human rights guaranteed by the Constitution of Zambia and international human rights instruments. The Court held that a decision by the Zambian Air Force to subject the two petitioners, who were then serving officers in the Zambian Air Force, to mandatory HIV testing without their informed consent, was a blatant violation of their rights to privacy and to protection from inhuman and degrading treatment.

Much as it is regrettable that the decision of the High Court in that case was not appealed against so as to afford the highest court in the land – the Supreme Court – that rare opportunity to pronounce itself on the all too important issue of HIV testing, the judgment nonetheless represents a giant step in the promotion and protection of the rights of people living with HIV and AIDS. Though an appeal would, beyond question, have enhanced the precedential value of that decision on a matter which has hitherto been timidly litigated in Zambia, the judgment is, nevertheless, remarkable for its pioneering role in the judicial treatment of the right to privacy in the context of HIV and AIDS.

This case is also significant because it raised many other important issues which are not often accorded a place in human rights litigation in the country. Apart from the question of the application of international human rights instruments and standards in Zambia, the Court pronounced itself on the efficacy of the Directive Principles of State Policy which lists economic, social and cultural rights as non-justiciable.[2]

---

1 (2009) HL/86 (unreported) decided by Justice Elizabeth Muyovwe of the Livingstone High Court. At the time of writing this comment, the judge had been elevated to the Supreme Court of Zambia.

2 The Constitution of Zambia, ch 1 of the Laws of Zambia sets out the Directive Principles of State Policy in part IX. According to art 110, these principles shall guide the executive, the legislature and the judiciary in the development of national policies, the implementation of those policies, the enactment of laws and the application of the Constitution and other laws. According to art 111, these Principles are not justiciable.

This article argues that the decision of the High Court of Zambia in the case of *Stanley Kangaipe and Charles Chookole v Attorney-General* demonstrates that the rights of HIV-positive persons to privacy and against degrading treatment through mandatory testing are not vague or incapable of judicial enforcement. In this regard, the decision charts new pathways in conceptualising arguments around human rights litigation, particularly those of HIV-positive persons. It also illustrates how the Constitution, local and foreign precedents, as well as international conventions and other local and international standards of a soft law status, could in fact prove useful if interpreted generously in ensuring the effective protection of the rights of persons living with HIV and AIDS.

Novel and commendable as the decision is, it is not without shortcomings. It raises somewhat disquieting issues in the way it was rationalised. The biggest weakness of this decision lies in its general failure to state clearly the rights of HIV-positive employees whose employment is terminated on account of unsatisfactory performance brought about by prolonged ill health. The Court failed to make a clear link between the termination of employment of an HIV-positive employee based on poor performance and the HIV status of the employee. A further omission lies in the judgment's silence on the weight to be placed on non-traditional legal authorities, such as Directive Principles of State Policy, employment manuals, guidelines and policy documents.

This contribution is not a negative criticism of the decision which was, by and large, laudable, but is rather a commentary on the somewhat conservative approach adopted by the Court in that matter and points out gaps that could have been sealed in favour of HIV-positive employees.

2 Facts and arguments

To appreciate the issues that fell to be determined in the case, one inevitably has to understand the salient facts which gave rise to the petition. The two petitioners were former employees of the Zambian Air Force. They were both discharged on medical grounds following their testing HIV positive (the test was administered without their knowledge and consent). The circumstances leading up to the first petitioner's discharge from the Air Force started when, in 2001, he saw the Air Force resident doctor complaining of a swollen right leg. He was referred to a general hospital where he was examined and given medication. A month later the resident doctor informed him that he had *kaposis sarcoma*. Treatment for this disease was commenced. Later the same year, he was ordered to appear before a medical board constituted by the Zambian Air Force. Later the following year, the first petitioner's name appeared on a routine station order, signed by the

station commander, as an officer required to submit to a compulsory medical check-up. It was a punishable infraction to ignore the station commander's directives. He attended the clinic for the check-up. Specimens of, among other things, his blood, were taken, although he was not informed of the nature of the tests to be conducted before or after the samples were taken. In particular, no warning or intimation was made that an HIV test would be conducted. Two days later, the resident doctor called him and prescribed new drugs, namely, Lamivudine, Stavudine and Nevirapine, without informing him why he was giving him this new medication. He was not advised that he had tested positive for HIV, nor was he informed that the medication he was given was in fact for the treatment for HIV. He felt much better with the new medication. Two months later, he discontinued the medication even though he had not run out of it. He claimed that this was due to insufficiency of information on a failure to take these drugs. In October 2002 he was informed of the recommendation of the medical board that he was to be discharged on medical grounds.

In 2005 the first petitioner's wife fell ill and remained so for a long time. He went to a different medical facility with her. They were advised to undergo voluntary counselling and HIV testing (VCT). The results showed that both were HIV positive and they were put on anti-retroviral (ARV) therapy. This, however, was not before they were advised on the need to stick to treatment and the consequences of failing to adhere to the treatment regime. It was after this that the first petitioner discovered, much to his shock and annoyance, that the medication prescribed after VCT was the same as that which the resident doctor had prescribed for him some three years previously.

Like the first petitioner, the second petitioner developed problems with his right leg and was treated with pain killers and antibiotics. He had serious medical challenges which saw him admitted to a hospital for pulmonary tuberculosis. He had blocked nostrils and nearly had his right leg amputated. He later worked normally and underwent re-engagement medical examinations in 1996 and was found fit to continue in full-time service. He undertook further training and served in diverse capacities and places. In 2001 he appeared before a medical board, during which he had to give a written statement of his medical history regarding the swelling of his leg and the fungal infections he had. After this, he continued to work normally. In 2002 he had to attend a compulsory medical check-up at the instance of the station commander of the Zambian Air Force through a routine station order that was issued. His blood samples, among others, were taken and, without his knowledge or consent, tested. No counselling before or after the testing of the blood samples was done. Later, he was called and told that they were changing the medication which he had been receiving for his leg and was being put on a new drug – Nevirapine, Stavudine and Lamivudine. Though he did not know that he had been

put on ARV therapy, the second petitioner responded very well to the treatment and his condition of health improved considerably.

In October 2002 he received a letter discharging him from the Air Force on medical grounds. This was barely two weeks after the station commander congratulated him for outstanding performance and conferred on him the substantive rank of sergeant. He subsequently trained as an automotive mechanic and was able to find employment. He continued to attend the Zambian Air Force facilities for medical attention. He came to know of his HIV status in 2003 when the resident doctor referred him to the Sepo Centre, a facility which assisted patients on ARV therapy with food supplements. The referral note to the Centre read, *inter alia*, 'Our diagnosis – known patient with immunosuppression on ARVs. Pls assist him as necessary'. Upon presenting the referral note, the second petitioner was counselled before he gave his blood sample and after testing he was advised of his HIV status and the consequences of failing to adhere to the ARV regime.

On the basis of the foregoing facts, the two petitioners brought the action against their employer, the Zambian Air Force, sued through the respondent.[3] They asked the High Court to determine and declare that the decision to subject them to a mandatory medical test and examination, including HIV testing, without their express or informed consent and without pre-testing counselling:

(i) was *ultra vires* article 11 of the Zambian Constitution which guarantees the right to life, liberty and security of the person;
(ii) violated the petitioners' right to protection from inhuman and degrading treatment guaranteed under article 15 of the Constitution;
(iii) violated the petitioners' right to privacy guaranteed under article 17 of the Constitution; and
(iv) violated the petitioners' right to equal and adequate educational opportunities in all levels as provided for under articles 112(d) and (e) of the Constitution.

It should be noted that article 112 of the Constitution of Zambia is part of the Directive Principles of State Policy. The petitioners' claim under paragraph (iv) was, therefore, as novel as it was brave. The petitioners went further to ask the Court to also find that the decision to discharge them on medical grounds and/or exclude them on account of their HIV status, premised as it was on Regulation 9(3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations, Third Schedule Serial (vxi), was *ultra vires* the Constitution of Zambia, and international human rights instruments to which Zambia was party. It was argued in specific terms that, apart from violating the identified

3 Pursuant to sec 12 of the of the State Proceedings Act, ch 71 Laws of Zambia.

provisions of the Zambian Constitution, the decision to subject the petitioners to mandatory HIV testing was contrary to article 3 of the Universal Declaration of Human Rights (Universal Declaration) relating to the right to life, liberty and security of person; article 6 of the African Charter on Human and Peoples' Rights (African Charter) guaranteeing the right to liberty and security of person; and article 6 of the International Covenant on Civil and Political Rights (ICCPR). It was contended that the discharge of the two petitioners, on a proper construction of the facts, was on the basis of their HIV status and that this decision violated articles 11(a), 21(1) and (2) of the Constitution, and further that Regulation 9(3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations, Third Schedule Serial (xvi) of the Defence Act was *ultra vires* the Constitution of Zambia and the provisions of international law.

In arguing in support of the petitioners' case, an attempt was made to persuade the court to apply essentially five kinds of principles and legal authorities, namely (i) domestic legislation and case law; (ii) judicial decisions by foreign courts and tribunals; (iii) provisions of local standards contained in documents such as policy statements, employment standards and guidelines; (iv) international treaty standards and conventions to which Zambia is a party; and (v) non-treaty standards making up soft law in the form of declarations and guidelines.

Of these sources of law, domestic legislation and case law present no difficulty of applicability since their value as legal authority and precedent is well acknowledged. It is the treatment of the other sources of law that raises some concern, especially in as far as the weight to be placed on each of them is concerned. In the English common law tradition such as Zambia inherited, the manner in which aspects of relevant legal standards apply in determining an issue before a court of law is significant. In particular, the distinction between primary and secondary sources, what is binding authority and what is merely persuasive, is critical. In this particular case, counsel on both sides did not appear to have made a deliberate effort to place the authorities cited in support of the arguments in any particular hierarchical order. The presiding judge did not appear to be unduly concerned with the approach adopted by counsel either. In fact, the Court proceeded as if equal weight could be placed on the different sources of law applicable to the issues before it. In my view, this was unfortunate as it does nothing to enhance the concept of judicial precedent.

As far as domestic legislation and case law are concerned, the petitioners claimed that a number of their constitutional rights had been violated by subjecting them to a mandatory medical examination, including an HIV test. These rights are:

(a) those set out in article 11(a), namely, the right to liberty, security of the person and to protection of the law;

(b) that set out in article 13, namely, the right to personal liberty;
(c) that set out in set out in article 15, namely, the right to protection from inhuman and degrading treatment; and
(d) that set out in article 17, namely, the right to privacy.

In support of their position, the case of *Akashambatwa Mbikusita-Lewanika v Frederick Chiluba*[4] was cited. In that case the Zambian High Court declined to order the respondent to be subjected to a DNA test without his consent to determine his disputed paternity. The reason for this refusal was basically that the respondent's rights to liberty and security of the person would be violated. The High Court in that case, as quoted by the High Court in *Kangaipe,* stated:

> The question of consent is of cardinal importance and was considered by the House of Lords in the case of *S v S* which I have already referred to and I would like to quote from the speech of Lord Reid at page 111: 'I must now examine the present legal position with regard to blood tests. There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will. In my view, the reason is not that he ought not to be required to furnish evidence which may tell against him. By discovery of documents and in other ways the law often does this. The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by *coup d'état* but by gradual erosion, and often it is true that the matter is regarded differently in the United States. We were referred to a number of state enactments authorising the courts to order adults to submit to blood tests. They may feel that this is safe because of their geographical position, size, power or resources or because they have a written constitution. But here parliament has clearly endorsed our view by the provisions of s 21(1) of the 1969 Act.'

As far as mandatory testing is concerned, therefore, the petitioners' advocates were spot-on. What are primary sources of applicable law were applied by the Court in accepting that mandatory testing violated the right to privacy as guaranteed in the Constitution. The Court accepted the reasoning in the *Chiluba case* as well as article 17 of the Constitution guaranteeing privacy.

The petitioners further argued that mandatory testing without consent violated article 6 of the African Charter, article 3 of the Universal Declaration and articles 6 and 9 of ICCPR, all of which dealt with the right to life, liberty and security of the person. Counsel then cited the Botswana case of *Diau v Botswana Building Society*,[5] which involved a woman who declined to undergo an HIV test. The Court in that case was equally emphatic on the need for consent to medical examination when it held:

> Informed consent is premised on the view that the person to be tested is the master of his own life and body. In the premises it should follow that the ultimate decision whether or not to test lies with him or her, not the

4 (1998) ZR 79.
5 (2003) 2 BLR 409.

> employer, not even the medical doctor. The purpose of informed consent is to honour a person's right to self-determination and freedom of choice.

It is the manner in which the High Court treated the latter additional arguments anchored on non-Zambian authorities that should perhaps attract academic and judicial interest. The Court accepted all these authorities stating in the process:

> This court is at large to consider and take into account provisions of international instruments and decided cases in other countries. The Zambian courts are not operating in isolation and any decision made by other courts on any aspect of law is worth considering.

It is unclear whether the Court in that case meant that foreign decisions were applicable and carried the same force as local case law. What is clear from the Court's statement, though, is that the foreign decisions and international instruments were to be used, considered and taken into account since 'Zambian courts are not operating in isolation'. In my view, this was no doubt an overbroad statement by the High Court if the words 'consider and take into account' are understood, as they suggest, to have been used as synonymous with 'apply'. It was overbroad in at least four senses. Firstly, the High Court is not at large to take into account provisions of international instruments and decided cases in other countries. The Court will most definitely not come anywhere close to applying an international instrument to which Zambia is not a party unless, of course, it can be demonstrated that it is *jus cogens*. Secondly, in applying any international instrument, the Court will, or at least should, have regard to the relative weight to be attached to the instrument in question. The Universal Declaration, which is non-binding and was meant merely to be a common standard of achievement,[6] will not be given the same weight as authority as a ratified treaty which, in the order of things, is legally binding on a ratifying state. Thirdly, any consideration of an international instrument in the domestic setting should take into account the fact that Zambia is a dualist and not a monist state,[7] so that no consideration of an international instrument will imply direct application of the instrument bypassing the domestication step. Fourthly, the Court will not be at liberty to apply an international instrument on an issue adequately covered by domestic legislation.

---

6 The Universal Declaration, adopted in December 1948, is considered to be an 'authoritative interpretation of the Charter of the United Nations' and 'the common standard to which the legislation of all the member states of the United Nations should aspire'; LB Sohn 'The new international law: Protection of the rights of individuals rather than states' (1982) 32 *American University Law Review* 10 15 (citing Prof Cassin, one of the principal authors of the Universal Declaration).

7 Monism in international law denotes those states in whose systems international law by domestication or otherwise transforms into national law. The act of ratifying an international treaty immediately incorporates that international law into national law. In dualist states, national implementing legislation is necessary.

As regards decisions of non-Zambian courts, the High Court's statement should likewise have been punctuated by caveats. Firstly, the Zambian courts follow a clearly-defined hierarchy in terms of binding precedents. Foreign judgments will at best be of persuasive value only and the Court in that case should have clearly stated so. Secondly, the extent of the persuasive force of these judgments will invariably depend on the level of the court that decided the particular case and, thirdly, such cases will probably not be considered if they conflict with local decisions made by a court of equal or comparable jurisdiction. The High Court in the *Kangaipe* case quite appropriately quoted an instructive passage on this issue from the Zambian Supreme Court judgment in *Michael Sata v The Post Newspapers Limited*,[8] where it was stated:

> I make reference to international instruments because I am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic legislation but also because the opinions of other senior courts in various jurisdictions dealing with similar problems tend to have a persuasive value. At the very least, consideration of such decisions may help us formulate our own preferred direction which, given the context of our own situation and the state of our own laws, may be different to a lesser or greater extent.

Having accepted both international treaty law as set out in ICCPR as well as the African Charter, and the standards in the Universal Declaration without distinction as to the weight attached to each, and having also accepted to apply foreign case law, the Court proceeded to refer to a number of foreign cases, including *Airedale NHS Trust v Bland*[9] and *Chester v Afshar*.[10] The Court also relied on the New Zealand case of *Auckland Area Health Board v AG*,[11] in which the court quoted from the English decision of *Re A (Children) (Conjoined twins: surgical separation)*[12] regarding the significance of the right to privacy as a human right. The judge then reproduced article 4 of the African Charter dealing with the right to respect for life and integrity, and article 5 dealing with the right to respect of the dignity inherent in human beings and the right against inhuman and degrading treatment and punishment. It then referred to ICCPR which prohibits inhuman and degrading treatment, and article 17 of the Zambian Constitution which protects one against the search of a person of his person or property without his consent. On the basis of all these authorities, the Court concluded as follows:

8 [1995] ZMHC 1.

9 (1993) 1 All ER 821.

10 (2004) 4 All ER 587.

11 (1993) 1 NZLR 235.

12 (2000) 4 All ER 961.

> I find that the petitioners' right to the protection from inhuman and degrading treatment under article 15 and the right to privacy under article 17 were violated. I must hasten to note that after the petitioners were put on ARVs they responded positively to the treatment and this is going by their own evidence – but this does not take away the fact that their fundamental rights to privacy and protection from inhuman treatment were infringed.

As observed earlier, the Court applied horizontally both local and international authorities and did not appear concerned about the question of the weight to be attached to each of these categories of law. Given that the authorities cited appeared unanimous on the point, the judge's approach could largely be regarded as harmless as the overall picture would not change in any case.

On the issue whether the putting of the petitioners on ARV treatment without receiving the necessary adherence counselling violated their human rights, the petitioners argued that this, again, was a violation of their rights under the Constitution and international human rights instruments. They argued that the minimum standards and requirements for voluntary counselling and testing had not been met before they were placed on ARVs. In this respect, they cited the South African case of *C v Minister of Correctional Services*,[13] where the Court held that informed consent demanded pre- and post-testing counselling. Failure to provide such counselling, they submitted, violated their rights to protection against liberty and security of the person and the right to protection from inhuman and degrading treatment. Providing the petitioners with ARVs without informing them of their HIV status or providing them with adherence counselling violated their right to life under article 11(a), read with article 12(1) of the Constitution of Zambia, as well as article 6 of ICCPR.

The petitioners also claimed that they had suffered a violation of their rights to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels as provided for under article 112(d) of the Constitution.[14]

The Court dismissed all the arguments premised on this ground. Firstly, on a technical construction of the evidence before it, as is explained below, the Court found that pre-testing counselling had been given to the petitioners:

> On this point, I find that this is not true ... and I cannot imagine that the very person who decided to save their lives would merely prescribe medication without giving the necessary counselling ... The submission

13 1996 4 SA 292 (T).

14 Art 112(d) of the Constitution reads: 'The following Directives shall be the Principles of State Policy for the purpose of this part: ... (d) The state shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons and take measures to constantly improve such facilities and amenities.'

> by the petitioners that they were not given adherence counselling is not tenable under the circumstances.

It is obvious from this statement that the Court did not make a finding of fact on the evidence before it. Rather, it made a deduction that if medication was prescribed and given to the petitioners, then it followed that counselling was equally offered. If indeed there was evidence to justify the finding, the Court would have said so. The only evidence available to the Court was that of the petitioners which the Court clearly disbelieved.

Having found as it did that pre-testing counselling had been given, the important question whether providing a patient with ARVs without prior information did or did not violate the right of the patient was rendered irrelevant and was not considered by the Court at all. Any finding by the Court on this issue would doubtlessly have been most useful, albeit such finding would be only *obiter*. What the Court did, nonetheless, was to selectively and gratuitously deal with the one limb of the contention premised on the same argument, namely, whether a failure to inform the petitioners that they were being placed on ARVs was a violation of article 112(d) of the Zambian Constitution; namely, that it violated the petitioners' right to adequate medical and health facilities and equal and adequate educational opportunities in all fields and at all levels.

The petitioners' arguments around this issue were not disingenuous. They conceded that article 111 of the Constitution made the Directive Principles of State Policy, including article 112, not legally enforceable by themselves, but that they were not relied upon 'by themselves' but in conjunction with other provisions, namely, provisions in international human rights instruments, and that this made them enforceable. Without much hesitation, the Court dismissed the argument merely because

> [t]he petitioners have shown no evidence to support the argument that their rights under article 112 were infringed. The Court is not in a position to make a declaration which is not supported by evidence. This part of the claim has no merit and it is must fail.

Having assumed or found as it did that pre-testing counselling had been given to the petitioners before they were placed on ARVs, the Court had the choice of not addressing the issue whether article 112 had been violated at all as it already determined that the petitioners were counselled before they were put on ARVs. Rather than leave this issue altogether, the Court proceeded to consider, rather redundantly, the part of the same argument premised on article 112 of the Constitution. The moment the Court chose to deal with that limb of the argument, it should have given appropriate guidance as to whether the Directive Principles of State Policy could be enforced at all and, if so, under what circumstances. As it is, a less than clear insinuation was made through the judgment that if evidence were available the Directive Principles of

State Policy would be infringed, and the Court would then have been inclined to hold that the petitioners' rights had been violated.

The petitioners also asked the Court to determine and declare that the respondent's decision to discharge and/or exclude the petitioners on account of their HIV status on medical grounds premised on section 9(3) of the Defence Force (Regular Force) (Establishment and Service) Regulations, Third Schedule Serial (xvi) was *ultra vires* the Constitution of Zambia, in particular article 11 and article 21, which guarantee the right to freely associate, and article 23, which guarantees the right against discrimination on account of social and other status including HIV status. Furthermore, it was argued that article 112(c) of the Constitution had been violated and that this infringed their right as disadvantaged persons to social benefits and amenities as are suitable to their needs. The argument was that, because the Regulations sanctioned the taking of action which violated constitutional provisions and provisions of the Universal Declaration, the African Charter and ICCPR, the Regulations were *ultra vires* these protective provisions and therefore null and void, and accordingly that action taken pursuant to those Regulations was equally null and void.

Again the Court found on the facts of the case that the discharge of the petitioners was not on the basis of their HIV status; rather it was on the basis of their prolonged ill health which stretched back to the time before they were tested for HIV. Furthermore, the Medical Board which recommended their discharge was held before they were tested for HIV. According to the Court, the discharge of the petitioners from the Air Force was due to their being 'medically unfit and likely to remain so permanently' in accordance with the Regulations made pursuant to the Defence Act.

By making this finding, the Court technically justified its avoidance altogether of the question whether discharging an HIV-positive employee on medical grounds amounts to a violation of article 11 (the right to life, liberty and protection of the law), article 21 (freedom of association) and article 23 (the right against discrimination). Perhaps more curiously, the Court opted to use a standard of unfitness employed for limited and specific purposes in the Zambian Air Force Manual for Assessment of Medical Fitness in which 'permanently unfit', according to the respondent, did not only refer to HIV-induced inability. The Court rejected the suggestion by the petitioners and the opinion evidence of the petitioners' witness that disability should be assessed objectively to mean the loss of a normal function of a body part either temporarily or permanently. The Court preferred instead to take the definition of disability as used in the Manual and the Regulations applicable to the Zambian Air Force only and stated:

> The ZAF Manual has its own definition of what can be termed 'temporary or permanent'. No doubt every institution has its own standard of assessment and in this case Zambia Air Force has its laid-down guidelines as to the way assessments are carried ... In this case, it has to be borne in

> mind that we are talking about physical fitness to perform military duties in the Zambia Air Force.

The consequences of the Court's decision to adopt a subjective standard as set out in the Zambian Air Force Manual and the Regulations, rather than an objective one which the petitioners advocated for, struck a fatal blow in the protection of the rights of HIV-positive employees against discharge on medical grounds of physical unfitness, where reference to their HIV status is not made in discharging them. Using the reasoning of the Court in this case, it is conceivable that an employer who discharges an HIV-positive employee on account of physical unfitness to perform his duties would be justified to do so if he avoids reference to the employee's HIV status. This contrasts sharply with the finding of the Industrial Court of Botswana in respect of a similarly-circumstanced employee in *Lemo v Northern Air Maintenance (Pty) Limited*,[15] which is considered in some detail below. Of course, no suggestion is made here that the Court in *Kangaipe* should have followed the decision of the Botswana Industrial Court. The point is one of judicial activism, or rather the lack of it. The circumstances here presented a propitious opportunity for judicial activism in favour of the rights of HIV-positive employees. That opportunity went begging. Perhaps more importantly, the provisions of the Zambian Air Force Manual and the Regulations appeared to have been unduly heavily weighted by the Court as applicable law to the situation before it.

The Court concluded that the Defence Force (Regular Force) (Enlistment and Service) Regulations, which permit the air commander to discharge or exclude military personnel on medical grounds, was not unconstitutional nor did it violate international instruments. The reasoning of the Court in this regard was not entirely lucid and appeared to have been mired in semantics and rhetoric. In dismissing the argument that the regulations were *ultra vires* the Constitution and international instruments, the Court stated:

> Having regard to the facts of this case, there is no evidence to this effect. The Regulation is very clear and cannot be misused to infringe on the rights of military personnel living with HIV/AIDS or indeed any other military personnel in general. Under the said Regulation it is the fitness of the soldier which determines the course of the action and not necessarily the disease.

It is unclear what evidence the Court expected the petitioners to submit on a matter hinging purely on construction. Paradoxically, in the case of the petitioners who went to great lengths to show that, although they were HIV positive, they were fit for some forms of work within the Air Force, they had their discharge justified by the reasoning of the Court which should in fact have helped them retain their jobs.

Another argument preferred by the petitioners was premised on purely non-legally-binding documents. It was contended that the

15 IC 166 of 2004, Botswana (Industrial Court).

decision of the Air Force in this case was contrary to the spirit and intent of the stated Government Policy and Guidelines on HIV/AIDS in so far as it related to treatment, attitude, and accommodation of servicemen who have been diagnosed with the virus that causes AIDS. In addressing this argument, the Court reiterated the point that the petitioners had not been discharged on the basis of their HIV status. Rather than leave it there, the Court went on to hold that the Zambian Defence Force HIV/AIDS Policy of January 2008 was inapplicable because it only came into effect after the petitioners had been discharged:

> In my view it has no bearing on this petition. The policy does not have retrospective effect. The Court is obliged to focus on the situation which was prevailing before and during the discharge of the petitioners from military service.

Whether the Court meant that, but for the non-retrospective effect of the policy, it would have been applied to determine the issues before it, is not clear. Assuming, as one is inclined to do, that the natural inference to be drawn from the Court's statement just quoted is that if the policy were passed before the events giving rise to this grievance, then it would apply, one would then be justified to ask whether this policy document would occupy a higher status in terms of applicability than provisions of the Directive Principles of State Policy as set out in the Constitution, which the Court found, *obiter*, were not applicable.

3 Whither judicial activism?

The petitioners advanced the argument that they were entitled to continue working in the Zambian Air Force in their respective ranks and sections or departments. Alternatively they suggested that they could be redeployed to appropriate or alternative available sections or departments in the military establishment suitable to their status until such time as they would have become unable to work due to immune-suppression. In response, while acknowledging that there was provision in the Regulations for the transfer or redeployment of officers from one department to another, the Court maintained that this provision did not apply to soldiers who were discharged for being permanently medically unfit for military service.

Here, no doubt, the judge saw her role as limited merely to the application unreservedly of laws applicable to Zambia as she understood them, including, in this case, manuals and guidelines. This is judicial restraint typical of conservative judges. Going by the manner in which the Court approached the arguments, the judge in this particular case may well have been conservative. A conservationist

approach to judicial decision making is nowhere better illustrated than in *S v Adams*,[16] where the judge remarked:[17]

> An Act of Parliament creates law but not necessarily equity. As a judge in a court of law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a court of equity, I would have come to the assistance of the appellant. Unfortunately, and on an intellectual honest approach, I am compelled to conclude that the appeal must fail.

Referring to judges who take the approach of judicial restraint, Dugard laconically observed:[18]

> [T]he sole task of the court in interpreting a statute is to discover the legislature's intention through rules of interpretation. Its function is merely seen as mechanical ... The intention of the legislature is always discoverable, provided the right rules of interpretation are used in the right manner. The judge is denied any creative power in his mechanical search for the legislature's intention, and desirable policy considerations, based on traditional legal values, are viewed as irrelevant. The approach accords with the Blackstonian theory that judges are authorised to 'find' the law only, not to 'make' it.

Lawyers oriented in human rights protection and promotion, like liberal judges are, of course, opposed to judicial restraint and conservatism which they view as retrogressive. The judicial officer should not be tied to the strict letter of a legislative provision where matters canvassed before him concern important questions of human rights.[19] This is particularly so where the law is manifestly unjust. The judge is urged to approach the provision purposively to place it in comport with the recognised human rights norms and standards.[20] It is only then that the law can remain relevant to new challenges. This appears to be the modern trend in dealing with issues such as HIV and AIDS.

A number of cases from different jurisdictions in the African region illustrate the general approach courts are taking in clarifying HIV legislation and legal standards affecting this subject. The approach ensures that legislative gaps do not further harm vulnerable groups afflicted by HIV/AIDS and reflects judicial activism *par excellence.* In

16 1979 4 SA 793 (T).

17 *Adams* (n 16 above) 801.

18 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181, as quoted in D Kleyn & F Viljoen (eds) *Beginners' guide for law students* (1995) 44.

19 Kleyn & Viljoen (n 18 above).

20 See eg the dissenting judgment of Lord Akin in *Liversidge v Anderson* 1942 AC 206 HL, when he said: 'I view with great apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the executive', quoted in PJJ Olivier 'Executive-mindedness and independence' in B Ajibola & D van Zyl (eds) *The judiciary in Africa* (1998) 172.

the South African case of *Memory Mushando Magaida v The State*,[21] where the HIV-positive appellant was sentenced by the lower court to 16 years and three months' imprisonment for 99 counts of fraud, the Supreme Court of Appeal held that the High Court erred by failing to consider on appeal the HIV status of the appellant and the fact that while in prison she would be unable to receive treatment comparable to what she could receive in a hospital. While holding that no illness will by itself entitle a convicted person to escape imprisonment if it is the appropriate punishment, the court should consider the totality of the convicted person's circumstances when rendering a sentence. This consideration should include whether a sentence may be relatively more burdensome as a result of the convicted person's health. The Court in this regard referred to the need for 'individualisation of sentence'.[22]

The Kenyan High Court judgment in the case of *JAO v Home Park Caterers Limited and 2 Others*[23] perhaps typifies the activist approach that judges have been commended for in ensuring that the rights of HIV-positive employees are protected. The facts of that case and the arguments have some striking similarities with those in *Kangaipe.* The respondent filed an originating summons arguing that the first applicant, Home Park Caterers and two others – a doctor and a hospital – had violated her rights. She argued that the doctor had violated her right to privacy and confidentiality when he tested her for HIV without her consent and disclosing her HIV status to her employer without her consent. She also contended that the doctor had not acted in accordance with his professional and statutory duty to counsel and to disclose her HIV test results to her. Her further argument was that Home Park Caterers had violated her right to non-discrimination by terminating her employment based on her HIV status. The applicants raised a technical objection. They sought to have the matter struck off for being scandalous, frivolous and vexatious and for not disclosing any cause of action. In respect of the last ground they argued that, while the respondent asserted that her employment had been terminated on 30 April 2002, the medical report, the contents of which formed the basis of her discharge, was dated 2 May 2002. This discrepancy, plus the fact that Home Park Caterers neither participated in her medical examination nor the issuance of the report and merely terminated her employment owing to 'prolonged absenteeism on medical grounds', meant that she did not in truth have a cause of action.

---

21 Case 515/2004 [2005] ZASA 68 26 August 2005, Supreme Court of Appeal, South Africa.

22 This contrasts very sharply with the Zimbabwean case of *S v JM* (HC 2845/07) [2007] ZWBHC 86; HB 86/07 9 August 2007, Zimbabwe High Court, where the Court held that the defendant's HIV-positive status and likelihood that she would be a burden to the prison authorities are not a proper basis for reconsideration of her prison sentence, as these are administrative issues.

23 Civil Case 38 of 2003 (decided in 2004) Kenya High Court.

Although the chronology of events was such as would have persuaded the Court to summarily dismiss the case, the Court concluded that because of 'the nature of the case, the universality of the HIV and AIDS pandemic and the development of human rights jurisprudence together with the ongoing attempts at the harmonisation of the relevant conventions with domestic law', the originating summons should be considered reasonable.[24]

An activist approach to HIV and AIDS and the workplace, in complete contradistinction with the approach adopted by the High Court in the *Kangaipe* case, was also taken in the Botswana case of *Lemo v Northern Air Maintenance (Pty) Limited*.[25] In that case, Lemo was employed by Northern Air Maintenance (NAM) as a trainee aircraft engineer. In the first four years of employment, his health deteriorated remarkably. As a consequence, he exhausted all his annual leave days and paid sick leave days. He applied for and was given unpaid sick leave on various occasions. In January 2004, NAM suggested to Lemo that he should see a named private medical practitioner for purposes of assessing his fitness for employment. Lemo declined, saying that he thought that medical practitioners at a public medical facility were better suited to attend to him since they were familiar with his medical history. NAM insisted that Lemo should see a private medical practitioner. The following day, Lemo informed NAM that he was HIV positive. The next day NAM terminated Lemo's employment owing to 'his continual poor attendance over the last three years'. Lemo then filed a complaint with the district labour office claiming that he had been unfairly dismissed due to his HIV status. The labour office agreed with him and granted him compensation. Lemo then appealed to the Industrial Court seeking reinstatement and an increase in the amount of compensation. The issue before the Industrial Court was whether an employer could, and if so, in what circumstances, terminate the employment of an HIV-positive employee with a history of absenteeism. With the substitution of the word 'absenteeism' in that case for 'permanently unfit', the *Lemo case* is very similar to the situation that presented itself before the High Court in *Kangaipe*. Could the Zambian Air Force terminate the petitioners' employment bearing in mind that they had a history of ill health, and were HIV positive?

The Court's decision in the *Lemo* case was fairly interesting. It held that the termination of an employee's employment solely on the basis of HIV status violated the constitutional right to dignity. The Court also reviewed international standards on workplace discrimination

24 The Court also considered the prevalence of stigma and discrimination on the basis of one's HIV status and protected JAO's identity by allowing the use of her initials as a pseudonym. This matter was eventually settled out of court with court approval. Home Park Caterers and the doctor ended up paying JAO compensation in the order of KAS 2 250 000.

25 IC 166 0f 2004, Botswana (Industrial Court).

and cautioned that employers should desist from discriminatory and unfair practices towards HIV-positive employees and advised that such employees deserved to be treated in the same way as employees suffering from any life-threatening illness. The Court also noted that an HIV-positive employee may 'for years, even decades' experience no interference in the performance of his job duties, especially given the treatment currently available. It went further to hold that an employee may only be terminated if he is incapable of performing his duties (for example, is absent for prolonged periods of time) and has been given a fair hearing. The determination about whether an employee's absences are reasonable should include a consideration of the nature of the employee's job, the extent to which the employer's business is suffering and the prospects of the employee's recovery. A fair hearing should include a discussion of relevant factors, including the nature and causes of the employee's incapacity, the likelihood of recovery, improvement, or recurrence, the period of absence, the effect of absence on the employer's business, and any other relevant factors.[26] The Court determined that NAM had used Lemo's absences as a pretext to terminate his employment when the real reason for the termination was his HIV status alone.

The Constitutional Court of South Africa's judgment in *Hoffman v South African Airways*[27] is yet another of the many case authorities that have demonstrated an activist approach to the issue of HIV and AIDS. In that case it was held that a denial of employment because of a person's HIV status violated the constitutional prohibition against unfair discrimination. The Court stressed that, although the employer's commercial interests were legitimate concerns, they could not constitute a valid justification of prejudicial or stereotypical treatment.

A plethora of judicial precedents with trappings of judicial activism around the issue of termination of employment or denial of employment opportunities on the basis of one's HIV status exist outside the African region too. If examples were required, one would look no further than the Indian cases of *Bombay Indian Inhabitant v M/S ZY and Another*[28] and *MX v ZY*,[29] and the Colombian case of *XX v Gun Club Corporation and Others*.[30]

The Court in the *Bombay Indian Inhabitant* case warned that a failure to address employment discrimination against HIV-positive people would essentially condemn them to 'economic death'. Perhaps it was in the Colombian case of *XX v Gun Club Corporation* where the

26 See Centre for Reproductive Rights, Toronto, Canada *Legal grounds, reproductive and sexual rights in commonwealth courts* (2010) 92.

27 2000 2 SA 628 (CC).

28 High Court, AIR (1997) 406.

29 AIR 1997 Bom 406 (High Court of Judicature, 1997).

30 Constitutional Court of Colombia, Judgment SU-256/96 (1996).

strongest proactive position yet in favour HIV-positive employees was advocated. There, the Court held that the termination of XX's employment on the basis of his HIV status violated his right to equality, employment, privacy, health and social security. The Court ordered compensation and an illness pension. Among other things, the Court said that

> [t]he extent of a society's civilisation is measured, among other things, by the manner in which it assists the weak, the sick and in general the more needy, and not, to the contrary, by the manner in which it permits discrimination against them or their elimination.

4 Conclusion

The case of *Kangaipe* has no doubt contributed to the expanding frontiers of human rights litigation in Zambia as far as HIV/AIDS is concerned. While the case presented the opportunity for both developing and refining problems of the applicability of local and foreign authorities, that opportunity does not appear to have been fully exploited.

One important point we learn from the case is that submissions by counsel on both sides should reflect some deliberate attempt to categorise authorities according to the value attached to each. The court too, should always be alive to this necessity. This is the only way to obviate the recourse to policy statements, doctrinal writings, administrative rhetoric, political opinions and other inapplicable standards on a scale incompatible with the practical needs of rational judicial reasoning.

What is readily apparent is the difficulty posed by the insistence on the part of the court on an HIV-positive employee, proving that the employer terminated his or her employment on the basis of his or her HIV status rather than absenteeism or unfitness or some other reason caused principally by his or her health. Issues tend to be so closely linked that it becomes unintelligible to attempt to treat them as if they were not mutually exclusive. A formidable obstacle for petitioners in these cases is the issue of precise proof of the reason – the motivation for the employer's termination of their employment. This is a particularly daunting prospect and a vexed one at that. Much as the court is routinely obliged to insist on the adversarial system aphorism of 'he who alleges must prove', it is arguably unsuited to addressing arguments in HIV-related litigation given the difficulties of adducing solid evidence demanded in cases such as *Kangaipe.* If such an approach is habitually taken, given not only the inequality of arms but also the magnitude of what is at stake for either party, it would surely be more appropriate to proceed on the basis of an assumption that the dismissal of an HIV-positive employee is on the basis of that status unless proven otherwise. Clear reasons should be provided as

a matter of fairness. It is perhaps time the courts started shaking their entrenched foundation of judicial restraint and lethargy.

New human rights-based approaches in dealing with HIV in the workplace, despite limitations, some of which have been unveiled in the *Kangaipe* case, have certainly opened up new opportunities for litigating HIV issues in Zambia. They have, for example, recontexualised and reinvigorated discussion on the place of international jurisprudence in the domestic setting. This type of litigation has also wrought more diffuse impacts. The enhanced profile that they offer to human rights issues has proven significant in forging greater publicity for HIV cases than they have enjoyed previously.

In summary, then, some aspects of the approach adopted by the Court in *Kangaipe* to human rights claims premised on HIV issues in Zambia are encouraging in principle, as such claims are being given sufficient credence to warrant close judicial scrutiny. On balance, however, the protection of the rights in the employment setting of persons living with HIV remains contingent on innovative and activist approaches being adopted by the courts. Obstacles that petitioners face remain considerable. Ignoring this fact requires at least some explanation to human rights advocates and HIV or AIDS activists.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The Ugandan Transfer of Convicted Offenders Act, 2012 : A commentary

Jamil Ddamulira Mujuzi[*]
Senior Lecturer, Faculty of Law, University of the Western Cape; Post-Doctoral Research Fellow, Community Law Centre, University of the Western Cape, South Africa

Summary

Like many countries, Uganda is home to foreign nationals. The presence of foreign nationals in the prison of a country raises questions regarding their treatment. Countries are increasingly enacting legislation, ratifying or acceding to treaties, or signing agreements governing the transfer of such offenders to serve the last part of their sentences in their countries of nationality, citizenship or domicile. On 17 May 2012, the Ugandan Parliament passed the Transfer of Convicted Offenders Bill, 2007 into law. The Transfer of Convicted Offenders Act was assented to by the President of Uganda on 27 July 2012 and, once it comes into force, will regulate the transfer of convicted offenders between Uganda and other countries. The purpose of the article is to highlight the debates surrounding some provisions of the Bill, including the purpose of the Act; human rights issues, consent of offenders to transfer; the costs of the transfer; and pardon and amnesty.

1 Introduction

Like many countries, Uganda has foreign nationals in its prisons.[1] Ugandan nationals also serve prison sentences in countries such

* LLB (Hons) (Makerere), LLM (Human Rights and Democratisation in Africa) (Pretoria), LLM (Free State), LLD (Western Cape);djmujuzi@gmail.com. I am indebted to the South African National Research Foundation and the University of the Western Cape for providing me with the funds that I used to travel to Uganda to conduct research for the purpose of writing this article. The usual caveats apply.

1 It is estimated that close to 1% of the prisoners in Ugandan prisons are foreign nationals. See International Centre for Prison Studies http://www.prisonstudies.org/info/worldbrief/ wpb_country.php?country=51 (accessed 31 October 2012).

as China, Iran, Pakistan and Malaysia.[2] In July 2007, the Ugandan government published the Transfer of Convicted Offenders Bill in the *Government Gazette*.[3] As the name suggests, the Bill deals with the transfer of convicted offenders between Uganda and other countries. Between 2007 and early 2012, the process to enact the Transfer of Convicted Offenders Bill into law 'froze' for unclear reasons. During this period, however, Uganda signed a prisoner transfer agreement with the United Kingdom (UK) to regulate the transfer of convicted offenders between the two countries.[4] It also signed an agreement with Mauritius on the transfer of prisoners.[5]

In May 2012, the Ugandan Parliament debated and passed the Transfer of Offenders Bill into law in one day.[6] On 27 July 2012 the Transfer of Convicted Offenders Act[7] was assented to by the Ugandan President, Yoweri Kaguta Museveni.[8]

Uganda is not the only African country with legislation or mechanisms for the transfer of offenders from other countries. African countries have taken three different approaches on the question of the transfer of convicted offenders. The first approach is for countries to enact prisoner transfer legislation. Countries that have taken this approach include Nigeria;[9] Ghana;[10] Namibia;[11] Tanzania;[12]

2 See M Walubiri 'Ugandans in foreign jails to be brought home' *The New Vision* 22 May 2012 http://www.newvision.co.ug/news/631254-Ugandans-in-foreign-jails-to-be-brought-home.html (accessed 31 October 2012).

3 The Transfer of Convicted Offenders Bill 14 of 2007 *Uganda Gazette* 35 vol C, 13 July 2007.

4 See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009).

5 See http://www.gov.mu/portal/sites/mfamission/addisababa/news.htm (accessed 19 November 2012).

6 The debates took place on 17 May 2012 between 15.33 and 17.40. Both the second and third readings of the Bill were completed within that time and the Bill was passed. See *Hansard* of Parliament of Uganda, 17 May 2012 3582-3605 (on file with the author).

7 Transfer of Convicted Offenders Act, 2012.

8 Sec 1 of the Act provides that '[t]he Act shall come into force on such day as the Minister may by statutory instrument appoint'. As at the time of writing, the author's attempts to ascertain whether this Act had come into force were futile.

9 Transfer of Convicted Offenders (Enactment and Enforcement) Act, ch T16, 1988.

10 Transfer of Convicted Persons Act, 2007 (Act 743).

11 Transfer of Convicted Offenders Act 9 of 2005.

12 Transfer of Prisoners Act 10 of 2004.

Mauritius;[13] Zambia;[14] Zimbabwe;[15] Swaziland;[16] Madagascar;[17] and Malawi.[18]

The second approach is taken by African countries entering into prisoner transfer agreements with other African countries. This is the case with Zambia and Mozambique;[19] Ghana and Nigeria;[20] Mauritius and Tanzania;[21] Mozambique and Malawi;[22] and Malawi and Zambia.[23] Some African countries have entered into prisoner transfer agreements with countries outside Africa, such as Nigeria with Thailand;[24] Mauritius with India;[25] and the UK with Rwanda, Uganda, Libya, Morocco and Ghana.[26] Another approach is for one country, Mauritius, to ratify

13 Transfer of Prisoners Act 10 of 2001.

14 Transfer of Convicted Persons Act 26 of 1998.

15 Transfer of Offenders Act 14 of 1990.

16 Transfer of Convicted Offenders Act 10 of 2001.

17 Transfer of Prisoners Act, 2001.

18 Transfer of Offenders Act 25 of 1995.

19 See 'Zambia and Mozambique sign MoU on the transfer of convicted persons' *Lusaka Times* 26 July 2011 http://www.lusakatimes.com/2011/07/26/zambia-mozambique-sign-mou-transfer-convicted-persons/ (accessed 31 October 2012).

20 See 'Ghana, Nigeria to exchange prisoners' *Modern Ghana News* 12 January 2010 http://www.modernghana.com/print/258677/1/ghana-nigeria-to-exchange-prisoners.html (accessed 31 October 2012).

21 See Agreement Between the Government of the United Republic of Tanzania and the Government of the Republic of Mauritius on the Transfer of Convicted Offenders, First Schedule to the Transfer of Prisoners (Republic of Tanzania) Regulations 2008, GN 45 of 2008.

22 See 'Mozambique: Prisoner transfer agreement with Malawi' 20 March 2012, AllAfrica.com http://allafrica.com/stories/201203201309.html (accessed 31 October 2012).

23 See 'Malawi, Zambia to exchange prisoners' *Global Times* 7 October 2009 http://world.globaltimes.cn/africa/2009-10/474864.html (accessed 31 October 2012).

24 See A Agbese 'Nigeria: Thailand to repatriate 500 Nigerian prisoners' 4 December 2000, AllAfrica.com http://allafrica.com/stories/200012040126.html (accessed 31 October 2012).

25 Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India on the Transfer of Prisoners, Schedule to the Transfer of Prisoners (Republic of India) Regulations 2006, GN 29 of 2006.

26 See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana concerning the Transfer of Prisoners (17 July 2008); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010); Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Great Socialist People's Libyan Arab Jamahiriya on the Transfer of Prisoners (17 November 2008); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco on the Transfer of Convicted Offenders (21 February 2002).

the Convention on the Transfer of Sentenced Persons (European).[27] Prisoner transfer arrangements almost always involve issues such as the purpose of the transfer; the human rights of the people to be transferred; the consent of the person to be transferred; the costs involved in the transfer; the exclusion of some offenders from the transfer; and also the parole or amnesty of those who have been transferred. The article discusses some provisions of the Transfer of Convicted Offenders Act in the light of its drafting history – based on the *verbatim* parliamentary proceedings – and highlights some of the challenges that are likely to be encountered in its implementation in relation to the issues mentioned above. The discussion will start with the purpose of the Act.

2 Purpose of the Act

The memorandum to the Bill states, *inter alia*:[28]

> The principle object of this mutual arrangement [for the transfer of convicted offenders] within the Commonwealth is that a person convicted of an offence in a foreign country should be given an opportunity, with his or her consent and that of the countries concerned, to serve his or her sentence of imprisonment in his or her home country. This would promote the rehabilitation of the offender and the offender's eventual integration into the community to which he or she belongs.

Indeed, most prisoner transfer arrangements highlight rehabilitation as the main or one of the main reasons for the transfer. Whether the main objective of a prisoner transfer, in the Ugandan context, is to ensure that the offender is rehabilitated and reintegrated is debatable for the following reasons. First, it is based on the assumption that prisoners will be transferred from countries that have no effective rehabilitation programmes to Ugandan prisons, presumably with such programmes, for them to be rehabilitated and eventually reintegrated. Transferring a prisoner to Uganda for rehabilitation remains doubtful, especially in light of the fact that Ugandan prisons are not conducive to rehabilitation because of overcrowding.[29]

It is precisely because of the poor prison conditions in Uganda that the UK reportedly offered to renovate Uganda's maximum security prison so that it meets international standards before prisoners were transferred from the UK to Uganda for fear that such prisoners could challenge their transfer on the ground that they would be detained

27 Convention on the Transfer of Sentenced Persons, CETS 112, entered into force on 1 July 1985, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=&CL=ENG (accessed 31 October 2012).

28 Para 3 Memorandum to the Bill.

29 See Human Rights Watch 'Even dead bodies must work: Health, hard labour, and abuse in Ugandan prisons' 14 July 2011 http://www.hrw.org/node/100272 (accessed 31 October 2012). See also the discussion below on human rights.

in inhumane and degrading conditions.[30] The second point is that the existence of rehabilitation programmes is not one of the pre-conditions for the transfer of an offender. If indeed rehabilitation was the main object of the transfer arrangement, one would have expected the existence of rehabilitation programmes to be a pre-condition for any transfer to take place.[31] In light of the fact that the existence of rehabilitation programmes is not one of the pre-conditions for the transfer, one is tempted to suspect that the main object of the transfer, especially from rich countries, is for the countries to get 'rid of' foreign nationals who have broken their laws.[32]

3 Rights of transferees

Before I deal with the issue of the human rights of the offenders to be transferred, I must deal briefly with the issue of prisoners' rights in Uganda and in international law, especially in light of the international human rights treaties to which Uganda is a party. The Constitution of Uganda does not expressly provide for the rights of prisoners. This is

30 R Baguma 'UK funds Luzira prison rehabilitation' *The New Vision* 4 September 2009 http://www.newvision.co.ug/D/8/13/693494 (accessed 31 October 2012).

31 The International Prisoner Transfer Unit (IPTU) of the Department of Justice of the United States of America uses the Guidelines for Evaluating Prisoner Transfer Applications and the likelihood of social rehabilitation is one of the factors that have to be considered before a request for the transfer of an offender is allowed. In assessing whether there is a likelihood of the offender's social rehabilitation, the IPTU looks at the following issues: the prisoner's acceptance of responsibility; his criminal history; the seriousness of the offence; criminal ties to the sending and receiving countries; and family and other social ties to the sending and receiving countries. See M Abbell *International prisoner transfer* (2010) 373.

32 It has been argued that there are several policy considerations for countries to enter into prisoner transfer agreements. 'The main problems facing a foreign prisoner are the cultural and language barriers, the lack of rehabilitation programmes and refusal of conditional release programmes (due to the perceived flight risk), and the general prejudice faced by the foreign prisoner, other prisoners, and prison staff. Prisoner transfer agreements were seen as a way to alleviate these additional burdens on the foreign prisoner. However, it would appear that these treaties are now also seen as a method by which the sentencing country can expel foreign prisoners and relieve itself of a considerable financial strain, which is a motive which runs contrary to the humanitarian goals of these treaties.' See MC Bassiouni 'United States policies and practices on execution of foreign sentences' in MC Bassiouni (ed) *International criminal law: Multilateral and bilateral enforcement mechanisms* (2008) 588. In Italy, an autonomous trade union for prison warders reportedly urged the government to sign prisoner transfer agreements because '[s]uch agreements would free up prison spaces and help the Italian government save millions of euros'. See 'Send foreign prisoners back home, Italy urged' *News Africa* 27 August 2012 http://www.africa-news.eu/immigration-news/italy/4576-send-foreign-prisoners-back-home-italy-urged.html (accessed 14 November 2012).

attributable to the drafting history of the Constitution. The Uganda Constitutional Commission wrote the following:[33]

> Despite Uganda being a signatory to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment ... there is consensus in people's views on the subject that the behaviour of governments since independence has often been to completely deny the rights of prisoners and their human dignity. The conditions in which prisoners live, the manner in which they are treated and the punishments which are meted out to them all show disregard for their rights. Prisoners have rights to sufficient food, hygienic conditions, fresh air and the like. The conditions of our prisons and the provisions given to prisoners, whether of food, drink and clothes, most often violate their rights. Prisoners have very little chance of lodging complaints to independent officials, although the institution of Justice of the Peace exists in name. Many prisoners and the public in general are rather ignorant about prisoners' rights.

The Constitutional Commission recommended that the following prisoners' rights be provided for in the new Constitution: sufficient food; water; fresh air; ample space; adequate bedding; a clean atmosphere; and the right to be treated as human beings.[34] The Commission added that prisoners should have the right to be visited by relatives, a lawyer, religious personnel and friends;[35] the right to lodge complaints to an impartial committee or personnel against prison officials for any unjust treatment;[36] and the right to quick and adequate medical examination and treatment.[37] The Commission added that prisoners should be rehabilitated and that the government should assist them to develop their talents and skills and should be rehabilitated.[38] The recommendations in the Constitutional Commission's report were debated by the Constituent Assembly. Some Constituent Assembly delegates argued that the Constitution should expressly provide for prisoners' rights.[39] However, the Legal and Drafting Committee was of the view that there was no need for prisoners' rights to be expressly mentioned in the Constitution. The Chairperson of the Legal and Drafting Committee submitted:[40]

---

33 The Report of the Uganda Constitutional Commission: Analysis and Recommendations (1992) para 7.80.

34 Para 7.171.

35 Para 7.171(b).

36 Para 7.171(c).

37 Para 7.171(d).

38 Para 7.171(e).

39 See Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Basaliza, 1 July 1994 504; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Bamwenda, 4 July 1994 523; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Atwoma Tiberio, 20 March 1995 3429 3437.

40 Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Prof Kanyeihamba 18 May 1995 4370.

> There were two other matters ... which were raised with the Committee but which we think are already adequately covered. One was a matter ... raised by Hon Tiberio Atwoma which dealt with the rights of prisoners. He was particularly concerned that prisoners should have their rights enshrined in our new Constitution. Having examined the subject, the Legal and Drafting Committee came to the conclusion that every prisoner has the same rights as citizens, except that of movement. And that of movement is restricted in accordance with provisions of the law because he has been sentenced to internment. Having said that, then they should be exercising their rights like anybody else within the confines of the punishment they have been given. For example, everyone has got the right to vote in the election. We do not have to provide specifically that prisoners shall have a right to vote because they are also citizens. So, this is not a matter of the Constitution; it is a matter of administrative arrangement by the electoral commission to ensure that every Ugandan who has a right to vote and who is not prohibited by law can vote. Similarly, other rights of prisoners as to feeding in prison and so forth are covered by the Prisons Act and also by our accession to the Geneva Convention about prisoners of war and so forth. So, we do not need to specifically provide for it in the Constitution. Nevertheless, we did consider this matter.

The above submission shows that the drafters of the Constitution intended prisoners to enjoy all the rights in the Constitution apart from the right to freedom of movement. In 2006 Uganda enacted a new Prisons Act[41] to replace the colonial legislation governing the administration of prisons. The Prisons Act was assented to by the President on 26 May 2006 and came into force on 14 July 2006. The long title of the Act provides that one of its objectives is 'to bring the Act in line ... with universally-accepted international standards'. International law, and especially the Standard Minimum Rules for the Treatment of Prisoners, was relied on in drafting the Act. It is against that background that the Act provides for the rights of prisoners. These rights are: the right to be treated with human dignity;[42] the right to freedom from discrimination;[43] freedom of worship;[44] 'to take part in cultural activities and education aimed at the full development of the human personality';[45] the right 'to undertake meaningful remunerated employment';[46] and the right 'to have access to the health services available in the country'.[47] The Prisons Act also provides

41 Prisons Act 2006.

42 Sec 57(a).

43 Sec 57(b). For a detailed discussion of the right to freedom from discrimination in the Ugandan Constitution, see JD Mujuzi 'The drafting history of the provision on the right to freedom from discrimination in the Ugandan Constitution with a focus on the grounds of sex, disability, and sexual orientation' (2012) 12 *International Journal of Discrimination and the Law* 52-76.

44 Sec 57(c). For a detailed discussion of the right to freedom of worship in Uganda, see JD Mujuzi 'The right to freedom to practise one's religion in the Constitution of Uganda' (2011) 6 *Religion and Human Rights* 1-12.

45 Sec 57(d).

46 Sec 57(e).

47 Sec 57(f).

for the rights of foreign prisoners, such as the right to equal treatment with nationals; access to work, education and vocational training; respect for his religious and cultural beliefs or practices; the right to communicate with his country's diplomatic representatives; and the right to be informed of the prison rules and regulations.[48] It should be emphasised that the above are not the only rights of prisoners. The Prisons Act should be read in line with the Constitution. This means that prisoners should enjoy the rights which are provided for in the Constitution, even though those rights are not mentioned in the Prisons Act. This is because of the drafting history of the Constitution, as alluded to above. For example, the right to vote is not mentioned in the Prisons Act, but the drafting history of the Constitution shows that the provision on the right to vote was deliberately designed to allow prisoners to vote.[49] Prisoners in Uganda also enjoy the rights protected in the relevant international human rights instruments to which Uganda is a party. These include the rights under the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter). Uganda has an obligation in terms of the Convention against Torture (CAT) to prohibit torture. This has been done by the enactment of the Prevention and Prohibition of Torture Act.[50]

Although the Constitution of Uganda, international human rights instruments and the Prisons Act protect prisoners' rights, there are concerns that in practice prisoners' rights are being violated. At the international level, the poor prison conditions in Uganda have been an issue of concern for the United Nations (UN) human rights bodies. The Committee against Torture (CAT Committee) has been concerned about sexual violence and torture in Ugandan prisons.[51] In its concluding observation on Uganda's initial report on ICCPR to the Human Rights Committee in 2004, the Committee expressed concern and had the following to say about the prison conditions in Uganda:[52]

> The state party has acknowledged the deplorable prison conditions in Uganda. The most common problems are overcrowding, scarcity of food, poor sanitary conditions and inadequate material, human and financial

48 Sec 82.

49 Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Sam Kutesa, 22 May 1995 4416; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Sam Ringwegi, 22 May 1995 4417. See also Mr Masika, 22 May 1995 4426; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Naburri, 24 June 1994 319.

50 Prevention and Prohibition of Torture Act 2012.

51 Conclusions and Recommendations of the Committee against Torture on Uganda's initial report, CAT/C/CR/34/UGA, 21 June 2005 paras 6(f), 10(m) & 11(c).

52 Para 18 Concluding Observations of the Human Rights Committee on Uganda's initial report, CCPR/CO/80/UGA, 4 May 2004.

> resources. The treatment of prisoners continues to be a matter of concern to the Committee. There are reported incidents of corporal punishment for disciplinary offences. Solitary confinement and deprivation of food are also used as disciplinary measures. Juveniles and women are often not kept separate from adults and males.

The Committee recommended that Uganda 'should terminate practices contrary to article 7 and bring prison conditions into line with article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners' and that the country 'should also take immediate action to reduce overcrowding in prisons'.[53] Some of the issues raised by the Committee have been addressed. For example, the Prisons Act[54] prohibits corporal punishment[55] and solitary confinement.[56] The African Commission on Human and Peoples' Rights (African Commission) has also expressed concern about the poor prison conditions in Uganda.[57] Recent media reports show that prison authorities informed the Parliamentary Committee on Defence and Internal Affairs that prisons are overcrowded and that there were food shortages in prisons as the prison authorities do not have enough money to feed all the prisoners[58] and that the majority of inmates are awaiting trial.[59]

The issue of human rights is critical in prisoner transfer arrangements as this determines whether countries would be willing to transfer offenders to Uganda. However, prisoner transfer legislation in African countries, such as Tanzania, Zimbabwe, Namibia, Swaziland, Mauritius, Nigeria and Ghana, does not mention the issue of the rights of the offenders to be transferred. In other words, it is not one of the prerequisites for the transfer of the offender that the administering state will respect the rights and freedoms of the offender. It should be emphasised that this is not unique to Africa. Legislation on the transfer of offenders in

53 Para 19 Concluding Observations of the Human Rights Committee on Uganda's initial report, CCPR/CO/80/UGA, 4 May 2004.

54 Prisons Act 2006.

55 Sec 81(2).

56 Sec 81(1).

57 See Mission Report by the Special Rapporteur on Prisons and Conditions of Detention in Africa on the visit to Uganda 11-22 March 2001 http://www.achpr.org/states/uganda/missions/prisons-2001/ (accessed 15 November 2012).

58 I Imaka 'Overcrowded prisons facing food shortages' *The Daily Monitor* 9 August 2012 http://www.monitor.co.ug/News/National/Overcrowded-prisons-facing-food-shortages/-/688334/1474842/-/en4hpqz/-/index.html (accessed 15 November 2012).

59 GM Araali 'Remands are straining our resources, says prison boss' *The Daily Monitor* 23 July 2012 http://www.monitor.co.ug/News/National/Remands-are-straining-our-resources--says-prison-boss/-/688334/1460920/-/wqrgys/-/index.html (accessed 15 November 2012).

other countries (such as Samoa[60] and Tonga)[61] does not stipulate that for a prisoner to be transferred, the administering country guarantees that the rights of the offender will be respected. The two international multilateral treaties on the transfer of offenders – the Council of Europe's Convention on the Transfer of Sentenced Persons[62] and the Inter-American Convention on Serving Criminal Sentences Abroad – also do not stipulate that for a prisoner to be transferred, the administering country guarantees that the rights of the offender will be respected. Likewise, the UN's Model Agreement on the Transfer of Foreign Prisoners[63] and the Scheme for the Transfer of Convicted Offenders within the Commonwealth[64] also do not stipulate respect for human rights as one of the prerequisites for the transfer.

It has to be recalled that in some countries, prisoners are detained in conditions that are below internationally-accepted standards. However, the fact that those pieces of legislation and treaties do not mention the rights of the offenders to be transferred does not mean that administering countries have no obligation to respect such rights. They are bound by their constitutions and regional and international human rights treaties to respect the rights of the people in their jurisdictions, including those of transferred offenders.

The above deficiency is being addressed in some bilateral prisoner transfer agreements or treaties. The transfer of prisoner agreements or treaties between the UK and some African countries mention the issue of human rights in the context of prisoner transfer. For example, the agreements between the UK and Rwanda and Uganda state that '[s]entenced persons shall be treated with respect for their rights'[65]

---

60 International Transfer of Prisoners Act 16 of 2009.

61 Transfer of Prisoners Act 8 of 1997.

62 Even the Additional Protocol to the Convention on the Transfer of Sentenced Persons, European Treaty Series 167 (1997) is silent on the rights of the transferred person except, in limited circumstances, with regard to the right not to be tried for the offence that was committed in the administering state before the transfer. See art 3.

63 For a brief drafting history of the United Nation's Model Agreement on the Transfer of Foreign Prisoners, see M Abdul-Aziz 'International perspective on transfer of prisoners and execution of foreign penal judgments' in Bassiouni (n 32 above) 529-532. See also United Nations Office on Drugs and Crime *Handbook on the international transfer of sentenced persons* (2012) 17-18.

64 For the drafting history of the Scheme for the Transfer of Convicted Offenders within the Commonwealth, see AMF Webb *The scheme for the transfer of convicted offenders within the Commonwealth: Explanatory documentation prepared for Commonwealth* (1987) 1-39.

65 See Preamble to the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010) and Preamble to the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009).

and that '[e]ach party shall treat all sentenced persons transferred under this agreement in accordance with their applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment'.[66]

It is clear that the rights emphasised here are the rights to life, freedom from torture, cruel, inhuman or degrading treatment or punishment. It should be recalled, as mentioned earlier, that prison conditions in many, if not all, Ugandan prisons are below internationally-accepted standards, a fact that has been recognised by human rights organisations[67] and Ugandan courts.[68] As mentioned earlier, in order to ensure that Ugandan nationals who have been sentenced to imprisonment in the UK do not challenge their transfer to serve their sentences in Uganda on the grounds that the prison conditions in Uganda are poor, the UK government reportedly offered to renovate prisons in Uganda with the objective of improving the conditions in these prisons.[69] It is, thus, not surprising that the issue of human rights was discussed at length by Ugandan law makers during the debates on the Transfer of the Convicted Offenders Bill. The Committee on Legal and Parliamentary Affairs (the Committee) submitted:[70]

> Where the transfer of a convicted offender is based on a request from an administering country, there is a need for stronger safeguards against potential abuse by the requesting country. Due regard should be placed on its human rights record and the operation and condition of its prison system, the existence of an inspection mechanism, etc. This is with a view to assess its observance of human rights standards, to ensure that the convicted offender will not be placed in a situation where he or she is particularly vulnerable to possible abuse as a result of such transfer, and to adhere to the principle of *non-refoulement*.

Clause 5 of the Bill provided for two general requirements for the transfer: The convicted offender has to be informed, by the sentencing country, of the substance of the Transfer of Convicted Offenders

66 Art 9 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010); art 9 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009).

67 See Human Rights Watch (n 29 above).

68 In *Uganda v Nabakoza Jackline & Others* [2004] UGHC 24 (7 September 2004) the High Court, in setting aside the sentence of three months' imprisonment that had been imposed on the accused and substituting it with a sentence of caution, considered, *inter alia*, the fact that prisons in Uganda were overcrowded and that there was no need for the accused, who had committed the minor offence of being idle and disorderly, to be sentenced to direct imprisonment.

69 Baguma (n 30 above).

70 *Hansard* of Parliament of Uganda, 17 May 2012, Committee Report 3585.

Act,[71] if he or she or the sentencing or the administering country has made the request for the transfer and, in a case where the convicted offender makes a request for the transfer, the Ugandan authorities have to inform the relevant authorities in the administering country of that request, or where the offender is to be transferred to Uganda, the relevant authorities in the sentencing country have to inform the relevant authorities in Uganda of that request.[72]

The Committee proposed that clause 5 should be amended by inserting a sub-clause to read as follows: 'A convicted offender shall not be transferred to a country where he is at a risk of being tortured or subjected to other human rights abuses.'[73] The Committee member submitted that the above amendment was justifiable on the basis of article 3 of CAT, General Comment 3 of the UN Human Rights Committee and the jurisprudence from the UN CAT Committee.[74] Although in the above submission the Committee makes it very clear that the rights in question are not limited to the right to freedom from torture, most delegates based their submissions on the fact that a transferred offender should not be subjected to torture. For example, the Deputy Chairperson of the Committee submitted that he 'would surely need a law that would secure [him] from being taken to a country where I would be tortured'.[75]

Another legislator submitted that he supported the proposed amendment to clause 5, but added that the amendment should read that '[a] convicted offender shall not be transferred to a country where there is sufficient proof' that such a person would be subjected to torture. He added that by inserting such a qualification in clause 5, Parliament 'would subject it to proof that [the offenders] are likely to be tortured where they have been transferred'.[76] The Deputy Chairperson of the Committee opposed the above qualification on the ground that it would be impossible for the offender to prove that he would be subjected to psychological torture if he were to be transferred and that the proposal 'would make it subject to a trial on which the court needs to convince itself with evidence that there is

71 Cl 5(1).

72 Cl 5(2).

73 *Hansard* of Parliament of Uganda, 17 May 2012, submissions by Baka 3888-3589.

74 Mr Baka submitted that '[t]he justification is that the UN Committee against Torture, in *Tapia Paez v Sweden* (Communication 39/1996), on 28 April 1997 noted: "The test of article 3 of the Convention against Torture is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another state, the state party is under obligation not to return the person concerned to that state. The nature of activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention." It is also to comply with the UN Human Rights Committee General Comment 31.' See *Hansard* of Parliament of Uganda, 17 May 2012 3589 (emphasis removed).

75 *Hansard* Parliament of Uganda, 17 May 2012 3589.

76 As above.

bound to be torture'.[77] In support of his submission that there has to be proof that such a person would be tortured before his transfer is refused, Mr Biraaro added that[78]

> [t]here are countries which are known to be notorious for torturing people. So, what I am looking at is that someone can stubbornly want to stay away and not be transferred and yet we are looking at instances where we may have our countrymen, Ugandans, being convicted in other countries but may be stubborn and want to stay away claiming that Uganda is a risky home for them to be. So, that is the situation I am looking at. Even if it is psychological, it should be internationally known that such and such a country tortures people. But there are those which do not. So, how do we know? There should be glaring proof that the person if transferred will be subject to ill-treatment.

The qualification was rejected on the ground that it could not be proved that the person in question would indeed be subjected to torture, especially psychological torture, if he were to be transferred.[79] Another reason given for opposing the proposal was that it would be a burden on the sentencing country to prove such evidence. As one delegate put it:[80]

> I disagree with the proposal ... because sufficient proof is very subjective. You will be giving the sentencing country another burden of having to research to find out whether there is sufficient proof. I think the provision as it is is sufficient enough. Once the sentencing country thinks that the convicted offender will be at a risk of being abused even when he has requested to be transferred, I think that is enough for the transfer not to be effected.

In the end, however, the proposed amendment was not made part of clause 5 as the Committee withdrew the amendment.[81] The result was that it is not a requirement, in terms of the Transfer of Convicted Offenders Act, that the offender shall not be transferred if there is a reason to suspect that he or she would be subjected to torture.[82] It is argued that, although the Transfer of Convicted Offenders Act does not expressly bar the transfer of an offender to a country where there are reasons to believe that such a person would be subjected to torture, Uganda has an international obligation, in terms of article 3(1) of CAT, not to 'expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

In assessing whether such a person could be in danger of being subjected to torture, Uganda would have to rely on the test set in

77 As above.

78 As above.

79 As above.

80 *Hansard* Parliament of Uganda, 17 May 2012, submission by Mugabi 3590.

81 As above.

82 See secs 5 & 6.

article 3(2) of CAT, which is to the effect that Uganda 'shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights'. Torture in this context should be understood as physical and mental torture. This is in line with article 1 of CAT[83] and section 2 of the Prohibition and Prevention of Torture Act that was recently passed by the Ugandan Parliament.[84] Uganda also has a national and international human rights obligation to ensure that prisoners are not transferred to Uganda where there are substantial grounds to believe that they will be tortured or that they will be subjected to cruel, inhuman and degrading treatment or punishment. This is because article 24 of the Constitution of Uganda expressly provides that no person shall be subjected to torture, cruel, inhuman or degrading treatment or punishment. CAT also requires Uganda to prohibit torture.

It should be recalled that the prison conditions in Uganda are below international standards. The question that arises is whether a prisoner who has consented to or has applied for his or her transfer to Uganda, who is fully aware of the prison conditions in Uganda, can have his or her application declined by the relevant authorities, for example, in the UK, on the basis that his transfer to Uganda would be a violation of the right not to be subjected to cruel, inhuman or degrading treatment. During the debates in parliament on the Transfer of Convicted Offenders Bill, it was argued that Uganda should not allow the transfer of an offender to a country where he or she would be subjected to torture, even if such an offender consented to his or her transfer.[85]

It is argued that, even if a prisoner consents to his transfer to a country where he would be subjected to cruel, inhuman or degrading treatment, such a transfer should not be allowed. This is because the right not to be subjected to cruel, inhuman or degrading treatment

83 Art 1 of CAT defines torture to mean 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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 only from, inherent in or incidental to lawful sanctions.'

84 S Kakaire 'Parliament passes law to criminalise torture' *The Observer* 27 April 2012 http://observer.ug/index.php?option=com_content&task=view&id=18439&Itemid=114 (accessed 14 November 2012). The Prevention and Prohibition of Torture Act, 2012 was assented to by the President of Uganda on 27 July 2012.

85 See discussion below on consent.

is an absolute and non-derogable[86] right in ICCPR.[87] It is also an absolute and non-derogable right in the Ugandan Constitution.[88] The Prevention and Prohibition of Torture Act also criminalises cruel, inhuman and degrading treatment or punishment.[89] It is argued that Uganda also has a legal duty not to accept the transfer of a prisoner to its territory if it knows that he or she would be detained in inhuman and degrading prison conditions as the imprisonment of such a person in such conditions would be contrary to Uganda's national and international human rights obligations.

Another important issue to consider in the context of prisoner transfer is whether a prisoner who has been transferred to Uganda will complete his sentence in the prison to which he had been transferred – assuming that the prison in question meets international standards. Section 73(3) of the Prisons Act[90] provides that '[t]he Commissioner-General may, by general or special order, direct that a prisoner be transferred from the prison to which he or she was committed or in which he or she is detained to another prison'. A prisoner who has been transferred to a given prison in Uganda may, therefore, be transferred to another prison. In order to ensure that prisoners who have been transferred from other countries to Uganda are not transferred from prisons that comply with international standards to those that do not comply with such standards, clause 21 of the Bill was amended to include a provision to the effect that there shall be a regular inspection of prisons by 'inspectors' to monitor the conditions under which those offenders are being detained. The 'justification' for the existence of such inspectors is 'to provide for routine inspections of correctional or penal institutions where the sentences are to be served by the transferred convicted offender in compliance with rule 55 of the United Nations Standard Minimum Rules for the Treatment of Prisoners'. In its report to Parliament, the Committee wrote:[91]

> Provisions of the reports under clause 21 should be made mandatory.[92] In addition, the administering country should guarantee access to a convicted person's place of detention for independent inspection mechanisms. On

86 For a distinction between absolute and non-derogable rights, see A Conte *Human rights in the prevention and punishment of terrorism: Commonwealth approaches: The United Kingdom, Canada, Australia and New Zealand* (2010) 284-287.

87 Arts 4 & 7 ICCPR.

88 Art 44 Constitution of Uganda.

89 See sec 7.

90 Prisons Act 2006.

91 Committee Report, *Hansard* Parliament of Uganda, 17 May 2012 3585.

92 Cl 21(1) provided that '[a]fter a convicted offender is transferred to Uganda, the proper authority in Uganda shall notify the sentencing country (a) when it considers enforcement of the sentence to be completed; (b) if the convicted offender escape from custody before the enforcement of the sentence is completed; (c) if the offender commits any other offence while serving sentence; or (d) if the offender dies while serving sentence'.

> this account, the Bill should integrate rule 55 of the Standard Minimum Rules for the Treatment of Prisoners of 1977. It states that there shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be, in particular, to ensure that these institutions are administered in accordance with the existing laws and regulations, with a view to bringing about the objectives of penal and correctional services.

Section 21(3) of the Act indeed incorporates the above recommendation.[93] The challenge with the amendment is that, although its drafting history makes clear the task of the inspectors, it does not stipulate the powers of the prison inspectors and what they are supposed to do with their reports. It appears that such reports will be forwarded to the sentencing country in terms of section 21(2) of the Act, which provides that 'the proper authority in Uganda shall, if requested by the proper authority of the sentencing country, provide that authority with a report or reports concerning the enforcement of the sentence'. What is not clear is what the sentencing state would do with such reports. Assuming that the sentencing state finds that the conditions in which the offender is being detained are inhuman and degrading, it would have to raise the issue with the administering state. And if the administering state does not improve the conditions of detention, the sentencing state, if the transfer agreement allows it to do so, could pardon the offender or commute his sentence which would ensure that he or she is released from detention.

4 Consent before the transfer

One of the most contentious issues in the prisoner transfer arrangement is whether the offender's consent should be a prerequisite for the transfer to take place. Some countries, such as Nigeria[94] and the UK,

93 Sec 21(3) provides that '[t]here shall be a regular inspection of penal institutions and correctional services of the administering country by qualified and experienced inspectors appointed by the proper authority to ensure that these institutions are administered in accordance with existing laws and regulations and to bring about the objectives of penal and correctional services'.

94 Sec 8 of the Transfer of Convicted Offenders (Enactment and Enforcement) Act, ch T16, 1988 provided: '(1) The sentencing country shall ensure that the convicted offender or a person authorised to act on his behalf [due to the convicted offender's age or his physical or mental condition] ... voluntarily and in writing with full knowledge of the legal consequences thereof; and the procedure for giving such consent shall be in accordance with the law of the sentencing country. (2) The sentencing country shall afford to the administering country every opportunity to verify that the consent is given in accordance with the provisions of subsection (1) of this section.' Sec 3 of the Transfer of Convicted Offenders (Enactment and Enforcement) (Amendment) Bill, 2011 deletes sec 8 of the main Act. This Bill was passed in October 2011. See 'Nigeria: Representatives pass transfer of Convicted Offenders Bill' AllAfrica http://allafrica.com/stories/201110070519.html (accessed 31 October 2012).

have removed the prisoner's consent as a requirement for the transfer to take place. For example, the treaties between the UK and Libya, Rwanda and Ghana do not require that a prisoner should consent to his or her transfer for such a transfer to take place.[95] It has been argued that 'the requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners, or as a means of disguised extradition'.[96] Clause 6(d) of the Bill provided that the transfer of the offender could only take place if he or she, *inter alia*, 'has, in writing, applied for or consented to the transfer' and if he or she is incapable or incompetent to consent to such a transfer because of his age or mental state, such consent has to be given by a person who is legally empowered to act. The above clause was passed without amendment.[97]

However, the mere fact that such a person has consented to his or her transfer or has applied for his or her transfer does not mean that the Ugandan authorities will approve such a transfer, even if the administering country also agrees to such a transfer. One of the factors that will have to be put into consideration is the issue of the rights of the offender in question should he or she be transferred. As one legislator made it clear in Parliament when the Bill was being debated:[98]

> Even when a convicted offender seeks for a transfer to their own country, if the sentencing country has proof in their own way that they will be tortured, they do not do the transfer because they are supposed to initiate the process of the transfer.

It should also be recalled that section 9 of the Act provides for the verification of the prisoner's consent. It provides that the prisoner must give his 'consent voluntarily according to the law and with full knowledge of the legal consequences of the transfer'.[99] The proper authorities in Uganda have an obligation in terms of section 9(2) 'to afford an opportunity to the proper authority of the country to which a convicted offender is to be transferred, to verify whether the consent complies with the conditions provided for' under section 9(1). In the case of a prisoner who is 'incapable or incompetent to give consent', such consent has to be given by a person who is entitled to act on that prisoner's behalf.[100] Although the section does not expressly say so, it is applicable to children or mentally or intellectually-challenged prisoners. It is argued in both cases that a prisoner should only be

95 Art 4(3) (Libya); art 2(3) (Rwanda). The treaty with Rwanda expressly mentions that the offender's consent will not be required for the transfer to take place.

96 M Abdul-Aziz 'International perspective on transfer of prisoners and execution of foreign penal judgments' in Bassiouni (n 32 above) 533.

97 See sec 6(d).

98 *Hansard* Parliament of Uganda, 17 May 2012, submission by Baka 3590.

99 Sec 9(1).

100 Sec 6(d).

transferred if it is in his or her best interests.[101] Sections 6(d) and 9 of the Act are silent on the details of how the consent in question will be made and verified. This means that Uganda could learn from countries with experience on the transfer of offenders in dealing with these issues. Section 24 of the Act allows the Minister of Justice to issue regulations implementing the Act. It is recommended that in such regulations, the following issues could be dealt with.

The first issue is that of legal representation for an offender who is to be transferred. It is recommended that the regulations should provide that an offender who is contemplating being transferred should acquire legal advice before the authorities can come to the conclusion that he has consented to the transfer. If he is unable to pay for legal advice, legal advice should be provided at state expense. The lawyer should be able to explain to the offender issues such as parole and early release legislation in the administering country.[102] The second issue is that of the verification process of the offender's consent. In cases where offenders have been transferred to or from the United States of America, a judicial officer is appointed to verify the consent in question.[103] It would also be a good idea for Ugandan authorities to ensure that a judicial officer presides over the verification process to ensure that the offender indeed voluntarily consented to the transfer.[104] The third issue to be dealt with is whether the offender can revoke the consent when it has already been verified as having been given voluntarily.[105] Although generally the offender should not be allowed to revoke his consent when it has been verified as having been given voluntarily, there could be cases where he should be permitted to revoke that consent, for example, if after verification it emerges that there is a possibility that he could be subjected to torture or cruel, inhuman and degrading treatment or punishment. In such a case, his transfer would be in violation of Uganda's national and international human rights obligations.

5 Pardon, amnesty, commutation and review of sentence

Clause 19 of the Bill allowed the Ugandan authorities to grant pardon or amnesty to the transferred offender or to commute the sentence of

101 See art 3 of the Convention on the Rights of the Child and generally the Convention on the Rights of Persons with Disabilities.

102 The implications of the transfer on the duration that the offender will spend in prison is one of the issues that lawyers have dealt with in cases where offenders have been transferred to and from the United States of America. See Abbell (n 31 above) 27-30 110-111.

103 Abbell (n 31 above) 24-26 102-103.

104 Uganda could also use diplomatic or consular corps or any other official do verify the prisoner's consent.

105 See Abbell (n 31 above) 30-31 111-112.

the offender in question unless one of the conditions of the transfer is that the sentencing state reserves the right to grant such amnesty, pardon or to commute such a sentence. The Committee suggested that the word 'amnesty' should be deleted from clause 9 of the Bill because 'amnesty does not require conviction under the laws of Uganda and yet to qualify under the Bill, the offender must be convicted',[106] and it was emphasised that in Ugandan laws, 'a convicted person can never get amnesty. They can get something else but not amnesty.'[107] During the debates on clause 19 of the Bill, it was made clear that[108]

> [a]mnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide and crimes against humanity and other gross violations of human rights, including torture, are inconsistent with the state's human rights obligations. To that extent, perpetrators of such crimes should be excluded from such privileges under the Bill, particularly in clause 19.

When the Bill was passed, section 19 excluded amnesty.[109] It is beyond the scope of this article to discuss the law relating to amnesty in Uganda. It should be mentioned in passing that the above submission does not appear to be supported by the jurisprudence emanating from the Constitutional Court on the question of amnesty. In *Thomas Kwoyelo Alias Latino v Uganda*,[110] the petitioner, a former rebel leader, was indicted before the International Crimes Division of the High Court for grave breaches of the Geneva Conventions. He argued before the Constitutional Court that his indictment was discriminatory and therefore contrary to article 21 of the Constitution which prohibits discrimination, because thousands of rebels, including rebel leaders and some of his seniors, had been granted amnesty, but that the petitioner had been denied such amnesty.[111] The Constitutional Court observed that 'insurgents are subject to international law and can be prosecuted for crimes against humanity or genocide',[112] but concluded that the prosecution of the petitioner was unconstitutional because it violated article 21 of the Constitution which prohibited discrimination. It is, therefore, clear that even those who commit international crimes or gross human rights violations could be granted amnesty in Uganda.

106 *Hansard* Parliament of Uganda, 17 May 2012, submission by Mr Baka 3598.

107 *Hansard* Parliament of Uganda, 17 May 2012, submission by Deputy Chairperson of the Committee 3598.

108 *Hansard* Parliament of Uganda, 17 May 2012, submission, Committee Report 3585.

109 See sec 19 of the Act.

110 *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Petition 036/11) (judgment of 22 September 2011).

111 Evidence presented to the Constitutional Court showed that by the time of the petitioner's trial, 24 066 rebels had been granted amnesty from prosecution and that in 2010, when the applicant applied for amnesty, 274 were granted amnesty but the applicant was not granted amnesty. See *Thomas Kwoyelo* (n 110 above) 17.

112 As above.

The Transfer of Convicted Offenders Act does not provide that people who have been convicted of war crimes, genocide and crimes against humanity and other gross violations of human rights, including torture, will not be pardoned or have their sentences commuted. One cannot successfully invoke the drafting history of clause 19, and in particular the above-mentioned submissions on the issue of pardon, to argue that the drafters of the Act were of the view that people convicted of international crimes and gross violations of human rights cannot be pardoned. This is because article 121(4)(a) of the Constitution provides that the President may, on the advice of the Committee on the Prerogative of Mercy, 'grant to any person convicted of an offence a pardon either free or subject to lawful conditions'. Article 121(4)(a) is very clear that the President can grant pardon to 'any person', including those who have been transferred from other countries to serve their sentences in Uganda. This also includes those people who have been convicted of international crimes, including gross violations of human rights. However, the agreement between Uganda and the UK on the transfer of offenders is to the effect that[113]

> [t]he continued enforcement of the sentence after transfer shall be governed by the laws and procedures of the receiving state, including those governing conditions of imprisonment, confinement or other deprivation of liberty, and those providing for the reduction of the term of imprisonment, confinement or other deprivation of liberty by parole, conditional release, remission or otherwise.

And that[114]

> The receiving state shall modify or terminate enforcement of the sentence as soon as it is informed of any decision by the transferring state to pardon the sentenced person, or of any other decision or measure of the transferring state that results in cancellation or reduction of the sentence.

The effect of article 7 of the agreement between the UK and Uganda is that an offender transferred from the UK to Uganda can be pardoned by the UK authorities and if such a decision is communicated to the Ugandan authorities, they have to put it into effect. This has the effect of subjecting the prisoner in question to two pardon 'regimes'. The prisoner could be pardoned by the President in terms of article 121 of the Constitution and also by the UK authorities in terms of article 7 of the agreement. Whether this encroaches on Uganda's sovereignty is a question that will not be answered here.

113 Art 7(2) Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Uganda on the Transfer of Sentenced Persons (2 June 2009).

114 n 113 above, art 7(4).

6 Exclusion of some offenders from the Act

The Transfer of Convicted Offenders Bill was silent on the offenders to which the Act would not be applicable. This prompted one member of parliament to ask whether the Act would also be applicable to Ugandans who have been sentenced to death in other countries.[115] The Committee made it clear that the Bill was not applicable to all Ugandans who have been sentenced abroad or to all foreign nationals who have been sentenced in Uganda. In particular, the Act is not applicable to those who have been sentenced to death. It was made clear during the debates in parliament that 'the death sentence is not catered for here' and that 'if you are sentenced to death, this not being sentenced to imprisonment', and therefore the Act is not applicable here.[116]

One would have expected the Act to expressly state which offenders it excludes. Some countries, such as Zambia, provide in their legislation that people who have been sentenced to death cannot be transferred to serve their sentences in other countries.[117] The treaty between the UK and Peru provides that a person who has been sentenced to death shall not be transferred under the treaty unless his or her sentence has been commuted.[118] The agreement between the UK and Laos provides that a person who has been convicted of the following offences under Lao law shall not be transferred to serve his or her sentence in the UK: offences against the President; internal security; and under legislation protecting national art treasures.[119]

7 Costs of the transfer

In any prisoner transfer arrangement the costs involved in such a transfer have to be considered. Some countries, such as South Africa, have been reluctant to enter into prisoner transfer agreements or to enact prisoner transfer legislation because of the enormous costs

115 *Hansard* Parliament of Uganda, 17 May 2012, submission by Alaso 3595.

116 *Hansard* Parliament of Uganda, 17 May 2012, submissions by the Deputy Chairperson of the Committee and by Mugabi 3595.

117 See sec 4(3) of the Zambia Transfer of Convicted Persons Act.

118 Art 3(b) of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru on the Transfer of Sentenced Persons (7 March 2003).

119 Art 4(h) of the Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lao People's Republic on the Transfer of Sentenced Persons (7 May 2009).

involved in such transfers.[120] Clause 22 of the Bill, which was passed without any amendment,[121] provides:

> Without prejudice to the right of the proper authority of the sentencing country or the administering country to defray all expenses connected with the transfer of a convicted offender, the cost of transfer shall be defrayed in such proportions as may be agreed upon either generally or in any particular case between the proper authority in Uganda and that of the country involved in the transfer.

In its report on the Bill, the Committee gave the rationale behind clause 22 in the following terms:[122]

> Clause 22 of the Bill envisages that the costs of transfer are to be met by the government of Uganda and that of the sentencing country in such proportions as may be agreed upon, either generally or in respect to any particular case. Considering that there could be cases where by reason or the nature of the offence committed, such as the white-collar crimes, it would be inequitable to apply public resources to the repatriation of the convicted prisoner back to Uganda. It should therefore be a requirement that in case of a transfer of an offender to Uganda, the proportion of expenses of such a transfer agreed to be met by the government of Uganda will be borne by such offender or by someone on their behalf. In the alternative, the Minister should have the powers to require a person, with or without a surety, to give an undertaking to pay part of the expenses to the minister. Such expenses shall be regarded as a debt owed to the state. Only when the offender is indigent or for any other good reason should the costs be met by the government of Uganda.

Different countries have taken different approaches on the question of meeting the costs involved in the transfer of offenders.[123] When interpreting or applying section 22 of the Transfer of Convicted Offenders Act, courts or the relevant authorities should bear in mind the fact that the drafters of the Act envisioned a situation where there would be circumstances when the offender in question would be expected to foot the bill of the transfer. Therefore, in applying section 22, the relevant authorities should not only consider the nature of the offence that was committed by the offender. The financial position of the offender should also be considered. If the offender in question committed an offence such as murder without any financial gain, and such an offender is able to pay for his transfer to Uganda, he should pay for his transfer. If the offender committed a 'white-collar' crime but is unable to foot the bill for his transfer, the expenses should be met by the Ugandan authorities or by the sentencing state.

---

120 See, generally, JD Mujuzi 'Towards the establishment of a prisoners transfer legal regime in South Africa: Failed attempts, available options and critical issues to consider' (2012) 20 *African Journal of International and Comparative Law* 281-300.

121 *Hansard* Parliament of Uganda, 17 May 2012 3599. Cl 22 would become sec 22 of the Act.

122 *Hansard* Parliament of Uganda, 17 May 2012, Committee Report 3585.

123 Mujuzi (n 120 above) 281-300.

8 Conclusion

This article has dealt with the drafting history of the Transfer of Convicted Offenders Bill, focusing on the following issues: the purpose of the transfer of the offender; the rights of the offender to be transferred; the consent of the offender before the transfer; the costs involved in the transfer; the exclusion of some offenders from the Bill; and the question of pardon and amnesty. Enacting prisoner transfer legislation is one of the ways through which offenders can be transferred to or from Uganda to serve the remainder of their sentences. Uganda is called upon to explore the possibility of ratifying multilateral treaties on the transfer of offenders. The ratification of those treaties will enable Uganda to transfer offenders to state parties to those treaties and to receive offenders from state parties to those treaties without the need to sign bilateral agreements or treaties with such countries. The treaties that Uganda could ratify are the Council of Europe's Convention on the Transfer of Sentenced Persons and Inter-American Convention on Serving Criminal Services Abroad.[124] This Convention has been ratified by at least one African country, Mauritius, as has many non-European countries. The drafting history of the Council of Europe's Convention on the Transfer of Sentenced Persons shows that the word 'European' was deliberately excluded from the title because, as stated by the select committee of the European Committee on Crime Problems:[125]

> Unlike other conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word 'European' in its title. This reflects the draftmen's opinion that the instrument should be open also to like-minded democratic states outside Europe. Two states – Canada and the United States of America – were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.

The Inter-American Convention on Serving Criminal Services Abroad is also open for signature and ratification by non-inter-American states and, at time of writing this article, it has been ratified by two non-inter-American states – Saudi Arabia and the Czech Republic.[126] Section 3 of the Ugandan Transfer of Convicted Offenders Act defines a sentence to mean 'any punishment or measure involving deprivation of liberty ordered by a court or tribunal in the exercise of its criminal jurisdiction

124 Inter-American Convention on Serving Criminal Sentences Abroad, OAS Treaty Series 76.

125 Para 11 Explanatory Report on the Convention on the Transfer of Sentenced Persons http://conventions.coe.int/Treaty/EN/reports/html/112.htm (accessed 19 November 2012).

126 Czech Republic ratified this treaty on 13 October 2011 and Saudi Arabia on 8 July 2011. See http://www.oas.org/juridico/english/sigs/a-57.html (accessed 19 November 2012).

and includes supervision while at liberty on parole or on probation'. The Act is therefore not exclusively applicable to those offenders sentenced to imprisonment. This means that Uganda, unlike other African countries, such as Swaziland[127] and Namibia,[128] whose transfer of offenders legislation defines 'sentence' to mean 'any punishment or measure involving deprivation of liberty', is in a position to transfer and receive offenders who have been sentenced to other forms of sentences other than imprisonment. In the light of the increasing emphasis on alternatives to imprisonment in Africa,[129] Uganda should be applauded for enacting legislation that is not limited to the transfer of only those offenders sentenced to imprisonment.[130] The challenge, though, is that Uganda does not have effective mechanisms to ensure that transferred offenders on parole are properly supervised. This is because of the fact that, although the Prisons Act provides for circumstances under which a prisoner may be released on parole,[131] it does not establish a parole board.[132] There is thus an urgent need for the parole board to be established for other countries to be able to send offenders on parole to complete part of their sentences in Uganda. In interpreting or applying the Act, the relevant authorities, where necessary, should have regard to its drafting history for the purpose of ensuring that the intentions of the drafters are not disregarded or ignored.

127 Sec 2 Swaziland Transfer of Convicted Offenders Act.

128 Sec 1 Namibian Transfer of Convicted Offenders Act.

129 See, generally, JD Mujuzi 'Alternative sentencing under African human rights instruments and mechanisms: Lessons for Southern Africa' (2008) 8 *University of Botswana Law Journal* 47.

130 The trend in Europe is also to transfer not only offenders sentenced to imprisonment, but also those sentenced to non-custodial measures or those on parole. See the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. For a brief discussion of the benefits of transferring offenders sentenced to non-custodial sentences or those released on parole, see Abbell (n 31 above) 147-148.

131 Sec 89.

132 C Ariko 'Prisons to launch parole system' *The New Vision* 10 December 2007 http://www.newvision.co.ug/D/8/13/601422 (accessed 19 November 2012).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Kenya's provisional warrant of arrest for President Omar al Bashir of the Republic of Sudan

Phillip Apuuli Kasaija[*]
Associate Professor, Department of Political Science, Makerere University, Kampala, Uganda

Summary

At the end of November 2011 a Kenyan High Court ordered that, if ever President Omar al Bashir of the Republic of Sudan steps on Kenyan territory, he should be arrested and transferred into the custody of the International Criminal Court (ICC). In pursuit of this ruling, the same court in January 2012 issued a provisional warrant of arrest for President Bashir. In issuing the ruling and the provisional arrest warrant, the Court observed that it was implementing the decision of the ICC, which issued warrants of arrest for Bashir in March 2009 and July 2010 for crimes against humanity and genocide, respectively, which he allegedly committed in the Darfur conflict. The contribution argues that, first, the Court missed an opportunity to clarify the issue of the tension existing between provisions of the Rome Statute, particularly article 27 relating to the irrelevance of official capacity, and article 98(1) relating to co-operation with respect to waiver of immunity and consent to surrender a head of state whose country is not a state party to the Rome Statute. Secondly, the Court's declaration that the principle of universal jurisdiction has acquired jus cogens *status and its application to the Bashir case was not correct.*

1 Introduction

On 27 August 2010, President Omar al Bashir of the Republic of Sudan attended the promulgation of the new Constitution of Kenya 2010

* BA (Hons) (Makerere), LLM DPhil (Sussex); pkasaija@ss.mak.ac.ug/apuulik@gmail.com

at Uhuru Park, Nairobi. Again in October 2010, Bashir was to attend an Intergovernmental Authority on Development (IGAD) summit meeting in Nairobi on the future of Sudan but, due to the uproar at his presence in Kenya from various quarters, the meeting was shifted to Addis Ababa, Ethiopia. Also, the African Union (AU) summit meeting that was to be held in Malawi in July 2012 ran into problems because of Bashir. Malawi, which was to play host, requested that Bashir not be invited to attend the meeting.[1] Malawi, a party to the Statute of the International Criminal Court (ICC), stated that it had an obligation to arrest Bashir, who was wanted by the ICC, were he to visit Malawi. After the death of President Bingu wa Mutharika in April 2012, who had played host to Bashir in October 2011, President Joyce Banda, his successor, stated that there was a risk of damaging relations with Malawi's donors (Western countries)[2] were the country not to comply with the decision of the ICC to arrest Bashir. As a consequence of Malawi's insistence that Bashir was not welcome, the AU decided to move the meeting to Addis Ababa.

Bashir's presence in Kenya in August 2010 became a subject of discussion in Kenya and around the world, because in March 2009, Pre-Trial Chamber I (PTC I) of the ICC had issued a warrant of arrest for him as a result of the investigation by the Chief Prosecutor of the ICC in the Darfur situation. As a result of Bashir's visit and Kenya's failure to arrest and hand him over to the ICC, the International Commission of Jurists-Kenya Chapter (KICJ) (the applicant) petitioned the High Court of Kenya seeking to find Kenya in violation of its obligations under the Rome Statute of the ICC.[3] The application was motivated by, *inter alia*, 'the development, strengthening and protection of the rule of law, and in particular to keep under review all aspects of the rule of law and human rights within the Republic of Kenya, and take such action as will be of assistance in promoting or ensuring the enjoyment of these rights'.[4] Kenya became a state party to the Rome Statute in 2005.

On 28 November 2011, Kenyan High Court Judge Nicholas Ombija ruled that, should Bashir ever visit Kenya again, he should be arrested

1 For a discussion, see D Akande 'The African Union, the ICC and universal jurisdiction: Recent developments' *EJIL Talk!* 29 August 2012 http://www.ejiltalk.org/the-african-union-the-icc-and-universal-jurisdiction-some-recent-developments/ (accessed 7 September 2012).

2 Aljazeera 'Malawi cancels AU summit over Sudan's Bashir' 9 June 2012 http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html (accessed 15 September 2012) (observing that Joyce Banda, Malawi's new President, wanted Bashir to stay away to avoid straining ties with key donors for her impoverished country).

3 See Republic of Kenya, In the High Court at Nairobi, Misc Criminal Application 685 (2010), 28 November 2011 (unreported) (on file with author).

4 As above.

and handed over to the ICC.[5] The judge ordered that the Attorney-General and the Internal Security Minister enforce the directive, and hand over the Sudanese leader to the ICC.[6] Sudan reacted to the ruling by threatening to expel Kenya's ambassador to Sudan and recall its own ambassador to Kenya. President Bashir gave Kenya two weeks to rescind the ruling.[7] Meanwhile, the Kenyan government sent a special envoy to Sudan to reassure Bashir that the government would appeal the ruling.[8] In this regard, Foreign Minister Moses Wetangula was quoted as assuring the Sudan government that 'the government of Kenya ... expresses its deep concern at the very unhelpful High Court ruling and will do everything in its powers to ensure that the ruling does not undermine in any way whatsoever the very cordial and fraternal relations that exist between Kenya and Sudan'.[9]

This article argues that in its ruling, the Court missed an opportunity to clarify the issue of the tension existing between provisions of the Rome Statute, particularly article 27, relating to the irrelevance of official capacity, and article 98(1), relating to co-operation with respect to a waiver of immunity and consent to surrender a head of state whose country is not a state party to the Rome Statute. Secondly, the Court's declaration that the principle of universal jurisdiction has acquired *jus cogens* status, and its application to the Bashir case was not correct.

---

5 P Ogemba 'Court issues warrant against Sudan's Bashir', *Daily Nation on the Web* 28 November 2011 http://allafrica.com/stories/201111282128.html (accessed 12 December 2011). Again, on 23 January 2012, Judge Ombija issued a provisional warrant of arrest against President Omar al-Bashir with strict consequences to Internal Security Minister George Saitoti if the government failed to obey the order. The judge said that 'he was satisfied with the information provided by the ICJ-Kenya Chapter to issue the provisional warrant of arrest urgently as provided under section 32 of the International Crimes Act (ICA).' He also observed that 'it is necessary to ensure [Omar al-Bashir] will not obstruct or endanger the ongoing investigations into the crimes for which he is allegedly responsible and that he will not continue with the commission of the crimes'. See P Ogemba 'Kenya court issues new Bashir warrant' *Daily Nation on the Web* 23 January 2012 http://allafrica.com/stories/201201241147.html (accessed 25 January 2012).

6 As above.

7 Sudan threatened sanctions on Kenya, including imposing a no-fly zone over Sudanese air by flights originating in or bound for Kenya; the expulsion of Kenyan nationals from Sudan; and the stopping of all Kenyan exports to Sudan (Sudan being a large importer of Kenyan tea). J Gitau International Commission of Jurists-Kenya Chapter (KCIJ) (e-ail communication) (on file with author).

8 *Daily Nation on the Web* 28 November 2011 http://allafrica.com/stories/201111300076.html (accessed 12 December 2011). See 'Country to appeal Bashir arrest order'. On 20 December 2011, the Attorney-General, Githu Muigai, lodged an appeal in the Court of Appeal seeking a temporary suspension of the arrest warrant against Bashir. The Court ruled that the Attorney-General's arguments were insufficient to suspend the warrant, and thus the warrant should stay in effect until the appeal is heard on merit. See E Latif 'Bashir warrant in force until appeal is heard' *Capital FM (Nairobi)* 20 December 2011 http://allafrica.com/stories/201112201033.html (accessed 27 December 2011).

9 As above.

2 International Commission of Jurists-Kenya Chapter's application

2.1 Background and pleadings

Following President Bashir's visit to Kenya in August 2010, the KICJ sued the Attorney-General and the Minister of State for Provincial Administration and Internal Security of Kenya as first and second respondents respectively, arguing *inter alia* that Kenya enhanced her commitment to fight against impunity by domesticating the Rome Statute in the domestic laws through the enactment of the International Crimes Act 2008 (ICA 2008), which entered into force on 1 January 2009;[10] that the ICA 2008, like the Rome Statute, does not recognise immunity on the basis of official capacity; that despite the Kenyan government being averse to or not aware of its commitments and obligations under international and municipal law, President Bashir was invited and hosted by the good government of Kenya at the promulgation of the new Kenyan Constitution on 27 August 2010; that the presence of Bashir in Kenyan territory was in violation of Kenya's obligations under the Rome Statute, the ICA 2008 and the new Kenyan Constitution of 2010; that the failure, neglect or refusal to arrest Bashir violated the basic tenets of international law; and that the hosting of Bashir by the Kenyan government raised very serious concerns over Kenya's commitment to combating impunity for the most serious crimes against humanity.[11]

It was the contention of the applicant that the disjointed approach in responding to the requests from the ICC was testimony of the different interests at play in the Grand Coalition Government (of Kenya) and

10 Specifically, arts 29 and 30 were cited by the applicant. Sec 29 provides: '(1) If a request for surrender is received, other than a request for provisional arrest referred to in section 28(2), the Minister shall, if satisfied that the request is supported by the information and documents required by article 91 of the Rome Statute, notify a judge of the High Court in writing that it has been made and request that the judge issue a warrant for the arrest of the person whose surrender is sought. (2) If a notice is sent to a judge under subsection (1), the Minister shall also send to the judge a copy of the request and supporting documents.' Sec 30 provides: '(1) After receiving a request under section 29, the judge may issue a warrant in the prescribed form for the arrest of the person if the judge is satisfied on the basis of information presented to him that – (a) the person is or is suspected of being in Kenya or may come to Kenya; and (b) there are reasonable grounds to believe that that person is the person to whom the request for surrender from the ICC relates. (2) The judge shall give reasons for the issue or refusal to issue a warrant under subsection (1).'

11 See n 3 above.

thus it was in the applicant's interest to prosecute the application in line with its objectives and mandate.[12]

The first and second respondents argued, *inter alia*, that a request for a provisional warrant of arrest could only be made by the ICC, and thus the applicant lacked *locus standi* as it had not demonstrated its interest in the case, nor had it shown that it had been instructed to act on behalf of the ICC; that foreign requests in matters of mutual legal assistance or extradition are channelled through the Attorney-General who, if satisfied as to the authenticity of the request, will move to the High Court for issuance of a warrant and conduct proceedings on behalf of the requesting party, the process not being done by an individual or any authority; and that there was no evidence of a request by the ICC to the Kenyan government for a provisional arrest warrant for Bashir, therefore the High Court lacked jurisdiction to hear, determine or give the orders sought in the application. It is instructive to note that the respondents never raised the issue of Bashir's immunity as a sitting head of state.

Later on, the Kenyans for Justice and Development Trust (KEJUDE), through its trustees Andrew Okiya, Omtata Okoiti and Augustinho Neto Oyugi, joined the proceedings as the third respondent. KEJUDE *inter alia* argued that the decision of the Assembly of the AU taken at Sirte, Libya in July 2009, directing all the members of the AU to withhold co-operation with the ICC in respect of the arrest and surrender of Bashir, still stood; that the AU has called on the United Nations (UN) Security Council to invoke article 16 of the Rome Statute to suspend the warrant against Bashir; that Kenya as a member of the AU is bound by the decisions and resolutions of the AU; that as a neighbour to Sudan, Kenya declaring a warrant of arrest against Bashir is an act of aggression whose execution shall jeopardise or risk the lives and property of an estimated 500 000 Kenyans in Sudan; and that the issuance of the warrant of arrest by the Kenyan courts may lead to a deterioration of the relations between the two states.

2.2 Applicant's prayers

The applicant sought the following orders: that the Court issues a provisional warrant of arrest against President Bashir; that it orders the second respondent to effect the said arrest warrant, if and when the said Bashir sets foot within the territory of the Republic of Kenya; and

12 As above. Apparently, the applicant, on learning that President Bashir was to visit Kenya again in October 2012, had written to the two principals in the Grand Coalition Government, President Kibaki and Prime Minister Odinga, calling on them to take [Kenya's] international and domestic obligations seriously. In his response, Prime Minister Odinga observed that the presence of President Bashir in Kenya's territory on 27 August 2010 '[had not been] a matter of mutual agreement with the Grand Coalition'.

that it issues such further orders, writ or direction as it deems fit and just in the circumstances.

2.3 Judgment

As a matter of fact, the Court easily established that Kenya had ratified the Rome Statute on 15 March 2005 and followed up this action by domesticating the Rome Statute by passing the ICA 2008, which came into force on 1 January 2009. The Constitution of Kenya 2010, which was promulgated on 27 August 2010, states in the Sixth Schedule, clause 7(1), that all laws in force immediately before the effective date (read 27 August 2010) continue in force and should be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with the Constitution.

2.3.1 Establishing jurisdiction

The Court held that the Rome Statute formed part of the laws of Kenya by virtue of the fact that article 2(5) of the Constitution of Kenya 2010 states that the general rules of international law form part of the law of Kenya. This position is further buttressed by section 41(1)[13] of the ICA 2008 and article 2(6)[14] of the Constitution of Kenya 2010. In establishing its jurisdiction to decide the application, the Court observed that 'the Constitution of Kenya 2010 does not in anyway reject the role of the international institutions such as the ICC'.[15] Thus, it noted that the Constitution of Kenya 2010 envisages that those exercising judicial authority to be guided by *inter alia* such principles as 'human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised'.[16] The Court, whilst observing that these values could not be given fulfilment by Kenya acting in isolation of the community of nations, noted that it was essential to recognise and facilitate the role of the ICC operating in the framework of the Rome Statute, in the framework of the Kenyan legal system. In this regard, the Constitution of Kenya 2010 gives

13 It states: 'The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters: (a) the making of the requests by the ICC to Kenya for assistance and the method of dealing with these requests; (b) the conduct of an investigation by the Prosecutor or the ICC; (c) the bringing and determination of proceedings before the ICC; (d) the enforcement in Kenya of sentences of imprisonment or other measurers imposed by the ICC, and any related matters; (e) the making of requests by Kenya to the ICC for assistance and the method of dealing with those requests.'

14 It states: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

15 n 3 above.

16 Art 10(2)(b).

the High Court jurisdiction to hear any questions in respect of the interpretation of the Constitution, including the determination of[17]

> the question whether any law is inconsistent with or in contravention of this Constitution; the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; any matter relating to constitutional powers of state organs in respect of country government and any matter relating to the constitutional relationship between the levels of government; and a question relating to conflict of law under article 191; and any other jurisdiction, original or appellate, conferred on it by legislation.

In the end, the Court concluded that both the Constitution of Kenya 2010 and the ICA 2008 grant it jurisdiction to enforce the Rome Statute.

2.3.2 Applicable principles

The Court considered the application of the principle of universal jurisdiction to the case. Under this principle, any state is empowered to bring to trial persons accused of international crimes regardless of the place of the commission of the crime or the nationality of the offender. Rightly, the Court noted that the principle was first proclaimed in customary international law in the seventeenth century with regard to piracy. Any state was authorised to arrest and bring to justice persons suspected of engaging in piracy, whatever their nationality and the place of the commission of the offence because pirates were regarded as 'enemies of all mankind' (*hostis humani generis*).

The Court then observed that the Rome Statute obligations were in any case customary international law which a state could not contravene. Violating customary international law, the Court noted, 'is intentionally violating fundamental rules of international public policy ... which would be detrimental to the international legal system and how that system and the society it serves defines itself'.[18] The duty to prosecute international crimes, the Court also noted,[19]

> has developed into *jus cogens* and customary international law, thus delegating states to prosecute perpetrators wherever they may be found. The states party to the ICC Statute are under a duty to prosecute or extradite perpetrators to the ICC for prosecution.

17 Art 165(3)(d).

18 n 3 above.

19 As above.

Citing the classic cases, including those of *Pinochet*[20] and *Eichmann*,[21] and the German Penal Code and Italian Criminal Code, the Court observed that a state may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim and even whether or not the accused is in custody or at any rate present in the state.

Whilst applying the principles of international law to the facts of the case, the Court held that[22]

> the High Court in Kenya clearly has jurisdiction not only to issue a warrant of arrest against any person, irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction, but also to enforce the warrants should the Registrar of the ICC issue one.

In addition, the Court, after reviewing the approaches adopted in the jurisdictions of Australia, Canada and the United Kingdom, established that the applicant had *locus standi* and the issues raised by the application were justiciable.

In conclusion, the Court posed a very pertinent question: What happens when the warrants are issued and the Minister for Internal Security fails, neglects or refuses to execute them? In answering, the Court averred that any legal person, the applicant included, who has the requisite mandate and capacity to enforce or to execute the warrant may be at liberty to do so. Following this ruling, the Court in January 2012 issued a provisional warrant of arrest for President Bashir.

3 Analysing the judgment

As observed above, the respondents never raised the issue of President Bashir's immunity in their pleadings. Presumably, following the *non ultra petita* rule, that is why the Court also never considered it. Nevertheless, in my considered opinion, the Court missed an opportunity to give clarity on the tension existing between the

20 For a full record on this, see *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v* [1998] UKHL 41; [2000] 1 AC 61; [1998] 4 All ER 897; [1998] 3 WLR 1456 (25 November 1998); *Pinochet, In re* [1999] UKHL 1; [2000] 1 AC 119; [1999] 1 All ER 577; [1999] 2 WLR 272 (15 January 1999); *Pinochet, Re* [1999] UKHL 52 (15 January 1999); and *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17 (24 March 1999).

21 *Attorney-General of the Government of Israel v Eichmann* 36 ILR 5 (1961).

22 n 3 above.

different provisions of the Rome Statute, in particular articles 27[23] and 98(1).[24] Article 27 relates to the irrelevance of official capacity, while article 98(1) relates to co-operation with respect to a waiver of immunity and consent to surrender of a head of state whose country is not a state party to the Rome Statute. It should be recalled that the ICC's Pre-Trial Chamber (PTC) ignored discussing this issue when it first issued arrest warrants for President Bashir. According to Akande, 'the PTC ought to have dealt with the applicability of article 98 and how it relates to 27 before proceeding to issue the request for arrest and surrender to states parties, and Security Council members'.[25] Several countries in Africa, including Chad and Malawi, have been reported to the UN Security Council by the ICC for failure to arrest Bashir when he visited them.[26] Considering that Kenya is a state party to the Rome Statute and Sudan is not, the Kenyan court missed an opportunity to clarify the tensions arising out of the competing obligations existing between the two articles.

3.1 Irrelevance of official capacity *vis-à-vis* immunities of a sitting head of state

Immunity is the right not to be submitted to the exercise of foreign jurisdiction.[27] Its underlying purpose is the maintenance of peaceful relations between states and the settlement of disputes by consent rather than the *diktat* of one state, and to that end international law recognises the independence and equality of states and accordingly requires restraint from subjecting one state to adjudication of its

23 It states: '(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity of a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.'

24 It states: 'The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the co-operation of that third state for the waiver of the immunity.'

25 D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of international Criminal Justice* 337.

26 ICC 'Pre-Trial Chamber I (PTC I) informs the United Nations Security Council and the Assembly of States Parties about Chad's non-co-operation in the arrest and surrender of Omar Al Bashir' Press Release ICC-CPI-20111213-PR756, 13 December 2011 http://www.icc-cpi.int/NR/exeres/371A3E88-35C6-4C54-8C98-60B92D3E140A.htm (accessed 4 February 2012).

27 S Wirth 'Immunity for core crimes? The ICJ's judgment in the *Congo v Belgium* case' (2002) 13 *European Journal of International Law* 882.

disputes in the national courts of another state.[28] To allow the national court of another state to review judicially the propriety of a state's conduct would constitute a major intrusion into the internal administration of that state with the consequent loss of independence. The general purpose of immunity is to safeguard the ability of states to discharge their functions without interference, as well as to protect their dignity.[29]

Under customary international law, serving heads of state are accorded immunity from the criminal jurisdiction of foreign states.[30] Those immunities, as stated by the International Court of Justice (ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000* (*Arrest Warrant* case) are to protect the individual concerned against any act or authority of another state which would hinder him or her in the performance of his or her duties.[31] Immunity from criminal jurisdiction includes immunity from personal arrest or detention and extends even to cases where heads of state are suspected of having committed war crimes or crimes against humanity.[32] As observed by the ICJ:[33]

> A head of state enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another state which would hinder him or her in the performance of his or her duties'.

However, the policy and doctrine of international accountability mechanisms, especially courts and tribunals, have trumped the customary international law notion that heads of state enjoy immunity when they are alleged to have committed international crimes.[34]

---

28 H Fox 'International law and restraints on the exercise of jurisdiction by national courts of states' in MD Evans (ed) *International law* (2006) 362.

29 n 27 above, 882. According to the ICJ in the *Arrest Warrant* case, Judgment, ICJ Reports 2002 para 51, 'in international law it is firmly established that ... certain holders of high ranking office in a state, such as the Head of State ... enjoy immunities from jurisdiction in other states, both civil and criminal'.

30 R Cryer *et al An introduction to international criminal law and procedure* (2007) 422.

31 *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) (Judgment) 14 February 2002 (*Arrest Warrant* case) ICJ Rep 2002, para 54.

32 M Ssenyonjo 'The ICC arrest warrant for President Al Bashir of Sudan' (2010) 59 *International and Comparative Law Quarterly* 209.

33 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep para 170, quoting from the *Arrest Warrant* case, para 54.

34 See eg C Gosnell 'The request for an arrest warrant in Al Bashir: Idealistic posturing or calculated plan?' (2008) 6 *Journal of International Criminal Justice* 841 843-844 (observing that the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) 'have held that the obligation to co-operate mandated by the Security Council acting under chapter VII prevails over any customary international law immunities that might otherwise exist').

For example, serving heads of state are not immune from the ICC jurisdiction by virtue of article 27 of the Rome Statute. Apparently, even before the coming into force of the Rome Statute, the ICJ in the *Arrest Warrant* case (albeit with respect to the Minister for Foreign Affairs) had established that[35]

> [a]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the UN Charter, and the future ICC created by the 1998 Rome Convention.

In its decision, while referring the Republic of Malawi to the UN Security Council for failing to arrest and surrender Bashir when he visited the country in October 2011, the PTC dealt with the issue of immunities of serving heads of state *vis-à-vis* the ICC.[36] The Chamber, after reviewing heads of state's immunity before international courts since the end of World War I up until the establishment of the Special Court for Sierra Leone (SCSL),[37] held that[38]

> the principle in international law is that immunity of ...[a] sitting head of state cannot be invoked to oppose a prosecution by an international court. This is equally applicable to ... sitting heads of states not parties to the [Rome] Statute whenever the Court may exercise jurisdiction.

The matter of the immunity from arrest of a serving head of state has now been put to rest by the SCSL in the *Prosecutor v Charles Ghankay Taylor* case. The Court, while handing down judgment on 26 April 2012, affirmed the decision of its Appeals Chamber of 31 May 2004 that the sovereign equality of states does not prevent a head of state from being prosecuted before an international tribunal or court.[39]

---

35 Para 61 *Arrest Warrant* case (n 31 above).

36 ICC Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Ahmad Al Bashir, ICC-02/05-01/09, 12 December 2011.

37 n 36 above, paras 23-35.

38 n 36 above, para 36.

39 Para 2, Summary Judgment *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, 26 April 2012. The court also observed that 'the official position of Charles Taylor as an incumbent Head of State at the time when the criminal proceedings were initiated against him was not a bar to his prosecution'. The Appeals Chamber had concluded that 'the principle of state immunity derives from the equality of sovereign states, and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community'. See *Prosecutor v Charles Ghankay Taylor*, Case SCSL-2003-10-I, Decision on Immunity from Jurisdiction, 31 May 2004. The motion was heard in the Appeals Chamber by Justices Emmanuel Ayoola, Gerorge Gelaga King and Renate Winter, http://sc-sl.org/SCSL-03-01-I-059.pdf (accessed 15 September 2012).

Nevertheless, there appears to be a contradiction between articles 27 and 98(1) of the Rome Statute.[40] The ICC itself acknowledged this fact when it observed that 'the Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks co-operation regarding the arrest of a head of state'.[41] Van der Vyver notes that[42]

> [a]rticle 98(1) clashes with the spirit of the Statute and ... with article 27(2), which discards immunities and special procedural rules that may attach to the official capacity of a person indicted to stand trial at the ICC.

To him, article 98(1) recognises the legal rights of states to the protection of their heads of state (and other officials) under international law.

Whilst state parties who adopt the Rome Statute revoke the immunity of their heads of state (this is why many states have had to amend their constitutions before ratifying the Rome Statute), third states (states not parties to the Rome Statute) continue to have protection for their heads of state. According to Ssenyonjo, 'Sudan has not ratified the Rome Statute and so is not bound by article 27'.[43] Article 98(1) requires that the Court may not proceed with a request for arrest and surrender *unless it has obtained the consent and waiver of the third state (Sudan)*. Thus, the ICC must first seek a prior waiver by a third state (Sudan) of the immunity of the individual (Bashir). A waiver is required because the immunity of a head of state is a right that attaches to a state, and not the person of the head of state alone. Waiver and consent are the only means of removing other obligations under international law. There is no application for a waiver that has been made by the ICC to Sudan in the case of Bashir. Therefore, there is no competence under article 98(1) for the ICC to make a request for the surrender of Bashir to state parties of the ICC without a waiver of his immunity by Sudan; neither can the requirement of the waiver

40 According to Akande (n 25 above 337), this is so because the two provisions were drafted by different committees in the preparation of the Rome Statute, and no thought appears to have been given to their consistency with one another.

41 Para 37 Decision Pursuant to Article 87(7) (n 36 above). The Chamber went on to state that Malawi, and by extension the AU, are not entitled to rely on art 98(1) of the Statute to justify refusing to comply with the co-operation request. It gave four reasons for this: that immunity of heads of state before international courts has been rejected time and time again, dating all the way back to WWI; that there has been an increase in heads of state prosecutions by international courts in the last decade, giving examples of Slobodan Milosevic, Charles Taylor, Muammar Qaddafi and Laurent Gbagbo; that the 120 state parties to the Rome Statute have all accepted that any immunity they had under international law has been stripped from their top officials when they ratified the Statute; and that all states that have ratified the Statute cannot in turn interpret it in a way that disables and defeats the object of the Court and international justice. See paras 38-41.

42 JD van der Vyver 'Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court' (2011) 11 *African Human Rights Law Journal* 687.

43 n 32 above 210 (my emphasis).

itself be vitiated by the Court. Thus, whilst Ssenyonjo concludes that '[t]he Rome Statute cannot create obligations for a non-state party without its consent, and as such the Statute cannot remove the official immunity enjoyed by a head of state of a non-state party',[44] Triffterer is of the view that 'making the surrender of an official of a non-party state enjoying sovereign immunity dependent upon a waiver of that immunity by the non-party state concerned, could in practice bar the Court from exercising its jurisdiction over such a person, since the ICC Statute does not permit trials *in absentia*'.[45]

Also, it has been posited that, whilst article 27 does not remove the immunity of the head of state of non-state parties to the Rome Statute, in the case of Bashir such immunity may be regarded as having been removed by UN Security Council Resolution 1593, which referred the situation in Darfur to the ICC under chapter VII of the UN Charter.[46] There is ample academic debate on the effect of Resolution 1593 on Sudan being a non-state party to the Rome Statute.[47] For example, according to Schabas, it is now *lex lata* that the UN Security Council can withdraw immunity from anyone and this is what it has done

44 As above.

45 n 42 above 688.

46 n 32 above 211.

47 n 25 above 341-342. Akande argues that 'by requiring Sudan to co-operate fully with the Court, Resolution 1593 explicitly subjects Sudan to the requests and decisions of the Court ... The fact that Sudan is bound by article 25 of the UN Charter and implicitly by Resolution 1593 to accept the decision of the ICC puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan's obligations to accept the provisions of the Statute are derived not from the Statute directly, but from a UN Security Council resolution and the Charter.' Gosnell (n 34 above) 843 posits that 'the Darfur situation was referred to the ICC by the Security Council, acting under chapter VII of the UN Charter ... This disables Sudan from asserting any immunity against an ICC arrest warrant.' SM Weldehaimanot 'Arresting Al Bashir: The African Union's opposition and the legalities' (2011) 19 *African Journal of International and Comparative Law* 208 223-224: 'After reviewing the debates on the issue by different scholars *inter alia* concluding that for normative consistency and also objectivity, a UN SC referral resolution should have the effect of making non-member states parties to the Rome Statute [to comply] as far as the referred situation is concerned ... as far as UNSC referred situations are concerned, the solution is to place non-member states on the same footing as member states.' See IK Souare 'Sudan: What implications for President Al-Bashir's indictment by the ICC?' Institute for Security Studies Situation Report 25 September 2008 7 (arguing, unlike Akande and Gosnell, that 'the ICC and the UN signed a relationship agreement on 4 October 2004 ... Article 2(3) of this Agreement commits both the UN and ICC to respect each other's status and mandate. Thus all member states of the UN are bound by this agreement, which obligates them to respect the provisions of the Rome Statute. While the agreement does not establish a direct ICC jurisdiction over the UN members, it implies the acceptance, by the UN, of the provisions of the Rome Statute ... Should the UN Security Council therefore refer to the ICC a situation arising from events in a member state, such as Sudan ... that state has to respect and abide by the referral because of its membership of the UN.'

by establishing *ad hoc* tribunals.[48] Moreover, it has also been noted that, whilst Resolution 1593 did not explicitly withdraw immunity of a head of state, it implicitly did so on the basis following, *inter alia*, (i) the Security Council referral to the ICC means that all individuals investigated and prosecuted via the referral are bound by the provisions of the Rome Statute; (ii) that when the SC decided in Resolution 1593 operative paragraph 2 that the government of Sudan 'shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution' that included the lifting of the immunity; and (iii) that article 27 restates an already-existing principle of customary international law concerning the exercise of jurisdiction by any international court. Thus, it applies with respect to every person enjoying immunity under customary international law, regardless of whether the state this person represents is a party to the Rome Statute.[49] This position, however, is at variance with that of the AU, according to which[50]

> [t]he UN Security Council cannot lift President Bashir's immunity as any such lifting should have been [made] explicit. The mere referral of a 'situation' by the UN SC to the ICC or requesting a state to co-operate with the Court cannot be interpreted as lifting immunities granted under international law.

Whilst establishing the jurisdiction of the ICC in the Bashir case, the ICC did not undertake any analysis of article 27. Rather, it observed that, according to the Preamble of the Rome Statute, one of the core goals of the Court is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which must not go unpunished.[51] The Chamber noted that in order to achieve the punishment of impunity, article 27 of the Rome Statute must be operationalised.[52] Thus, it is upon this reasoning that the ICC issued a warrant of arrest for President Bashir in the first place. Moreover, the immunities that exist in national or international law (for example constitutional law and all rules of general and special international law such as those contained in the 1961 Vienna Convention on Diplomatic Relations) will not bar the

48 WA Schabas *An introduction to the International Criminal Court* (2007) 232.

49 n 32 above, 211; P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315 322-323.

50 African Union 'On the decisions of Pre-Trial Chamber I of the ICC pursuant to article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the co-operation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of Sudan' Press Release no. 002/2012, Addis Ababa, 9 January 2012 2.

51 ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v Omar Hassan Ahmad Al Bashir*, http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf (accessed 23 January 2012).

52 n 32 above 212.

ICC from exercising jurisdiction.[53] However, this position has been contested by the AU, which has argued that[54]

> [t]he immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals ... States cannot contract out of their international legal obligations *vis-à-vis* third states by establishing an international tribunal.

According to the AU, article 98(1) was included in the Rome Statute out of the recognition that the Statute is not capable of removing an immunity which international law grants to the officials of states that are not parties to the Rome Statute.[55] Immunities of state officials are rights of the state concerned and a treaty only binds parties to that treaty. A treaty may not deprive non-party states of rights which they ordinarily possess. In the final analysis, the AU reiterates the position as enunciated in the *Arrest Warrant* case that 'immunity accorded to senior officials, *ratione personae*, from foreign domestic jurisdiction (and from arrest) is absolute and applies even when the official is accused of committing an international crime'.[56] Nevertheless, the decision of the SCSL in the *Charles Taylor* case seems to have rendered the argument of the AU unsustainable.

In my considered opinion, the Kenyan Court missed an opportunity to contribute or even close the debate concerning the competing obligations existing between articles 27 and 98(1) of the Rome Statute as, hitherto, the ICC has not helped much on this front.

3.2 Universal jurisdiction

In his judgment Judge Ombija observed that universal jurisdiction is a *jus cogens* obligation under international law. He defined *jus cogens* as[57]

> a peremptory norm of general international law accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Unfortunately, that is as far as the judge went. He did not elaborate.

Under the universal jurisdiction principle, each and every state has jurisdiction to prosecute particular offences.[58] The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole. Enabling all states to share the right to jurisdiction in this way is meant to function as a guarantee

53 O Triffterer *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article* (2008) 791.

54 n 50 above 2.

55 As above.

56 As above.

57 n 3 above.

58 MN Shaw *International law* (1997) 470.

against impunity and prevent the alleged perpetrators of heinous crimes from finding a safe haven in third countries.[59] There are two categories of offences that clearly belong to the sphere of universal jurisdiction – piracy and war crimes. Whilst there is not a generally-accepted definition of [universal] jurisdiction under customary and conventional international law,[60] attempts have nevertheless been made to define the principle. Under the Princeton Principles on Universal Jurisdiction, universal principle is[61]

> criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

However, the challenge of relying on the principle to assert criminal jurisdiction over foreigners for acts committed abroad is evidenced by the reality that almost everything about it is contested. Even those states that have incorporated the principle into their national laws have reflected widely varied understandings of the concept.[62]

The universal principle has not only come under critical review in Africa but, in some instances, its application has created tension even among countries with long-standing political ties. Belgium's law on universal jurisdiction created tensions with the United States of America with the latter's Defence Secretary, Donald Rumsfeld, threatening to move the North Atlantic Treaty Organisation (NATO) headquarters from Brussels if the law remained in effect.[63] In Africa, the principle first attracted the attention of the AU when judges in France and Spain indicted some high-ranking Rwandan government officials for the shooting down of former Rwandan President Juvenal Habyarimana's plane, an act that sparked the 1994 Rwanda genocide. This resulted in the AU *inter alia* declaring that the abuse and misuse of the principle of universal jurisdiction by judges from non-African states against African leaders, *particularly Rwanda*, is a clear violation of the sovereignty and territorial integrity of these states.[64]

---

59 G Bottini 'Universal jurisdiction after the creation of the International Criminal Court' (2004) 36 *New York University Journal of International Law and Politics* 512.

60 CC Jalloh 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction' (2010) 21 *Criminal Law Forum* 1 6.

61 Principle 1(1) Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 28 (2001) http://www1.umn.edu/humanrts/instree/princeton.html (accessed 29 January 2012).

62 Dissenting Opinion by Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant* case, para 46. See also dissenting opinion of Judge Oda's posting that 'the court has shown wisdom in refraining from taking a definitive stance [in respect of universal jurisdiction] as the law is not sufficiently developed' (para 12).

63 n 59 above 550.

64 Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/14 (XI) para 5(ii) (my emphasis).

Leaving politics aside, the principle of universal jurisdiction in regard to international crimes that constitute violations of *jus cogens* is authorised by international law. In fact, states may accept and recognise a norm that creates an international crime as a basic principle of international law from which derogation is permitted but, in practice, they are free to determine for themselves whether the application of the universal principle is best to address the crime in question.[65] In other words, the competence of municipal tribunals to actually exercise the universal principle and the conditions under which such tribunals may actually exercise it are determined by the state concerned.[66]

Judge Ombija should not have applied the principle of universal jurisdiction in the Bashir case at all, as the case arises out of the jurisdiction of an international criminal tribunal, namely, the ICC. A distinction ought to be made between universal jurisdiction and the ICC. Whilst the former is an exceptional basis of jurisdiction which is exercised unilaterally by a state and does not necessarily involve an international organisation, the latter is exercised by an international body to which states have expressly agreed to delegate the power to enforce certain parts of international criminal law.[67] Simply put, the jurisdiction of an international tribunal is not constrained by where the crime was committed or the nationality of the accused or the victim. Mention must be made of the fact that at the Rome conference there was a heated debate between countries who argued in favour of including the universal jurisdiction in the ICC Statute and those who opposed it, such as the United States of America.[68] In the end, the jurisdictional scheme that was ultimately adopted in the treaty rejected universal jurisdiction, providing instead that the ICC could exercise jurisdiction when either the defendant was a national of the state party to the treaty or the crime was alleged to have been committed on the territory of a state party.[69]

4 Conclusion

Between November 2011 and January 2012, a Kenyan court ruled in favour of, first, the arrest and surrender, and, second, issued a provisional warrant of arrest for the Sudanese President Bashir should he ever visit Kenya again. In doing this, the court argued that it is

65 n 59 above 518.

66 I am grateful to the anonymous reviewer who drew me to this tangent of the argument.

67 n 59 above 513.

68 See generally MH Morris 'Universal jurisdiction in a divided world: Conference remarks' (2001) 35 *New England Law Review* 350.

69 As above.

implementing the decision of the ICC to which Kenya, as a state party, has obligations to execute. Unfortunately, in ordering the arrest and surrender of Bashir, the court did not expound on some of the most outstanding issues concerning the immunities possessed by a sitting president of a state which is not a state party to the Rome Statute. There clearly appears to be a clash between the obligations imposed by articles 27 and 98(1) of the Rome Statute. The Kenyan court would have scored a first had it resolved this issue, which the ICC has hitherto not fundamentally resolved.

The judge erred in applying the universal jurisdiction principle to the Bashir case because the Bashir indictment is founded upon the jurisdiction of the ICC and not that of the principle of universal jurisdiction. Moreover, it should be emphasised that the jurisdiction of the ICC is founded upon territorial (exercise of criminal jurisdiction by a state in its territorial home) and active personality (exercise of criminal jurisdiction by a state based on the nationality of the person) principles of jurisdiction.

AFRICAN HUMAN RIGHTS LAW JOURNAL
GUIDELINES FOR CONTRIBUTORS

Contributions should preferably be e-mailed to
isabeau.demeyer@up.ac.za

but may also be posted to:
The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria
South Africa
0002

All correspondence, books for review and other communications should be sent to the same address.

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission should not already have been published or submitted elsewhere.
- Articles that do not conform to the *African Human Rights Law Journal*'s style guidelines will be rejected out of hand.
- The *African Human Rights Law Journal* utilises plagiarism detection software. Please ensure that submissions do not infringe other persons' intellectual property rights.
- 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), 1 ½ 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'.
- Refer to the *Journal* or www.chr.up.ac.za for additional aspects of house style.

THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see **www.chr.up.ac.za** or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
Fax: (012) 362-5125
chr@up.ac.za

Staff

Adem Abebe
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Horace Adjolohoun
Alumni Co-ordinator; Doctoral candidate

Kweku Antwi
Project Manager: Advanced Human Rights Courses

Melhik Bekele
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Yolanda Booyzen
Webmaster

Danny Bradlow
SARCHI Professor of International Development Law and African Economic Relations

Danie Brand
Managing Editor: Pretoria University Law Press

Sukoluhle Joy Chilongo
Administrative Assistant: Advanced Human Rights Courses

Elize Delport
Consultant: Gender Unit; Extraordinary Lecturer

Isabeau de Meyer
Publication Manager: *African Human Rights Law Journal*; Administrator: LLM (Human Rights and Democratisation in Africa)

Michelo Hansungule
Professor of Human Rights Law; Academic Co-ordinator: LLM (Multidisciplinary Human Rights)

Lizette Hermann
Manager: Pretoria University Law Press

Ademola Jegede
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Busingye Kabumba
Project Assistant: Disability Rights

Magnus Killander
Senior Lecturer and Head of Research

Berita Kopolo
Tutor: LLM (International Trade and Investment Law in Africa); Doctoral candidate

Dan Kuwali
Post-doctoral Fellow

Emily Laubscher
Assistant Financial Manager

Eric Lwanga
Programme Co-ordinator: LLM (Human Rights and Democratisation in Africa)

Harold Meintjes
Financial Manager

Jehoshaphat Njau
Academic Associate

Martin Nsibirwa
Programme Manager: LLM (Human Rights and Democratisation in Africa)

Sarita Pienaar-Erasmus
Assistant Financial Manager

Ally Possi
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Ololade Shyllon
Project Administrator; Doctoral candidate

Olufemi Soyeju
Tutor: LLM (International Trade and Investment Law in Africa); Doctoral candidate

Norman Taku
Assistant Director

Armand Tanoh
Project Manager: African Human Rights Moot Court Competition; Doctoral candidate

Carole Viljoen
Operations Manager

Frans Viljoen
Director

Extraordinary/Honorary professors

Jakkie Cilliers
Director, Institute for Security Studies

Mustaqeem de Gama
Acting Director of International Trade and Economic Development, Department of Trade and Industry

John Dugard
Member, International Law Commission

Johann Kriegler
Retired Justice of the Constitutional Court of South Africa

Edward Kwakwa
Legal Counsel, World Intellectual Property Organisation, Geneva, Switzerland

Cephas Lumina
Independent Expert of the United Nations Human Rights Council

Yvonne Mokgoro
Retired Justice of the Constitutional Court of South Africa

Kenneth Mwenda
Senior Counsel, World Bank, Washington DC, USA

David Padilla
Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Mary Robinson
President, Mary Robinson Foundation – Climate Justice, Northern Ireland

Johann van der Westhuizen
Justice of the Constitutional Court of South Africa

Extraordinary lecturers

Jean Allain
Professor of Public International Law, Queen's University of Belfast, Northern Ireland

Cecile Aptel
Professor of Law, Fletcher School of Law, Boston, USA

Elize Delport
Consultant

Oagile Dingake
Justice of the Botswana High Court

Solomon Ebobrah
Co-ordinator and Senior Lecturer, Department of Jurisprudence and Public Law, Niger Delta University, Nigeria

Nicole Fritz
Executive Director, Southern Africa Litigation Centre

Asha Ramgobin
Executive Director, Human Rights Development Initiative

Advisory board

Johann Kriegler
Retired Justice of the Constitutional Court of South Africa

Shirley Mabusela
Former Deputy Chairperson, South African Human Rights Commission

Yvonne Mokgoro
Retired Justice of the Constitutional Court of South Africa

Johann van der Westhuizen
Justice of the Constitutional Court of South Africa

Projects and programmes

- African Human Rights Moot Court Competition
- Master's Programme (LLM) in Human Rights and Democratisation in Africa
- Master's Programme (LLM) in International Trade and Investment Law in Africa
- Master's Programme (LLM/MPhil) in Multidisciplinary Human Rights
- Gender Unit
- HIV/AIDS and Human Rights (with the Centre for the Study of AIDS)

- Good Governance Programme
- Indigenous Peoples' Rights in Africa

Regular publications

- *African Human Rights Law Journal*
- *African Human Rights Law Reports* (English and French)
- *Constitutional Law of South Africa*

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2012
Compiled by: I de Meyer
Source: http://www.africa-union.org (accessed 30 September 2012)

	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	**28/06/12**
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	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97			24/08/11
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		11/07/11	11/07/11
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	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
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	10/01/11	
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	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		**16/04/12**	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11
Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
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		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
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			17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
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	**24/01/12**
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	**53**	**45**	**46**	**26**	**35**	**17**

* Additional declaration under article 34(6)
Ratifications after 31 December 2011 are indicated in bold