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Editorial

This volume of the *African Human Rights Law Journal* appears as we are about to herald in 2016: the year that the African Union (AU) dedicates to human rights, with a focus on the rights of women. That the continental body has earmarked 2016 as 'African Year of Human Rights' is certainly to be welcomed; nevertheless, it is important that the year be one of critical stocktaking dedicated to our collective expression of concern, care and the need for corrective action.

This move by the AU as an institution – and by its member states – reflects a growing acceptance of the pivotal place of human rights on the continent – at least at the discursive level. Greater state involvement in the African human rights system is indeed laudable and is required to invigorate the system and to ensure its effective functioning. Experience has, however, shown that some states may attempt to usurp and dominate the human rights space and exploit their participation in the human rights discourse to demonise and delegitimise human rights defenders. By creating government-organised non-governmental organisations ('GONGOs') to participate in human rights fora, states may, for example, aim to distort and undermine human rights work on the continent. In similar vein, some caution may be expressed about the creation of a Pan-African Institute for Human Rights (PAIHR). To be established by 2016, the Institute is aimed at supporting the AU's human rights mechanisms. It is a matter of concern that the Institute is set to function as part of the AU's Department of Political Affairs, rather than as an independent entity, such as the Inter-American Institute of Human Rights, based in Costa Rica.

This volume of the *Journal* covers diverse and topical issues related to groups particularly vulnerable to human rights violations: persons living with HIV (PLHIV); lesbian, gay, bisexual or transgender (LGBT) persons; and women and girls. In his wide-ranging and comprehensive analysis, Eba categorises HIV-specific legislation in sub-Saharan Africa, and assesses the extent to which these laws have supported or threatened the rights of PLHIV. Addressing an issue of particular significance - the rights of LGBT persons - Ibrahim examines the discourse around LGBT persons, and its relevance for and resonance with Africa.

Turning to the AU landscape: Amvane joins the debate on the need for UN Security Council authorisation of AU intervention action undertaken pursuant to article 4(h) of its Constitutive Act; and

Windridge analyses the first merits decision of the AU's 'judicial branch', the African Court on Human and Peoples' Rights.

Turning to the domestic arena, Kaaba investigates the challenges African courts experience in adjudicating electoral disputes related to presidential elections. Vettori asks whether mandatory mediation poses an obstacle to access to justice. Continuing on the theme of access to justice, Bamgbose explains the link between clinical legal education, greater access to justice, and good governance. Focusing on an often-neglected segment of Nigerian society, Okafor and Ugochukwu explore the agency of 'the poor' in the jurisprudence of Appellate Courts in that country.

The next four contributions each focuses on a precarious aspect of women's rights – child marriage; access to contraception; impunity for sexual violence; and justice for the survivors of sexual violence perpetrated during armed conflict. All these contributions speak to pressing contemporary issues. Nwauche's contribution on child marriage, in particular, comes at an appropriate time, following in the wake of the First African Girls' Summit on Ending Child Marriage in Africa, held in Lusaka, Zambia, at the end of November 2015. Comparing the situation in Nigeria and South Africa, Savage-Oyekunle and Nienaber emphasise the crucial role of available information on contraception to give adolescent girls real access to contraceptive services. In their respective contributions, Kitharidis and Tunamsifu draw academic attention to the vexing and distressing on-going prevalence of rape, other sexual violence and impunity in the Democratic Republic of the Congo.

The final two articles in the *Journal* (by Mubangizi and Njotini) focus on aspects of the human rights situation in South Africa.

In the section on recent developments, Killander provides an overview of the most salient developments on the AU human rights landscape during 2014. The final two contributions in this section relate to judgments of the South African High Court. Van der Vyver takes a stand on the failure of the South African government, ignoring a decision of the High Court, to arrest Sudanese President and indictee before the International Criminal Court, Omar Al Bashir. Mujuzi discusses the issue of juristic persons' competence to bring private prosecutions, as it arose in a recent decision of the South African High Court.

The editors wish to thank the independent reviewers mentioned below, who so generously assisted in ensuring the consistent quality of the *Journal*: Sandy Africa; Akinola Akintayo; Miriam Azu; Gina Bekker; Pierre Brouard; Bonolo Dinokopila; John Dugard; Ebenezer Durojaye; Christof Heyns; Katy Hindle; Meetali Jain; Adrian Jjuuko; Anne Louw; Serges Kamga; Edward Kwakwa; Victor Lando; Joanna Mansfield; Stuart Maslen; Benyam Mezmur; Gino Naldi; Charles Ngwena; Chinedu Nwagu; Katherine O'Regan; Annabel Raw; Remi

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HIV-specific legislation in sub-Saharan Africa: A comprehensive human rights analysis

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Summary

As at 31 July 2014, 27 sub-Saharan African countries had adopted HIV-specific legislation to address the legal issues raised by the HIV and AIDS epidemics. The article provides the first comprehensive analysis of key provisions in these HIV-specific laws. It shows that HIV-specific laws include both protective and punitive provisions. Protective provisions often covered in these laws relate to non-discrimination in general or in specific areas, such as employment, health, housing and insurance. However, these non-discrimination provisions are often not strong enough to fully protect the human rights of people living with HIV and those affected by the epidemic. Punitive or restrictive provisions appear to be a defining feature of HIV-specific laws, both in terms of the number of countries that have adopted them and with regard to the diversity of restrictive provisions provided in these laws. Restrictive provisions often covered in HIV-specific laws include compulsory HIV testing, particularly for alleged sexual offenders, involuntary partner notification and criminalisation of HIV non-disclosure, exposure and transmission. In the great majority of cases, these provisions are overly broad, they disregard best available recommendations for legislating on HIV, fail to pass the human rights test of necessity, proportionality and reasonableness, consecrate myths and prejudice about people living with HIV, and risk undermining effective

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responses to the HIV epidemic. While noting these gaps and concerns in HIV-specific laws, the article calls for ensuring the effective implementation and enforcement of their protective provisions, while devising strategies to address their restrictive stipulations.

Key words: *HIV and AIDS; HIV-specific laws; non-discrimination; criminalisation; non-disclosure; exposure; transmission; human rights norms; Africa*

1 Introduction

The human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) epidemics remain a serious public health challenge facing sub-Saharan Africa. In 2013, there were an estimated 24,7 million people living with HIV in sub-Saharan Africa, representing some 71 per cent of the global total.[1] In 2012, there were 1,2 million deaths due to AIDS-related illnesses in the region.[2] As of December 2012, an estimated 15 million children in sub-Saharan Africa had lost one or both parents to AIDS.[3] Although important progress has been made in the response to HIV in the region – with a decline in new HIV infections and a significant increase in access to anti-retroviral treatment – the epidemic remains a leading cause of death.[4] Moreover, serious social, legal and policy issues, such as stigma, discrimination, gender inequality and other negative norms and practices that make people vulnerable to HIV and hinder their access to HIV services, remain largely unchallenged.[5]

The law is considered a structural tool that can shape individual behaviour in the context of public health challenges such as HIV, and orient the manner in which states respond to these challenges.[6] Consequently, all sub-Saharan African countries[7] have adopted legislative, policy or other measures to respond to HIV. In their legal responses, many countries in the region (27 out of 45) have resorted to HIV-specific laws, as opposed to other forms of legislation (see annexure). Sometimes referred to as omnibus HIV legislation, HIV-specific laws are legislative texts that address, in a single document, several aspects of HIV, such as HIV-related education and

1 UNAIDS *The gap report* (2014) 26.

2 UNAIDS *Global Report. UNAIDS Report on the Global AIDS Epidemic* (2013) A43.

3 UNICEF *Towards an AIDS-Free Generation. Children and AIDS: Sixth Stocktaking Report 2013* (2013).

4 See UNAIDS *How AIDS changed everything. MDG 6: 15 years, 15 lessons of hope from the AIDS response* (2015).

5 See Global Commission on HIV and the Law *HIV and the law: Risks, rights and health* (2012); CI Grossman & AL Stangl (eds) 'Global action to reduce HIV stigma and discrimination' (2013) 16 *Journal of the International AIDS Society* 18881.

6 See, eg, J Hamblin 'The role of the law in HIV/AIDS policy' (1991) 5 *AIDS* s239-s243; L Gable et al 'A global assessment of the role of law in the HIV/AIDS pandemic' (2009) 123 *Public Health* 260-264.

communication, HIV testing, non-discrimination based on HIV status, HIV prevention, treatment, care and support and HIV-related research.[8] Many countries in sub-Saharan Africa have resorted to HIV-specific laws because these laws make it possible, through a single piece of legislation, to address several aspects of the response to HIV, as opposed to the challenges and delays inherent in the adoption of a multitude of legislative amendments dealing with different aspects of HIV.[9]

Before November 2005, only three countries in sub-Saharan Africa (Angola, Burundi and Equatorial Guinea) had adopted HIV-specific laws. The 2004 development of Model Legislation on HIV/AIDS for West and Central Africa (also known as the N'Djamena Model Law) transformed the legislative landscape on HIV in sub-Saharan Africa and, particularly, in West and Central Africa.[10] Four years later, some 13 West and Central African countries had adopted HIV-specific laws largely based on the N'Djamena Model Law.[11] Although presented as

7 This article uses the regional grouping of countries of the Joint United Nations Programme on HIV/AIDS (UNAIDS). Under UNAIDS's regional grouping of countries, there are 45 sub-Saharan African countries, namely, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, The Democratic Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Sierra Leone, South Africa, South Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

8 In a few cases, these laws also deal with the establishment of national mechanisms for responding to the HIV epidemic, such as national AIDS commissions. P Eba 'One size punishes all … A critical appraisal of the criminalisation of HIV transmission or exposure through HIV-specific laws in sub-Saharan Africa' (2008) *AIDS Legal Quarterly* 1.

9 Countries such as South Africa, Botswana and Namibia have addressed HIV issues in general legislation without adopting HIV-specific laws. In South Africa, the Law Reform Commission under its Project 85 conducted a thorough review of legal issues relating to HIV, including employment, discrimination in schools, the criminalisation of HIV exposure or transmission and compulsory HIV testing of alleged sexual offenders. The review identified various areas for law reform, through general laws, to better respond to HIV and to protect human rights. See 'South African Law Reform Commission: Reports' http://www.justice.gov.za/salrc/reports.htm (accessed 15 November 2014).

10 See AWARE-HIV/AIDS 'Regional workshop to adopt a model law for STI/HIV/AIDS for West and Central Africa: General report N'Djamena, 8-11 September 2014' (on file with author).

11 See R Pearshouse 'Legislation contagion: The spread of problematic new HIV laws in Western Africa' (2007) 12 *HIV/AIDS Policy and Law Review* 1-12.

12 As above; Canadian HIV/AIDS Legal Network 'A human rights analysis of the N'Djamena model legislation on AIDS and HIV-specific legislation in Benin, Guinea, Guinea-Bissau, Mali, Niger, Sierra Leone and Togo' 2007 http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530 (accessed 8 November 2014); 'Africa: "Terrifying" new HIV/AIDS laws could undermine AIDS fight' *Irinnews* 7 August 2008 http://www.irinnews.org/report/79680/africa-terrifying-new-hiv-aids-laws-could-undermine-aids-fight (accessed 8 November 2014); 'West Africa: HIV law "a double-edged sword"' *Irinnews* 1 December 2008 http://www.irinnews.org/report/81758/west-africa-hiv-law-a-double-edged-sword (accessed 8 November 2014); UNAIDS 'UNAIDS recommendations for alternative language to some problematic articles in the N'Djamena legislation on HIV (2004)' 2008

a model approach to legislating on HIV, it has been criticised for its embrace of coercive approaches that violate human rights and risk undermining the existing response to HIV.[12]

On 31 July 2014, Uganda became the twenty-seventh sub-Saharan African country to enact HIV-specific legislation following assent by the Head of State to the HV and AIDS Prevention and Control Act.[13] This Act was criticised on the grounds that it raised both human rights and public health concerns similar to those in the N'Djamena Model Law.[14]

More than a decade after the first HIV-specific laws were adopted in sub-Saharan Africa, there is merit in conducting a comprehensive analysis of these laws to examine their key provisions against human rights and public health standards relating to HIV. The present desk research does this by focusing on 26 of the 27 HIV-specific laws that have been adopted in the region as of 31 July 2014.[15] The study first describes global, regional and sub-regional human rights norms and public health recommendations that are relevant to HIV. It then uses these norms and recommendations as the framework for assessing how HIV-specific laws address four key issues, namely, HIV-related discrimination, rights violations in the workplace, HIV testing and the criminalisation of HIV non-disclosure, exposure and transmission. The study concludes with remarks on whether HIV-specific laws advance human rights in the context of HIV and makes specific recommendations for improving them.

2 Human rights norms applicable in the context of HIV

Although no global human rights treaty expressly addresses HIV, there are a wealth of norms and principles in general human rights treaties that are relevant to HIV and to the protection of people living with or affected by the epidemic. In particular, the open-ended grounds for prohibiting discrimination based on 'other status' in the International Covenant on Civil and Political Rights (ICCPR),[16] the International

http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/manual/2008/20080912_alternativelanguage_ndajema_legislation_en.pdf (accessed 25 January 2015); D Grace 'Legislative epidemics: The role of model law in the transnational trend to criminalise HIV transmission' (2013) 39 *Medical Humanities* 77-84.

13 R Ninsiima 'Uganda: HIV law – After assent, Museveni under fire' *The Observer* 22 August 2014 http://allafrica.com/stories/201408220430.html (accessed 8 November 2014).

14 As above.

15 The analysis does not cover the HIV law of Equatorial Guinea. Although research confirmed the existence of HIV-specific law in this country, efforts to secure a copy of this legislation were not successful.

16 International Covenant on Civil and Political Rights, adopted 16 December 1966, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171. See art 2.

Covenant on Economic, Social and Cultural Rights (ICESCR),[17] and the Convention on the Rights of the Child (CRC)[18] have been or can be interpreted to include non-discrimination based on health and HIV status.[19] The provisions in these global treaties relating to the rights to liberty, security, equality, health, education, free and fair trial, among others, are also relevant to the HIV epidemic and for people living with or affected by HIV.[20] The monitoring bodies established under these treaties have on several occasions in General Comments and Concluding Observations affirmed relevant norms as being applicable to HIV.[21]

Similar to the situation at the global level, regional African human rights treaties – with the exception of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[22] – do not explicitly address HIV. However, key provisions, such as those relating to non-discrimination, liberty and security, health, education, prohibition of torture, inhuman and degrading treatment in the African Charter on Human and Peoples' Rights (African Charter),[23] the African Women's Protocol and the African Charter on the Rights and Welfare of the Child (African Children's Charter)[24] are relevant and applicable to HIV.[25] For example, in *Odafe & Others v Attorney-General & Others*,[26] the High Court of Nigeria invoked article 16 of the African Charter to vindicate the right of access to HIV treatment for prisoners.

In contrast to the silence of global and regional treaties on HIV, there is a wealth of non-binding instruments that assert human rights and public health recommendations in the context of HIV. Chief among these are the international guidelines on HIV/AIDS and human

17 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3. See art 2.

18 Convention on the Rights of the Child, adopted 20 November 1989, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989). See art 2(1).

19 See, in particular, ESCR Committee 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2 of the International Covenant on Economic, Social and Cultural Rights)' 2 July 2009 E/C 12/GC/20; Committee on the Rights of the Child 'General Comment No 3 (2003): HIV/AIDS and the rights of the child' CRC/GC/2003/1.

20 See AIDS and Human Rights Research Unit *Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa* (2007).

21 As above.

22 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 13 September 2000, CAB/LEG/66.6. Art 14 of the African Women's Protocol explicitly addresses HIV and AIDS under health and reproductive rights.

23 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.

24 African Charter on the Rights and Welfare of the Child, adopted 11 July 1990, OAU Doc CAB/LEG/24.9/49; reprinted in Heyns & Killander (n 23 above) 77.

25 See AIDS and Human Rights Research Unit (n 20 above).

26 (2004) AHRLR 205 (NgHC 2004).

rights (International Guidelines) developed by the Second International Consultation on HIV/AIDS and Human Rights convened by UNAIDS and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in September 1996.[27] In addition, the resolutions adopted by the UN General Assembly Special Session on HIV in 2001,[28] the High-Level Meetings on HIV in 2006[29] and 2011,[30] as well as the resolutions on HIV of the Commission on Human Rights and later the Human Rights Council, also provide specific standards for the protection of human rights in the context of HIV.[31] Finally, best practice recommendations for legislating on HIV, including those issued by the Inter-Parliamentary Union (IPU), UNAIDS, the United Nations Development Programme (UNDP) and the International Labour Organisation (ILO) are relevant to legal responses to HIV.[32]

At regional and sub-regional levels in Africa, several non-binding instruments have been adopted in relation to HIV by the African Union (AU), the African Commission on Human and Peoples' Rights (African Commission), the East African Community (EAC), the Inter-Governmental Authority on Development (IGAD) and the Southern African Development Community (SADC).[33]

Finally, general human rights provisions in the constitutions, legislation and case law of many sub-Saharan African countries offer standards for addressing HIV and for ensuring the protection of people living with or affected by the epidemic. For example, in *Banda v Lekha*,[34] the Industrial Court of Malawi asserted the applicability of the right to non-discrimination to HIV provided under the country's

27 Commission on Human Rights 'The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)' E/CN.4/RES/1997/33 11 April 1997 http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4480 (accessed 7 March 2015). The International Guidelines were revised in 2002 (Guideline 6) and a consolidated version was published by UNAIDS and OHCHR in 2006. Reference to the International Guidelines in the present article relates to this consolidated version. UNAIDS & OHCHR *International Guidelines on HIV/AIDS and Human Rights, 2006 consolidated version* (2006).

28 UN General Assembly Special Session on HIV/AIDS Declaration of Commitment on HIV/AIDS (A/RES/S-26/2) June 2001.

29 UN General Assembly Political Declaration on HIV/AIDS (A/RES/60/262) 15 June 2006.

30 UN General Assembly Political Declaration on HIV and AIDS: Intensifying our efforts to eliminate HIV and AIDS UN Doc A/RES/65/277 10 June 2011.

31 For an overview of the resolutions on HIV of the Commission on Human Rights and the Human Rights Council, see http://www2.ohchr.org/english/issues/hiv/document.htm (accessed 7 March 2015).

32 See, notably, UNAIDS & IPU *Handbook for legislators on HIV/AIDS, law and human rights: Action to combat HIV/AIDS in view of its devastating human, economic and social impact* (1999); UNAIDS, UNDP & IPU *Taking action against HIV and AIDS: Handbook for parliamentarians* (2007); UNDP *Legal environment assessment: An operational guide to conducting national legal, regulatory and policy assessments for HIV* (2014); International Labour Conference *Recommendation 200: Recommendation concerning HIV and AIDS and the world of work* 99th session, 17 June 2010.

33 AIDS and Human Rights Research Unit (n 20 above).

34 (2005) MWIRC 44.

Constitution. The Court held that '[s]ection 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of ... HIV status, it is to be implied that it is covered under the general statement of anti-discrimination in any form.'

3 A human rights analysis of four key areas covered in HIV-specific laws

A review of HIV-specific laws in sub-Saharan Africa shows that these laws cover a broad range of issues, from non-discrimination based on HIV status to HIV education and information, blood and tissue safety, HIV testing and counselling, disclosure and notification of HIV test results and the criminalisation of HIV non-disclosure, exposure or transmission (Table 1). However, this analysis focuses on: HIV-related discrimination, HIV-related protection in the workplace, HIV testing and the criminalisation of HIV non-disclosure, exposure and transmission. Three reasons motivate the selection of these issues. First, they are among those most covered in HIV-specific legislation in sub-Saharan Africa (Table 1) and, as such, allow for a comparative analysis. Second, they are among the most critical to effective HIV responses and to the protection of the rights of people living with HIV. Finally, they have attracted the most criticism and concerns.[35]

Table 1: Key issues addressed in HIV-specific laws in sub-Saharan Africa

Issue/area	Non-discrimination	Employment	HIV testing and counselling	Criminalisation of HIV non-disclosure, exposure and transmission
Number of HIV-specific laws addressing the issue (out of 26)	26	26	26	24 (except Comoros and Mauritius)

35 See, eg, Pearshouse (n 11 above); Canadian HIV/AIDS Legal Network (n 12 above); 'Africa: "Terrifying" new HIV/AIDS laws could undermine AIDS fight' (n 12 above); C Kazatchkine 'Criminalising HIV transmission or exposure: The context of Francophone West and Central Africa' (2010) 14 *HIV/AIDS Law and Policy Review* 1-11; P Sanon et al 'Advocating prevention over punishment: The risks of HIV criminalisation in Burkina Faso' (2009) 17 *Reproductive Health Matters* 146-153; IPPF *Verdict on a virus: Public health, human rights and criminal law* (2008).

3.1 HIV-related discrimination

Translating international norms into specific guidance on non-discrimination in the context of HIV, the International Guidelines recommend that[36]

> [g]eneral anti-discrimination laws should be enacted or revised to cover people living with asymptomatic HIV infection, people living with AIDS and those merely suspected of HIV or AIDS. Such laws should also protect groups made more vulnerable to HIV/AIDS due to the discrimination they face … Direct and indirect discrimination should be covered, as should cases where HIV is only one of several reasons for a discriminatory act.

In terms of the International Guidelines and other relevant legislative guidance,[37] appropriate HIV-related non-discrimination provisions should cover the following: (i) actual or perceived HIV status; (ii) the HIV status of a person and that of others associated with them (eg family members or friends); (iii) indirect discrimination; and (iv) critical areas of protection, such employment, education, health and insurance and credit.

All 26 HIV-specific laws include one or more provisions that prohibit discrimination based on HIV status. In a significant number of countries (19 out of 26), these provisions prohibit discrimination based on both actual and presumed (or perceived) HIV status.[38] A handful of countries (five out of 26)[39] explicitly prohibit discrimination based on another person's HIV-positive status, and only one country (Chad)[40] explicitly prohibits indirect discrimination.

In 12 HIV-specific laws, anti-discrimination provisions include both a general prohibition of discrimination as well as specific provisions that prohibit discrimination in particular areas, such as employment, education, health, housing and insurance.[41] Twelve countries prohibit discrimination in specific areas without an overarching non-discrimination provision.[42] A total of 24 HIV-specific laws address HIV-related discrimination in specific areas. Only two countries (Mauritania and Mauritius) have a general non-discrimination provision without other clauses addressing discrimination in specific areas.[43] The areas most covered by the prohibition of discrimination include

36 OHCHR & UNAIDS (n 27 above) 31-32.

37 See n 32 above.

38 Burkina Faso (art 2); Cape Verde (arts 24(1) & 25); Comoros (art 17); Congo (art 27); Côte d'Ivoire (art 18); DRC (arts 10 & 20); Guinea-Bissau (art 29); Kenya (arts 31 & 32); Liberia (art 18(28)); Madagascar (arts 2 & 44); Mali (art 30); Mauritania (art 21); Mauritius (art 3); Niger (art 29); Senegal (art 24); Sierra Leone (art 39); Tanzania (arts 30 & 31); Togo (art 23); and Uganda (art 32).

39 Congo (art 27); DRC (arts 18 & 20); Madagascar (arts 2 & 39); Niger (art 29); and Togo (art 23).

40 Chad (art 28).

41 Benin, Burkina Faso, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Madagascar, Mozambique, Niger, Tanzania and Togo.

42 Angola, Burundi, Cape Verde, DRC, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Senegal, Sierra Leone and Uganda.

43 Mauritania (art 21) and Mauritius (art 3).

employment, education, health care, and access to insurance and credit. All 24 laws covering specific areas of discrimination either explicitly prohibit HIV-related discrimination in employment or forbid HIV testing as a condition for employment. Some 20 countries explicitly prohibit discrimination based on HIV status in education.[44] A total of 19 countries prohibit HIV-related discrimination in access to health care,[45] and some 17 countries prohibit HIV-related discrimination in accessing insurance and credit.[46]

The prohibition of discrimination based on actual or perceived HIV status in almost all HIV-specific laws is important to protect individuals who may face discrimination, not because they are HIV positive, but for belonging to a group that is perceived to be at a higher risk of HIV infection, particularly sex workers, men who have sex with men and people who inject drugs. Members of these populations may experience HIV-related discrimination because their lifestyle, behaviour or life circumstances often lead to suspicion that they are living with HIV.

Of concern is the limited number of countries that explicitly cover non-discrimination based on someone else's HIV status. The failure to address this form of discrimination constitutes a gap because the fear and stigma relating to HIV may lead to many individuals being discriminated against, not because of their own HIV status, but because of that of their parents, spouses, relatives or associates. This gap particularly may affect children who could experience discrimination based on their parents' or caregivers' HIV-positive status.[47] The lack of attention in HIV-specific laws to indirect discrimination is also concerning because only one country explicitly addresses it. Indirect discrimination refers to 'laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of … rights as distinguished by prohibited

44 Angola (sec 5(g)); Benin (art 2); Burkina Faso (art 16); Burundi (art 32); Cape Verde (art 25); Chad (art 29); Comoros (art 23); Congo (art 29); DRC (art 16); Guinea-Bissau (art 30(1)); Kenya (art 32); Liberia (art 18(28)(c)); Madagascar (art 39); Mali (art 31); Mozambique (art 17); Niger (art 32); Senegal (art 25); Sierra Leone (art 40); Togo (art 26); and Uganda (art 33).

45 Angola (sec 5(a)); Benin (art 2); Burkina Faso (art 16); Cape Verde (art 29); Central African Republic (art 14); Comoros (art 21); Congo (art 26); DRC (art 10); Guinea (art 15); Guinea-Bissau (art 34); Kenya (art 36); Liberia (art 18(28)(c)); Madagascar (art 62); Mali (art 35); Senegal (art 29); Sierra Leone (art 44); Tanzania (art 29); Togo (arts 39 & 40); and Uganda (art 37).

46 Angola (sec 9); Benin (art 22); Burkina Faso (art 19); Burundi (art 38); Cape Verde (art 28); Chad (art 39); Comoros (art 26); Guinea (art 6); Guinea-Bissau (art 33); Kenya (art 35); Liberia (art 18(28)(c)); Mali (art 34); Niger (art 34); Senegal (art 28); Sierra Leone (art 43); Togo (arts 34 & 36); and Uganda (art 36).

47 See, eg, J Cohen 'Southern Africa: AIDS-affected children face systemic discrimination in accessing education' (2005) 10 *HIV/AIDS Policy and Law Rev*iew 24-25; Human Rights Watch 'Letting them fail: Government neglect and the right to education for children affected by AIDS' October 2005 http://www.hrw.org/sites/default/files/reports/africa1005.pdf; PJ Surkan et al 'Perceived discrimination and stigma toward children affected by HIV/AIDS and their HIV-positive caregivers in central Haiti' (2010) 22 *AIDS Care* 803-815.

grounds of discrimination'.[48] For example, a law or policy requiring a physical medical examination as a pre-condition to enrol in schools could constitute indirect discrimination towards children living with HIV who may not be able to pass the test.[49]

A further weakness in several non-discrimination provisions is that they do not prohibit discrimination generally but rather forbid specific discriminatory acts. For instance, in relation to non-discrimination in education, some HIV-specific laws only prohibit the refusal to allow entry into schools without attention to other measures that could be discriminatory towards HIV-positive learners in the context of education. This is, for instance, the case in the HIV laws of Niger,[50] Togo[51] and Guinea-Bissau.[52] Such provisions are too narrow in scope and would leave persons living with HIV, particularly children, without explicit protection in many instances.

In general, provisions in HIV-specific laws relating to non-discrimination in employment are more comprehensive than those dealing with non-discrimination in other areas. While one would understand the importance of devoting specific attention to non-discrimination in employment, there is no reason why areas such as education and health would not merit similar emphasis. Laconic non-discrimination provisions may in particular be problematic in areas such as insurance and access to credit. Most of the 17 HIV-specific laws with provisions relating to insurance and credit merely state that denial of insurance to people living with HIV is prohibited without elaborating on the nature or scope of insurance coverage or providing for subsequent regulations to appropriately address access to insurance and credit for people living with HIV.[53] Failure to precisely regulate these issues may, in practice, leave people living with HIV with limited protection against discriminatory practices by insurers.

3.2 HIV in employment

General human rights treaties (such as the ICCPR, the ICESCR and the African Charter) and specific HIV instruments (such as the International Guidelines) provide relevant principles on non-discrimination that apply to HIV and employment.[54] In addition, norms and principles on HIV in the workplace developed by the ILO

48 ESCR Committee (n 19 above) para 10(b).
49 A Meerkotter *Equal rights for all: Litigating cases of HIV-related discrimination* (2011) 25.
50 Art 32 HIV law of Niger.
51 Art 26 HIV law of Togo.
52 Art 30(1) HIV Law of Guinea-Bissau.
53 See, eg, sec 9 of the HIV law of Angola and art 18(28)(c) of the HIV law of Liberia.
54 In addition to general human rights treaties, all ILO Conventions applicable to the workplace are relevant in the context of HIV. ILO *HIV and AIDS and labour rights: A handbook for judges and legal professionals* (2013) 30-33.

provide frameworks for legislating on HIV in the workplace.[55] Chief among these is the ILO Recommendation concerning HIV and AIDS and the World of Work No 200 (Recommendation 200), which provides comprehensive guidance on addressing HIV in the context of employment.[56] Though not binding, Recommendation 200 is a standard adopted by ILO constituents (governments, employers and workers), which sets out key principles and rights relating to HIV in the workplace.[57]

On the basis of Recommendation 200 and other norms applicable to HIV in the workplace, this study identified six areas for assessing the provisions of HIV-specific laws relating to the workplace. The areas for assessment are (i) non-discrimination in employment; (ii) the prohibition of HIV testing as a condition for employment; (iii) privacy and confidentiality in the workplace; (iv) reasonable accommodation for HIV-positive workers; (v) access to post-exposure prophylaxis in case of occupation exposure and compensation in case of occupational HIV infection; and (vi) the requirement for HIV policies and programmes in the workplace.

As discussed in the section on non-discrimination above, all but two HIV-specific laws address HIV-related discrimination in the workplace.[58] In 11 countries, the prohibition of HIV-related discrimination in employment explicitly addresses both actual and perceived HIV status.[59] In two countries (Burkina Faso and Burundi), the provisions addressing HIV in the workplace are narrowly drafted and only prohibit HIV testing as a condition for employment.[60] None of the 26 countries with HIV-specific laws have adopted the full set of six measures that are necessary to effectively address HIV in the workplace. Nineteen countries have provisions that explicitly require governments or employers to put in place HIV employment policies,

55 For a discussion of ILO norms and principles applicable to HIV in the workplace, see ILO *HIV and AIDS and labour rights: A handbook for judges and legal professionals* (2013).

56 International Labour Conference (n 32 above). Also important is the *ILO Code of practice on HIV/AIDS and the world of work* (ILO Code of Practice on HIV) adopted in 2001. Unlike Recommendation 200 which is a standard, the ILO Code of Practice on HIV only sets out practical guidelines for consideration by public authorities, employers and workers. It is not a binding instrument and does not create a particular obligation on states.

57 ILO *Rules of the game: An introduction to international labour standards* Revised edition (2009) http://ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_108393.pdf (accessed 5 November 2014); L Swepston 'The future of ILO standards' (1994) 117 *Monthly Labour Review* 16-23.

58 The two exceptions are Mauritania and Mauritius.

59 Cape Verde (art 24); DRC (art 20); Guinea-Bissau (art 29); Kenya (art 31); Liberia (art 18(28)(b)); Madagascar (art 44); Mali (art 30); Senegal (art 24); Sierra Leone (art 39); Tanzania (art 30); and Uganda (art 32(1))

60 See art 19 of the HIV law of Burkina Faso and art 30(b) of the HIV law of Burundi.

training and programmes.[61] For example, the HIV law of Tanzania provides that[62]

> [e]very employer in consultation with the Ministry shall establish and co-ordinate a workplace programme on HIV and AIDS for employees under his control and such programmes shall include provision of gender-responsive HIV and AIDS education, distribution of condoms and support to people living with HIV and AIDS.

Twelve countries have provisions that explicitly provide for access to post-exposure prophylaxis in the workplace, for compensation in case of occupational transmission of HIV, or both.[63] For example, the HIV law of Uganda provides that '[e]very health institution shall, within sixty days of the commencement of the Act, ensure that the universal precautions on post exposure prophylaxis … are complied with'.[64] Six countries have provisions allowing for reasonable accommodation of people living with HIV to ensure that they remain employed with the necessary adjustments to their work, taking into account their health condition.[65] Finally, five countries have provisions that protect medical confidentiality in the workplace.[66]

Effective responses to HIV in the context of employment require a broad range of measures, provided under Recommendation 200, that range from the prohibition of discrimination in the workplace to measures aimed at protecting HIV-positive employees and creating an enabling and non-discriminatory environment. The fact that a significant number of HIV-specific laws (19 out of 26) provide for HIV education and programmes in the workplace is positive. These programmes could contribute to create a positive and supportive environment for people living with HIV, provided that they are of sufficient quality and appropriately resourced.[67]

However, the fact that none of the countries with HIV-specific laws has adopted the full set of six measures to address HIV in the workplace raises serious concerns. It is particularly worrying that in two countries, legislative responses to HIV in the workplace are limited to the prohibition of HIV testing as a condition for employment. Such

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61 Angola (sec 7(3)); Benin (art 20); Cape Verde (arts 8 & 11); Central African Republic (art 23); Chad (art 40); Côte d'Ivoire (art 34); DRC (art 19); Guinea (art 3); Guinea-Bissau (art 3); Kenya (art 7); Liberia (art 18(7)); Madagascar (art 45); Mali (art 3); Mauritania (art 4); Mozambique (article 43); Niger (art 9); Senegal (art 6); Sierra Leone (art 22); and Tanzania (art 9).

62 Art 9 HIV law of Tanzania.

63 Angola (sec 11); Benin (art 21); Comoros (art 11); Côte d'Ivoire (art 17); DRC (art 23); Kenya (art 6); Madagascar (art 54); Niger (article 25); Senegal (art 10); Sierra Leone (art 26(3)); Tanzania (art 12(2)); and Uganda (art 32(5)).

64 Art 32(5) HIV law of Uganda.

65 Angola (sec 7); Benin (art 19); Chad (art 36); Central African Republic (art 22); Comoros (art 24); and Congo (art 31).

66 Chad (art 35); Côte d'Ivoire (art 31); DRC (art 26); Madagascar (art 49); and Tanzania (art 17(1)).

67 AP Mahajan et al 'An overview of HIV/AIDS workplace policies and programmes in Southern Africa' (2007) 21 *AIDS* 31-39.

narrow provisions are likely to be ineffective in addressing the multifaceted nature of discrimination and other HIV-related human rights violations in the workplace. For instance, employers may become aware of, or suspect, the HIV-positive status of their employees through, for example, the monitoring of sick leave patterns, and may then subject these workers to less favourable treatment in the workplace. Under provisions that only ban HIV testing as a condition for employment, such behaviour will not be deemed discriminatory.

In a number of HIV-specific laws, the prohibition of HIV testing as a condition for employment is relative and may be waived. In Liberia, HIV testing may take place as a condition for employment where 'it can be shown, on the testimony of competent medical authorities, that [an HIV-positive person] is a clear and present danger of HIV transmission to others'.[68] Because of the widespread fear, stigma and misconception relating to the risks of HIV transmission, such provisions could in practice lead to abusive application that would deny people living with HIV access to employment. This was, for instance, the case when South African Airways refused to hire an HIV-positive person as cabin attendant on 'safety, medical and operational grounds'.[69] These grounds were ultimately dismissed by the South African Constitutional Court, who ruled that 'the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination'.[70]

Confidentiality regarding one's health status is a critical element of the right to privacy which should be protected in all settings, including in the workplace.[71] The fact that only five countries explicitly address the protection of medical confidentiality in the workplace is a concern. Although many HIV-specific laws have general provisions on confidentiality regarding HIV test results,[72] it is unclear whether these general confidentiality provisions pertaining to the obligation of health care workers to maintain patients' confidentiality in the workplace will in practice be interpreted as also applying to non-health care personnel.[73]

With only six countries explicitly addressing this, the insufficient attention devoted to reasonable accommodation for HIV-positive workers is concerning. This is because, in spite of recent progress, access to anti-retroviral treatment in many sub-Saharan African

68 Art 18(28)(b) HIV law of Liberia.

69 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 para 7.

70 *Hoffmann* (n 69 above) para 40. For a discussion of this decision, see C Ngwena 'Constitutional values and HIV/AIDS in the workplace: Reflections on *Hoffman v South African Airways*' (2001) 1 *Developing World Bioethics* 42-56.

71 See, eg, International Labour Conference (n 32 above) paras 24-29; C Ngwena 'HIV in the workplace: Protecting rights to equality and privacy' (1999) 15 *South African Journal on Human Rights* 513.

72 See, eg, art 25 of the HIV law of Mali.

73 As above.

countries remains limited and the quality of care for people living with HIV remains substandard. In the context of HIV, reasonable accommodation refers to 'any modification or adjustment to a job or to the workplace that is reasonably practicable and enables a person living with HIV or AIDS to have access to, or participate or advance in, employment'.[74] The failure to provide for reasonable accommodation leaves HIV-positive employees at the mercy of unfair dismissal. Moreover, in two of the countries that address reasonable accommodation, it is considered an option.[75] Therefore, employers have no obligation to provide for such measures for HIV-positive employees.

3.3 HIV testing in HIV-specific laws

HIV counselling and testing (HCT) is considered the gateway to HIV-related prevention, treatment, care and support services.[76] Those who test positive for HIV can be linked to HIV-related treatment and care services and they can receive specific counselling and support that enable them to lead safer and healthier lives. Those who test negative for HIV can also receive information and counselling that may reinforce HIV prevention messages and behaviour.[77] Despite the importance of HIV testing, more than half the adults living with HIV in sub-Saharan Africa are not aware of their HIV status.[78] This high percentage of people with an unidentified HIV status often leads to the late diagnosis of HIV infection, which compromises the effectiveness of HIV treatment and increases the odds of HIV-related morbidity and mortality.[79]

Fear of stigma, discrimination and other human rights violations is considered to be among the main determinants of low and delayed HIV testing.[80] Human rights standards, together with 30 years of public health experience in addressing HIV, recommend that the most effective approaches to encouraging people to test for HIV are those

74 International Labour Conference (n 32 above) para 1(g).

75 Reasonable accommodation is an option in Angola (art 7) and Central African Republic (art 22). However, in Benin (art 19), Chad (art 36), Comoros (art 24) and Congo (art 31), it is an obligation for the employer.

76 UNAIDS 'Treatment 2015' (2013) 17.

77 WHO 'The right to know: New approaches to HIV testing and counselling' 2003 http://www.who.int/hiv/pub/vct/en/Right_know_a4E.pdf?ua=1 (accessed 21 February 2015).

78 UNAIDS (n 1 above) 12.

79 See IM Kigozi et al 'Late disease stage at presentation to an HIV clinic in the era of free anti-retroviral therapy in sub-Saharan Africa' (2009) 52 *Journal of Acquired Immune Deficiency Syndrome* 280; M May et al 'Impact of late diagnosis and treatment on life expectancy in people with HIV-1: UK Collaborative HIV Cohort (UK CHIC) Study' (2011) 343 *British Medical Journal* 6016.

80 A Mukolo et al 'Predictors of late presentation for HIV diagnosis: A literature review and suggested way forward' (2013) 17 *AIDS and Behaviour* 5-30.

that protect human rights.[81] Respecting people's rights to liberty, security and privacy, including their rights to informed consent, autonomy and confidentiality, is instrumental in increasing the uptake of HIV testing.[82] These experiences and best practices led to the adoption of voluntary HIV counselling and testing (VCT), anchored in the principles of confidentiality, pre- and post-test counselling and informed consent, also known as the '3Cs'.[83] Over the years, and in an effort to expand access to HCT, global and national public health policies have also endorsed provider-initiated testing and counselling (PITC).[84] In spite of this shift in policy,[85] the core principles of confidentiality, counselling and informed consent are still maintained in the context of HIV testing services.[86]

Informed consent to medical procedures is derived from the rights to privacy, liberty and security, dignity, protection against cruel, inhuman and degrading treatment, and to health provided for under global and regional human rights law. As stated by the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Special Rapporteur on Health):[87]

> Informed consent invokes several elements of human rights that are indivisible, interdependent and interrelated. In addition to the right to health, these include the right to self-determination, freedom from discrimination, freedom from non-consensual experimentation, security and dignity of the human person, recognition before the law, freedom of thought and expression and reproductive self-determination. All states parties to [ICESCR] have a legal obligation not to interfere with the rights conferred under the Covenant.

81 UNAIDS & WHO *UNAIDS/WHO Policy statement on HIV testing* (2004) 1; MA Chesney & AW Smith 'Critical delays in HIV testing and care: The potential role of stigma' (1999) 42 *American Behavioral Scientist* 1162-1174.

82 UNAIDS & OHCHR (n 27 above).

83 See UNAIDS & WHO (n 81 above). More recently, WHO and UNAIDS have been referring to '5Cs' by adding 'correct test results' and 'connection/linkage to prevention, care and treatment' to the original '3Cs'. WHO & UNAIDS 'Statement on HIV testing and counseling: WHO, UNAIDS re-affirm opposition to mandatory HIV testing' 2012 http://www.who.int/hiv/events/2012/world_aids_day/hiv_testing_counselling/en/ (accessed 8 March 2015).

84 WHO & UNAIDS *Guidance on provider-initiated HIV testing and counselling in health facilities* (2007). PITC refers to HIV testing and counselling recommended by a health-care provider in a clinical setting. It is defined in contrast to client-initiated testing, where an individual takes the initiative to seek information on his or her HIV status. PITC has now been endorsed by many countries in sub-Saharan Africa; see R Baggaley et al 'From caution to urgency: The evolution of HIV testing and counselling in Africa' (2012) 90 *Bulletin of the World Health Organization* 652-658B.

85 For a presentation on the debates and issues on evolving HIV testing policies, see R Jürgens 'Increasing access to HIV testing and counselling while respecting human rights – Background paper' 2007 http://www.unaids.org.cn/pics/20120821114907.pdf (accessed 8 February 2015).

86 See WHO & UNAIDS (n 84 above); UNAIDS & WHO (n 81 above) 1.

87 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health A/64/272, 10 August 2009 para 19.

Informed consent to HIV testing involves two complementary elements: access to information and knowledge, on the one hand, and full agreement, on the other.[88] Informed consent by a person to a medical procedure such as HIV testing,[89] therefore, requires that the person be provided with full information and knowledge, that they understand the information and, as a result, fully and freely agree to undergo HIV testing.[90] The Special Rapporteur on Health has also stressed that '[i]nformed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of a patient to be involved in medical decision making'.[91] In this regard, the Supreme Court of Namibia has held that 'individual autonomy and self-determination are overriding principles … require[ing] that in deciding whether or not to undergo an elective procedure, the patient must have the final word'.[92] A similar patient-centred approach to informed consent was introduced into South African law in *Castell v De Greef*.[93]

Confidentiality regarding HIV test results, and HIV status in general, is derived from the right to privacy which is enshrined in global and regional human rights treaties, including the ICCPR,[94] CRC[95] and African Children's Charter.[96] In particular, article 17 of the ICCPR provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The International Guidelines further note that in the context of HIV, the 'right to privacy encompasses obligations to respect physical privacy, including the need to respect confidentiality of all information relating to a person's HIV status'.[97] The protection of confidentiality regarding HIV status is also important because of the negative consequences of unwarranted disclosure. As highlighted by the then Appellate Division in South Africa:[98]

88 K Grant & A Meerkotter *Protecting rights: Litigating cases of HIV testing and confidentiality of status* (2012) 11.

89 HIV testing is recognised as a medical procedure. *C v Minister of Correctional Services* 1996 (4) SA 292 (T).

90 The High Court of South Africa concluded that the failure to provide pre-test counselling was an unlawful 'deviation from the accepted norm of informed consent'. *C v Minister of Correctional Services* (n 89 above).

91 Report of the Special Rapporteur on Health (n 87 above) para 9.

92 *Government of the Republic of Namibia v LM* [2014] NASC (3 November 2014) para 106.

93 1994 (4) All SA 63 (c) (S Afr).

94 Art 17 ICCPR.

95 Art 16 CRC.

96 Art 10 African Children's Charter.

97 UNAIDS & OHCHR (n 27 above) para 119.

98 *Van Vuuren & Another NNO v Kruger* 1993 (4) SA 842 (SAA) para 10.

> There are in the case of HIV and AIDS special circumstances justifying the protection of confidentiality. By the very nature of the disease, it is essential that persons who are at risk should seek medical advice or treatment. Disclosure of the condition has serious personal and social consequences for the patient. He is often isolated or rejected by others which may lead to increased anxiety, depression and psychological conditions that tend to hasten the onset of so-called full-blown AIDS.

All 26 HIV-specific laws under review include provisions relating to HCT. The three principles of confidentiality, pre- and post-test counselling and informed consent are explicitly provided for in the great majority of these HIV-specific laws. All 26 HIV-specific laws affirm the principle of confidentiality regarding HIV test results, and assert informed consent as a condition for HIV testing or prohibit compulsory HIV testing. Furthermore, all but five countries have provisions on pre- and post-test counselling.[99] In a number of countries, such as Congo[100] and Guinea,[101] specific provisions in the HIV law even detail the content of pre- and post-test counselling.

However, most HIV-specific laws allow for exceptions or limitations to the principles of informed consent and confidentiality. In general, HIV-specific laws allow for informed consent to HIV testing to be waived in three types of circumstances. First, some laws allow health care workers to perform an HIV test without informed consent in the context of access to treatment and care. For example, in Uganda informed consent is not needed if the patient 'unreasonably withholds' it.[102] Similarly, informed consent is not required in Angola if it appears that HIV testing is needed for appropriate medical care.[103] Second, HIV-specific laws allow for non-consensual HIV testing in the context of personal relationships. For instance, in Burkina Faso, HIV testing is allowed to settle matrimonial disputes.[104] Thirdly, and most commonly, several statutes allow for compulsory HIV testing within the criminal justice system.

Exceptions to confidentiality in HIV-specific laws range from compulsory disclosure of HIV test results within the criminal justice system to the personal realm, with laws allowing the disclosure of HIV status to the parents or guardians of minors (persons below the age of 18) and non-voluntary disclosure to sexual partners. Although many of these exceptions raise concern, the analysis below focuses on two of these, namely, compulsory HIV testing in the context of sexual offences as an exception to informed consent, and non-voluntary

99 The five countries that do not explicitly provide pre- and post-test counselling in their HIV-specific laws are Angola, Burundi, Central African Republic, Madagascar and Niger.

100 Arts 21 & 22 HIV law of Congo

101 Art 1 HIV law of Guinea.

102 Art 11(a) HIV law of Uganda.

103 Art 22(1)(a) HIV law of Angola.

104 Art 19 HIV law of Burkina Faso.

notification of the partners of people living with HIV as an exception to confidentiality.[105]

3.3.1 Compulsory HIV testing in the context of sexual offences

In terms of the International Guidelines, any exception to informed consent, including compulsory HIV testing, should be carefully considered. The International Guidelines stress in this regard that 'exceptions to voluntary testing would need specific judicial authorisation, granted only after due evaluation of the important considerations involved in terms of privacy and liberty'.[106] They further point out that 'compulsory HIV testing can constitute a depravation of liberty and a violation of the right to security of the person'.[107] Similarly, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) emphasised that '[f]orced or compulsory HIV testing is also a common abuse that may constitute degrading treatment if it is "done on a discriminatory basis without respecting consent and necessity requirements"'.[108] To meet human rights standards, provisions relating to compulsory HIV testing should satisfy general requirements relating to any limitation of human rights. Compulsory testing provisions should therefore (i) be provided under the law; (ii) be based on a legitimate interest; (iii) be proportionate to that interest; and (iv) constitute the least restrictive measure available and actually achieving that interest in a democratic society.[109]

The analysis of HIV-specific laws adopted in sub-Saharan Africa shows that just over one-third of them (eight out of 26) explicitly allow for compulsory HIV testing in the context of sexual offences.[110] Of these, five require compulsory HIV testing in the case of rape.[111] Five countries allow for compulsory HIV testing in the case of prosecution for HIV non-disclosure, exposure or transmission.[112] Four countries allow for compulsory HIV testing in case of sexual offences without defining which particular sexual acts fall under their ambit.[113]

105 For a discussion of the other exceptions, see Pearshouse (n 11 above).

106 UNAIDS & OHCHR (n 27 above) para 20(b).

107 UNAIDS & OHCHR para 135.

108 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment A/HRC/22/53, 1 February 2013 para 71.

109 See UN Commission on Human Rights *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* 1984 E/CN.4/1985/4; *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998); *Enhorn v Sweden* ECHR (Application 56529/00) 25 January 2005.

110 Burkina Faso (art 19); Guinea-Bissau (art 17(3)(a)); Kenya (sec 13(3)); Liberia (sec 18(21)(2)(b)); Mali (art 18(b)); Mauritania (art 15); Tanzania (sec 15(4)(c)); and Uganda (sec 12).

111 Burkina Faso (art 19); Cape Verde (art 15(2)(b)); Liberia (sec 18(21)(2)(b)); Mali (art 18(b)); and Mauritania (art 15).

112 Burkina Faso (art 19); Cape Verde (art 15(2)(a)); Guinea-Bissau (art 17(3)(a)); Liberia (sec 18(21)(2)(a)); and Mali (art 18(a)).

113 Guinea-Bissau (art 17(3)(b)); Kenya (sec 13(3)); Tanzania (sec 15(4)(c)); and Uganda (sec 12).

In addition to these, there are ten countries with provisions allowing for compulsory HIV testing when ordered by a court, which may be applied to sexual offences.[114] For example, the HIV law of Mozambique allows for compulsory HIV testing 'when it is required for the purpose of criminal procedures with the prior order of a competent judicial authority'.[115]

The provisions allowing for compulsory HIV testing in the context of sexual offences raise a number of human rights and public health issues.[116] The human rights concerns raised by these provisions relate, first, to the fact that many of the provisions are silent on the nature of sexual offences for which an HIV test is considered compulsory. This implies that compulsory HIV testing can occur in relation to all sorts of sexual offences, whether they involve a risk of HIV infection or not.

Second, many HIV-specific laws allow for compulsory HIV testing of individuals who are *charged* with a sexual offence. Some laws, such as that of Uganda, even allow for HIV testing of a 'person who is *apprehended* for a sexual offence'.[117] In either case, the person being subjected to HIV testing has not yet been found guilty of an offence and should consequently benefit from the presumption of innocence. To subject such a person to HIV testing without consent represents an infringement of the right to liberty, security and a fair trial provided for under international human rights law.[118] The violation of these rights is particularly acute in the case of persons who are merely 'apprehended' for sexual offences, as is the case under the HIV law of Uganda. There is no justification, under human rights norms and in terms of public health, for blanket HIV testing of all people living with HIV accused of sexual offences. In a case relating to the blanket denial of bail to HIV-positive people alleged to have committed rape, the Botswana Court of Appeal rejected all justifications to such restrictions by noting, among others:[119]

> It is beyond … comprehension how depriving a person of his liberty merely because he is alleged to have committed rape – not, it must be stressed, because he is found guilty of it – can in any way reduce the crime rate, including rape or serve to contain or restrict the incidence of HIV/AIDS.

Thirdly, most HIV-specific laws that allow for compulsory HIV testing of sexual offenders are generally silent on the conditions, initiator,

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114 Angola (sec 22(c)); Burundi (art 11(c)); Chad (art 4); Guinea (art 22(d)); Mozambique (art 25(1)(c)); Niger (art 11); Senegal (art 12); Tanzania (sec 15(4)(a)); Togo (art 6); and Uganda (sec 14).

115 Art 25(1)(c) HIV law of Mozambique.

116 Similar concerns have been raised about the provisions on compulsory HIV testing of sexual offenders under the Sexual Offences Act 2007 of South Africa. See S Roehrs 'Implementing the unfeasible: Compulsory HIV testing for alleged sexual offenders' (2007) 22 *South African Crime Quarterly* 27-32; K Naidoo & K Govender 'Compulsory HIV testing of alleged sexual offenders – A human rights violation' (2011) 4 *South African Journal of Bioethics and Law* 95-101.

117 Sec 12 HIV law of Uganda (my emphasis).

118 Naidoo & Govender (n 116 above) 95-101.

119 See *Attorney-General's Reference: In re The State v Marapo* [2002] 2 BLR 26.

process and timeline for conducting these tests, thus leaving these critical issues open to interpretation by law enforcement agents and courts. This lack of precision is likely to lead to procedural unfairness. There is also uncertainty, in most HIV-specific laws, about the rationale for imposing compulsory HIV testing in the context of sexual offences. Is the HIV test aimed at informing victims of sexual offences? Or is it intended to support a guilty verdict in a criminal law case? Or is the HIV test result expected to serve as an element for the imposition of higher penalties in the context of sexual offences? Who receives the result of the HIV test? Is it only the court? Does the alleged offender also receive it? None of these questions is clearly addressed under these laws.

Several HIV-specific laws in sub-Saharan Africa can also be criticised from a public health perspective because they may lead in practice to (over)focusing on the alleged offender to the detriment of survivors of sexual offences.[120] Instead of focusing on the alleged perpetrator of a sexual offence, HIV-specific laws should rather ensure that public health authorities and law enforcement agents provide and facilitate access to post-exposure prophylaxis (PEP) and support services for the survivors of sexual offences to prevent the transmission of HIV and other sexually-transmitted infections.[121] In fact, most HIV-specific laws that allow explicitly for compulsory HIV testing of sexual offenders do not provide for PEP and other necessary medical and psychological services for survivors of sexual offences.

Finally, compulsory HIV testing for sexual offenders appears to be unnecessary from a public health perspective.[122] This is because a negative HIV test result of the alleged offender does not conclusively prove that the survivor of the sexual offence was not exposed to HIV infection. Some alleged offenders might indeed be in the 'window period', during which period the rapid test used in the majority of sub-Saharan African countries will not detect the antibodies that indicate HIV infection.[123] Similarly, a positive HIV result of the offender does not mean that the survivor has contracted HIV. It is therefore precarious from a public health perspective to base access to HIV services for survivors of sexual offences on the HIV test results of the alleged offender. Also, by providing for compulsory HIV testing for all sexual offences without any consideration of the nature of sexual acts and the actual risk of HIV that they involve, HIV-specific laws contribute to perpetuating misinformation and prejudice about HIV and its modes of transmission.

120 Roehrs (n 116 above); Naidoo & Govender (n 116 above).

121 See DJ Mcquoid-Mason 'Free provision of PEP and medical advice for sexual offence victims: What should doctors do?' (2008) 98 *South African Medical Journal* 847-848.

122 Roehrs (n 116 above); Naidoo & Govender (n 116 above).

123 As above.

Arguably, provisions relating to compulsory HIV testing of sexual offenders in HIV-specific laws may be deemed to violate human rights because they are overly broad, unnecessary and do not hold any health benefit for survivors of sexual violence.[124]

3.3.2 Partner notification

Partner notification is a public health measure that seeks to reduce the 'burden of asymptomatic disease in the community and to shorten the average period of infectiousness for a given disease' with the expectation that this will reduce the transmission of the disease.[125] It consists of identifying the sexual partners of people living with HIV and informing them that they may have been exposed to HIV, so as to ensure that they are tested and receive treatment, if required.[126] Well established in the context of sexually-transmitted diseases (STDs), at least in Western countries,[127] partner notification raises human rights and ethical concerns in the context of HIV and its utility is often questioned.[128] Yet, in recent years, the recognition of the prophylactic and prevention benefits of early initiation of anti-retroviral therapy seems to be leading to a renewed consideration of partner notification.[129]

From a human rights perspective, partner notification requires striking a balance between the preservation of the individual right to privacy of the person living with HIV and the protection of public health, particularly in relation to the partner who may be at risk of HIV transmission or who may be HIV positive but may not be aware of it.[130] Unlike partner notification done with the consent of the person

124 As above.

125 M Adler & F Cowan 'Sexually-transmitted infections' in R Detels et al (eds) *Oxford textbook of public health Volume 3 The practice of public health Fourth edition* (2002) 1449.

126 As above.

127 EP Richards III 'HIV: Testing, screening and confidentiality – An American perspective' in R Bennett & CA Erin (eds) *HIV and AIDS: Testing, screening and confidentiality* (1999) 75-90.

128 See CG Pottker-Fishel 'Improper bedside manner: Why state partner notification laws are ineffective in controlling the proliferation of HIV' (2007) 17 *Health Matrix* 147-179; LA Gostin & JG Hodge Jr 'Piercing the veil of secrecy in HIV/AIDS and other sexually-transmitted diseases: Theories of privacy and disclosure in partner notification' (1998) 9 *Duke Journal of Gender, Law and Policy* 10-88; S Bott & CM Obermeyer 'The social and gender context of HIV disclosure in sub-Saharan Africa: A review of policies and practices' (2013) 10 *Journal of Social Aspects of HIV/AIDS* s5-s16.

129 See, eg, European Centre for Disease Prevention and Control 'Technical report: Public health benefits of partner notification for sexually-transmitted infections and HIV' 2013 http://www.ecdc.europa.eu/en/publications/Publications/Partner-notification-for-HIV-STI-June-2013.pdf (accessed 10 February 2015); National AIDS Trust 'HIV partner notification: A missed opportunity?' 2012 http://www.nat.org.uk/media/files/policy/2012/may-2012-hiv-partner-notification.pdf (accessed 15 February 2015).

130 S Roehrs 'Privacy, HIV/AIDS and public health interventions' (2009) 126 *South African Law Journal* 381-382; Pottker-Fishel (n 128 above); Gostin & Hodge (n 128 above) 62-68.

living with HIV, it is involuntary partner notification that raises serious ethical, human rights and practical issues.[131] As it overrides the right to privacy of the person living with HIV, involuntary partner notification must be strictly framed so as to prevent abuse.[132]

In practice, partner notification involves disclosure of confidential information about a patient by the health care worker, either directly to sexual partners or indirectly through public health officers.[133] This raises issues about the privileged nature of the relationship between patients and health practitioners.[134] The protection of the doctor-patient relationship is not just an ethical and legal duty on health care workers. It is also necessary to ensure trust in health care systems so that people come forward to seek HIV and other health services. As noted by the European Court of Human Rights:[135]

> Respecting the confidentiality of health data is a vital principle … It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.

The International Guidelines, therefore, provide narrow circumstances for regulating involuntary partner notification so as to protect human rights, while pursuing public health goals.[136] On the basis of the International Guidelines and best available recommendations, the following four key elements are highlighted to assess the provisions on involuntary partner notification in HIV-specific laws adopted in sub-Saharan Africa. These are that (i) the opportunity to notify should first be given to the HIV-positive person; (ii) partner notification is an option (not an obligation) for the health care provider; (iii) notification should only occur where there is a risk of HIV infection to another;[137] and (v) fear of violence and other serious negative consequences should preclude partner notification by health care workers.[138]

The assessment of HIV specific laws in sub-Saharan African countries shows that nearly all of them (21 out of 26) have provisions allowing for involuntary partner notification. In 17 of these countries, involuntary partner notification can occur only after the person living with HIV has first been given the opportunity to inform the sexual partner but did not do so. In a significant number of countries (17 out

131 As above.
132 As above.
133 Richards (n 127 above).
134 Roehrs (n 130 above) 381-382; Pottker-Fishel (n 128 above) 156-157; Gostin & Hodge Jr (n 128 above) 62-68.
135 *I v Finland* ECHR (Application 20511/03) 17 July 2008 para 38.
136 UNAIDS & OHCHR (n 27 above) para 20(g).
137 As above.
138 This element is not part of the provisions on involuntary partner notification of the International Guidelines, but is recommended by UNAIDS because of the serious negative consequences of non-voluntary HIV disclosure, particularly for women. See UNAIDS (n 12 above).

of 21), partner notification is an option (choice) for health care workers who can decide whether to notify the sexual partner. Some 11 countries require the existence of a risk of HIV transmission to the sexual partner as a condition for involuntary notification. Only four countries provide for fear of violence as a reason that precludes involuntary partner notification (see Table 2).

Table 2: Involuntary partner notification in HIV-specific laws

Countries allowing for involuntary partner notification (21 countries)	**Opportunity first given to HIV positive person to notify** (17 countries)	**Option to notify for health care worker** (17 countries)	**Risk of HIV infection as reason for notification** (11 countries)	**Fear of violence as reason for not notifying** (4 countries)	**Timeline for notification** (7 countries)
Angola (sec 13(2))	No	Yes	Yes	No	No
Benin (arts 4 & 6)	Yes	Yes	Yes	No	No
Burkina Faso (arts 7 & 8)	Yes	No (obligation)	No	No	Yes (immediately, art 7)
Burundi (art 28)	Yes	No (obligation)	No	No	No
Cape Verde (art 22)	Yes	Yes	No	No	Yes (6 weeks, art 22(1))
Chad (art 51)	Yes	No (obligation)	No	No	No
Central African Republic (art 8(4))	No	Not provided	Yes	No	No
Comoros (art 33)	Yes	Yes	Yes	Yes	No
Cote d'Ivoire (arts 11 &12)	Yes	Yes	No	No	Yes (3 months, art 12)
DRC (art 41)	Yes	Yes	No	No	Yes (immediately art 41)
Guinea (art 23)	Yes	Yes	Yes	Yes	No
Guinea-Bissau (art 26)	Yes	Yes	No	No	Yes (6 weeks, art 26(1))
Kenya (sec 24(7))	Yes	Yes	No	No	No
Liberia (sec 18(24))	Yes	Yes	Yes	Yes	No
Madagascar (art 63)	Yes	Yes	Yes	No	No
Mali (art 27)	Yes	Yes	No	No	Yes (6 weeks, art 27(1)).
Niger (arts 15 to 17)	Yes	Yes	Yes	No	Yes (6 weeks, art 15)
Senegal (art 22)	Yes	Yes	Yes	No	No

Tanzania (sec 16(2)(c).	No	Yes	No	No	No
Togo (art 10)	Yes	Yes	Yes	Yes	No
Uganda (sec 18(2)(e)	No	Yes	Yes	no	No

There are two positive elements that stem from this analysis. First, a significant number of countries (17 out of 21) allowing for involuntary partner notification give the opportunity to notify others to the person living with HIV. Second, the same number of countries (17) has made involuntary partner notification an option for health care workers, not an obligation (see Table 2). Yet, involuntary partner notification provisions in HIV-specific laws raise several serious human rights, public health and practical concerns. Ten countries allow for involuntary partner notification even in cases where there is no risk of HIV infection to the sexual partner of the person living with HIV (see Table 2). For instance, under these laws, sexual partners with whom the person living with HIV engaged only in protected sex or sexual acts that carry no risk of HIV infection may still be notified. Such provisions are overly broad and unnecessary.

Under the conditions provided in the International Guidelines, there is no set timeline for involuntary partner notification. In view of the complexity of partner notification, the determination of the moment for notifying should be done on a case-by-case basis, taking into consideration the personal circumstances of those involved, including the psychological state of the HIV-positive person and the partner to be notified. The International Guidelines recommend in this regard that 'health-care professionals decide, on the basis of each individual case'.[139] Despite this recommendation, seven countries set strict timelines after which involuntary partner notification can take place (see Table 2). In DRC and Burkina Faso, people living with HIV must disclose immediately after becoming aware of their HIV status. In Cape Verde, Guinea-Bissau, Mali and Niger, the timeline for disclosure is six weeks. In Côte d'Ivoire, it is three months. Past these periods, involuntary partner notification may take place. There is no scientific or medical rationale for the selection of the six-week or three-month periods as the threshold for involuntary notification. It rather seems that the six-week timeline was replicated from article 26 of the N'Djamena Model Law.[140] In fact, countries that have adopted this period have also adopted several other problematic provisions from this Model Law.[141]

Involuntary partner notification provisions also pose serious practical and resource issues. It is unclear from most of these

139 UNAIDS & OHCHR (n 27 above) para 20(g).

140 See art 26 of Model Legislation on HIV/AIDS for West and Central Africa; Pearshouse (n 11 above) 6-7.

141 Pearshouse (n 11 above).

provisions which specific category of health workers can conduct partner notification. Is it a doctor, an HIV counsellor, or any person who provides health care services to people living with HIV? The determination of this issue is not a moot point. In sub-Saharan African countries where health care workers and health systems are already overburdened, the implementation of partner notification is likely to create serious additional constraints. In a region where the average density of physician per 1 000 people is less than 0,5,[142] one cannot reasonably expect medical doctors to take on the task of identifying and notifying the sexual partners of persons living with HIV. In fact, the critical issues of training and of human and financial resources to adequately undertake partner notification are eluded in most HIV-specific laws.

Involuntary partner notification can also lead to discrimination, violence and other forms of human rights violations, particularly for women.[143] Yet, only four out of the 21 countries allowing for involuntary partner notification recognise fear of violence and other serious negative consequences as reasons for not notifying. As noted by the Special Rapporteur on Torture, '[u]nauthorised disclosure of HIV status to sexual partners … is a frequent abuse against people living with HIV that may lead to physical violence'.[144] By failing to address fear of violence as a limitation to disclosure and partner notification, these HIV-specific laws are likely to expose people living with HIV to violence, but also to the possibility of overly-broad criminal prosecution for HIV non-disclosure, exposure and transmission. These provisions are also likely to have negative public health consequences because fear of involuntary disclosure has been shown to be among the factors that prevent people from seeking HIV testing and other services.[145]

Ultimately, only four countries (Comoros, Guinea, Liberia and Togo) have adopted all four key conditions relating to involuntary partner notification under the International Guidelines and UNAIDS recommendations (see Table 2).

142 See WHO 'Health workforce density of physicians (total number per 1 000 population): Latest available year' http://gamapserver.who.int/gho/interactive_charts/health_workforce/ PhysiciansDensity_Total/atlas.html (accessed 7 March 2015).

143 KH Rothenberg & SJ Paskey 'The risk of domestic violence and women with HIV infection: Implications for partner notification, public policy, and the law' (1995) 85 *American Journal of Public Health* 1569-1576; JE Maher et al 'Partner violence, partner notification, and women's decisions to have an HIV test' (2000) 25 *Journal of Acquired Immune Deficiency Syndromes* 276-282.

144 Report of the Special Rapporteur on Torture (n 108 above) para 71.

145 A Medley et al 'Rates, barriers and outcomes of HIV serostatus disclosure among women in developing countries: Implications for prevention of mother-to-child transmission programmes' (2004) 82 *Bulleting of the World Health Organization* 299-307; S Maman et al 'HIV status disclosure to families for social support in South Africa (NIMH Project Accept/HPTN 043)' (2014) 26 *AIDS Care* 226-232.

3.4 Criminalisation of HIV non-disclosure, exposure and transmission

Under international law, each country can choose which behaviours and practices should be subject to the criminal law.[146] However, there are principles of criminal law and human rights that should guide the definition and content of criminal law offences and related penalties.[147] In the context of HIV, it has been argued that the appropriateness of criminal law provisions applicable to the epidemic can be questioned, and their compliance with criminal law principles and human rights standards interrogated, if it appears that these provisions undermine efforts to address HIV.[148]

In particular, serious concerns have over the years been raised about the application of criminal law, through HIV-specific provisions or general criminal law offences, to prosecute individuals who allegedly do not disclose their HIV status prior to sexual relations (HIV non-disclosure), who expose others to HIV (HIV exposure), or who transmit HIV (HIV transmission).[149] These concerns are related to the human rights and public health consequences of such application of the criminal law in the context of HIV.[150] Human rights concerns point to the fact that such criminalisation (i) often ignores the latest scientific and medical knowledge relevant to HIV; (ii) disregards generally-applicable criminal law principles; and (iii) frequently results in disproportionately harsh sentences.[151] Public health arguments stress that there is no evidence that criminal law is an effective tool for HIV prevention and points to the possible negative impact on access and uptake of HIV services because of such criminalisation.[152] On their part, proponents of the criminalisation of HIV non-disclosure, exposure or transmission argue that it may help prevent behaviour that leads to HIV transmission, educate the public on HIV and

146 See, eg, J Pradel *Droit penal général* (2007) 24-25.

147 See, eg, C Bassiouni 'Human rights in the context of criminal justice: Identifying international procedural protections and equivalent protections in national constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 235-297.

148 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health A/HRC/14/20 27 April 2010 15-22; UNAIDS *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations* (2013) 7-10.

149 See S Burris & E Cameron 'The case against criminalisation of HIV transmission' (2008) 300 *Journal of the American Medical Association* 578-581; CL Galletly & SD Pinkerton 'Conflicting messages: How criminal HIV disclosure laws undermine public health efforts to control the spread of HIV' (2006) 10 *AIDS and Behaviour* 451-461; UNAIDS (n 148 above) 7-10; EJ Bernard *HIV and the criminal law* (2010); Report of the Special Rapporteur on Health (n 148 above).

150 As above.

151 As above.

152 As above.

reinforce social norms against 'reprehensible HIV-related behaviour'.[153]

The UNAIDS guidance note on ending the overly-broad criminalisation of HIV non-disclosure, exposure and transmission (guidance note)[154] is, to date, the most elaborated global document specifically addressing and providing recommendations on the criminalisation of HIV non-disclosure, exposure and transmission. The guidance note expounds on earlier UN recommendations on HIV and the criminal law.[155] It reiterates that there is no evidence that the criminalisation of HIV non-disclosure, exposure and transmission is an effective measure to address HIV, and sets out key principles that should guide any use of the criminal law in this area.[156] Six of these principles will be used here to assess the content of provisions criminalising HIV non-disclosure, exposure and transmission in the HIV-specific laws adopted in sub-Saharan African countries. These principles are (i) to limit criminal liability to cases of intentional HIV transmission (negligent or reckless transmission should not be criminalised); that there is (ii) no criminal liability in cases of mere non-disclosure or exposure where transmission has not occurred; (iii) no criminal liability in cases involving condom use; (iv) no criminal liability where the person living with HIV has a low viral load or is on effective treatment; (v) no criminal liability when the person did not know his or her HIV status; and (vi) no criminal liability in case of disclosure of HIV status prior to a sexual act.[157]

The review of HIV-specific laws in sub-Saharan Africa shows that nearly all of the countries (24 out of 26) criminalise HIV non-disclosure, exposure or transmission (see Table 3).[158] Of these, only nine countries restrict criminalisation to cases involving actual transmission of HIV (see Table 3). Eight countries criminalise HIV non-disclosure and 12 countries criminalise HIV exposure where transmission did not occur. Seven countries allow for criminal liability on the basis of negligence or recklessness (see Table 3). Only eight countries exclude criminal liability in cases involving condom use or the practice of safe sex (see Table 3). Seven countries have provisions that could be interpreted to bar criminal liability when a person has a

153 C van Wyk 'The need for a new statutory offence aimed at harmful HIV-related behaviour: The general public interest perspective' (2000) 41 *Codicillus* 2-10; DHJ Hermann 'Criminalising conduct related to HIV transmission' (1990) 9 *Saint Louis University Public Law Review* 351.

154 UNAIDS (n 148 above).

155 UNAIDS *Criminal law, public health and HIV transmission: A policy options paper* (2002); UNAIDS & United Nations Development Programme (UNDP) 'Criminalisation of HIV transmission: Policy brief' 2008 http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf (accessed 7 March 2015).

156 UNAIDS (n 148 above) 7-8.

157 UNAIDS (n 148 above).

158 Comoros and Mauritius are the only two countries with HIV-specific laws that do not criminalise HIV non-disclosure, exposure and transmission.

low viral load or is on effective HIV treatment (see Table 3). Finally, seven countries allow for criminal liability only for people who are aware of their HIV status and eight countries recognise disclosure to the sexual partner as a shield against criminal liability (see Table 3).

The fact that almost all countries with HIV-specific laws in sub-Saharan Africa criminalise HIV non-disclosure, exposure and transmission is often cited to epitomise the embrace of coercive approaches in HIV-specific laws in the region.[159] The significant number of countries that allow for prosecution without an intention to transmit HIV and, in the case of HIV non-disclosure and exposure where HIV has not been transmitted, raises serious concerns relating to the fair application of the criminal law.[160] That 16 countries allow for the criminalisation of people living with HIV even when they engage in protected sex is also a major concern as it clearly contravenes HIV prevention efforts based on condom use and introduces a disincentive for protected sex.[161] Condom use is a central element of HIV prevention efforts among sexually-active individuals.[162] For people living with HIV, the consistent and correct use of latex condoms is recommended to protect themselves (against the risk of re-infection with HIV or infection with other sexually-transmitted infections) and others (against the risk of onward transmission).[163] Therefore, allowing the criminal prosecution of individuals who use condoms would not only be unfair, but it also risks undermining HIV prevention efforts.

Although no country explicitly addresses low viral load and effective HIV treatment, the provisions in HIV-specific laws limiting criminal liability to acts involving a significant risk of HIV transmission can be interpreted to cover this situation. This is the case in Congo, Côte d'Ivoire, Guinea, Liberia, Mozambique, Senegal and Sierra Leone (see Table 3). Medical and scientific advances in the context of HIV demonstrate that people with a low viral load or who are on effective HIV treatment pose no significant risk of transmission.[164] Recognising these two elements as excluding criminal liability is, therefore, in line with best scientific and medical evidence relating to HIV. Recently, a number of scientists, public health authorities and courts in Europe

159 Pearshouse (n 11 above); Kazatchkine (n 35 above); Eba (n 8 above).

160 UNAIDS explicitly opposes the application of criminal sanction in cases where people did not know their HIV status and where HIV was not transmitted. See UNAIDS (n 148 above).

161 The failure to promote the use of condoms is also identified as a major flaw in HIV-specific criminal laws adopted in the United States. See Galletly & Pinkerton (n 149 above) 453-456.

162 UNAIDS, WHO & UNFPA 'Position statement on condoms and HIV prevention' July 2004 http://www.unfpa.org/upload/lib_pub_file/343_filename_Condom_statement.pdf (accessed 14 December 2008).

163 When used consistently and correctly, latex condoms significantly reduce the risk of HIV transmission. See SC Weller & K Davis-Beaty 'Condom effectiveness in reducing heterosexual HIV transmission (Review)' (2002) 1 *Cochrane Database of Systematic Reviews* 1-22.

and Canada have concluded that people with a low viral load or who are on effective HIV treatment should not be criminalised for HIV non-disclosure, exposure and transmission.[165] However, in most HIV-specific laws, criminal liability is not limited to acts that carry a significant risk of HIV transmission. In countries such as Mauritania and Guinea-Bissau, HIV transmission is defined as 'any attempt to a person's life by the inoculation of substance infected with HIV, regardless of how these substances were used or employed and independently of the consequences thereof'.[166] This provision is extremely vague and may be used to target a wide range of activities without consideration of the reality of the risk of HIV transmission involved.

In 16 countries, vague criminal law provisions could be invoked to prosecute a woman who transmits HIV to her child during pregnancy, delivery or breast-feeding (see Table 3). In Sierra Leone, the HIV Act of 2007 explicitly provided for such prosecution.[167] The outcry created by this provision and its potential negative impact on women's willingness to come forward for HIV services led to the revision of Sierra Leone's HIV law to explicitly exclude the prosecution of mother-to-child transmission of HIV.[168] Similarly, recently adopted HIV-specific laws in six countries also explicitly exclude the criminalisation of mother-to-child transmission of HIV.[169]

The failure to recognise HIV disclosure by the person living with HIV as a barrier to criminal liability in 16 countries is worrying and also paradoxical. In fact, in many of these laws, disclosure is encouraged and the failure to disclose is often punished. The failure to protect those who disclose their HIV status and obtain the informed consent

164 MS Cohen et al 'Prevention of HIV-1 infection with early anti-retroviral therapy' (2011) 365 *New England Journal of Medicine* 493-505; TC Quinn et al 'Viral load and heterosexual transmission of human immunodeficiency virus type 1' (2000) 342 *New England Journal of Medicine* 921-929; J Castilla et al 'Effectiveness of highly active anti-retroviral therapy in reducing heterosexual transmission of HIV' (2005) 40 *Journal of Acquired Immune Deficiency Syndromes* 96-101.

165 See M Loutfy et al 'Canadian Consensus Statement on HIV and its transmission in the context of the criminal law' (2014) 25 *Canadian Journal of Infectious Diseases and Medical Microbiology* 135-140; *'S' v Procureur Général*, Arrêt, 23 February 2009 (Chambre pénale) (Genève); P Vernazza et al 'Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle' (2008) 89 *Bulletin des médecins suisses* 165-169.

166 Arts 1 & 23 HIV law of Mauritania and art 37 and '*concept de base*' HIV law of Guinea-Bissau.

167 Art 21(2) of the Prevention and Control of HIV and AIDS Act 2007 of Sierra Leone provides that '[a]ny person who is and is aware of being infected with HIV or is carrying and is aware of carrying HIV antibodies shall not knowingly or recklessly place another person, and in the case of a pregnant woman, the foetus, at risk of becoming infected with HIV, unless that other person knew that fact and voluntarily accepted the risk of being infected with HIV'.

168 Sec 37(2)(g) of the HIV law of Sierra Leone of 2011 explicitly excludes the criminalisation of mother-to-child transmission of HIV.

169 Congo (art 42); Côte d'Ivoire (art 51); Guinea (art 37); Liberia (sec 18(27)(b)(viii)); Senegal (art 36); and Togo (art 36).

of their sexual partners before sex further illustrates the conflict between HIV-specific laws and public health messages.[170] Indeed, in spite of its many challenges,[171] the disclosure of HIV status to sexual partners is encouraged as a measure of HIV prevention and as an element that may foster support for the person living with HIV and help reduce stigma.[172] Furthermore, disclosure and informed consent to sexual acts are important elements of the sexual and reproductive health rights of people living with HIV who may agree with their partners to have unprotected sex for several reasons, including procreation.[173] The prosecution of people living with HIV who inform their partners and obtain their consent is unfair and is likely to have a negatively impact on disclosure.

A further problem in HIV-specific laws is what can be termed 'over-criminalisation'.[174] This refers to the fact that, in the same HIV-specific law, several provisions can be used to prosecute HIV non-disclosure, exposure or transmission. A typical example of over-criminalisation can be found in the HIV law of Burkina Faso. This HIV law contains three separate provisions with different constitutive elements that may be applied to the criminalisation of HIV non-disclosure, exposure or transmission. These are article 20, which criminalises the sexual transmission of HIV; article 22, which addresses 'transfer of substances' infected with HIV and could also be used to punish the sexual transmission of HIV; and, finally, article 26, which criminalises any person living with HIV who does not take the necessary precautions to protect his or her partners.[175] This over-criminalisation is likely to be a source of confusion for people living with HIV as well as for those responsible for implementing HIV-specific laws. For instance, on the basis of a provision of the law, a person living with HIV may consistently practise sex with condoms, yet another vague provision in the same law may be invoked to prosecute that person for HIV non-disclosure, exposure or transmission. This problem is also evident in the HIV laws of the Central African Republic and Mauritania which have provisions that prevent the prosecution of people living with HIV who engage in 'protected sex' (which includes the use of condoms).[176] However, these provisions are made irrelevant by the

170 See Galletly & Pinkerton (n 149 above) 453-456.

171 There are several challenges associated with the promotion of disclosure, especially for women who have been reported to face negative reactions ranging from abandonment to violence. See Medley et al (n 145 above); Maman et al (n 145 above).

172 See Chesney & Smith (n 81 above); EN Waddell & PA Messeri 'Social support, disclosure, and use of anti-retroviral therapy' (2006) 10 *AIDS and Behaviour* 263-272.

173 See GNP+ et al *Advancing the sexual and reproductive health and human rights of people living with HIV: A guidance package* (2009).

174 Eba (n 8 above) 5.

175 Arts 20, 21 & 22 HIV law of Burkina Faso.

176 See art 34 of the HIV law of Central African Republic and art 23 of the HIV law of Mauritania.

fact that these laws also contain other provisions that may be used to prosecute people living with HIV even when they use condoms.[177]

As described above, the majority of provisions criminalising HIV non-disclosure, exposure and transmission in HIV-specific laws do not meet the standards set in the UNAIDS guidance note. Many ignore basic criminal law principles of legality, foreseeability, intent, causality, proportionality and proof that should serve as the basis for the definition of offences and the imposition of penalties.[178] These criminal law provisions allow for the prosecution for acts that constitute no or very little risk of HIV infection; they fail to recognise condom use, low viral load and effective HIV treatment; and allow for the criminalisation of people who have taken steps to inform their sexual partners and obtain their consent prior to sex. Laws that allow for such use of the criminal law are overly broad, violate criminal law principles, trump human rights and are unfair.[179] These provisions are often based on myths and misconceptions about HIV and its modes of transmission, and they risk undermining effective public health efforts that are based on the use of condoms and on encouraging disclosure. At a time when efforts are being made to end the AIDS epidemic in Africa and to globally focus on expanding access to HIV testing,[180] these overly-broad criminal law provisions are likely to be counterproductive. The provisions will discourage people from coming forward for HIV testing and will negatively impact the patient-doctor relationship.[181]

4 Conclusion and recommendations

HIV-specific laws are now part of the legal frameworks of a majority of countries in sub-Saharan Africa and the trend in favour of these laws is still increasing.[182] An analysis of these laws shows that they include both protective and punitive provisions. Protective provisions often covered in these laws relate to non-discrimination. Yet, many of these protective clauses, such as general non-discrimination provisions and protection in the context of employment, are often not strong

177 See arts 35, 37, 38 & 39 of the HIV law of Central African Republic and art 23 of the HIV law of Mauritania.

178 UNAIDS (n 147 above) 7.

179 UNAIDS (n 147 above).

180 UNAIDS 'Fast-Track: Ending the AIDS epidemic by 2030' 2014 http://www.unaids.org/sites/default/files/media_asset/JC2686_WAD2014report_en.pdf (accessed 8 February 2015).

181 See Galletly & Pinkerton (n 149 above); P O'Byrne et al 'Non-disclosure prosecutions and population health outcomes: Examining HIV testing, HIV diagnoses, and the attitudes of men who have sex with men following non-disclosure prosecution media releases in Ottawa, Canada' (2013) 13 *BMC Public Health* 94.

182 Only in 2014, three countries (Côte d'Ivoire, Comoros and Uganda) have adopted such laws and, at the time of writing, at least one country (Malawi) was working towards the development of an HIV-specific law.

enough to effectively guarantee the human rights of people living with HIV and those affected by the epidemic. Typically, most general non-discrimination provisions cover discrimination based solely on one's actual HIV status. However, many omit critical areas such as discrimination based on another person's status, discrimination based on perceived or presumed HIV status as well as indirect discrimination. The strength of non-discrimination provisions covering specific areas such as education, housing, health and insurance varies greatly. These weaknesses are concerning because a central reason for adopting HIV-specific laws is that they provide clarity and specific protection of the human rights of people living with HIV, rather than leaving it to the courts to guarantee those rights in the context of litigation. The clarity of legislative provisions is also important in sub-Saharan Africa where access to justice remains a serious challenge, particularly for people living with HIV.

Punitive provisions appear to be a defining feature of HIV-specific laws, both in terms of the number of countries that have adopted punitive provisions and with regard to the diversity of restrictive provisions provided in these laws. This situation is paradoxical because a main argument for the adoption of these laws has been the 'need to protect people living with HIV'.[183] Restrictive provisions often covered in these laws include compulsory HIV testing, particularly for alleged sexual offenders, involuntary partner notification and the criminalisation of HIV non-disclosure, exposure and transmission. In the great majority of cases, these provisions are overly broad, they disregard best available recommendations for legislating on HIV, fail to pass the human rights test of necessity, proportionality and reasonableness, consecrate myths and prejudice about people living with HIV, and risk undermining effective responses to the HIV epidemic. Exceptionally, recently-adopted or revised HIV-specific laws appear to have more evidence-informed and rights-based provisions. In addition, criminal law provisions and limitation of rights under these recent laws are often more narrowly drafted. This is due to the increased scrutiny by, and involvement of, key actors, including civil society, human rights groups and the UN in the development of these laws in recent years following the concerns raised by the N'Djamena Model Law and the laws based thereon.

The study, therefore, concludes that the content of HIV-specific laws in sub-Saharan Africa is generally inadequate. Most of the laws fail to uphold human rights standards and best available public health recommendations relating to HIV. By embracing various coercive and overly-broad provisions against people living with HIV, these laws are unlikely to support efforts to break the stigma and fear that still keep people from seeking HIV services. Furthermore, by failing to adopt enabling provisions for populations such as sex workers, young people and men who have sex with men, who are particularly vulnerable to

183 Eba (n 8 above) 1.

HIV, these laws appear as symbolic responses that do not address critical issues of protection and access to services for key populations in sub-Saharan Africa. It has been argued that, in many instances, HIV-specific laws were adopted in an attempt by parliamentarians and governments to signal to the population that they were taking 'tough measures' to address HIV.[184]

While acknowledging the glaring gaps and serious concerns in HIV-specific laws, the study also concludes that these laws do have some merit as they offer some human rights protection, particularly in relation to non-discrimination. The study, therefore, calls for a two-pronged approach in dealing with HIV-specific laws in sub-Saharan Africa. First, the study calls for a thorough analysis of the content of HIV-specific laws in all countries where they exist. The benefit of a general overview, such as the one presented in this study, must be completed by an analysis of each HIV-specific law through a process that involves human rights and public health experts, people living with HIV, HIV programme implementers and parliamentarians, among others. Such an analysis will ensure that the gaps and concerns in HIV-specific laws are outlined and that efforts urgently are put in place to address these concerns. Where possible, these gaps should be addressed through regulations that could clarify the content of the law. In contexts where these issues cannot be addressed through regulations, amendments or legislative reform should be pursued.

Second, this study calls for paying more attention to the enforcement of protective provisions in existing HIV-specific laws. While efforts are to be continued for reforming the most concerning aspects of HIV-specific laws,[185] these efforts should be accompanied by renewed action by civil society, people living with HIV and others to identify and support the implementation of protective provisions under these laws, such as those relating to the prohibition of discrimination in employment or in schools and equal access to health care services. Such an approach seems to have been adopted in Kenya, where civil society organisations have successfully challenged the provisions in the HIV law criminalising HIV transmission,[186] while at the same time playing a critical role in supporting the establishment of the HIV and AIDS Tribunal provided for under this law, as an important mechanism for the protection of the rights of people living with HIV.[187] If effectively pursued, this two-pronged approach could ensure that HIV-specific laws deliver on their stated

184 See Pearshouse (n 11 above); Grace (n 12 above).

185 Efforts to change problematic HIV-specific laws are by their very nature a protracted endeavour. While in countries such as Sierra Leone, Congo and Togo these efforts have succeeded in reforming key punitive provisions, in other countries, such as Burkina Faso, DRC, Mauritania and Niger, reform efforts have stalled.

186 *AIDS Law Project v Attorney General & 3 Others* Kenya High Court [2015] eKLR.

187 See D Njagi 'HIV-positive Kenyans need tribunal to address rights violations' *IPS* 3 August 2010 http://www.ipsnews.net/2010/08/hiv-positive-kenyans-need-tribunal-to-address-rights-violations/ (accessed 7 March 2015).

objective: the protection of people living with, vulnerable to or affected by HIV.

Table 3: Criminalisation of HIV non-disclosure, exposure and transmission in HIV-specific laws

Country	Criminalises HIV non-disclosure	Criminalises HIV exposure	Criminalises HIV transmission	Limited to Intentional acts	Negligent or reckless acts	Applicable to MTCT	Elements that exclude criminal liability			
							Knowledge of HIV infection	Disclosure or informed consent	Condom use and other precautions	Effective HIV treatment or low viral load
Angola (arts 14 & 15)	Yes (art 14)	No	Yes (art 15(1))	Yes (art 15(1))	Yes (art 15(2))	Yes	No	No	No	No
Benin (art 27)	Yes (art 27)	No	No	No	No	No (specific to sex)	Yes	Yes	No	No
Burkina Faso (arts 20, 22 & 26)	Yes (art 20)	No	Yes (art 22)	Yes (art 22)	No	Yes (art 22)	No	No	Yes (arts 20 & 26)	No
Burundi (art 42)	No	No	Yes (art 42)	Yes (art 42)	No	Yes	No	No	No	No
Cape Verde (art 30)	No	No	Yes (art 30)	No (arts 30 & 2)	No	Yes	No	No	No	No
CAR (arts 34, 35, 37, 38 & 39)	Yes (art 39)	Yes (art 37)	Yes (art 35)	Yes (art 35)	Yes	Yes (arts 37 & 38)	No	No	No	No
Chad (arts 54 & 55)	No	No	Yes	No	Yes (art 55)	Yes	No	No	No	No
Congo (arts 41 & 42)	No	No	Yes	Yes	No	No (excluded by art 42)	Yes (art 42)	Yes (art 42)	Yes (art 42)	Yes

Côte d'Ivoire (arts 48 to 51)	Yes (art 48)	Yes (arts 48 & 49)	No	Yes (art 48)	No	No (excluded by art 51)	Yes (art 51)	Yes (art 51)	Yes (art 51)	Yes
DRC (art 45)	No	No	Yes	Yes	No	Yes	No	No	No	No
Guinea (arts 34, 35, 36 & 37)	Yes (art 35)	Yes (art 35)	Yes (art 34)	Yes (art 34)	No	No (excluded by art 37)	Yes (art 37(c))	Yes (art 37(e))	Yes (art 37(d))	Yes
Guinea-Bissau (art 37)	No	Yes	Yes	No	No	Yes	No	No	No	No
Kenya (sec 24)	Yes (sec 24(1))	Yes (sec 24(2))	No	Yes (sec 24(2))	Yes (sec 24(2))	Yes	Yes	Yes	No (sec 24(2))	No
Liberia (secs18(27) (a) & 18(27)(b))	No	Yes (sec 18(27)(a))	Yes (18(27)(a))	Yes (sec 18 (27)(a)	No	No (sec 18(27)(b)(viii))	Yes (sec 18(27)(b)(ii))	Yes (sec 18(27)(b)(v))	Yes (sec 18(27)(b)(iv))	Yes
Madagascar (art 67)	No	No	Yes (art 67)	No (art 67)	Yes (art 67)	Yes	No	No	No	No
Mali (art 37)	No	Yes	No	Yes	No	Yes	No	No	No	No
Mauritania (art 23)	Yes	Yes (art 23)	No	No	Yes (art 23)	Yes	No	No	No	No
Mozambique (art 52)	No	No	Yes	No	No	Yes	No	No	Yes (art 52(2)	Yes (art 52(2)
Niger (arts 39 & 40)	No	Yes (arts 39 & 40)	No	Yes (art 39)	Yes (art 40)	Yes (arts 39 & 40)	No	No	No	No
Senegal (art 36)	No	Yes (art 36)	No	Yes	No	No (excluded by art 36)	Yes	No	Yes	Yes (art 36)

Sierra Leone (secs 37(1) & 37(2))	No	No	Yes (sec 37(1))	Yes (sec 37(1))	No	No (excluded by sec 37(2)(g))	Yes (sec 37(2)(b)	Yes (sec 37(2)(e)	Yes (sec 37(2)(d)	Yes (sec 37(2)(a)
Tanzania (sec 47)	No	No	Yes (sec 47)	Yes (sec 47)	No	Yes (sec 47)	No	No	No	No
Togo (art 61)	No	Yes (art 61)	Yes (art 61)	Yes (art 61)	No	No (excluded by art 61)	Yes	Yes	Yes	No
Uganda (secs 41 & 43)	No	Yes (sec 41)	Yes (sec 43)	Yes (sec 43)	No	Yes (secs 41 & 43)	No	No (sec 41)	No (sec 41)	No

Annex: HIV-specific laws in sub-Saharan Africa

Country	Title of HIV-specific law	Year of adoption
1 Angola	Lei No 8/04 sobre o Virus da Immunodeficiência Humana (VIH) e a Sindroma de Immunodeficiência Adquirida (SIDA)	2004
2 Benin	Loi No 2005-31 du 5 Avril 2006 portant prévention, prise en charge et contrôle du VIH/SIDA	2006
3 Burkina Faso	Loi No 030-2008/AN portant lutte contre le VIH/SIDA et protection des droits des personnes vivant avec le VIH/SIDA	2008
4 Burundi	Loi No 1/018 du 12 Mai 2005 portant protection juridique des personnes infectées par le Virus de l'Immunodéficience Humaine et des personnes atteintes du Syndrome Immunodéficience Acquise	2005
5 Cape Verde	Loi No 19/VII/2007	2007
6 Central African Republic	Loi 06.030 de 2006 fixant les droits et obligations des personnes vivant avec le VIH/SIDA	2006
7 Chad	Loi No 19/PR/2007 du 15 Novembre 2007 portant lutte contre VIH/SIDA/IST et protection des droits des personnes vivant avec le VIH/SIDA	2007
8 Comoros	Loi No 14-011/AU du 21 avril 2014, relative aux droits des personnes vivant avec le VIH et leur implication dans la réponse nationale	2014
9 Congo	Loi No 30 - 2011 du 3 juin 2011 portant lutte contre le VIH et le SIDA et protection des droits des personnes vivant avec le VIH	2011
10 Côte d'Ivoire	Loi No 2014-430 du 14 juillet 2014 portant régime de prévention, de protection et de répression en matière de lutte contre le VIH et le SIDA	2014
11 Democratic Republic of Congo	Loi No 08/011 du 14 Juillet 2008 portant protection des droits des personnes vivant avec le VIH/SIDA et des personnes affectées	2008
12 Equatorial Guinea	Ley No 3/2005 sobre la prevención y la lucha contra las infecciones de transmisión sexual (ITS), el VIH/SIDA y la defensa de los derechos de las personas afectadas	2005
13 Guinea	Ordonnance No 056/2009/PRG/SGG portant amendement de la loi L/2005/025/AN du 22 Novembre 2005 relative à la prévention, la prise en charge et le contrôle du VIH/SIDA en République de Guinée	2009, amended HIV Law of 2005
14 Guinea-Bissau	Loi No 5/2007 du 10 septembre 2007 de la prévention, du traitement et du contrôle du VIH/sida	2007
15 Kenya	HIV and AIDS Prevention and Control Act, No 14 of 2006	2006
16 Liberia	An Act to Amend the Public Health Law, Title 33, Liberian Code of Laws Revised (1976) to Create New Chapter 18 Providing for the Control of Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS)	2010
17 Madagascar	Loi No 2005-040 du 20 Février 2006 sur la lutte contre le VIH/SIDA et la protection des droits des personnes vivant avec le VIH/SIDA)	2006

18 Mali	Loi No 6-028 du 29 Juin 2006 fixant les règles relatives à la prévention, à la prise en charge et au contrôle du VIH/ SIDA	2006
19 Mauritania	Loi No 2007-042 relative à la prévention, la prise en charge et le contrôle du VIH/SIDA	2007
20 Mauritius	HIV and AIDS Act, No 31 of 2006	2006
21 Mozambique	Lei No 12/2009, estabelece os direitos e deveres da pessoa vivendo com HIV e SIDA, e adopta medidas necessárias para a prevenção, protecção e tratamento da mesma	2009
22 Niger	Loi No 2007-08 du 30 Avril 2007 relative à la prévention, la prise en charge et le contrôle du Virus de d'Immunodéficience Humaine (HIV)	2007
23 Senegal	Loi No 2010-03 du 9 avril 2010 relative au VIH/SIDA	2010
24 Sierra Leone	The National HIV and AIDS Commission Act of 2011	2011, amended HIIV Law of 2007
25 Tanzania	HIV and AIDS (Prevention and Control) Act, No 28 of 2008	2008
26 Togo	Loi No 2010-018 du 31 Décembre 2010 modifiant la loi No 2005 – 012 du 14 Décembre 2005 portant protection des personnes en matière de VIH/SIDA	2010, amended HIV Law of 2005
27 Uganda	HIV Prevention and Control Act of 2014	2014

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LGBT rights in Africa and the discursive role of international human rights law

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Summary

Much of Africa seems to be riding on a homophobic wave that is being billed as an African resistance to Western attempts to force homosexuality on Africa. However, this Africanisation of homophobia is based on false premises. Pre-colonial Africa entertained a diverse set of ways in which non-heterosexuality and non-heteronormativity were expressed and it was colonialism that introduced the now widespread religious and legal norms that policed sexuality and gender. The current wave of homophobia is also based on Western anti-LGBT rights discourses and in some part is sponsored by Western/American evangelical groups. The article argues that the imposition of an African label on colonial and neo-colonial products needs to be challenged without, however, effectively replacing it with an equally Western construct. The article advocates a grassroots and ground-up approach wherein international law on LGBT rights is used for its discursive value at the societal, national and regional levels. As part of this approach, it is argued that activists should temporarily refrain from bringing LGBT cases to the African Commission on Human and Peoples' Rights since a detrimental decision, which currently is extremely likely, can cause serious and long-term problems.

Key words: *LGBT rights; sexual orientation; African Commission on Human and Peoples' Rights; discrimination; homophobia*

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1 Introduction

> I cannot but be as God has made me. And so I spoke against the injustices of apartheid, about racism, where people were penalised for something about which they could do nothing, their ethnicity. I, therefore, could not keep quiet when people were hounded for something they did not choose, their sexual orientation.
>
> Archbishop Desmond Tutu[1]

In February 2014, Uganda's notorious Anti-Homosexuality Act was signed into law, bringing to a climax a five-year saga apparently sparked and sponsored by American evangelical groups. Less than half a year later, the country's Supreme Court struck down the law on technical grounds, allegedly due to pressure put on President Museveni by Western governments.[2] While many have analysed the role of Western evangelical organisations in lobbying for this law,[3] the situation on the continent is more complex and wider than Uganda. Following a wave of successful campaigns for gay marriage in Europe and America, many African governments have been taking or talking about measures in the opposite direction. Although positive developments have taken place, such as Mozambique's phasing out of colonial Portuguese laws penalising homosexual acts in July 2015, the trend indicates that before the situation of sexual and gender minorities improves in Africa, it could get much worse.

In recognition of the situation of LGBT[4] rights organisations, human rights experts rightly warn that now is not a good time to utilise judicial mechanisms, including the African Commission on Human and Peoples' Rights (African Commission), to ensure the protection of LGBT rights. There is currently the likelihood that judicial organs will set dangerous precedents that have the effect of thwarting the progressive development of LGBT rights. The article argues that international law is valuable in the promotion of human rights, even if it is not used in courts. It suggests specific strategies on how international human rights regimes can be mobilised to advance LGBT rights as part of a larger advocacy strategy. It also argues that activists working to protect LGBT rights should, unlike the homophobic campaign, look to and encourage African organisations and discourses rather than importing their campaign wholesale.

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1 D Tutu 'International Gay and Lesbian Human Rights Commission 2008', Grace Cathedral, San Francisco, 8 April 2008, http://www.youtube.com/watch?v=ONVgf_RHrkk (accessed 30 July 2015).

2 BBC News 'Uganda court annuls anti-homosexuality law' 1 August 2014 http://www.bbc.com/news/world-africa-28605400 (accessed 30 July 2015).

3 See n 30 below.

4 LGBT is used in this article as a short form for lesbian, gay, bisexual and transgender. Whereas the homophobic laws that the article deals with are typically meant to outlaw and repress non-heterosexual sexual orientation, they will in practice produce consequences adversely affecting individuals with non-conforming gender identities as well. It is for that reason that the article elects to merge both issues and to take a broader look.

2 Background: An African debate that is also not African

Among the international actors discussing, or rather arguing about, the rights of sexual and gender minorities, many African nations have come to the fore in opposing the notion that LGBT rights should be protected legally. In the United Nations (UN) General Assembly and Human Rights Council, for example, a group of African nations have forged an alliance with the Organisation of Islamic Conference in opposing initiatives to afford greater protection to LGBT rights.[5] Additionally, 36 African countries criminalise sodomy and this list includes those that impose life imprisonment and the death sentence.[6] Nineteen African nations, however, have never had sodomy laws or have decriminalised homosexuality.[7] South Africa, which legally recognises gay marriage, has supported LGBT rights in international fora, albeit without speaking out against the laws and practices of its African neighbours.[8] Although this statistic already draws a gloomy picture, there are now movements in many countries that create momentum to make things worse.

Africa presents a multi-layered paradox, as the pro- and anti-LGBT rights movements in the region are directly and indirectly connected to sexual/gender minority politics in the west. First, contemporary laws in most of Africa were imposed on the continent by colonial powers, whether of the Christian or Islamic variant, and there is some indication that homophobia might have been the exception and very mild in pre-colonial Africa.[9] Therefore, there is something deceitful about the anti-LGBT rights campaign in how it legitimises a colonial imposition as something that is essentially African. However, at the same time, many colonial practices have been so entrenched that they are no longer dismissed as alien.

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5 Generally, Human Rights Council 'Human Rights Council Panel on Ending Violence and Discrimination against Individuals Based on their Sexual Orientation and Gender Identity' Geneva, Switzerland, 7 March 2012.

6 LP Itaborahy & J Zhu 'State-sponsored homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love' International Lesbian, Gay, Bisexual, Trans- and Intersex Association, May 2003; also see J Jolly 'Africa's lesbians demand change' BBC News 27 February 2008.

7 Countries that do not criminalise homosexual acts are Benin, Burkina Faso, Cape Verde, Central African Republic, Congo, Chad, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Gabon, Guinea-Bissau, Lesotho, Madagascar, Mali, Mozambique, Niger, Rwanda and South Africa. See International Lesbian, Gay, Bisexual, Trans- and Intersex Association *State-sponsored homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love* (2013) 22.

8 J Dougherty 'UN Council passes gay rights resolution' CNN 17 June 2011; JL Feder 'South Africa, which once led on promoting LGBT rights abroad, could become a roadblock' *BuzzFeed News* 18 September 2014 http://www.buzzfeed.com/lesterfeder/lgbt-rights-resolution-passes-united-nations-human-rights-co#.iivd81Prm (accessed 30 July 2015).

9 See nn 18-22 below.

Second, while there is contemporaneously no shortage of home-grown homophobia, the recent push against LGBT rights is ideologically and financially supported by conservative Christian groups from the west. The recent alien torts claim against Scott Lively[10] for his role in lobbying for the Ugandan draft 'kill the gays' legislation and the complicity of American evangelical organisations in sponsoring this bill are only two reminders of the transnational nature of the anti-LGBT rights movement.[11] At the same time, the LGBT rights movement, itself, is also heavily influenced by the narratives, styles and colours of Western LGBT rights activism, in addition to being backed by Western organisations. Although acceded to in this article for its salience in international human rights discourse and to some extent the discourse of the African Commission itself, the 'LGBT' lexicon is evidence of the predominance of Western discourses on sexuality which may not reflect the experiences and identities of Africans with non-conforming sexualities or genders.

Given the role of European colonial legislation, Christianity, Islam and Western/American conservatism, and global LGBT rights activists and organisations, it appears as if the debate on LGBT rights in Africa is far from being solely African. It is a universal debate that is simultaneously taking place in other parts of the world, sometimes with the same actors involved in the West and Africa. To the extent that the homophobic discourse is transcontinental, LGBT rights activism is becoming inevitably multi-local as well. As a cumulative result of the non-African discourses colouring both homophobic and pro-rights discourses, one may rightly observe that Africans increasingly are finding themselves joining in a Western debate that is rapidly becoming globalised. By the mere fact that Africans on all sides are joining the debate, they are also globalising and privileging the hitherto alien discourses on the topic.

3 LGBT rights in public discourse: The war over signification

Despite the Western roots of the contemporary homophobic wave that is sweeping Africa, one of the major arguments that are being voiced against the protection of LGBT rights is that homosexuality is 'un-African'.[12] By characterising homophobia as part of African culture, the 'un-African' narrative claims that the difference really is

10 *Sexual Minorities Uganda v Scott Lively* CA 12-cv-30051-Map 14 August 2013; also see M Bennett-Smith 'Scott Lively, "Kill the gays" Bill supporter, says "Right to sodomy" is destroying human rights' *The Huffington Post* 23 January 2013.

11 See n 30 below.

12 Generally see SK Mazzochi 'The great debate: Lessons to be learned from an international comparative analysis on same-sex marriage' (2011) 16 *Roger Williams University Law Review* 600-602; LC Backer 'Emasculated men, effeminate law in the United States, Zimbabwe and Malaysia' (2005) 17 *Yale Journal of Law and Feminism* 29-32.

one of culture and that there is no reason why Africa should abandon its culture in favour of the West's. Repeated enough times, underlined with religious zeal and the threat of supernatural damnation, this narrative slowly has resulted in widespread hatred. In Uganda, Nigeria, Kenya and Tanzania such narratives have resulted in a vigilante-type violence and the persecution of homosexual individuals and human rights defenders.

This notion of cultural relativism has been abused by past African political elites to claim that Africans do not have rights protecting them against mass murder and torture.[13] Mobutu Sese Seko, for example, justified his position as lifelong corrupt dictator in reference to African culture. 'Democracy is not for Africa', he said. 'There was only one African chief.'[14] As if the deployment of European/colonial stereotypes[15] about Africa's pre-colonial political experience was not enough, Mobutu also borrowed from colonial predecessors the idea of imposing forced labour on the population, resulting in the bondage of rural populations. Paradoxically, while African dictators imposed forced labour because such was supposedly demanded by African culture, the colonial stereotype that preceded them was that labour needed to be imposed on Africans because such practice had no precedent in pre-colonial African culture.[16]

The same notion is now deployed against sexual minorities, paving the way for discrimination and the criminalisation of sexual orientation and identity. African culture, essentialised and stripped of its diversity, is presented as homogenously heterosexual and inherently homophobic. Typically, the claim is that Africans 'are unique people whose culture, morality and heritage totally abhor homosexual and lesbian practices and indeed any other form of unnatural sexual acts'.[17] Such a view has been promoted despite the fact that anthropological and historical evidence reveals that the claim is unfounded. The demystification of homophobic pseudo-history and

13 R Burke *Decolonisation and the evolution of international human rights* (2010) ch 5.

14 *Wall Street Journal* 14 October 1985.

15 In many parts of Africa, the institution of the chief was invented by colonial administrators and departments because that is how they expected Africans to organise, even though the African experience was much more diverse. Since the deployment of authoritarian chiefs made administration and the collection of revenues, the administrators were probably motivated primarily by convenience rather than mere essentialism. See C Lentz *Ethnicity and the making of history in Northern Ghana* (2006) 33-71; also see W Easterly *The white man's burden: Why the west's efforts to aid the rest have done so much ill and so little good* (2006) 274-278.

16 TM Callaghy 'State-subject communication in Zaire: Domination and the concept of domain consensus' (1980) 18 *Journal of Modern African Studies* 490-492; for an interesting account of a colonial account, see RL Doty *Imperial encounters* (1996) ch 3.

17 E Mittelstaedt 'Safeguarding the rights of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations' (2008) 9 *Chicago Journal of International Law* 368-369.

the detachment of homophobia from 'African-ness' are, thus, a necessary first step in the promotion of LGBT rights.

From the outset it should be made clear that homosexuality, tolerance or, for that matter, homophobia are not alien to pre-colonial, colonial or post-colonial Africa.[18] In pre-colonial and colonial times, not only was there a more diverse understanding of sex, gender and family than the Western Judeo-Christian one,[19] but the treatment of sexual and gender minorities within African cultures could have varied from discouraging public discussion of homosexual desires and acts to complete tolerance of LGBT minorities, including the institutionalisation of some forms of same-sex relationships.[20]

There is evidence showing not only that same-sex intimacy was tolerated in ancient Egypt, but that at certain periods same-sex relationships were legally recognised.[21] Among the Azande, in pre-colonial Sudan, male same-sex marriage was legally recognised where dowry was paid to boy-wives and damages were awarded for infidelity.[22] The Meru people of Kenya, the Bantu of Angola and the Zulu of South Africa tolerated transgender men and allowed them to marry other men, while gay prostitution is reported among the Hausa of Nigeria.[23] Effeminate males among the Langi of Uganda were allowed to marry men.[24] In Zimbabwe, LGBT affection, while being tolerated, was not publicly displayed or discussed, in the same way

18 See, generally, BS Pincheon 'An ethnography of silences: Race, (homo)sexualities, and a discourse of Africa' (2000) 43 *African Studies Review* 39; S Murray & W Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (1998); RC Bleys *The geography of perversion: Male-to-male sexual behaviour outside the west and the ethnographic imagination, 1750-1918* (1995); DP Amory '"Homosexuality" in Africa: Issues and debates' (1997) 25 *A Journal of Opinion* 5; D Constantine-Simms (ed) *The greatest taboo: Homosexuality in black communities* (2000) 132; WN Eskridge Jr 'A history of same-sex marriage' (1993) 79 *Virginia Law Review* 1419.

19 Eg, see the debate on sex and women-to-woman marriages in Kenya in CW Kitetu & AN Kioko 'Issues of language and gender in marriage as practised by the Kamba in Kenya' in LL Atanga et al (eds) *Gender and language in sub-Saharan Africa: Tradition, struggle and change* (2013); I Amadiume *Male daughters, female husbands: Gender and sex in an African society* (1987).

20 See Eskridge (n 18 above) 1437-1441 1458-1462; MJ Herskovits 'A note on "woman marriage" in Dahomey' (1937) 10 *Africa* 335; RS Oboler 'Is the female husband a man? Woman/woman marriage among the Nandi of Kenya' (1980) 19 *Ethnology* 69.

21 Eskridge (n 18 above) 1437-1441; also see generally TA Dowson 'Archaeologists, feminists, and queers: Sexual politics in the construction of the past' in PL Geller & MK Stockett (eds) *Feminist anthropology: Past, present, and future* (2006) 96-98. The most documented type of institutionalised or ritualised homosexual expression, however, related to the expression of aggression against other men, especially in the context of war. Generally, see T Murphy (ed) *Reader's guide to lesbian and gay studies* (2000) 198-199.

22 EE Evans-Pritchard 'Sexual inversion among the Azande' (1970) 72 *American Anthropologist* 1428-1434.

23 DF Greenberg *The construction of homosexuality* (1988) 60-61.

24 S Tamale 'Homosexuality is not un-African' *Al Jazeera* 26 April 2014 http://america.aljazeera.com/opinions/2014/4/homosexuality-africamuseveniugandanigeriaethiopia.html (accessed 30 July 2015).

that heterosexual affection was tabooed.[25] The Amhara in Ethiopia, unlike their Western Christian counterparts, tolerated sexual minorities, whom they considered 'God's mistakes' rather than criminals who needed to be punished.[26] It was with the imposition of colonialism and white rule that homosexuality was criminalised and harshly punished in sub-Saharan Africa, including with both corporal and capital punishment.[27]

Murray and Roscoe, in the most comprehensive book on the subject, point out that[28]

> [t]he colonialists did not introduce homosexuality to Africa but rather intolerance of it – and systems of surveillance and regulation for suppressing it … these systems were not successful as long as the reaction of the colonised was simply to hide or deny such practices. Only when native people began to forget that same-sex patterns were ever a part of their culture did homosexuality become truly stigmatised.

While homophobia had been entrenched in African ethical and legal systems by the time colonialism ended, much of the homophobic rhetoric that is currently on the rise is once again taken from Western homophobic campaigns. Major players, for example, are either Western educated conservatives[29] or are directly funded or supported by Western (specifically American) homophobia campaigners.[30]

Although this study is not an empirical one, and therefore should not be perceived to be making statistical claims, it looks as though a strong hypothesis can be made regarding the role of conservative or fundamentalist religion in promoting homophobia in Africa. In a comparative study of Europe and North America, Kollman concluded that religiosity and confessional heritage play a significant role in the non-acceptance of LGBT rights.[31] A case in point is the recent Irish constitutional referendum to allow same-sex marriage. During this process, religious groups made up a significant segment of the 'No'

25 Eg see M Epprecht 'The "unsaying" of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 *Journal of South African Studies* 633-638.

26 Murray & Roscoe (n 18 above) 22.

27 Epprecht (n 25 above) 645-646; see also generally B Anderson 'The politics of homosexuality in Africa' (2007) 1 *Africana* 123; A Gupta *This alien legacy – The origins of "sodomy" laws in British colonialism* (2008).

28 Murray & Roscoe (n 18 above) xvi.

29 Epprecht (n 25 above) 647.

30 W Besen 'What is the endgame of the anti-gay movement?' *Huffington Post* 23 May 2013; J Gettleman 'Americans' role seen in Uganda anti-gay push' *New York Times* 3 January 2010; T McVeigh et al 'Anti-gay bigots plunge Africa into new era of hate crimes' *The Guardian* 12 December 2009; Z Alsop 'Uganda's anti-gay Bill: Inspired by the US *Time* 10 December 2009; D Englander 'Protecting the human rights of LGBTI people in Uganda in the wake of Uganda's "Anti Homosexuality Bill, 2009"' (2011) 25 *Emory International Law Review* 1270-1273; L Carasik 'Retrogressive anti-gay law in Uganda has ties to the US' *AlJazeera* 13 January 2014.

31 See K Kollman 'Same-sex unions: The globalisation of an idea' (2007) 51 *International Studies Quarterly* 347-351.

lobby and, not surprisingly, these groups are said to have financially benefited from American right-wing Christian support.[32]

In the case of Africa, the same laws, religions and sometimes the same Western religious organisations are contending to shape the narrative on LGBT issues and may be responsible for a new wave of homophobia, discrimination and violence. While it is not suggested that religion takes the sole responsibility for homophobia in Africa, it is clear that it plays a central role that needs to be taken into account. On top of the religious overtone, one notices how the Western – especially American conservative – discourse dominates the African homophobic campaign which takes up other conservative issues as well.

In a recent rally against President Obama's visit to Kenya, for example, protestors are seen with familiar slogans such as 'Stand with the family' and 'Protect the family'. Given the fact that same-sex acts are illegal in Kenya and gay marriage is not at issue, the adoption of anti-gay marriage rhetoric and slogans shows how much inspiration the protest might have derived from Western/American conservatism. Reverberating the American 'Adam and Eve, not Adam and Steve' slogan, participants chanted 'We do not want Obama and Obama; we do not want Michelle and Michelle. We want Obama and Michelle and we want a child!'[33] In the same rally, a member of parliament tapped into more than one American conservative agenda in a speech where he stated: 'We are telling Mr Obama when he comes to Kenya this month and he tries to bring the abortion agenda, the gay agenda, we shall tell him to shut up and go home.'[34] William Ruto, the Deputy-President of Kenya, who sees homosexuality as 'unchristian' and 'dirty',[35] states that his position is meant 'to defend our faith, and to defend our religion, and to defend our country'.[36]

The insertion of religious claims that are borrowed from the West into Africa suggests that the war over signification is going to take place, not only regarding whether the African subject is by definition and always homophobic, but also regarding whether the divine is bigoted. In addition to a general progressive discussion, LGBT rights advocates may find themselves compelled to utilise religious pro-LGBT rights polemics in order to make religion-based arguments for tolerance and to counter fundamentalist animosity towards minorities.

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32 H McDonald 'US Christians "bankrolling" no campaign in Ireland's gay marriage referendum' *The Guardian* 16 May 2015.

33 A Laing 'Kenyan politicians tell Barack Obama to leave "gay rights" talk at home' *The Telegraph* 6 July 2015 http://www.telegraph.co.uk/news/worldnews/barackobama/11721249/Kenyan-politicians-tell-Barack-Obama-to-leave-gay-rights-talk-at-home.html (accessed 30 July 2015).

34 H Malalo 'MP tells anti-gay rally: Obama should not push gay agenda in Kenya' *Reuters* 6 July 2015 http://news.yahoo.com/mp-tells-anti-gay-rally-obama-not-push-132438907.html (accessed 30 July 2015).

35 As above.

36 'DP Ruto says Kenya will not tolerate gay practices' 5 July 2015 https://www.youtube.com/watch?v=t-nPRLjbMYU (accessed 30 July 2015).

The thinking seems to be that in 'Christian Africa', institutions and liberation theologies need not be re-invented as, similar to homophobia, these too can be appropriated from the West and modified for use in African countries.[37] Given how the firebrand conservative view has succeeded in holding root, it is clear that support of LGBT-affirming or tolerant religious groups and views is long overdue. However, not only may Queer theology be too radical for the ears of many African believers, but the importation of such constructs or churches may rightly be considered a Western imposition akin to the Evangelical homophobia.

On the other hand, however, while moves such as the utilisation of Queer theology by definition do not account for indigenous or African expressions of religion, non-heterosexuality and non-heteronormativity, they may be a necessary evil to counter the homophobic pro-violence religious narrative. A religion-based narrative assumes an audience that is deeply steeped in the Christian faith and, therefore, already conversant in non-African and global religious discourses. However, to the extent that expressions of African homosexualities persist or are in formation within African cultures, activists should be careful not to put these under pressure by inadvertently replacing them with already-privileged Western expressions.

As much as possible, therefore, indigenous expressions and forms of signification should take precedence to prevent LGBT rights activism from becoming yet another expression of cultural hegemony. Not only may LGBT individuals and rights activists have strong local and pan-African affinities and identities that will push them towards resisting a culturally-hegemonic approach, but such an approach can also force individuals to identify in ways that are alien and inappropriate to their own contexts. It is the African LGBT agents who know their subject positions and contexts best and should be supported to craft their own discourses and strategies. The over-politicisation of LGBT issues, the rigid categorisation of LGBT identities, an over-emphasis on gay marriage, and the deployment of forms of protest and symbols that typify the West may not be in the best interests of the LGBT rights movement in Africa. Local organisations and religious leaders should take the lead in protecting local cultural expressions of sexuality and gender in figuring out the future of LGBT rights in Africa. Additionally, a Western hegemonic approach is bound to illicit a negative reaction from Africans, including human rights activists, who are shaped in part by a disdain for their colonial histories and neo-colonial realities.

A final matter that needs to be noted is the role of religious leaders in either preventing/curtailing or spreading violence against sexual or gender minorities, even where they are in disagreement over the propriety of protecting LGBT rights. Religious institutions are known

37 Eg, see S Hunt (ed) *Contemporary Christianity and LGBTI sexualities* (2009).

to have played a significant role in supporting human rights in apartheid South Africa and in almost all post-independence dictatorial contexts and they continue to play this role in many countries. However, given the prominent role being played by religious organisations in the homophobic campaign, religious leaders need to be reminded that religion can play a distressing role in promoting a zeal for violence.[38] It is understandable that not all religious leaders will join Archbishop Desmond Tutu and Imam Muhsin Hendricks in fighting bigotry. It needs to be emphasised, nonetheless, that it is incumbent upon all religious leaders to condemn and prevent violence against sexual and gender minorities even if they believed non-heterosexual and non-heteronormative individuals to be sinful.

4 Piece by piece: The African Commission as a potential but problematic forum

While the African Union (AU) and its human rights organs[39] are good starting points for dialogue about LGBT rights, the conversation needs to be carried out primarily in African nations themselves. Care needs to be taken in choosing a legal strategy at the regional level because, if the African Commission is forced to make a decision now, it may end up with a decision that legitimises the violation of LGBT rights. As noted earlier, there is a move by and in African nations to Africanise Western homophobia that is particularly incensed by the successes of protecting LGBT rights in the west. If the African Commission were to hold that LGBT rights are un-African or takes some form of a cultural relativist stance in a binding decision, it effectively will set the clock back on the discourse that has picked up momentum over the last decade.

It is in recognition of this fact that the International Gay and Lesbian Human Rights Commission, for example, warned against bringing gay rights issues to the African Commission.[40] Two scholars

38 This was exemplified during the Rwandan genocide where the churches did not oppose the genocide or sometimes directly or indirectly supported it. See T Longman *Christianity and genocide in Rwanda* (2010). While religious leaders have been trying to delegitimise the violence, the role of religion in the actions of the Anti-Balaka and Boko Haram is undeniable.

39 Although there is an African Court on Human and Peoples' Rights, only seven states have made a declaration allowing individuals or NGOs to apply to it. This means that, as far as the rest of Africa is concerned, it is only the African Commission that has the power to forward cases to the Court and the Commission has so far been quite reluctant to do so. It is for this reason that it is the Commission and not the Court that is discussed in this article. Generally, see AM Ibrahim 'Evaluating a decade of the AU's protection of human rights and democracy: A post-Tahrir assessment' (2012) 12 *African Human Rights Law Journal* 46-47.

40 International Gay and Lesbian Human Rights Commission 'Making the mountain move: An activists guide to how international human rights mechanisms can work for you' http://www.iglhrc.org/sites/default/files/186-1.pdf (accessed 30 July 2015).

who may be regarded among the most prominent experts on African human rights law, Rachel Murray and Frans Viljoen, hold the same position.[41] Two trends in the Commission's work affirm that this conclusion is still valid.

First, the African Commission's 2010 refusal to grant the Coalition of African Lesbians (CAL) observer status, a status that is normally easy to attain, indicates that the Commission can be extremely reluctant to make a controversial but forward-looking decision on LGBT rights. The Commission justified its decision, a decision which at the time had been pending for two years, by noting that the activities of CAL did not promote any of the rights enshrined in the African Charter on Human and Peoples' Rights (African Charter).[42] Although the Commission granted CAL observer status subsequently, in April 2015, the decision followed a concerted seven-year campaign by CAL, joined by many major human rights organisations in Africa, and a significant amount of resistance from the Commission.

Institutional resistance to LGBT rights is amplified by the fact that some commissioners exhibit ignorance about LGBT issues or even show signs of homophobia. In the Commission's published reports on prisoners' rights, one sees an obsessive concern over homosexuality, independent of concerns over health or sexual abuse in prisons.[43] One report, for instance, identifies primarily male 'homosexual relations' as a separate 'area of concern', while rape and sexual assault are not directly mentioned in the document.[44] In the same report, the Rapporteur writes:

> Homosexuality does not seem to be as widespread or receive the same favourable conditions for its existence in all the prisons. The causes that promote this phenomenon range from non-fulfilment by the prison authorities of certain vital needs of the prisoners (food, toiletries, blankets ...) to overcrowding, which is reaching alarming proportions in some prisons and other places of detention. The risk is specially high when

41 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86 106 (pointing to the homophobia expressed by individual commissioners and the fact that the commissioners were going to defer to the interests of the governments that appointed them. They warn that bringing cases to the Commission at this point will hurt LGBT rights by setting legal precedents that will take a long time to reverse.)

42 Report of the African Commission on Human and Peoples' Rights (ACHPR) EX.CL/600(XVII) para 33 19-23 July 2010).

43 See Dr Vera Mlangazuwa Chirwa, Special Rapporteur on Prisons and Conditions of Detention, Prisons in Malawi: Report on a Visit 17 to 28 June 2001 (Series IV No 9); Dr Vera Mlangazuwa Chirwa Special Rapporteur on Prisons and Conditions of Detention, Prisons in Mozambique: Report on a Visit 4-14 April 2001 (Series IV No 8). (While these reports do connect homosexual acts and relationships in connection with health concerns and sexual abuse, one nonetheless senses an independent concern over male homosexuality.)

44 Special Rapporteur on Prisons and Conditions of Detention, Prisons in Namibia: Report to the Government of Namibia on the Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 17 to 28 September 2001 (DOC/OS(XXXIII)/324c/I).

> adult prisoners are housed together with minors … A prisoner who spent more than five months in prison went to the clinic for a consultation about a perianal gonorrhoeal abscess that could only have been caused by homosexual relations.

Even when indirectly discussing rape and sexual abuse of young prisoners, the commissioner seems to see the problem primarily as one of homosexuality rather than sexual and physical abuse. There may, one would suspect, be advocates of non-recognition of LGBT rights within the African Commission independent of political/ pragmatic considerations of the Commission as an institution.

The second reason that makes the African Commission's protective mandate, or its complaint mechanism, an unattractive forum for the time being is that it is likely to show great deference to the currently-prevailing position of African political elites on LGBT rights. This will continue to be the case, especially if the 'LGBT rights are un-African' narrative is taken up by states as an anti-neocolonial stance. In the latter case, the situation of LGBT rights will deteriorate as not only will official persecution intensify in domestic systems, but the AU can be mobilised to shield member states from condemnation as an expression of African solidarity.[45]

Going back to the CAL example, in addition to the commissioners' views on LGBT rights, the initial rejection in 2010 was probably influenced by the threat of state delegates to withdraw from the regional system or even to bring a communication against South Africa because it guarantees LGBT rights in its Constitution.[46] Even after the Commission decided in 2015 to grant CAL observer status, the AU's Executive Council, which is composed of Ministers from all member states, asked the Commission to withdraw the observer status of CAL, which it accused of trying to 'impose values contrary to the African values'.[47] In a bid to prevent similar decisions in the future, the Executive Council went further by asking the Commission to reconsider the criteria it uses to grant observer status and to bring these in line with 'fundamental African values, identity and good traditions'.[48]

Considering how the African Commission and AU member states are reacting to something as trivial as the granting of observer status to one NGO, one could imagine that the political organs will be disposed to take more drastic measures to prevent the development of far-reaching precedents. With enough pressure from the AU's political organs, on a matter they are increasingly tagging as a pan-

45 Eg, this has been the case in relation to the International Criminal Court's work on Africa. See Ibrahim (n 39 above) 48 57-61.

46 For a detailed discussion of the decision and the circumstances surrounding it, see S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 27.

47 AU Executive Council, Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII) para 7.

48 As above.

African issue and one that has populist appeal, there is a great possibility that the Commission can be pressured into making a substantive decision contrary to the interests of LGBT rights. Compared to the first CAL decision, a precedent-setting adverse decision by the Commission would be much more difficult to reverse and would take much longer to undo as well. One also has to bear in mind that many African leaders who face democracy/legitimacy deficits may find in this matter an opportunity to rally their constituencies behind them and to garner whatever fleeting legitimacy they can muster out of this situation. Therefore, the political organs of the AU are almost guaranteed to put concerted pressure on this issue, including through the process of the appointment of commissioners.

For these reasons, before any significant push is made in legal litigation, there needs to be a discourse on LGBT rights that requires development from the ground up. Since most international human rights bodies[49] already recognise LGBT rights as part of their non-discrimination and privacy regimes, international law can be an important discursive tool. In areas where decriminalisation is not possible, activists should focus on the rights of LGBT individuals to work, associate, express their views and be free from violence and discrimination. Such a non-confrontational approach will give LGBT individuals and activists some breathing space to pursue pro-rights discourses and is feasible since the claims to protection would be based on pre-existing laws and jurisprudence.

This approach has been successfully deployed in Kenya and Botswana, where local LGBT rights non-governmental organisations (NGOs) achieved legal recognition after suing their respective governments for denying them legal registration. In the Kenyan High Court case, *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 Others*, the Court decided the case based on an extensive review of international and regional law on the freedom of association.[50] In addition to relying on international treaties, the Court held that the jurisprudence of the African Commission, the African Court on Human and Peoples' Rights and the UN Human Rights Council on the freedom of association led to the conclusion that the prohibition of homosexual acts did not preclude LGBT individuals from freely associating. The Court also relied on case law from Botswana, South Africa, Uganda, the United Kingdom and the

49 These include the UN Human Rights Committee; the UN Committee on Economic, Social and Cultural Rights; the UN Committee on the Elimination of Discrimination against Women; the UN Committee on Torture; the UN Committee on the Rights of the Child; and the UN High Commissioner for Human Rights. The African Commission's decision in *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) falls in this category as it can be used as a discursive tool in as long as the Commission is not given opportunities to explicitly reverse the implications of the pro-LGBT rights statements in that decision.

50 Petition 440 of 2013.

United States to support its conclusion. Although the Court does not emphasise the point or elaborate it in any detail, it unequivocally recognises LGBT groups as 'a minority and vulnerable group'.

It is when or in places where a certain level of acceptance of LGBT rights has been achieved that a significant push towards decriminalisation should be attempted. A ground-up approach ought to begin a decriminalisation campaign from the state level as it is only with the erosion of criminalisation of non-heterosexual sexuality in member states that the African Commission will be ready to deal with major LGBT rights issues. However, wherever there is a chance that a push for decriminalisation can lead to more criminalisation, activism should harken back to public discourse which cannot be used to stir moral panic by homophobic campaigners.

5 Moulding regional dialogue and the performative role of soft law

Murray and Viljoen suggest different interim techniques of lobbying the African Commission, including by the adoption of resolutions, the establishment of specialised mechanisms, and granting LGBT organisations observer status with the Commission.[51] One may also add that, even if the commissioners would not at this time go as far as supporting decriminalisation, it is probable that they would not uphold laws that allow discrimination based on sexual orientation or gender identity or laws that provide for content-based prohibition of expression. For example, the Commission's Special Rapporteur on Human Rights Defenders has strongly criticised new anti-homosexuality legislation in Nigeria and Uganda for proscribing the promotion of LGBT rights.[52] The Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings has also expressed concerns over the continent-wide increase in proposed amendments to impose the death penalty on homosexuality, an act which does not meet the threshold of 'most serious crimes' which justify capital punishment.[53]

Commissioners also seem to recognise the human rights implications of laws and practices that proscribe or discriminate against LGBT individuals in the provision of health care and the provision of HIV/AIDS treatment or management. For example, the African Commission raised concerns regarding discrimination in the

51 Murray & Viljoen (n 41 above) 107-108.

52 African Commission on Human and Peoples' Rights, Press release on the implications of the Same-Sex Marriage (Prohibition) Act 2013 on human rights defenders in Nigeria, 6 February 2014; African Commission on Human and Peoples' Rights, Press release on the implications of the Anti-Homosexuality Act on the work of human rights defenders in the Republic of Uganda, 11 March 2014.

53 Commissioner Kayitesi Zainabo Sylvie, Intersession Activity Report 28 April-12 May 2014.

provision of medical treatment in its reports on the rights of persons living with HIV/AIDS,[54] and one report also notes that criminalisation is a hindrance to the provision of medical treatment.[55] A backhand reference to the Commission's acceptance of non-discrimination is also recognised, again with reference to HIV and AIDS, in General Comments on articles 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Commission raised concerns over human rights issues connected with homosexuality in its country visits and subsequent reports regarding Cameroon, Namibia and Uganda. This means that, despite the risks associated with the Commission, it holds out some promise in protecting LGBT rights and these same openings can introduce the LGBT rights discourse to the institution.

By far the strongest and most exhaustive pro-LGBT rights decision of the African Commission came from its Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.[56] Although this Resolution addresses the right to be free from discrimination, the right to life and the right to be free from torture and similar forms of treatment/punishment, it does not at first sight seem to afford any more protection than the pro-rights resolutions that preceded it. However, its preambular mention of the African Charter's articles 2 (non-discrimination) and 3 (equal protection of the law) sets up a conceptual paradigm based on which protection can be broadened from discrimination in healthcare and HIV and AIDS treatment to discrimination in public or private sector employment, housing, social services, and so on.

Despite the fact that this Resolution is by far the most progressive document to come from the African Commission, it is clear that the Commission is very careful in how it deploys it. Except for its recognition of LGBT rights as legitimate human rights (or minority rights) concerns, the substantive part of the Resolution contains issues that are already protected by regional and domestic law. One will also

54 Commissioner Reine Alapini Gansou, Intersession Report to be presented to the 59th session of the African Commission on Human and Peoples' Rights, April 2011–October 2011.

55 Commissioner Lucy Asuagbor, Activity Report presented to the special 52nd ordinary session of the African Commission on Human and Peoples' Rights, in commemoration of the 25th anniversary of the Commission, 9-22 October 2012.

56 African Commission on Human and Peoples' Rights Resolution 275, meeting at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014. One could argue, as was implied by Rudman (A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1-27), that the African Commission has, in *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 49 above) para 169, already accepted the legal standard in which arts 2 and 3 are presumed to incorporate discrimination based on sexual orientation. While this point may be raised in the pro-rights discourse and even in domestic litigation, it should not be taken as a signal of the Commission's preparedness to take more progressive steps.

note that the Resolution is extremely carefully worded to avoid the issue of decriminalisation. The Commission's Resolution, therefore, carefully but slowly entrenches what it had already achieved rather than blazing a trail. It is partly because of this attitude of the Commission that LGBT rights activism should be built from domestic jurisdictions, which will make it easy for the Commission to slowly build a jurisprudence of non-discrimination and eventually build up to decriminalisation.

An additional way in which momentum for LGBT rights protection can be incrementally built from the ground up is the lobbying of sub-regional organisations. Since many sub-regional economic communities in Africa either contain specific reference to human rights or indirectly deal with human rights issues, mainstreaming human rights and LGBT rights concerns in their work might be possible.[57] Such an approach was taken by the Human Rights Awareness and Promotion Forum, a Ugandan NGO, which brought a case against Uganda at the East African Court of Justice. Although it is not clear whether this – still pending – case will be discontinued because Uganda's Anti-Homosexuality Act has been overturned, the application's aggressive or litigation approach creates the risk of creating hard-to-reverse precedents.

Where sub-regional organisations' specific projects and declarations inculcate issues of equality, such actions may be used later to prove growing consensus or even *opinio juris* when the issue is finally litigated at the African Commission. The best example for this is probably including a prohibition of discrimination based on sexual orientation and gender identity in the different protocols, declarations and procedures that relate to regional and sub-regional HIV/AIDS policies and projects or those relating to aid distribution. If there is any role Western donors can play without feeding the neo-colonialism narrative, it should be as sponsors of these projects. Because the work of these sub-regional organisations usually is outside the public view, African leaders are unlikely to make them grounds for proving their homophobic credentials. These institutions can provide fora where non-threatening reforms that can improve the conditions of LGBT communities and also promote respect for general rights.

South Africa, a country that has played such a pivotal role as the constitutional model in Africa, already is playing a diffusional role both at the African and international level with regard to LGBT rights. Rather than focusing on the African Commission, it is better to get to the Commission from the ground-up. It is important that South Africa replaces the west as a point of diffusion as its tortured history of fighting antiquated imperial values will give it legitimacy in pressuring fellow African nations. While the same could be said of African countries such as Cape Verde and Mozambique, those that specifically

57 See OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bosl & J Diescho (eds) *Human rights in Africa* (2009) 275.

ban discrimination based on sexual orientation or gender identity without going as far as recognising same-sex marriage, can also take a leading role among their political peers.

One of the ways in which countries like South Africa can take on this role, for example, is in the role it plays in its immediate region and in the AU. The Southern African Development Community (SADC) can be used to diffuse the South African legal discourse. Although the SADC's tribunal has for the time being been shut down at the insistence of Zimbabwe,[58] the SADC human rights treaty can still be used to promote LGBT rights. For example, a conflict of laws or specifically recognition of foreign marriages regime can be used to challenge the homophobic laws of neighbouring states.[59] Among the objectives of SADC is the harmonisation of political and socio-economic policies of member states.[60] This would allow South African law, the law of the largest economic player in the region, to either get recognition to South African marriages or even be used as a model for legal reform.

Looking to South Africa as a source of pro-LGBT rights influence is, however, not unproblematic. South Africa's regional hegemonic ambition may overshadow the importance of human rights in its foreign policy. The latest example of this conflict manifested itself when the South African government allowed Omar al-Bashir to slip out of the country despite a High Court decision barring him from doing so. In addition to its cordial relations with the worst offenders in Africa, South Africa has also been criticised for sending lower level officials to African Commission sessions, signalling the minimal importance it accords to the institution and its processes.[61] The government's dilemma on human rights as a foreign policy item is understandable as it would not be able to as easily work, trade and mingle with a large number of African governments if it were to be adversarial about their human rights records. Despite the difficult position in which the South African government finds itself, it has to be recognised that, given that Western pressure on LGBT issues is unwelcome, South Africa is the only best alternative as a leading state actor. Therefore, LGBT rights advocates are well advised not to take South Africa's role for granted and to promote South African leadership, not only in LGBT rights but in human rights in general.

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58 C Gilbert & K Beck 'Killing Southern Africa's Human Rights Court' *Freedom House* 29 August 2012.

59 Even if non-state actors are not given standing, the tribunal would probably still be able to hear cases brought by the South African government that would espouse the interests of its LGBT citizens who get married in South Africa, but are doing business in other SADC nations.

60 Art 5 of the Treaty of the Southern African Development Community, Windhoek (as amended) 1992/1993, in (1993) 5 *African Journal of International and Comparative Law* 418.

61 Coalition of African Lesbians, African Commission http://www.cal.org.za/new/?page_id=49 (accessed 30 July 2015).

While South African soft power ought to be utilised as much as feasible, the deployment of European or American influence should be avoided and used with extreme care when unavoidable. It may be advisable for LGBT rights advocates to make good use of American and European (governmental and non-governmental) influence to encourage discourse on LGBT issues. The use of Western hegemony to do more than that will result in an unnecessary backlash. For example, a push for civil equality in a state where homosexual acts are not criminalised potentially can result in criminalisation, or the condition may change from criminalisation to more severe punishments as it had in Uganda, The Gambia and Nigeria,[62] where anti-LGBT groups are able to galvanise anti-imperial sentiments. Additionally, the deployment of Western hegemonic power will not only reinforce the narrative that LGBT rights are a neo-colonial agenda, but will put African human rights defenders in an extremely difficult position where they would have to fight homophobia in their countries while at the same time struggling against the appearance that they are on the side of a neo-colonial agenda even if they were in reality pan-Africanists.

6 Conclusions

As the evangelical movement galvanises moral outrage and gathers momentum, it is becoming clear that sexual and gender minorities will face a great deal of persecution. As one Ethiopian pastor suggested, if these movements are successful, 'Africa will become a graveyard for homosexuality'.[63] This promise had already come to full fruition in Uganda for some time and in The Gambia and Nigeria, where harsh laws were tightened. In both countries, mob violence has been unleashed against minorities and advocates of their rights. Most of the homophobic discourse may be morally deplorable and substantively laughable to the point that it is difficult to believe its success. However, the net effect of the homophobic lobby and the overlap with the interest of undemocratic regimes grappling for fleeting moments of public acknowledgment may result in the practical Africanisation of homophobia.

A positivistic analysis of the current state of international human rights law will no doubt lead to the conclusion that LGBT rights are recognised as a part of the principle of non-discrimination and that of privacy. However, this conclusion is not to be taken for granted as there is a real possibility that a new norm or norms could develop, making an 'African' exception to LGBT rights. Rather than bringing

62 See S Katyal 'Exporting identity' (2002) 14 *Yale Journal of Law and Feminism* 99-100.

63 KJM Baker 'A graveyard for homosexuals' *Newsweek* 12 December 2013 (quoting Seyoum Antonius, an Ethiopian evangelical leader and president of United for Life, a homophobic, anti-condom and anti-abortion organisation).

international law to court, where it risks being reinterpreted fundamentally and frozen in a homophobic moment, it should be kept in the agora just outside the gates of courts where it can influence and challenge public opinion. It is only after international law is used as a basis of public discourse that judicial discourse should be attempted.

LGBT rights advocacy should initially aim at disrupting the homosexuality as 'un-African' narrative, thereby averting a state-sponsored pan-African homophobic front. At this stage, the most important role of international law should be the prevention of the promulgation of laws that impose greater penalties on LGBT acts and identities at the domestic level. International legal standards should also be included in non-binding soft law pronouncements where they can have a performative role. Subsequently, and in some situations simultaneously, work should be done to decriminalise homosexuality in African states. If enough African states move towards decriminalisation at the domestic level, international law may be considered as a point of departure for litigation at the constitutional and regional levels.

While activists work to ward off the shores of Africa a neo-colonial religious zealot movement that is seeking a battle ground to avenge its recent losses in the west, they need to be careful about repeating the mistakes of the homophobia campaign. While it may be tempting to deploy the same weapons that vanquished the fundamentalists in the west, they risk westernising yet another element of African sexualities, cultures and identities. Not only are the cultural manifestations of non-heterosexual or non-heteronormative identity not necessarily the same in African societies, but the different linguistic, cultural and symbolic expressions of LGBT rights do not have to necessarily be modelled on what exists in the west. The Western LGBT rights discourse came to be as an interaction of local agents reacting to specific contexts and those contexts may or may not exist in Africa. Indigenous LGBT discourses, organisations, activists and religious leaders should, therefore, take the lead in LGBT rights promotion in Africa.

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Intervention pursuant to article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation

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Summary

Article 4(h) of the Constitutive Act of the African Union (AU) establishes the right of the Union to intervene in a member state to prevent grave violations of human rights. It does not state whether the AU should request prior authorisation from the United Nations (UN) Security Council, leading to many interpretations. Many articles were written on this issue at a time when the AU and the Security Council were not in confrontation. However, the situation has changed since the controversy over the arrest of President Al Bashir of Sudan, and the intervention by NATO in Libya in 2011. The AU's right of intervention may be the next controversy. This article examines the question whether the AU could implement military intervention in a member state without authorisation by the Security Council. The article initially states that, in principle, the AU needs authorisation in accordance with article 53 of the Charter of the UN. After further analysis, the article recognises that, under certain circumstances, the AU could implement such intervention without prior authorisation by the Council. The article analyses the legality and legitimacy of such action.

Key words: *African Union; United Nations; military intervention; authorisation*

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1 Introduction

Since the adoption of the Constitutive Act of the African Union (AU), numerous articles have been written on article 4(h) of the Act,[1] which presents what appears to be an innovative norm in international law. Intervention for humanitarian purposes has been debated ethically and morally.[2] However, the AU is the first organisation to insert it in a normative charter.[3] Indeed, article 4(h) establishes 'the right of the Union 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'. Three years later, the AU added amendments to the Constitutive Act to extend the right of intervention to 'a serious threat to a legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council'.[4] It is clear that by intervention, the Constitutive Act of the AU means military intervention authorised by the AU Assembly and implemented by African forces in an African state,[5] where at least one of the grave circumstances mentioned above exists. This intervention is unilaterally decided upon by the AU, and not requested by the state concerned, otherwise such intervention would not be within the scope of article 4(h), but within that of article 4(j),[6] which is deployed at the request of the state faced with war crimes, genocide or crimes against humanity. The debate around article 4(h) results from its supposed conflict with some measures of the United Nations (UN) Charter, namely, articles 2(4) and 53. Article 2(4) states:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The UN Charter defines two exceptions to this prohibition: self-defence, in article 51; and enforcement measures decided upon by the Security Council in chapter VII. Moreover, the Security Council may not only decide upon such measures and call on regional

1 AA Yusuf 'The right of intervention by the African Union: A new paradigm in regional enforcement action' (2003) 11 *African Yearbook of International Law* 3-21; B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *IRRC* 807-826; D Kuwali 'Art 4(h) + R2P: Towards a doctrine of persuasive preventive to end mass atrocity crimes' (2008) 3 *Interdisciplinary Journal of Human Rights Law* 55-85.

2 See, eg, JL Holzgrefe & R Keohane (eds) *Humanitarian intervention: Ethical, legal and political dilemmas* (2003).

3 AP Rodt 'The African Union mission in Burundi' (2012) 14 *Civil War* 375.

4 African Union 'Protocol on Amendments to the Constitutive Act of the African Union' 11 July 2003 para 4(h).

5 With the exception of Morocco, which left the Organisation in 1985 due to the position of the OAU on the affairs of Western Sahara in 1982.

6 Art 4(j) concerns 'the right of member states to request intervention from the Union in order to restore peace and security'.

organisations for their implementation, but may also authorise those regional organisations to initiate enforcement action. Without such authorisation by the Security Council, it is claimed that regional organisations may not undertake enforcement action. Article 53 of the UN Charter made this clear by stipulating that '[n]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council'.

The problem arises because of the fact that the Constitutive Act does not state whether the AU should request authorisation from the Security Council before being able to intervene in accordance with article 4(h).[7] The question then arises whether the obligation in article 53 of the UN Charter applies to the AU when exercising its right of intervention for humanitarian purposes in a member state according to article 4(h). If the answer to this question is in the affirmative, it may be asked whether there is any limit to that obligation. In other words, what would be the position of the AU if the Security Council hesitates or fails to authorise an intervention in time while it has been proven that war crimes, genocide or crimes against humanity are taking place in an African state? Is there any legality or legitimacy for the AU to intervene to stop mass violations of human rights without express prior authorisation by the Security Council?

As stated previously, this question has been debated since the adoption of the AU Constitutive Act. However, most of the articles on the issue were written before 2009. Up to that time, the relationship between the two organisations was cordial. However, since 2009, two problems have arisen between the Security Council and the AU. The first related to the matter of the International Criminal Court (ICC). In 2005, the Security Council authorised the ICC to investigate[8] alleged crimes in Darfur on the basis of article 13(b) of the Rome Statute. The Council refused to comply with the request of the AU regarding delaying the prosecution of President Al Bashir. The same was the case with the prosecution of President Uhuru Kenyatta of Kenya. Since 2009, the AU has asked its member states to refrain from co-operating with the ICC,[9] in other words, with the Security Council which mandated the ICC.

The second problem arose with the intervention in Libya, authorised by the Security Council and implemented by NATO. The AU was opposed to this intervention[10] and the way in which it was

7 Yusuf (n 1 above) 14.

8 Resolution of the Security Council S/RES/1593 (2005), adopted on 31 March 2005.

9 Thirteenth ordinary session of the Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 1-3 July 2009. See Assembly/AU/Dec.245(XIII) Rev 1 para 10.

10 See PSC/PR/COMM.2(CCLXV), Communiqué of the Peace and Security Council on 10 March 2011, para 6, where the PSC 'reaffirms its strong commitment to the respect of the unity and territorial integrity of Libya, as well as its rejection of any foreign military intervention, whatever its form'.

implemented, as recounted by South African President Zuma before the Security Council in 2012.[11] Article 4(h) may well be the next confrontation between the two organisations.

This article argues that, even if the principle is that the AU needs authorisation by the Security Council to exercise its right to intervene according to article 4(h), there may be certain circumstances under which it could intervene without authorisation. The article also recognises the fact that such intervention may be accomplished only if the Council has not decided whether to give authorisation, which means that the AU may not intervene if the Council expressly refuses to authorise the intervention.

2 Foundations of the centralisation of force

Chapter VIII of the UN Charter is the result of lengthy negotiations between partisans of regionalism and partisans of universalism.[12] The first universal organisation in charge of issues of international peace and security was the League of Nations. This organisation, created shortly after World War I, was hostile towards regional organisations. Such hostility could have resulted from several factors, as explained by Villani.[13] The founding states of the League of Nations were aware of the fact that World War I mainly had been triggered by opposition between two groupings, the allied powers and the central powers. They considered it important to prevent the repetition of such a war, by refusing to mention any regional organisation in the Covenant of the League of Nations. President Wilson of the United States made it clear in the following terms: 'There can be no leagues or alliances or special covenants or understandings within the general and common family of the League of Nations.'[14] This completely excluded regional organisations from the system of the League of Nations.[15] Nevertheless, the President introduced an amendment to the

11 Echoing the AU, President Zuma stated: 'Critical to building a stronger relationship will be to avoid a situation such as that which transpired during the conflict in Libya. The AU's plan was completely ignored in favour of the bombing of Libya by NATO forces.' See Statement of President Zuma before the Security Council on the 6702nd meeting of the Council S/PV.6702 3.

12 A Acharya 'Norm subsidiarity and regional orders: Sovereignty, regionalism and rule making in the Third World' (2011) 55 *International Studies Quarterly* 97.

13 U Villani 'Les rapports entre l'ONU et les organisations régionales dans le domaine de maintien de la paix' (2001) 290 *Collected Courses of the Hague Academy of International Law* 239.

14 President Wilson's Address at the Metropolitan Opera House, New York, 27 September 1918, http://query.nytimes.com/gst/abstract.html?res=F20916F73E5511738DDDA10A94D1405B888DF1D3 (accessed 20 December 2013).

15 JM Yepes 'Les accords régionaux et le droit international' (1947) 71 *Collected Courses of the Hague Academy of International Law* 259.

Covenant to take into account the Monroe Doctrine.[16] However, recognition of the Monroe Doctrine was not enough to counterbalance the global spirit of the Covenant since it appeared as a mere exception to article 20 of the Covenant.

In addition, the founding states of the League of Nations were also aware of the fact that the League represented the first attempt at creating an international organisation that could impose its authority on sovereign states. It certainly would have been difficult if the League had to face not only the sovereignty of states, but other international organisations as well.[17] For these reasons, they did not envisage any relationship between the League and regional organisations. However, many regional organisations were created during the lifetime of the League,[18] but it was not possible for the universal organisation to take advantage of these organisations.

Therefore, when it came to draft a charter for the new universal organisation, the UN, some deemed it necessary to define the relationship between the UN and regional organisations. The debate was no longer about the existence of regional arrangements and their relationship with the global system, but on the role that these arrangements would play under the UN system, and the quality of the relationship that would exist. As Borgen commented about the US Secretary of State, Mr Hull, who favoured the global system: 'Hull did not deny that regional arrangements could exist, but believed that they "should be subordinate to a strong centralised organisation"'.[19]

The debate at the San Francisco conference consisted of two groups: those who were still attached to a centralised system and those who were opposed to the supremacy of the Security Council over regional arrangements.[20] A compromise was found, as reflected in chapter VIII of the UN Charter. Article 52 of the Charter[21] favours regional organisations for peaceful settlements. Contrary to articles 20 and 21 of the Charter of the League of Nations, which limited the existence of regional organisations, article 52 of the UN Charter states that nothing in the Charter precludes the existence of regional arrangements or agencies. The counterpart of this recognition,

16 Art 21 of the Covenant of the League of Nations resulting from that amendment stated: 'Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.'

17 Villani (n 13 above) 240.

18 Eg, the treaty to avoid or prevent conflicts between American states (Gondra Treaty); the Treaty of Mutual Assistance of 1923 (approved by the Assembly of the League of Nations).

19 CJ Borgen 'The theory and practice of regional organisation intervention in civil wars' (1994) 26 *New York University Journal of International Law and Politics* 799.

20 Latin American states were particularly on top of this position. However, all the defenders of regionalism did not have the same interests and were not co-ordinated to defend their views.

21 Art 52 of the UN Charter states: 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security …'

however, is found in article 53 of the UN Charter which forbids any enforcement action by a regional organisation unless authorised by the Security Council. This results from chapter VIII, that all regional organisations, the AU included, need authorisation by the Security Council to exercise enforcement actions. Member states of the UN kept their right to self-defence as defined in article 51 of the Charter. But what does the Charter mean by enforcement action? Is the right of intervention affected by that prohibition?

3 The right of intervention of the AU and enforcement actions

The meaning of 'enforcement action' has evolved since the adoption of the Charter in 1945. Goodrich, Hambro and Simons show that during the debate at San Francisco, 'enforcement action was intended to mean any and all measures the Security Council was authorised to take under articles 41 and 42'[22] of the UN Charter. Yet, article 41 is related to non-military actions, which mostly is known by the term 'embargo'. These actions 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.[23] Only article 42 concerns military actions. However, today we can agree with Borgen that 'practice has evinced a much more restricted interpretation of "enforcement action"'.[24] The Security Council, itself, opted for the same interpretation. The first issues were related to the Organization of American States (OAS). This regional organisation imposed collective economic measures against the Dominican Republic in 1960. The same occurred in the case of Cuba in 1962. The Security Council was then consulted on whether the OAS could legally take collective economic measures against a member state of that organisation without authorisation by the Council. Although the Soviet Union initially argued that such a measure required the approval of the Council, it was finally concluded that article 53 did not apply to non-military measures pursuant to article 41.[25] This position subsequently became the rule, including as far as African regional organisations were concerned.

In March 2009, under pressure from civilian opposition and armed forces, President Marc Ravalomanana of Madagascar resigned.

22 L Goodrich et al *Charter of the United Nations: Commentary and documents* (1969) 365.

23 Second sentence of art 41 of the UN Charter.

24 Borgen (n 19 above) 806.

25 S/PV.874, Record of the 874th meeting of the Security Council, 18 July 1960. Cuba brought the case before the Security Council. The United States and many other states were of the view that the OAS was the appropriate organisation to solve the problem in the first instance. The US first invoked the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947,

Mr Andry Rajoelina took the office of President of the Republic. The Security Council considered this change of government to be unconstitutional.[26] Indeed, article 30 of the AU Constitutive Act states that '[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'. On the basis of this measure, the Security Council decided 'to suspend Madagascar from participating in the activities of the AU until the restoration of constitutional order in this country'.[27] Before suspending Madagascar, the Council suspended Guinea and Mauritania. In all these cases, authorisation by the Security Council was not requested. As far as Madagascar was concerned, the Council requested the Chairperson of the Commission to work closely with all AU partners, including the Security Council.[28] But this was not to seek authorisation; the PSC only wanted the Security Council to support the implementation of its decision.

The Economic Community of West African States (ECOWAS) already previously had proceeded in the same manner. In 1997, ECOWAS imposed a general and total embargo on Sierra Leone. It was subsequently requested that the Committee of Four 'solicit assistance from the United Nations Security Council to render these sanctions imposed universal and mandatory, in accordance with the United Nations Charter'.[29] The Council was solicited not to give authorisation, but to render universal the implementation of sanctions that had already been decided upon by a regional organisation. The Security Council responded to that request by adopting Resolution 1132 (1997) in which it extended the sanctions imposed by ECOWAS on Sierra Leone. The Security Council had already responded in the same way in 1992 with the same regional organisation. ECOWAS imposed a general and complete embargo on all deliveries of weapons and military equipment to Liberia and requested the Council to extend these measures in a letter of 28 October 1992. By Resolution 788 (1992), the Security Council decided, according to chapter VII of the UN Charter, that all states should implement that

and the Charter of the Organization of American States, signed at Bogota on 30 April 1948, arguing that '[u]nder these treaties the American Republics contracted to resolve their international differences with any other American states first of all through the Organization of American States' (S/PV.874 para 97). The US also reminded that the 'UN Charter indicates to go to the regional organization first and to the United Nations as a place of last resort' (para 102). Apart from those legal arguments, and as some other states mentioned, the US maintained that to directly bring the differences before the Security Council would undermine the actions of the OAS, and some non-American states, such as the Soviet Union, could aggravate the situation (para 101).

26 PSC/PR/COMM.(CLXXXI), Communiqué of the Peace and Security Council on 20 March 2009, para 3.

27 Communiqué (n 26 above) para 4.

28 Communiqué para 5.

29 S/1997/695, letter dated 8 September 1997 from the Permanent Representative of Nigeria to the UN addressed to the President of the Security Council, Annex II and art 10.

embargo. This confirmed the assertion that authorisation by the Security Council is needed only for military measures. However, article 4(h) of the AU Charter corresponds to military action, and cannot therefore be covered by the system of Article 41 of the UN Charter analysed above. Nonetheless, some military actions are deployed with the consent of the host state, or with its call for such intervention. This is the case with peacekeeping operations. This also applies to AU intervention pursuant to article 4(j) of its Constitutive Act.

The UN Charter did not expressly institute peacekeeping operations. These operations appeared at a time when the Security Council could not apply chapter VII of the Charter. The practice emerged with the Suez crisis in 1956. The Security Council could not take any action, as two permanent members (France and the United Kingdom) were involved in that crisis and it was evident that they would use their veto if the Council intended to adopt any resolution on the issue. Owing to the process established by Resolution 377 (V), the General Assembly could authorise the deployment of the military to observe the ceasefire. The United Nations Emergency Force (UNEF) was subsequently deployed in accordance with Resolution 998 (ES-I) of the General Assembly of 4 November 1956. The spirit of this first military peacekeeping procedure was guided by three main principles: the consent of the parties; neutrality; and the use of force only for self-defence, as the Secretary-General described it.[30] The ICJ subsequently considered that peacekeeping operations 'were not enforcement actions'.[31] It is recognised in international law that regional organisations do not need authorisation to deploy peacekeeping operations.[32] The AU may, therefore, deploy a peacekeeping mission without authorisation by the Security Council, as long as the host state consents to it.

Today, these principles have evolved sufficiently. A new generation of peacekeeping operations has emerged, with greater robustness, known as 'robust peacekeeping'. Force may be used to a greater extent than before. According to the Brahimi report, in implementing robust peacekeeping, military units must be capable not only of defending themselves, but also of defending other components and the mission's mandate,[33] which often includes the protection of civilians. Furthermore, the report recommends that in particularly dangerous situations, rules of engagement 'should not force United Nations contingents to cede the initiative to their attackers'.[34] In

30 A/3943, Report of the Secretary-General, Summary study of the experience derived from the establishment and operation of the Force, paras 153-193.

31 Certain Expenses of the United Nations, Advisory Opinion, 20 July 1962 *ICJ Reports 1962* 166.

32 A Orakhelashvili 'The legal framework of peace operations by regional organisations' (2007) 11 *International Peacekeeping* 119.

33 A/55/305-S/2000/809, Report of the Panel on United Nations Peace Operations, para 49.

34 As above.

other words, peacekeepers should be allowed to attack only when the situation appears dangerous. In this context, should the AU request authorisation before deploying a robust peacekeeping operation? In actual fact, the answer is no. It is considered that peacekeeping still follows the same rules, even if some of the rules have evolved to adapt to the evolvement of armed conflicts. But even the current robustness of peacekeeping does not put peacekeeping and intervention under the same regime. The AU documents, themselves, establish a difference between peace support operations authorised by the Security Council in accordance with article 7(c) of the Protocol relating to the establishment of the Council, on the one hand, and intervention authorised by the AU Assembly in accordance with article 4(h) of the AU Constitutive Act, on the other. Peace support operations are not considered enforcement action, while intervention according to article 4(h) is. This intervention is also different from intervention pursuant to article 4(j) of the AU Constitutive Act.

Article 4(j) establishes 'the right of member states to request intervention from the Union in order to restore peace and security'. In fact, it is easier to imagine that no authorisation would be necessary in the latter case than in the case of article 4(h). Here it is the host state that requests the intervention. This does not violate article 2(4) of the UN Charter which deals with the prohibition of the threat or the use of force against the territorial integrity or political independence of any state, since the host itself requested the intervention. This was the case in 2008 in the Comoros.

The Union of the Comoros faced many military crises since its independence in 1975, including some *coups d'état*. Due to the problems in the Comorian Island of Anjouan in 2007 and the negative consequences they could have had for the elections scheduled that year, the President of Comoros requested support from the AU. The Peace and Security Council first deployed the AU Electoral and Security Assistance Mission to the Comoros (MAES), with an initial period running from 13 May to 31 July 2007,[35] and extended thereafter.[36] However, as the situation on the ground did not improve, the Comorian President requested stronger engagement by the AU. Consequently, the Assembly, in accordance with article 4(j), requested 'all member states capable of doing so to provide support to the Comorian government in its efforts to restore, as quickly as possible, the authority of the Union in Anjouan and to put an end to the crisis'.[37] This decision led to the deployment of an African military intervention known as 'Operation Democracy' in Comoros. The operation was successful, and restored peace and security to the

35 PSC/MIN/Comm.1(LXXVII), Peace and Security Council Communiqué of 9 May 2007.

36 See PSC/PR/Comm(LXXXIV), Peace and Security Council Communiqué of 31 July 2007.

37 Assembly/AU/Dec.186 (X), Decision of the Assembly on the Situation in the Comoros, 10th ordinary session, 31 January-2 February 2008, para 3.

Comoros, enabling MAES to achieve its goal. It is important to note that the AU Assembly did not request authorisation from the Security Council before this intervention. However, it would not be simple to establish a parallel with article 4(h). The intervention in the Comoros was authorised in accordance with article 4(j), which means that the intervention was requested and consented to by the host state and that there was no clash with article 2(4) of the UN Charter. This is not the case in the event of an intervention pursuant to article 4(h). The latter remains entirely under the ambit of the mechanism instituted by article 53 of the UN Charter.

4 Principle of necessary and prior authorisation

As outlined above, intervention pursuant to article 4(h) of the AU Constitutive Act corresponds to the 'enforcement action' defined in article 53 of the UN Charter. May the AU, therefore, ignore the mechanism of necessary authorisation as established by the UN? In actual fact, according to article 103 of the UN Charter, '[in] the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. This leads to the conclusion that, in principle, the AU has to respect article 53 of the UN Charter. The AU has to request authorisation from the Security Council when intervening in accordance with article 4(h) of its Constitutive Act. This is the principle. On the face of it, the analysis could end here.[38] However, many other questions may be raised if one wants to go further and get a more comprehensive analysis of the question. What did the AU intend when including this measure in its Constitutive Act? What would and should the AU do if there are war crimes, crimes against humanity or genocide on the ground and the Security Council does not provide timeous authorisation? Would the AU allow people to die because of technical problems at the Security Council? If the AU intervenes without Security Council authorisation, would such intervention be legal? The following analyses demonstrate that, in certain cases, the AU might intervene in accordance with article 4(h) without authorisation by the Security Council.

5 Evolvement of international peace and security

It mist be recognised that many measures in the UN Charter have evolved sufficiently. The Charter was written in 1945 during a

38 See, eg, G Amvane *Les rapports entre l'ONU et l'Union africaine en matière de paix et de sécurité sur le continent africain* (2012) 39-40. Since the analysis of art 4(h) was not the main issue, the author simply discussed the principle of necessary authorisation.

particular time in the world's history. Some aspects are no longer relevant in the world as it is today. That includes, for example, the notion of 'enemy state', which today has lost its meaning. Articles 53 and 107 of the Charter, to a certain extent, allow for measures against any state which during World War II had been an enemy of any signatory to the Charter. We cannot today imagine states or regional organisations deploying military actions against Germany or Japan on the basis of these two articles. The international scene has changed completely. Germany and Japan today are among the most significant financial contributors to the UN. The meaning of chapter VIII has also greatly evolved. This includes the notion of the 'maintenance of international peace and security', but also 'the co-operation between the UN and regional organisations under chapter VIII'.

As Yusuf wrote, '[t]he maintenance of peace and security among nations has evolved in recent years in the practice of the United Nations to encompass the protection of human security within nations'.[39] A new concept has been born, namely, peacekeeping. The General Assembly, through Resolution 377 (V), received new powers in the area of peace and security. This plenary organ is the one that created the first peacekeeping mission of the ground (UNEF). As President Zuma of South Africa stated before the Security Council, '[the] AU has also sought to give practical meaning to the vision of the United Nations Charter on co-operation with regional organisations'.[40] At the time the Charter was written, most armed conflicts were inter-state armed conflicts. However, the UN adapted the Charter and its implementation to the internal conflicts of today. It should, therefore, be accepted that an armed conflict taking place within one state threatens *international* peace and security. In addition, the Security Council has largely extended the notion to take into account situations that do not have an evident connection with peace and security. Kwakwa stated it as follows:[41]

> The concept of 'security' has been given a very expansive definition in the last few years. It is now generally accepted that security threats are manifested not only in traditional military terms, but also through such problems as poverty, resource scarcity, and refuge and migration flows.

Recently, Germany brought the Security Council to debate the 'impact of climate change' on the maintenance of international peace and security.[42] A month before Germany, Gabon had drawn the Council into a debate regarding the adoption of a second resolution

39 Yusuf (n 1 above) 11.

40 Statement of President Zuma (n 11 above) 3.

41 E Kwakwa 'Internal conflicts in Africa: Is there a right of humanitarian action?' (1994) 2 *African Yearbook of International Law* 34.

42 See PV/.6587, Record of the 6587th meeting of the Security Council; see also S/PRST/2011/15, the Presidential Statement adopted after that debate.

on the 'impact of the HIV/AIDS epidemic on international peace and security'.[43] This, again, demonstrates the fact that the Security Council has extended the notion of 'maintenance of international peace and security'.

The notion of 'co-operation between the UN and regional organisations' has also evolved. Where the UN did not have good relations with regional organisations during the Cold War era, this situation has changed completely since the 1990s. In 1992, the UN Secretary-General, Boutros Ghali, submitted a report, known as the 'Agenda for peace', to both the General Assembly and the Security Council. Three years later, he completed that report with a 'Supplement to an agenda for peace'. The Secretary-General recognised that[44]

> [r]egional action as a matter of decentralisation, delegation and co-operation with United Nations efforts could not only lighten the burden of the Council, but also contribute to a deeper sense of participation, consensus and democratisation in international affairs.

This caused the UN Charter to be imbued with a consideration of the problems and opportunities of today. As AU leaders claim:[45]

> A creative reading of the provisions of chapter VIII of the United Nations Charter to allow the African Union and its regional mechanisms for conflicts prevention, management and resolution to fully play their role as integral component of collective security.

Do African states reclaim this innovative and practical reading of chapter VIII so as to take into account their supposed willingness to intervene in accordance with article 4(h), even prior to authorisation by the Security Council?

6 Understanding the intention of the founders of the AU with regard to article 4(h)

As Maluwa described it, when the AU Constitutive Act was drafted, 'the implications of these provisions for the requirement of prior authorisation by the UN Security Council of enforcement action by regional organisations or arrangements under article 53 of the UN

43 S/RES/1983 (2011), Resolution of the Security Council adopted on 7 June 2011; see also S/PV.6547, Record of the 6547th meeting of the Security Council.

44 A/47/277-S/24111, An agenda for peace – Preventive diplomacy, peace making and peace keeping – Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 21 January 1992, para 64.

45 S/PV.6702, Record of the 6702nd meeting of the Security Council on 12 January 2012, Statement of Mr Ramtane Lamamra, Commissioner for Peace and Security of the AU. See also the statement by President Zuma of South Africa at the same meeting. President Zuma states: 'The AU has also sought to give practical meaning to the vision of the United Nations Charter on co-operation with regional organisations.'

Charter were not addressed in these debates'. Furthermore, the AU's legal adviser, Ben Kioko, wrote that 'when questions were raised as to whether the Union could possibly have an inherent right to intervene other than through the Security Council, they were dismissed out of hand'.[46] It is evident that the issue of prior Security Council authorisation was not the main concern of African leaders when drafting this polemical measure. More clearly, in the 'Ezulwini Consensus',[47] the AU stated that the UN General Assembly and Security Council were often far away from the scenes of conflict. Therefore, these UN bodies lacked the ability to undertake proper measures. Even if the AU recognised in this document that intervention by regional organisations should be undertaken with Security Council approval, it also relativised its speech and said that 'in certain situations, such approval could be granted "after the fact", in circumstances requiring urgent action'.[48] To get a better understanding of this position, it is important to go back on the context that prevailed at the time of the negotiation and adoption of the AU Charter.

The former Organisation of African Unity (OAU) may be considered to be a successful organisation, according to the goals fixed in its Charter. Created in 1963 during a period when some African states had recently become independent and others were still fighting for independence, the OAU established purposes and principles corresponding to its time. Article II of its Charter contains five purposes. Two of these require the organisation to defend sovereignty, territorial integrity and the independence of African states, and to eradicate all forms of colonialism in Africa. Thereafter, the three first principles contained in article III are '(1) the sovereign equality of all member states; (2) non-interference in the internal affairs of states; and (3) respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence'. Although these principles assisted the OAU to succeed with regard to the independence of territories, the end to apartheid and the territorial integrity of states, they soon became limited, and even became prejudicial and harmful, if not to African states, at least to African populations. As recognised by Kioko and others, the principle of non-interference did not allow the OAU to stop gross human right violations, such as those committed by Idi Amin in Uganda, or Bokassa in the Central African Republic in the 1970s.[49] More importantly, the OAU failed to prevent or stop the Rwandan genocide of 1994. Kioko writes that the Assembly of the OAU became a kind of 'heads of state club', where each head of state avoided criticising one

46 Kioko (n 1 above) 821.

47 Ext/EX.CL/2 (VII), The Common African Position on the Proposed Reform of the United Nations: The 'Ezulwini Consensus'.

48 Common African Position (n 47 above) 6.

49 Kioko (n 1 above) 812.

another.[50] The passivity of the OAU under the guise of the principle of non-interference was criticised by everyone in Africa, including some heads of state.[51] The OAU had succeeded in protecting African states and in defending their sovereignty, as established in its Charter. Yet, Africa needed another organisation that would protect the rights of its populations. The Charter of the AU which was then created proceeded from the principle of non-intervention to the right of intervention.

However, regardless of the fact that they themselves could not manage to protect their own populations, African leaders were frustrated by the UN, and the international community at large, for the way in which Africa's problems were being dealt with. The Charter of the OAU established the principle of non-interference, but it did not provide the organisation with a legal basis on which to deal with grave internal crises. The OAU could solve conflicts peacefully, but it did not give itself the means of using enforcement action. Thus, when massive human rights violations occurred in Uganda and the Central African Republic, and the Rwandan genocide took place, only the UN could intervene. However, the UN did nothing. In addition, African leaders felt that decisions on Africa were taken elsewhere, by people who did not care about Africa's problems.[52] Therefore, they did not want to subordinate their right of intervention under an organ like the Security Council. Kioko stated it as follows:[53]

> This decision reflected a sense of frustration with the slow pace of reform of the international order, and with instances in which the international community tended to focus attention on other parts of the world at the expense of more pressing problems in Africa.

This was the beginning of what has been conceptualised as 'African solutions to African problems', and described by Williams in these words:[54]

> Since the early 1990s, and particularly after the so-called Black Hawk Down episode in Mogadishu in October 1993, resulting in the death of eighteen US servicemen, several powerful Western states and a range of African governments have significantly altered their policies toward armed conflict in Africa.

50 Kioko 814.

51 Kioko 813. The author mentions derisive statements by some heads of state who criticised the passivity of the OAU under the guise of the principle of non-interference. Among these are President Museveni of Uganda, who criticised the OAU as the organisation that failed to protect the lives of 75 000 people in his country under the guise of the principle of non-interference; and President Aferwerki of Eritrea, who was of the view that the OAU was ineffective as it failed to protect the people of Eritrea.

52 Referring to the lack of interest in Africa after the Cold War.

53 Kioko (n 1 above) 821.

54 PD Williams 'Keeping the peace in Africa: Why "African" solutions are not enough' (2008) *Carnegie Council for Ethics and International Affairs* 310.

The African continent, in effect, then seemed to be left to its own devices.[55] A report from the Office for the Co-ordination of Humanitarian Affairs (OCHA) stated that '[t]he lesson of Rwanda for African leaders was that they "should no longer wait for action by the international community or the Security Council"'.[56] This may help understand why African leaders did not find it necessary to request authorisation by the UN Security Council when they had to intervene in a situation, also while there was a perceived disinterest on the part of the Council. The right of intervention of the AU could be analysed as what Acharya described as 'norm subsidiarity':[57] African states reacted to the 'tyranny', 'hypocrisy' and neglect by the UN during events of the 1970s and 1990s. The question is whether intervention by the AU without prior authorisation by the UN Security Council could be considered legal.

7 Possible legality and legitimacy of intervention by the AU without UN Security Council authorisation

Some commentators argue that article 53 of the UN Charter is a peremptory norm of general international law because of its connection with article 2(4), and that it is part of the UN Charter. But what is unacknowledged in this argument is that article 2(4) is not recognised as a *jus cogens* norm because it figures in the Charter. As Hossain stated, '[no] treaty, not even the Charter of the United Nations, can establish a rule of general international law'.[58] Article 2(4) is considered as *jus cogens* because the prohibition of threat or use of force existed before the adoption of the Charter and had already been universally accepted.[59] As Brownlie stated, '[t]he Kellogg-Briand norm prohibiting war making had by 1939 become so well established as "to justify the assertion that a customary rule had developed"'.[60] Therefore, it may be accepted that only article 2(4) is a *jus cogens* norm and not article 53. No legal document has recognised the question of authorisation by the Security Council as a peremptory norm of general international law. As for article 2(4), the article prohibits force against the territorial integrity or political independence of a state. We could then assert that the prohibition disappears with the consent of the states concerned. Yet, when

55 D O'Brien 'The search for subsidiarity: The UN, African regional organisations and humanitarian action' (2000) 7 *International Peacekeeping* 60.

56 Quoted by O'Brien (n 55 above) 63.

57 Acharya defines 'norm subsidiarity' as 'a process whereby local actors create rules with a view to preserving their autonomy from dominance, neglect, violation, or abuse by more powerful central actors'. See Acharya (n 12 above) 95-123.

58 K Hossain 'The concept of *jus cogens* and the obligation under the UN Charter' (2005) 3 *Santa Clara Journal of International Law* 77-78.

59 Hossain (n 58 above) 88-89.

60 I Brownlie, *International law and use of force by states* (1963) 108-110, quoted by Hossain (n 58 above) 92.

ratifying its Constitutive Act, member states of the AU agreed with its content, including article 4(h), which gives the AU the right to intervene to stop massive crimes and other human rights violations.

Moreover, as Kuwali pointed it out, article 4(h) could be based on the notion of 'responsibility to protect'.[61] He recalls that the UN General Assembly itself endorsed this notion at the World Summit.[62] Indeed, the General Assembly recognises that, should states fail to protect their population, the Security Council could apply chapter VII to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. On a case-to-case basis, appropriate regional organisations could intervene.[63] If this does not imply that regional organisations could intervene without Council authorisation, another UN document could be of assistance. The question came from the Secretary-General of the UN:[64]

> To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?

In actual fact, the correct answer is no. This shows that the AU is not the only organisation that wants a creative reading of the Charter. Many others would agree that there could be an intervention pursuant to article 4(h) without prior authorisation by the Security Council. The reading of the Charter evolves continuously to adapt to the problems of the international community. It was in the same spirit that Resolution 377 (V) was adopted to allow the General Assembly to intervene in matters belonging to the competence of the Council when the latter is not able to react in a timely manner. According to this, it should be specified that the AU can apply article 4(h) without authorisation only when the Council does not react. In other words, should the Council expressly refuse authorisation, the AU must comply with such a refusal. However, it is difficult to imagine that the Council would expressly prohibit any form of intervention while grave circumstances, such as those described in article 4(h) of the AU Charter, prevail on the ground. The discussion then revolves around non-reaction by the Council. It is this situation that Borgen called 'the problem of deadlock'.[65] As he wrote, the 'dilemma of deadlock arises when a regional organisation wishes to undertake an enforcement action but is unable to get Security Council approval'. If the Council

61 Kuwali (n 1 above).
62 Kuwali 62-64.
63 A/RES/60/1, 2005 World Summit Outcome – Resolution adopted by the General Assembly on 16 September 2005, para 139.
64 A/54/PV.4, Statement of the Secretary-General, presenting his annual report to the General Assembly, 20 September 1999.
65 Borgen (n 19 above) 802.

does nothing, and people are dying on the ground, the AU could legally intervene without prior authorisation by the Security Council. This would be the appropriate thing to do, since the AU would be stopping violations against peremptory norms of general international law, namely, genocide, war crimes and crimes against humanity.[66]

8 Conclusion

The article recognises the fact that the centralisation of force, in the hands of the Security Council, is crucial for the safety of the international community. Subsequently, any regional actor willing to use force should always request authorisation from the Security Council. This rule also applies to regional organisations such as the AU. Nevertheless, the article also acknowledges that if, due to a lack of unanimity among its members, the Security Council cannot pronounce itself on whether to give or to refuse such authorisation, while grave crimes such as those mentioned in article 4(h) of the AU Constitutive Act are taking place on the continent, the AU has a right to intervene and to put an end to genocide, war crimes or crimes against humanity.

However, having this right does not mean that the AU would effectively use it. Like the OAU, the AU is still acting as a 'heads of state club'. Most African leaders lack national legitimacy, many of them elected in a dubious context with a minimal respect for their own national constitutions. Which of these leaders would use article 4(h) against a colleague? In some cases, such as in Darfur, Libya, Egypt, the Central African Republic or Burundi, the AU could have intervened, but it seems that the AU adopts a policy of prudence when it comes to using force. In this context, article 4(h) appears to be a mere political act of frustration, rather than a real ambition to protect civilians from grave atrocities committed by their leaders or other armed groups. We could, therefore, conclude that the AU has the right to intervene in accordance with article 4(h) without authorisation by the Security Council when the latter is unable to pronounce itself. However, the current context does not allow one to affirm that the AU effectively plans to use this right.

66 As Judge Cherif Bassiouni stated: 'The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*.' See C Bassiouni 'International crimes: *Jus cogens* and *obligatio erga omnes*' (1996) 59 *Law and Contemporary Problems* 68. Each of these crimes has also particularly been recognised as being against *jus cogens*. Eg, The ICJ recognised that the prohibition against genocide was a *jus cogens* norm that could not be reserved or derogated from. See 'Reservations to the Convention on Genocide, Advisory Opinion: ICJ Report 1951' 15.

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A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights

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Summary

This article examines the case of Mtikila & Others v Tanzania *before the African Court on Human and Peoples' Rights. The application centres on Tanzania's prohibition on independent candidates running for public office, with the applicants alleging that this prohibition violates article 2 (freedom from discrimination), article 10 (freedom of association) and article 13(1) (the right to participate in government) of the African Charter on Human and Peoples' Rights. The case is the first to be decided on its merits at the African Court, the first to find in favour of the applicants and the first to consider the issue of reparations and damages. The article examines the arguments of both the applicants and Tanzania, including Tanzania's reliance on the 'claw-back' provisions found in articles 27(2) and 29(4) of the African Charter, before assessing and analysing the African Court's findings. The article highlights the African Court's findings that are likely to require further clarification in the future, as well as the possible precedents that the findings set. The article concludes by stating that, while the African Court should be commended for the delivery of its first judgment on the merits, Tanzania's approach to the judgment could be indicative of difficulties the African Court will encounter as it enters an era of judgment compliance by member states.*

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Key words: *Human rights; African Court on Human and Peoples' Rights; right to participate in government; freedom of association; election law*

1 Introduction

The following is a summary and analysis of *Mtikila & Others v Tanzania*,[1] a case heard before the African Court on Human and Peoples' Rights (African Court). The African Court rendered its judgment on 14 June 2013, with a further ruling on reparations on 13 June 2014.[2] The case concerns three applicants: two Tanzanian non-governmental organisations (NGOs); the Tanganyika Law Society and Human Rights Centre; and Reverend Christopher R Mtikila.[3] The applicants' cases were broadly the same: that current Tanzanian election laws prohibiting independent candidates from running for public office were in breach of various articles of the African Charter on Human and Peoples' Rights (African Charter), the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (Universal Declaration) and the rule of law.[4] The case is a watershed moment for African human rights as it is the first case in which an applicant successfully navigated through the African Court's restrictive jurisdictional requirements relating to individuals and NGOs, thus allowing the African Court to consider for the first time a case on its merits. That the African Court found in favour of the applicants is also significant, as is the subsequent reparations ruling, another first for the African Court. The article will provide an in-depth analysis of the jurisdictional issues, the parties' submissions and the African Court's findings. The article, however, argues that, whilst the African Court's ruling in *Mtikila* should be welcomed, it also raises a number of questions which will need to be answered in subsequent judgments with regard to jurisdiction and admissibility, as well as a warning of the potential hazards facing the African Court as it ventures into a new era of seeking compliance with its judgments by member states.

2 Background

In 1992, amendments to the Tanzanian Constitution required all candidates for presidential, parliamentary and local government

1 *Tanganyika Law Society and The Legal and Human Rights Law Centre v The United Republic of Tanzania* App 009/2011; *Reverend Christopher R Mtikila v The United Republic of Tanzania* App 011/2011 14 June 2013 (Judgment).

2 *Reverend Christopher R Mtikila v United Republic of Tanzania* App 011/2011 13 June 2014 (Reparations Ruling).

3 Judgment (n 1 above) paras 1 & 2.

4 Judgment paras 4, 78, 89.2 & 120.

elections to be members of and sponsored by a political party.[5] In 1993, Mtikila filed a case before the Tanzanian High Court challenging these amendments, arguing that the prohibition on independent candidates conflicted with the Tanzanian Constitution.[6] On 24 October 1994, the Tanzanian High Court found in favour of Mtikila and declared the amendments unconstitutional.[7] Prior to this judgment, on 16 October 1994 the Tanzanian government tabled a Bill in parliament seeking to prohibit independent candidates.[8] On 2 December 1994 parliament passed the Bill, which in effect restored the position prior to the High Court's judgment and continued the ban on independent candidates.[9]

In 2005, Mtikila brought another case before the Tanzanian High Court, again arguing that the ban on independent candidates was unconstitutional.[10] Again, the Tanzanian High Court found in his favour and allowed independent candidates.[11] In 2009 the Tanzanian Attorney-General appealed to the Tanzanian Court of Appeal.[12] On 17 June 2010, the Tanzanian Court of Appeal reversed the High Court's decision and once again prohibited independent candidates.[13] In its decision, the Court of Appeal found that the issue of independent candidates was essentially political and, therefore, had to be resolved by parliament.[14] Following this decision, parliament commenced with a consultation aimed at obtaining the view of Tanzanian citizens on the possible amendment to its Constitution.[15] When the case came before the African Court, this consultation was ongoing and independent candidates remained prohibited. [16]

3 Admissibility

The African Court first sought to establish the admissibility of the applicants' case before considering jurisdiction, an approach which was not unanimously supported amongst the bench.[17] Tanzania

5 Judgment para 67. For a detailed review of the 1992 reforms to the Tanzanian Constitution, see M Wambali 'The practice on the right to freedom of political participation in Tanzania' (2009) 9 *African Human Rights Law Journal* 203.
6 Judgment (n 1 above) para 68.
7 Judgment para 69.
8 Judgment para 70.
9 Judgment para 71.
10 Judgment para 72.
11 As above.
12 Judgment para 73.
13 As above.
14 Judgment para 74.
15 As above.
16 Judgment paras 74 & 75. For a summary of the case procedure, see Judgment paras 5-65.
17 See separate opinion of Vice-President Fatsah Ouguergouz (Ouguergouz opinion); separate opinion BM Ngoepe J (Ngoepe opinion); separate opinion of Gerard Niyungeko J (Niyungeko opinion) discussed below.

affirmed that it had ratified the African Charter and the Protocol on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and, importantly for the case to proceed to be considered on its merits, that it had in addition signed the special declaration allowing individuals and NGOs to submit claims directly.[18] However, Tanzania made two challenges to the admissibility of the case, namely, the applicants' (i) failure to exhaust local remedies; and (ii) delay in filing applications.[19]

3.1 Failure to exhaust local remedies

Tanzania submitted that the applicants had failed to exhaust local remedies,[20] a challenge that has since become a default amongst member states facing cases ostensibly on their merits.[21] With regard to Mtikila, Tanzania argued that the Tanzanian Court of Appeal had stated that the issue of independent candidates was an issue for parliament, that parliament had tabled a Bill dealing with the proposed constitutional consultation and that a consulting body had been set up to review the Tanzanian Constitution.[22] Therefore, as a citizen of Tanzania, Mtikila would have the opportunity to take part in that consultation and to give his views.[23]

The applicants responded that parliament and the constitutional review process did not constitute viable local remedies as found in the African Court Protocol and African Charter, as the remedy to be exhausted was a judicial one.[24]

The African Court agreed that the remedies to be exhausted were primarily judicial since these met the criteria of 'availability, effectiveness and sufficiency'.[25] It found that the political process relied on by Tanzania was not freely accessible to each individual, was discretionary, could be abandoned at any time, and that the outcome

18 Judgment (n 1 above) para 3, referring to arts 5(3) and 36(4) of the African Court Protocol. For a detailed review of the relevant articles and observations on the rule of the African Court, see GJ Naldi 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 *African Human Rights Law Journal* 366-392.

19 Judgment (n 1 above) paras 79, 80 & 80.1 on failure to exhaust local remedies; Judgment para 80.2 on unreasonable delay in filing the applications.

20 Judgment para 80.1.

21 See *Lohé Issa Konaté v Burkina Faso* App 004/2013 5 December 2014, paras 74-115; *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema Alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso*, App 013/2011 14 June 2013, paras 55-113.

22 Judgment (n 1 above) para 80.1.

23 As above.

24 As above.

25 Judgment (n 1 above) para 82.1, referring to remedies envisaged by art 6(2) of the African Court Protocol read together with art 56(5) of the Protocol. The African Court considered *Jawara v The Gambia*, (2000) AHRLR 107 (ACHPR 2000); *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999); *Velásquez-Rodríguez v Honduras* IACHR (29 July 1988) Ser C/Doc 4; *Akdivar & Others v Turkey* (1996) ECHR 21893/93.

depended on the will of the majority.[26] The African Court concluded that, no matter how democratic the constitutional review process is, it cannot be equated to an independent judicial process for protecting African Charter rights.[27] Based on this finding, the African Court observed that, as the Court of Appeal is Tanzania's final court of appeal, Mtikila had exhausted local remedies.[28] This finding may be seen as the African Court refusing to allow member states to simply create review processes under the guise of consultations in order to forestall potential applicants' cases before the African Court, a welcome stance given the potential vague and wide-ranging temporal and geographic scope of any such 'consultation' which could lead, if allowed to stand as a legitimate opposition to exhausting local remedies, to applicants waiting for months, if not years, for such consultations to end before properly exhausting local remedies. Regarding NGOs, the African Court stated that it was not necessary for them to institute the same proceedings as Mtikila as the outcome would be the same,[29] thus giving NGOs a wide-ranging scope to circumnavigate exhaustion of local remedies issues, since an NGO can use this precedent to join applications before the African Court where it can demonstrate that the individual applicant has done the work of taking the case through various national courts.[30]

3.2 Delay in filing applications

Tanzania also submitted that the applicants took an unreasonably long time to bring their applications before the African Court.[31] It argued that the Tanzanian Court of Appeal handed down its judgment on 17 June 2010 and the applicants did not file their applications until 2 and 10 June 2011 respectively.[32]

The applicants responded that there had been no undue delay.[33] They argued that within four months of the Court of Appeal's decision, Tanzania held national elections in which functionaries were preoccupied, that they had to wait to see how parliament responded to the Court of Appeal's judgment, and that time should run from the time when parliament failed to act.[34]

The African Court found that the applicants were entitled to wait for the reaction of parliament to the Court of Appeal's judgment.[35] The Court found that the period of just under one year between the date of the Court of Appeal's judgment and the applicants filing their

26 Judgment (n 1 above) para 82.3.
27 Judgment para 82.3.
28 As above.
29 As above.
30 See also *Zongo* (n 21 above) paras 107-112.
31 Judgment (n 1 above) para 80.2.
32 As above.
33 Judgment para 81.2.
34 As above.
35 Judgment para 83.

case was not unreasonably long.[36] The African Court's Statute and Rules do not prescribe a time limit for the filing of applications before the African Court. Accordingly, the African Court's willingness to consider applications filed just under one year from the final decision of the domestic court's decision may be seen, if not as a definitive measure, at the very least as a useful barometer for future applicants concerned as to whether their application may be considered unreasonably delayed, and retains the African Court's flexibility in addressing the issue of delayed filings in future cases.

4 Jurisdiction

Having dispensed with Tanzania's submissions regarding the admissibility of the applicants' cases, the African Court proceeded to consider (i) Tanzania's submissions on the temporal jurisdiction of the African Court;[37] and (ii) *proprio motu*, other jurisdictional issues.

4.1 Temporal jurisdiction of the African Court

Tanzania argued that, at the time of the alleged violation of the applicants' rights, the African Court Protocol had not come into operation and that, therefore, the African Court had no jurisdiction to hear the matter.[38]

In response, Mtikila submitted that a distinction should be made between normative and institutional provisions. He argued that the rights sought to be protected were already contained in the African Charter, to which Tanzania was a party. He contended that, although the African Court Protocol came into operation later, it was only a mechanism to protect these African Charter rights and, therefore, the matter was not time-barred. [39]

The African Court rejected Tanzania's argument, finding that as Tanzania had ratified the African Charter by the time the alleged violations had occurred, the African Charter bound Tanzania and that, therefore, it was under a duty to protect the rights found therein.[40] The African Court also noted that at the time the Court Protocol was ratified, the alleged violations were still continuing and were so up to the time of the hearing, by which time Tanzania had also made its special declaration allowing individuals to apply directly to the African Court.[41]

This approach sets a potentially important precedent for the African Court. It can be read to mean that applicants' rights are protected

36 As above.
37 Judgment para 80.3.
38 As above.
39 Judgment para 81.3.
40 Judgment para 84.
41 As above.

from the time a member state ratifies the African Charter rather than the African Court Protocol. This means that applicants could bring cases related to rights violations that occurred before the ratification of the African Court Protocol, therefore giving applicants a much wider scope. Given that all African Union (AU) member states, apart from South Sudan, have ratified the African Charter, this potentially leaves the door open to applicants from member states who have not yet ratified the African Court Protocol to bring cases in the future for violations that are occurring now or in the past, once the member state in question does ratify the African Court Protocol. For example, Cameroon became the most recent member state to sign the African Court Protocol,[42] but it ratified the African Charter on 20 June 1989.[43] Putting aside issues of direct access for individuals and NGOs (Cameroon is yet to sign the special declaration), the approach adopted here by the African Court could open the door for applications relating to Cameroon going back to 1989, the date of its ratification of the African Charter, rather than from August 2015 when it ratified the African Court Protocol. Given that any delay in bringing a case relating to the period 1989-2015 is because Cameroon had not signed the African Court Protocol until August 2015, it remains open whether the African Court would allow the applications on the basis of their being reasonably delayed.

4.2 Material and personal jurisdiction of the African Court

Although no other jurisdictional arguments were raised by Tanzania, the African Court provided, *proprio motu*, a short analysis of the reasons why it considered the case admissible.[44] It noted that the alleged violations fell within the scope of its jurisdiction,[45] and that the applicants, as Tanzanian NGOs and citizens, were entitled to bring their case directly before the African Court as Tanzania had signed the special declaration pursuant to articles 5(3) and 36(4) of the African Court Protocol.[46] This *proprio motu* step was not required and may be as a result of the case being the first to be tried on its merits.[47]

5 Merits

Having rejected Tanzania's arguments both on admissibility and jurisdiction, and having satisfied itself *proprio motu* on its jurisdiction,

42 Cameroon deposited its ratification on 17 August 2015. See http://www.african-court.org/en/index.php/news/latest-news/606-cameroon-becomes-29th-au-member-state-to-ratify-protocol-on-establishment-of-african-court-on-human-and-peoples-rights (accessed 9 October 2015).

43 http://www.achpr.org/instruments/achpr/ratification/ (accessed 9 October 2015).

44 Judgment (n 1 above) paras 85-88.

45 Judgment para 85.

46 Judgment para 86.

47 In the subsequent *Zongo* and *Konaté* judgments (n 21 above), the African Court did not follow the same procedure.

the African Court proceeded, for the first time in its existence, to assess the merits of the applicants' case.[48]

5.1 Applicants' submissions

Both applicants argued that the amendments to Tanzania's Constitution prohibiting independent candidates violated Tanzanian citizens' rights under the African Charter, namely, (i) the right to freedom of association pursuant to article 10; (ii) the right to participate in public/governmental affairs pursuant to article 13(1); and (iii) the right against discrimination pursuant to article 2.[49]

The applicants also argued that the prohibition violated Tanzanian citizens' rights under other international human rights law instruments, specifically (i) the equal right of men and women to the enjoyment of all civil and political rights pursuant to article 3 of the ICCPR; (ii) the right to take part in government pursuant to article 25 of the ICCPR; (iii) freedom of association pursuant to article 22 of the ICCPR and article 20 of the Universal Declaration; (iv) and the right to take part in the government of one's country, directly or through freely-chosen representatives, pursuant to article 21(1) of the Universal Declaration.[50] Mtikila also contended that Tanzania violated the rule of law by instituting a constitutional review process to settle an issue pending before the courts.[51]

In greater detail as regards freedom of association, the applicants argued that freedom of association was a core principle in monitoring the actions of government. As to the right not to be discriminated against and the right to equality, the applicants argued that the prohibition on independent candidates had the effect of discriminating against the majority of Tanzanians. The applicants explained that, although the law prohibiting independent candidates applied to all Tanzanians equally, its effects were discriminatory because only those who are members of and sponsored by political parties may seek election.[52]

As to the rule of law, Mtikila argued that the rule of law was a principle of customary international law and that by initiating a constitutional amendment to settle a legal dispute pending before a domestic court which nullified the court's judgment, Tanzania abused the process of constitutional amendment and, therefore, the principle of the rule of law.[53]

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48 Judgment (n 1 above) paras 89-126.

49 Judgment paras 4, 76(a), 76(b), 78, 89.2, 89.3, 91 & 93.

50 Judgment paras 92 & 93.

51 Judgment para 120.

52 The applicants cited in particular *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 64, where the African Commission held, inter alia, that any 'measure which seeks to exclude a section of the citizenry from participating in the democratic processes is discriminatory and falls foul of the [African] Charter'.

53 Judgment (n 1 above) para 120.

Each party's request to rectify the alleged violations, however, differed slightly. The NGOs requested (i) a finding that Tanzania was in breach of articles 2 and 13(1) of the African Charter and articles 3 and 25 of the ICCPR;[54] (ii) an order rectifying the situation;[55] (iii) an order for Tanzania to report to the Court within 12 months of its decision;[56] and (iv) that Tanzania paid its costs.[57] Mtikila, on the other hand, requested (i) the African Court to make a finding that Tanzania had violated his rights;[58] and (ii) Tanzania to provide compensation for the ongoing denial of his rights.[59]

5.2 Tanzania's response

Tanzania essentially had one argument in response to the applicants' various complaints; that the prohibition of independent candidates was essential to maintain peace in Tanzania. In particular, Tanzania submitted that the ban on independent candidates was a way of 'avoiding absolute and uncontrolled liberty' which would lead to 'anarchy and disorder', and that the prohibition was necessary for good governance and unity.[60] Specifically regarding government leadership, Tanzania argued that the prohibition was necessary for 'national security, defence, public order, public peace and morality'.[61] It argued that the requirements for registering a political party, described by the applicants as onerous, were in fact necessary to avoid tribalism.[62]

Regarding the right to freely participate in the government of one's country, Tanzania again argued that the prohibition on independent candidates was a 'necessity' for social reasons.[63] In support, Tanzania relied on the Inter-American Court of Human Rights case of *Castañeda Gutman v Mexico*,[64] arguing that the introduction of independent candidates depended on the social needs of a state and its 'historical reality'.[65] Tanzania explained that following independence, it initially had a multi-party system but then instituted a one-party system to cement national unity.[66] It stated that it reintroduced multi-party democracy in the early 1990s with independent candidacy

54 Judgment para 76(a).
55 Judgment para 76(b).
56 Judgment para 76(c).
57 Judgment para 76(e). The NGOs also requested any other remedy or relief the African Court deemed necessary to grant. See Judgment para 76(d).
58 Judgment (n 1 above) para 77 (a).
59 Judgment para 77(b). Importantly, in terms of the later Reparations Ruling, Mtikila reserved the right to substantiate his claims for compensation and reparations. See Judgment para 77(c).
60 Judgment paras 90-95.
61 Judgment paras 90.1 & 94.
62 Judgment paras 90.1 & 102.
63 Judgment paras 94 & 101.
64 IACHR (6 August 2008) Ser C/Doc 184, paras 192 & 193.
65 Judgment (n 1 above) paras 103 & 107.3.
66 Judgment para 104.

prohibited.[67] Tanzania argued that this prohibition was necessary at a time when it was a young democracy in order to strengthen multi-party democracy.[68] In response to questions put to Tanzania during the hearing, it explained that the prohibition was also necessary due to the structure of Tanzania, being comprised of mainland Tanzania and Zanzibar, and that the requirement that political parties have a minimum number of members from mainland Tanzania and Zanzibar had so far resulted in no tribalism in Tanzania.[69] Tanzania further argued that the law that sets out procedures for how individuals can participate in government was reasonable.[70]

Regarding the right to freedom of association, Tanzania argued that no one was forced to stand for political position; that it was rather a matter of personal ambition.[71] With particular reference to Mtikila, Tanzania submitted that he had never been prevented from participating in politics, that he belonged to a political party and had contested the presidential election but had lost.[72]

With regard to the right not to be discriminated against and the right to equality, Tanzania maintained that the law prohibiting independent candidates was not discriminatory as it applied equally to all Tanzanians.[73] As to the rule of law, Tanzania submitted that it fully adhered to principles of the rule of law, including the separation of powers and independence of the judiciary as provided for in the Tanzanian Constitution. Tanzania argued that constitutional review and amendment were not new phenomena in Tanzania and that the Constitution had undergone 14 such amendments.[74] It pointed out that article 98(1) of the Tanzanian Constitution allowed amendments at any time when the need arises and that, therefore, the issue of a violation of the rule of law did not arise.[75]

5.3 African Court's findings

5.3.1 Right to participate freely in the government of one's country

The African Court considered in detail article 13(1) of the African Charter.[76] It emphasised that article 13(1) was an individual right and

67 As above.
68 As above.
69 Judgment para 102.
70 As above.
71 Judgment para 90.3.
72 Judgment paras 90.3 & 96.
73 Judgment para 90.2.
74 Judgment para 120.
75 As above.
76 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.'

not a right attributed to groups,[77] and found that its 'patently clear terms' meant that a requirement that an individual be a member of a political party 'surely derogates' from the right.[78] This may be seen as the African Court adopting a strict reading of article 13(1) of the African Charter, and in particular the words 'freely' and 'directly', by finding that the right to participate in government goes further than a right found through the possibility of joining a political party, as argued by Tanzania, but instead as a right which allows a citizen to participate freely and directly and, therefore, independently. The African Court proceeded to examine whether this derogation was justifiable under articles 27(2)[79] or 29(4)[80] of the African Charter,[81] both 'claw-back' provisions allowing for the derogation of rights when weighed against the rights of others or for the strengthening of social or national solidarity. Specifically, the African Court examined the jurisprudence pertaining to a state's restriction of a citizen's rights and when it may be considered proportionate.[82] In particular, it recalled that the African Commission on Human and Peoples' Rights (African Commission) had found that the 'only legitimate reasons for limitations to the rights and freedoms of the African Charter' are found in article 27(2) of the African Charter, and that for a right that is effected through a law of 'general application', the question of whether it is proportional can be answered by weighing the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal.[83] It further noted that the 'legitimate state interest' must be 'proportionate with and absolutely necessary for the advantages which are to be obtained'.[84] It also noted that the European Court of Human Rights and Inter-American Court of Human Rights take similar approaches on the restriction of rights.[85]

The African Court also considered the United Nations (UN) Human Rights Committee's General Comment 25 on article 25 of the

77 Judgment (n 1 above) paras 97 & 98.
78 Judgment para 99.
79 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'
80 '[T]o preserve and strengthen social and national solidarity, particularly when the latter is threatened.'
81 Judgment (n 1 above) para 100.
82 Judgment paras 106.1-106.5.
83 Judgment para 106.1, referring to *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998); *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).
84 Judgment (n 1 above) 106.1
85 Judgment paras 106.2-106.5, referring to *Handyside v United Kingdom* ECHR (7 December 1976) Ser A 24; *Gillow v United Kingdom* ECHR (24 November 1986) Ser A 109; *Olsson v Sweden* ECHR (24 March 1988) Ser A 130; *Sporrong & Lonnroth v Sweden* ECHR (23 September 1982) Ser A 52; arts 30 & 32(2) American Convention on Human Rights; *Baena Ricardo & Others v Panama* IACHR (2 February 2001) Ser C/Doc 72. See also Judgment (n 1 above) para 107.1.

ICCPR,[86] and found that limitations to African Charter rights and freedoms are only those set out in article 27(2) of the African Charter and that such limitations must be proportionate to the legitimate aim pursued.[87]

In the present case, the African Court found that there was nothing in Tanzania's arguments to demonstrate that the restrictions on the right to participate freely in the government fell within the permissible restrictions set out in article 27(2) of the African Charter, and that prohibition was not proportional to the claim by Tanzania of fostering national unity and solidarity.[88]

The African Court distinguished the present case from *Castañeda* relied on by Tanzania, stating that in that case, the Inter-American Court of Human Rights found that individuals had other options to seek public elective office, in particular pointing out that, apart from being a member of a political party and being sponsored by that party, prospective candidates in Mexico could also be sponsored by a political party without it being necessary to be a member, or that an individual could easily form a political party since the requirements were not arduous.[89] The African Court found that in the present case, the only option available to Tanzanians was membership of and sponsorship by a political party.[90] It observed that a person's freedom to choose a candidate of their choice was, therefore, restricted to those sponsored by a political party,[91] therefore finding that the requirement that a citizen must be a member of a political party is 'an unnecessary fetter' that denies citizens direct participation, which amounts to a violation of their rights.[92]

The African Court's approach here to the claw-back provisions found in articles 27(2) and 29(4) of the African Charter is likely to play an important role in future cases as the African Court moves forward and considers more cases on their merits. The Court made it clear that these provisions could only be used in limited circumstances and

86 Judgment para 105.4, referring to the UN Human Rights Committee's General Comment 25 on art 25 of the ICCPR, para 17: 'The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.'

87 Judgment (n 1 above) para 107.1.

88 Judgment para 107.2.

89 Judgment para 107.3.

90 As above.

91 Judgment para 109.

92 As above. The Court also found that Tanzania could not use art 13(1) of the African Charter as a reason for not complying with international standards. Citing the African Commission's findings, it found that, having ratified the African Charter, Tanzania was under an obligation to enact laws which are in line with the African Charter. See Judgment (n 1 above) para 109, referring to *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 50.

could not be used as a catch-all for member states to hide behind by arguing that any laws which may violate the African Charter, or other international human rights instruments, could be justified by the need to consider the rights of others or for national or social solidarity. It means that member states seeking to rely on these provisions will have to work much harder to justify the violations, other than simply arguing that is was necessary for the greater good or for social necessity, which is essentially what Tanzania did in this case without pointing to specific examples.

The African Court also dismissed Tanzania's argument that Mtikila had formed his own political party, as in no 'way absolv[ing] [Tanzania] from any of its obligations',[93] thus demonstrating that, even if an applicant has managed to circumnavigate a violated right, this does not absolve the member state's actions which violated the right in the first place, or nullify the need for the African Court to make a finding and recommendations for rectification. The African Court confirmed that these types of cases should not be considered as 'personal action[s]' since, if there is a violation, it affects all Tanzanians.[94] Despite the fact that Mtikila had set up a political party, the African Court found that, should he wish to again stand as an independent candidate, he had the right to insist on the 'strict observance of his Charter rights'.[95] The African Court considered it arguable that, even if Mtikila continued as a member of his own political party, he still had the right to challenge the prohibition of independent candidates.[96] Again, this stance shows that Mtikila's ability to surmount the violation does not negate the African Court's duty to consider the application not as a narrow issue affecting one individual or NGO, as Tanzania appeared to argue, but instead as a violation affecting every citizen of Tanzania.

5.3.2 Right to freedom of association

The African Court also considered a possible violation of article 10 of the African Charter.[97] The African Court considered that freedom of association is negated if an individual is forced to associate with others or if other people are forced to join up with the individual.[98] It, therefore, found that by requiring individuals to belong to and be sponsored by a political party, Tanzania had violated the right to

93 Judgment (n 1 above) para 110.
94 As above.
95 As above.
96 As above.
97 'Every individual shall have the right to free association provided that he abides by the law.' The African Court recognised the applicant's reliance on art 20 of the Universal Declaration and art 22 of the ICCPR. See Judgment (n 1 above) para 112.
98 Judgment para 113.

freedom of association as individuals are compelled to join or form an association before seeking election.[99] Thus, the African Court interpreted the right to freedom of association widely, incorporating not only the right to associate with others, but also the right *not* to be forced to associate with others as occurs when one is required to join a political party to run for public office.

The African Court again recalled that articles 27(2) and 29(4) of the African Charter allowed state parties some measure of discretion,[100] but it was not satisfied that the 'social needs' argument raised by Tanzania meant that the use of these claw-back provisions justified limiting the right to freedom of association.[101] The African Court, therefore, concluded that there had been a violation of article 10 of the African Charter.[102] The African Court demonstrated that it was willing to consider the claw-back provisions in articles 27(2) and 29(4) of the African Charter, but that the standard for applying them was high. Tanzania had simply not done enough to justify any interference with the right to freedom of association, again laying the onus firmly on member states seeking to use these provisions to demonstrate clearly why it should be used, above and beyond the vague and wide-ranging 'social needs' argument Tanzania sought to rely on.

5.3.3 Right not to be discriminated against and the right to equality

As to the right not to be discriminated against, the African Court understood the discrimination claimed by the applicants to be between Tanzanians who are not members of a political party, and therefore cannot run for election, and those who are members and therefore can.[103] Based on this understanding, the African Court considered the right not to be discriminated against related to the right to equal protection by the law as guaranteed by article 3(2) of the African Charter,[104] and that, in light of article 2 of the African Charter,[105] the alleged discrimination may be related to a distinction based on 'political or any other opinion'.[106]

The African Court, therefore, considered whether Tanzania's arguments, namely, that the particular structure of the Tanzanian mainland and Zanzibar and its history, required a 'gradual construction of a pluralist democracy in unity' reasonably justified the

99 Judgment para 114.
100 Judgment para 112.
101 Judgment para 115.
102 As above.
103 Judgment paras 116-118 & 119.
104 'Every individual shall be entitled to equal protection of the law.'
105 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'
106 Judgment (n 1 above) para 119.

'difference in treatment' between Tanzanians who are members of a political party and those who are not.[107]

Having already indicated that similar 'social needs' grounds could not justify restrictions on the right to participate in government and the right to freedom of association, the African Court considered that these same grounds could not legitimise the restrictions not be discriminated against and the right to equality before the law. The African Court, therefore, concluded that there had been a violation of articles 2 and 3(2) of the African Charter.[108] This approach is certainly a wide interpretation of article 3(2) of the African Charter, as the African Court effectively read that the enjoyment of rights includes not only race, ethnic group, political status or other delineated categories, but also the status of non-membership of a political party.

5.3.4 Breach of the rule of law

With respect to Mtikila's arguments regarding a breach of the rule of law, the African Court found that the concept of the rule of law was an all-encompassing principle under which human rights fall, and so cannot be treated in abstract or wholesale.[109] It found that Mtikila's claim was not related to a specific right and that, therefore, the issue of the violation of the principle of the rule of law did not properly arise.[110] While article 3(1) of the African Court Protocol allows for applications alleging violations of not only the African Charter but other international human rights instruments which the member state in question has ratified, it appears that an application alleging a breach of the rule of law is not precise enough to be considered by the African Court. In doing so, the African Court appears to approach the rule of law as an all-encompassing principle under which specific allegations of specific violations, such as the right to participate in government or the right to freedom of association, can be brought. This approach is likely to forestall any further applications brought by future applicants for a violation of the rule of law, who can instead focus on which specific alleged errors were committed under specific human rights instruments.

5.3.5 Alleged violations of the ICCPR and Universal Declaration

The African Court noted that, according to article 3(1) of the African Court Protocol, it had jurisdiction to interpret international treaties.[111] However, having considered the alleged violations under the relevant provisions of the African Charter, it did not deem it necessary to consider the application of such international treaties.[112] Whilst the

107 As above.
108 As above.
109 Judgment para 121.
110 As above.
111 Judgment para 122.
112 Judgment para 123.

African Court's clarification of article 3(1) of the Court Protocol should be seen as a confirmation that it has the jurisdiction to hear applications alleging violations of not only the African Charter but other international human rights instruments, the decision not to examine the allegations and make findings is disappointing. Although the African Court found violations of the African Charter, violations of other international human rights instruments should not be seen as an 'either/or' option. The African Court had the opportunity to not only state that it has jurisdiction over other international human rights instruments, but also to undertake an examination of the allegations. Without a thorough and detailed explanation as to why, despite having jurisdiction, the African Court simply elects not to examine the alleged other violations. It can be argued that in addition to fully exercising its power, the African Court's examination of violations of other international human rights instruments would also provide the applicants with a complete picture of the violation of their rights and accurately describe the member state's violations on multiple levels. It is to be hoped that future cases seek to examine all violations, although the precedent set in this case appears to have also been followed in the recent case of *Zongo*.[113]

6 Separate opinions

Of the nine judges to sit on the case, Judges Ouguergouz, Ngoepe and Niyungeko attached separate opinions.[114] In his separate opinion, Judge Ouguergouz stated that, whilst he was of the view that there had been a violation of articles 2, 3(2), 10 and 13(1) of the African Charter, the reasons given had not been articulated with sufficient clarity.[115] He also argued that the African Court should have first dealt with the issue of jurisdiction before considering admissibility.[116]

With regard to jurisdiction, Judge Ouguergouz argued that the African Court must first satisfy itself as to its jurisdiction to hear an application even where parties have failed to raise it as an argument.[117] In particular, he argued that the issue of jurisdiction must be considered at personal, material, temporal and geographical levels.[118] As to personal jurisdiction, Judge Ouguergouz argued that the African Court properly considered that as Tanzania had signed the special declaration allowing individuals to bring cases and that the

113 See generally *Zongo* (n 21 above), where the African Court failed to consider alleged violations of the ICCPR or Universal Declaration, despite these being raised by the applicants.

114 See separate opinions (n 17 above).

115 Ouguergouz opinon (n 17 above) para 1.

116 As above.

117 Ouguergouz opinion para 2.

118 Ouguergouz opinion para 5.

NGOs held observer status before the African Commission, it had personal jurisdiction.[119] He argued that objections to material and temporal jurisdiction were implicitly raised by Tanzania.[120] With regard to material jurisdiction, Judge Ouguergouz noted that Tanzania objected to Mtikila relying on the treaty establishing the East African Community, which was not in existence at the time Mtikila took his case to court in 1993.[121] He argued that the African Court should, therefore, have determined whether the treaty establishing the East African Community was applicable.[122] In this regard, he argued that it was for the African Court to determine which treaties and conventions should be considered 'relevant human rights instruments'.[123]

With regard to temporal jurisdiction, Judge Ouguergouz argued that in dealing with Tanzania's objections, the African Court should have made a clearer distinction between the obligations of Tanzania under the African Charter and its obligations under the African Court Protocol and 'optional declaration'.[124] He argued that the African Court should have made it clear that its jurisdiction was based solely on the Court Protocol and the optional declaration.[125] He argued that the critical date in determining temporal jurisdiction was the date on which Tanzania deposited the special declaration under article 34(6) of the Protocol, not from the entry into force of either the African Charter or Protocol.[126] He, therefore, contended that any alleged violations prior to 29 March 2010, when Tanzania deposited the special declaration, did not fall within the temporal jurisdiction of the African Court other than where the violations bear a 'continuous character'.[127] This approach would mean that applications against member states could only run from the date of signature of the special declaration and not from the date of ratification of the African Charter, as found by the majority. As discussed above, the approach adopted by the majority has the potential to result in applications dating back many years, before a member state signed the African Court Protocol or special declaration and may lead to a number of matters which would otherwise not fall within the jurisdiction of the African Court being within its jurisdiction. Certainly, the approach

119 Ouguergouz opinion paras 6-8. Judge Ouguergouz noted that with regard to geographical jurisdiction, there could be no dispute considering the nature of the violations. See Ouguergouz opinion (n 17 above) para 9.

120 Ouguergouz opinion para 10.

121 Ouguergouz opinion paras 11 & 12. Judge Ouguergouz noted Tanzania's arguments that the Treaty establishing the East African Community was not a human rights instrument and was therefore extraneous to the case. Ouguergouz opinion para 12.

122 Ouguergouz opinion para 13, referring to arts 3(1) & 7 of the African Court Protocol and Rule 26(1) of the Rules of the Court.

123 Ouguergouz opinion paras 14-16.

124 Ouguergouz opinion para 20. See also Ouguergouz opinion paras 17-19.

125 Ouguergouz opinion para 20.

126 Ouguergouz opinion para 22.

127 Ouguergouz opinion paras 22 & 23.

advocated by Judge Ouguergouz would limit applications to those alleging violations since ratification of the Court Protocol or special declaration but, importantly, could still encompass applications alleging violations that start prior to the member state signing the Protocol and/or special declaration which are continuous in nature and run after the ratification of the Protocol or special declaration.

Judge Ouguergouz also provided a brief comment on the admissibility of the applications of the two NGOs.[128] In his opinion, the African Court should have considered the NGOs' 'interest to act' and determined whether the NGOs had such an interest, thus allowing them to bring cases independently rather than on behalf of Mtikila.[129] The standing of NGOs is likely to be an issue which occurs more often in the future. Whereas other African human rights institutions, such as the African Committee of Experts on the Rights and Welfare of the Child, have made it clear that NGOs themselves may bring cases against member states,[130] so far the African Court has only entertained applications from individuals and NGOs. The Rules of the African Court and Court Protocol do not preclude an NGO from bringing a case on its own *per se*, but this issue will need to be addressed in future applications. Judge Ouguergouz's suggested approach of considering an NGO's 'interest to act' as a potential middle ground would at least ensure an NGO seeking to join an application has some nexus to the violation being alleged.

Judge Ouguergouz also considered the merits of the applications.[131] He argued that the barring of independent candidates does not, in itself, amount to a violation of articles 10 and 13(1) of the African Charter as it can only be a violation if it is considered an unreasonable or illegitimate limitation to the exercise of the rights.[132] He argued that the judgment would have benefited from being clearer that it is the test on whether the *limitations* are reasonable that was the key issue rather than the contravention of the articles themselves.[133] He argued that, unlike articles 22 and 25 of the ICCPR, articles 10 and 13(1) of the African Charter do not provide 'in a satisfactorily manner' for the freedom of association and the right of citizens to freely participate in the government of his or her country.[134] He submitted that the main weakness in the impugned

128 Ouguergouz opinion paras 24-27.

129 Ouguergouz opinion paras 26-27.

130 See eg *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine Pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal* (15 April 2014) Dec 003/Com/001/2012, paras 16-24.

131 Ouguergouz opinion (n 17 above) paras 28-38.

132 Ouguergouz opinion para 28, referring to *Castañeda* (n 64 above).

133 Ouguergouz opinion para 34. Judge Ouguergouz suggests that para 109 of the Judgment should be located 'upstream', whilst para 108 of the Judgment is extraneous.

134 Ouguergouz opinion para 29.

African Charter articles is the 'claw-back' clauses they contain[135] and that, therefore, these articles should be interpreted along the same lines as article 25 of the ICCPR which allows for 'reasonable' restrictions, for example the age of the person.[136] He argued that article 27 of the African Charter may serve as a useful tool in assessing which limitations on the impugned articles could be considered reasonable as they suggest that the only limitations would be those required to ensure 'respect for the right of others, collective security, morality and common interest'.[137] Therefore, it lies with the respondent state to show that limitations meet this test.[138] Judge Ouguergouz noted that Tanzania failed to provide such proof.[139] In effect, Judge Ouguergouz left the door open for the use of claw-back provisions in certain circumstances where its use reaches the threshold allowing a member state's legislation to ostensibly violate its citizens' African Charter rights, but that it is for the member state to demonstrate that this in fact is the case.

He further argued that, having found that Tanzania had violated articles 10 and 13(1) of the African Charter, the African Court could only have found that there was a violation of articles 2 and 3(2) of the African Charter.[140] He explained that the African Court should have started its reasoning by clearly indicating the distinction in scope between articles 2 and 3 of the African Charter,[141] and that different treatment does not necessarily mean discrimination.[142] Only after having discussed these premises should the African Court have dealt with the objective and reasonable nature of the limitations and rules that the aim of the difference is not legitimate in light of the African Charter.[143]

Judge Niyungeko's separate opinion addressed two issues, namely, (i) the order of treatment of admissibility and jurisdiction; and (ii) the African Court's grounds and reasoning in deciding whether it had

135 Ouguergouz opinion para 30.

136 As above.

137 Ouguergouz opinion paras 30-32. Judge Ouguergouz argues that para 112 of the Judgment confirms that art 27 of the African Charter may be viewed as a general claw-back provision.

138 Ouguergouz opinion para 33.

139 Ouguergouz opinion para 34.

140 Ouguergouz opinion para 35.

141 Ouguergouz opinion para 37. Judge Ouguergouz submits that non-discrimination under art 2 of the African Charter applies only to rights guaranteed under the African Charter, whereas the principles of equality under art 3 of the African Charter applies to all the rights protected in the municipal system of a state party, even if they are not recognised in the African Charter. See Ouguergouz opinion para 36.

142 Ouguergouz opinion para 37, referring to General Comment of art 26 of the Second International Covenant that differentiation is not discrimination if it is based on objective and reasonable criteria and if the aim is legitimate in light of the Covenant; *Lithgow v United Kingdom* ECHR (8 July 1986) Ser A 102 para 177.

143 Ouguergouz opinion para 38.

ratione temporis jurisdiction.[144] With regard to the order of considering the jurisdiction and admissibility of the application, Judge Niyungeko noted that this was the first time the African Court had considered the admissibility of the application before jurisdiction.[145] Judge Niyungeko argued that the African Court's failure to explain why it considered admissibility first might leave an impression of inconsistency and a lack of coherence.[146] He also argued that the change in approach posed a problem of principle.[147] In his opinion, the African Court is unable to consider the admissibility of the application before it has satisfied itself as to jurisdiction.[148] He likened admissibility to a limb of the merits of the case and argued that there was little sense in a judge considering what he was requested to do without first determining whether he could do it.[149] Pointing to Rule 39 of the Rules of the African Court, Judge Niyungeko argued that it was clear that jurisdiction should be dealt with first, and only hereafter should admissibility be considered.[150] There certainly seems to be merit in Judge Niyungeko's arguments, since a court or tribunal can have jurisdiction over a matter but not find the applicant admissible, but can never consider a case admissible if it does not have jurisdiction. To this end, it should be noted that in the more recent case of *Zongo*, the African Court elected to consider jurisdiction in a separate hearing before ultimately proceeding to consider the merits in a later hearing, giving some credence to the dissenting opinions filed in this case.[151]

As to *ratione temporis* jurisdiction, Judge Niyungeko viewed the finding that the continuing nature of the violation surmounted any temporal issues 'in order'.[152] He, however, argued that the African Court's analysis on the prior ratification of the African Charter was 'difficult to grasp',[153] as Tanzania's arguments related to the date of entry into force of the African Court Protocol, whilst the African Court's response was to invoke the date of entry into force of the African Charter.[154] In his opinion, the African Court should have made it clear that, although Tanzania was bound by the African Charter, it lacked the temporal jurisdiction as long as the Court Protocol conferring jurisdiction on it was not yet operational.[155] Judge Niyungeko described the African Court's failure to consider the date of entry into force of the Court Protocol, which confers jurisdiction on

144 Niyungeko opinion (n 17 above) para 1.
145 Niyungeko opinion para 3.
146 As above.
147 Niyungeko opinion para 4.
148 As above.
149 As above.
150 Niyungeko opinion paras 5-7.
151 See *Zongo* (n 21 above).
152 Niyungeko opinion (n 17 above) para 11.
153 As above.
154 As above.
155 Niyungeko opinion paras 12 & 17.

the African Court, when assessing Tanzania's submissions on temporal jurisdiction, as 'simply inconceivable'.[156] Again, as discussed above regarding Judge Ouguergouz, Judge Niyungeko's approach appears to have merit since the majority's approach of the operational date being from ratification of the African Charter, which occurred many years earlier, widens the possible scope of application well beyond the date from which the member state ratified the Protocol creating the African Court.

Judge Ngoepe's separate opinion also dealt with the issue of whether, when writing a judgment, the African Court should always deal first with admissibility and thereafter with jurisdiction or *vice versa*.[157] He likened the argument to that of the chicken and the egg, and strongly advocated the need for flexibility.[158] He further argued that this change of approach also raised a 'problem of principle', namely, whether it is possible for the African Court to consider the admissibility of the application before having satisfied itself that it has jurisdiction.[159] He argued that the African Court could not consider admissibility first as jurisdiction is not 'all-embracing', and that, therefore, jurisdiction should be considered first.[160] As discussed above, whilst flexibility is preferred, especially in the embryonic stages of the African Court, an application can be within the jurisdiction of the African Court but not be admissible, but it can never be admissible if not within the African Court's jurisdiction.

7 Compensation, reparation and costs

Recalling article 27(1) of the African Court Protocol and Rule 63 of the Rules of the Court, which allow the African Court to make orders of compensation or reparation, the African Court noted that Mtikila had reserved his right to elaborate on his claim for compensation or reparation but had not done so.[161] The African Court, therefore, did not make a finding on the issue, but called upon Mtikila, if he so wished, to exercise this right.[162] As to the request by the NGOs that the African Court order Tanzania to pay their costs, the Court noted that Rule 30 of the Rules stated that '[u]nless otherwise decided by the Court, each party shall bear its own costs'. Taking into account all the circumstances of the case, the African Court was of the view that there was no reason to depart from the provisions of this Rule.[163] The

156 Niyungeko opinion para 16.
157 Ngoepe opinion (n 17 above) para 1. Judge Ngoepe noted that in the present case, unlike in previous judgments, the African Court elected to deal with admissibility first and then with jurisdiction.
158 Ngoepe opinion paras 2 & 3.
159 Niyungeko opinion para 4.
160 As above.
161 Judgment (n 1 above) para 124.
162 As above; Reparations Ruling (n 2 above) para 6(4).
163 Judgment (n 1 above) para 125.

ruling that the NGOs should bear their own costs is disappointing and could be seen as setting a precedent whereby, even if successful, NGOs will not be able to recoup costs. This may lead to NGOs not wanting to incur financial costs with no prospect of recompense. In a scenario such as this case, it cannot be said that Tanzania would not be in a position to pay some or all of the costs of the NGOs. This may deter future applicants from bringing cases when they know that they are unlikely to recover the costs of the case. In the more recent case of *Zongo*, the African Court appears to follow the same approach in refusing to award costs to the NGO,[164] although it should be noted that the African Court did grant a token sum for moral damages suffered by the NGO.[165]

On 13 June 2014, following written submissions by Mtikila and Tanzania, the African Court reconvened to consider the issue of compensation and costs, for the first time in the Court's existence.

In his submissions, Mtikila argued that the ban on independent candidates required him to join different political parties and later to set up his own party.[166] He submitted that the ban also led him to engage in litigation, including before the African Court.[167] Mtikila's claim for costs and expenses, therefore, included the cost of setting up his political party and participating in elections, and the cost of litigation at the domestic level and before the African Court.[168] He claimed costs and expenses totalling Tsh 4 168 667 363 (approximately $2 500 000).[169] He also claimed lawyers' fees of $60 250 for litigation before the African Court.[170]

Mtikila also claimed moral damages occasioned by stress and moral harm exacerbated by incidents of police searches and loss of the opportunity to participate in the affairs of his country.[171] His claim for moral damages amounted to Tsh 831 322 637 (approximately $500 000).[172]

In addition to his claim for damages, costs and expenses, Mtikila also requested the African Court to set a time line for Tanzania's compliance with the African Court's findings, requesting that

164 See *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema Alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso* (5 June 2015) App 013/2011 (*Zongo* Reparations Judgment) para 72.

165 See *Zongo* Reparations Judgment (n 164 above) para 67.

166 Reparations Ruling (n 2 above) para 16.

167 As above.

168 Reparations Ruling para 18.

169 As above.

170 Reparations Ruling para 19.

171 Reparations Ruling para 17.

172 As above.

Tanzania reports every three months on its compliance until the African Court is satisfied that its findings have been complied with.[173]

Tanzania disputed all Mtikila's claims for reparations.[174] It argued that the issue of African Charter violations did not arise since Mtikila had decided to divert to the system of independent candidature only after his party had been refused registration.[175] It submitted that Mtikila's party was refused registration because he had refused to comply with the legal requirements required by all political parties and, therefore, could not claim to have been prevented from participating in public affairs or forced to join a political party.[176]

In addition, Tanzania argued that since Mtikila had failed to claim for the moral damages in either his application or at the domestic level, therefore failing to exhaust local remedies, the claim should be dismissed.[177] It also argued that Mtikila had exaggerated his claims for moral damages and the loss of opportunity to participate in public affairs.[178] In support of this, Tanzania argued that Mtikila premised the loss of opportunity to participate in public affairs on 'very varied and unpredictable political, social and economic factors',[179] and that Mtikila had participated voluntarily in the political processes.[180] It further argued that the inclusion of Tsh 25 000 for the provisional registration of his party was disputed as Mtikila had to follow the procedure to register the party, and that, therefore, this loss should not be attributed to it since this was a legal requirement.[181] Tanzania further argued that the current constitutional review process was sufficient reparation for the non-pecuniary damages.[182]

Tanzania further argued that Mtikila had also exaggerated costs and expenses.[183] It contended that the costs of Mtikila's independent presidential campaign should also be disallowed, since Tanzania did not allow independent candidates.[184] Tanzania further argued that that the itemised expenses in Mtikila's income and expenditure account were contrary to the Political Parties Act and Election Expenses Act and was 'fabricated and exaggerated'.[185] It contended that it should be given ample opportunity to challenge, verify and authenticate all the expenses claimed.[186]

173 Reparations Ruling para 20.
174 Reparations Ruling paras 24(i)-(viii).
175 Reparations Ruling para 23(i).
176 As above.
177 Reparations Ruling para 23(ii).
178 Reparations Ruling para 23(iii).
179 As above.
180 As above.
181 Reparations Ruling para 23(iv).
182 Reparations Ruling para 23(ix).
183 Reparations Ruling para 23(v).
184 Reparations Ruling para 23(vi).
185 Reparations Ruling para 23(vii).
186 As above.

Finally, Tanzania submitted that Mtikila's claim for costs for domestic litigation was against the African Court's order that each party shall bear its own costs.[187] It noted that Mtikila had failed to detail the costs or to provide evidence.[188] It argued that, since the domestic court had not awarded costs, the African Court could not do so as this would usurp the jurisdiction of the national courts.[189] Tanzania also disputed Mtikila's claim for costs of litigation before the African Court as his arrangement with counsel was *pro bono* and amounted to a 'retrospective acquisition of funds from the Court'.[190]

Mtikila replied that the costs of setting up his political party and subsequent costs of running it resulted exclusively from Tanzania's ban on independent candidates that had been found to be in violation of the African Charter.[191] He argued that the litigation before the African Court was a natural consequence of the ban on independent candidates,[192] and that the claim for stress and moral harm was a 'matter of common sense', especially since the requirement to start a political party and campaigns was a full-time work which prevented him from carrying out other full-time work, apart from his religious duties.[193] He argued that it was for Tanzania to show proof of errors in any of his claims for damages.[194]

With regard to claims for lawyers' fees for litigation in the African Court, Mtikila submitted that the expenses should be imputed to Tanzania as the African Court found it responsible for violating his African Charter rights, particularly since his claim for legal aid was denied.[195] He argued that Tanzania's response that independent candidacy remained banned highlighted the need for the African Court to draw up a 'precise calendar' to ensure that Tanzania complies with the African Court's judgment.[196]

In its finding on reparations, the African Court clearly identified the need for reparation and compensation for both pecuniary and non-pecuniary damages for individuals, and approached the issue of reparations from the welcome precedent of recognising that reparations could be awarded where a violation of the applicant's rights was found. The African Court specifically relied on the fundamental principle of international law that, where a violation of an 'international obligation' causes harm, there is an obligation to

187 Reparations Ruling para 23(viii).
188 As above.
189 As above.
190 Reparations Ruling para 23(x).
191 Reparations Ruling para 25(iii).
192 As above.
193 Reparations Ruling para 25(iv).
194 Reparations Ruling para 25(v).
195 Reparations Ruling para 25(vi).
196 Reparations Ruling para 25(viii).

provide adequate reparation,[197] which is reflected in article 27(1) of the African Court Protocol.[198]

As regards the pecuniary damages, the African Court started by assessing the African Commission's jurisprudence that a member state that violates African Charter rights should take measures to ensure that victims are given effective remedies, including restitution and compensation.[199] However, the African Court stated that, whilst the African Commission has recognised the rights of victims to compensation, it had not yet identified which factors states should take into account in their assessment of the compensation due,[200] although it had stated that a member state should compensate a victim for the torture and trauma suffered in line with international standards, and should ensure that there is payment of a compensatory benefit.[201] The African Court also looked to the Inter-American Court of Human Rights which has made findings on pecuniary damages.[202] Whilst a logical starting point, it should be noted that the African Commission's approach to compensation relates to the evaluation and assessment of damages to be paid by the member state *itself*. In the case of the African Court, it is the Court that awards damages and not the member state. Therefore, whilst of some interest, a direct comparison between the African Commission regime and the African Court is limited.

The African Court noted that Mtikila had submitted income and expenditure statements, but held that there were 'no sufficient evidentiary elements presented to establish that these damages directly arose from the facts of this case' and the violations of the African Charter.[203] The African Court also noted that Mtikila had 'insisted' on presenting evidence at a hearing and had failed to present this evidence in written submissions[204] or to produce any receipts to support his expense claims.[205] The African Court, therefore, found that there was a lack of evidence to prove the 'causal nexus' between the facts of the case and the damages claimed by Mtikila, and rejected his claim of pecuniary damages.[206]

The African Court concluded by stating that it was not sufficient to show that a state had violated a provision of the African Charter, but that it was also necessary to prove the damages, and that, in principle,

197 Reparations Ruling para 27, referring to *Factory of Chorzow (Ger v Pol)* PCIJ (13 September 1928) Ser A 17 para 29.
198 Reparations Ruling para 28.
199 Reparations Ruling para 29, referring to *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 229(d).
200 Reparations Ruling (n 2 above) para 29.
201 As above.
202 As above.
203 Reparations Ruling para 30.
204 As above.
205 As above.
206 Reparations Ruling para 32.

the existence of a violation of the African Charter was not *per se* sufficient to establish a material damage.[207] Accordingly, the African Court set out in plain terms that, whilst it had the jurisdiction to award expenses and damages, these should be backed up by receipts and other evidence in order to be considered valid. As to the costs incurred by Mtikila in campaigning with his own political party, again, the African Court's decision demonstrates that it is not enough to make claims, but a clear causal link between the claim and the violation must be established. In theory, the requirement that a person must be a member of a political party and, therefore, must bear the cost or expense of setting up such a party, is directly related to the violation. However, what is clear from the African Court's decision is that an applicant must do more than simply point out expenses, but must also demonstrate a clear link, in the absence whereof it will not award expenses.

With regard to non-pecuniary damages, the African Court recalled that moral damages were not damages occasioning economic loss, but which cover suffering and afflictions caused to the victim, the emotional distress of family members and non-material changes in the living conditions of the victim and his family.[208] The African Court again recalled the African Commission's jurisprudence on compensation for torture and trauma suffered, and the Inter-American Court on Human Rights test that non-pecuniary damages 'may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them as well as changes of a non-pecuniary nature in the living conditions of the victims or their family'.[209] It also considered the jurisprudence of the European Court of Human Rights on the awarding of non-pecuniary damages, noting that such damages could include damages for pain and suffering, anguish and distress and loss of opportunity, but observed that damages were awarded in some cases, whilst in others the European Court refused to speculate.[210]

The African Court found that in the present case, Mtikila had failed to produce evidence to support the claim that the damages claimed were directly caused by the facts of the case.[211] Whilst refusing to speculate, the African Court also stated that the finding of violations of Mtikila's African Charter rights and the orders contained in the judgment were just satisfaction for the non-pecuniary damages claimed.[212] Whilst Mtikila had failed to convince the African Court to

207 Reparations Ruling para 31.
208 Reparations Ruling para 33.
209 Reparations Ruling para 35, referring to *Villagran Morales* et al *v Guatemala* IACHR (26 May 2001) Ser C/Doc 77 para 84.
210 Reparations Ruling para 36, referring to *B v Austria* (1986) EHRR 409; *W v United Kingdom* (1987) EHRR 435; *P & Others v United Kingdom* (1999) EHRR 3.
211 Reparations Ruling para 37.
212 As above.

award non-pecuniary damages, this again may be seen as a welcome development in that it is recognised that non-pecuniary damages are within the remit of the African Court's powers to award damages, an approach which laid the foundation for the awarding of non-pecuniary damages in the recent *Zongo* reparations judgment.

As to legal expenses, the African Court accepted that expenses and costs formed part of the concept of reparations.[213] The African Court, however, found that Mtikila should have provided 'probative documents' and developed arguments relating to the evidence and, where financial claims were made, should have clearly described the items and the justification therefor.[214] It stated that the applicant bore the burden of proof, and that in the present case Mtikila had failed to properly develop his claims.[215]

Accordingly, the African Court rejected Mtikila's claims for pecuniary damages,[216] found that there was sufficient reparation for non-pecuniary damages,[217] dismissed the legal expense claims,[218] and found that each party should bear its own costs.[219] Whilst the African Court, therefore, dealt a blow to Mtikila himself due to a lack of evidence demonstrating a link between the alleged damages suffered or a failure to provide receipts and documentation, it was not a theoretical objection to the awarding of damages *per se*. This may, therefore, be seen as a positive step in the development of the award of damages at the African Court, as seen in *Zongo*, where the African Court took the foundations laid in Mtikila to proceed to award damages to the applicants – the first such award by the African Court.

With regard to compliance, the African Court noted Tanzania's reply at the reparations stage where it maintained that the judgment was wrong, since the law in Tanzania prohibited independent candidates from running for election.[220] The African Court expressed its 'concern' at this line of argument, compounded by Tanzania's failure to report to the African Court on the measures it was taking to comply.[221] The African Court, therefore, granted Mtikila's request for compliance, but extended the time for reporting, ordering Tanzania to report within six months from the date of the ruling on the implementation of the judgment.[222] Of course, such compliance can only occur where the member state in question acknowledges the validity of the judgment sought to be complied with. Perhaps of most concern in the reparations ruling is Tanzania's apparent lack of

213 Reparations Ruling para 39.
214 Reparations Ruling para 40.
215 As above.
216 Reparations Ruling para 46(2).
217 Reparations Ruling para 46(1).
218 Reparations Ruling para 46(3).
219 Reparations Ruling para 46(7).
220 Reparations Ruling para 43.
221 As above.
222 Reparations Ruling paras 43 & 46(4).

understanding of the judgment itself. It is a disturbing development that, even having rendered the judgment, Tanzania still argued that it was wrong. This stance, clearly, is likely to weigh on the effectiveness of compliance in Tanzania, not only for this case but for future cases, and may have a bearing on how other member states facing judgments against them approach compliance.

The African Court, therefore, made a welcome initiative to *proprio motu* order 'measures of satisfaction'.[223] The African Court noted that, in light of its concerns over Tanzania's apparent continued dispute over its findings and failure to report on implementation, Tanzania should within six months of the reparations decision (i) publish the official English translation translated into Kiswahili at its own expense and publish in both English and Kiswahili, once in the official gazette and once in a national newspaper;[224] and (ii) publish the judgment it its entirety in English on an official website to remain available for one year.[225] The African Court ordered that nine months from the ruling, Tanzania should submit to the African Court a report on the above measures.[226] In this context, the African Court's *proprio motu* move to impose measures of satisfaction are welcome, although it must be said that these measures are not particularly onerous, but Tanzania's compliance would at least show some kind of recognition of the African Court's powers by Tanzania. At the very least, these measures appear to demonstrate the African Court's serious concerns over Tanzania's apparent failure to acknowledge the judgment.

8 Conclusion

Despite some disappointment regarding the lack of consideration of international human rights instruments, the awarding of costs and the need for clarification on certain issues, such as its temporal jurisdiction, the African Court should be commended for having delivered its first judgment on the merits. The judgment provides several well-reasoned findings, including those on the exhaustion of local remedies, and dismissing Tanzania's arguably-weak jurisdictional submissions, such as its 'social needs' arguments, which found little favour with the African Court, who required more to allow the claw-back provisions to override the violation of the applicant's rights as set out in the African Charter, especially given the fact that Tanzania had failed to provide concrete examples of where these needs arose, as discussed above.

While wanting to avoid conjecture, it is worth considering whether such concrete examples provided by Tanzania as to the kind of civil

223 Reparations Ruling paras 44 & 45, referring to inherit powers under art 27 of the African Court Protocol.

224 Reparations Ruling paras 45(i) & 46(5)(i).

225 Reparations Ruling paras 45(ii) & 46(5)(ii).

226 Reparations Ruling para 46(6).

unrest or political tension alluded to may have amounted to a more persuasive argument in favour of the 'social need' for the prohibition of independent candidates. As it stands, the case sets an important precedent and will require member states to work somewhat harder than simply relying on 'justifiable restrictions' based on 'social needs' when introducing legislation or amending constitutions that ostensibly violate citizens' human rights.

Whilst the precedent set regarding claw-back provisions and the finding on violations themselves are encouraging, it is unfortunate that the African Court declined to discuss the potential violation of international treaties. As noted above, the African Court categorically states that international treaties, such as the ICCPR, are within its jurisdiction, which does at least solidify the jurisdictional position on international treaties. However, the African Court's decision not to consider the merits of the applicant's case is disappointing. The African Court appears to have adopted an 'either/or' approach. While the African Court found that Tanzania had violated the applicant's African Charter rights, this should not mean that the applicant's other rights under international treaties should be left unexamined. There may, of course, be practical reasons behind the African Court's decision not to go into the merits of international treaties, but in deciding not to consider these in detail, one is left wondering what the analysis may have brought about, while missing the possibility of further discussion and jurisprudence to guide future applications. Perhaps disturbingly, this 'either/or' approach was again followed in *Zongo*.

As to the issue of costs, it is discouraging to see the African Court rejecting the claim for costs by the NGOs.

Nevertheless, the African Court's clear position on its power to award damages should be welcomed. Unfortunately, without further information about Mtikila's claims, it is difficult to assess how detailed his expenses were, but it serves as a useful reminder to both applicants and counsel that claims will only be entertained where detailed records of expenses, costs and damages are maintained and submitted.

The reparations judgment also revealed that, at best, Tanzania appeared to be attempting the re-litigate the African Court's findings on the merits and, at worst, that it appeared to take the position that the judgment was wrong and that, therefore, it need not comply with it or entertain the subject of reparations. Either way, Tanzania appeared to have little interest in complying with the judgment. Bearing in mind Tanzania's failures thus far, it remains to be seen whether they will comply with these new orders and publish the judgment in the press and online. Clearly, in view of Tanzania's responses thus far, the issue of compliance should be of serious concern, and changes to Tanzania's electoral laws appear a while away yet.

Looking forward, with this judgment the African Court now enters an era of enforcement and many questions arise, such as how the Tanzanian government will react. How will the African Court react to Tanzania's reaction? Which other African countries have similar legislation? Will this decision require these states to also change their election laws? The reparations ruling does not paint a very bright picture of the dawn of this era of enforcement. However, in time all these questions will be answered. For now, *Mtikila* should be seen as a watershed moment and a progressive step by the African Court towards the protection of human rights in Africa.

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The challenges of adjudicating presidential election disputes in domestic courts in Africa

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Summary

Defective and fraudulent elections are common in Africa. Although there has been some improvement since the democratic wave of the 1980s and 1990s, sham elections are still prevalent across the continent. Where elections have been assailed with anomalies and results are disputed, as is often the case in Africa, aggrieved parties have looked to the judiciary as an institution of last hope to seek redress. The judiciary has, however, almost always decided presidential election disputes in common patterns that militate against the growth of democracy on the continent. The common patterns are that all cases are decided in favour of the status quo*; many cases are dismissed on flimsy technical and procedural rules without consideration of the merits; there is misuse of the substantial effect rule to uphold defective elections; there are delays in determining cases; and judges refrain from making any reasonable decisions. The judiciary in Africa may, therefore, be fully complicit in the delayed consolidation of electoral democracy on the continent.*

Key words: *Adjudication; election disputes; Africa; courts; presidential elections; democracy*

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1 Introduction

Defective and fraudulent elections are common in Africa.[1] Where elections have been assailed with anomalies and results are disputed, as is often the case in Africa, aggrieved parties have looked to the judiciary for redress. The judiciary thus is faced with the unenviable task of determining the ultimate outcome of the poll. Consequently, in order to protect the right to choose in an election, and to promote and safeguard democracy, the judiciary must be competent, honest, learned and independent.[2] Such a judiciary plays a transformative role in democracy as an impartial referee or umpire in the democratic game.[3]

This article looks at how African courts have handled presidential election disputes. The article first presents an overview of the role of the judiciary in resolving disputed presidential elections. It identifies common patterns that characterise the ways in which courts dispose of disputed presidential elections in Africa, all of which are unsatisfactory and a disincentive for the further growth and consolidation of democracy.

2 Overview of the role of the judiciary in election disputes

Elections affirm the sovereignty of the people.[4] Through elections, people constitute a government and hold the government accountable.[5] However, the history of elections in Africa is disappointing. Democratic elections have been rare and disputed elections have been the norm.[6]

Although there has been some improvement since the democratic wave of the 1980s and 1990s, sham elections are still prevalent across the continent. In Nigeria, for example, all presidential elections since the return to civilian rule in 1999 have been disputed, until 2015 when President Goodluck Jonathan peacefully conceded defeat. The

1 SI Lindberg *Democracy and elections in Africa* (2008) 10 14.

2 M Ndulo 'Rule of law, judicial reform, development and post-conflict societies' http://inbabyproducts.com/tag/rule-of-law-programs-judicial-reform-development-and (accessed 11 December 2013). See also M Ndulo 'Judicial reform, constitutionalism and the rule of law in Zambia: From a justice system to a just system' (2011) 2 *Zambia Social Science Journal* 1-27.

3 S Gloppen 'How to assess the political role of the Zambian courts' http://www.cmi.no/publications/publication/?1927=how-to-assess-the-political-role-of-the-zambian (accessed 12 November 2013).

4 Lindberg (n 1 above) 3 4 13.

5 Arts 2(3), 2(4) & 3(4) African Charter on Democracy, Elections and Governance 2007.

6 Lindberg (n 1 above) 14.

European Union (EU) observer mission to Nigeria, for instance, denounced the 2007 Nigerian elections in the following terms:[7]

> The 2007 state and federal elections fell far short of basic international and regional standards for democratic elections. They were marred by very poor organisation, of essential transparency, widespread procedural irregularities, substantial evidence of fraud, widespread voter disenfranchisement at different stages of the process, lack of equal conditions for political parties and candidates and numerous incidents of violence. As a result the process cannot be considered to have been credible.

In a similar fashion, all election observer missions to Zambia's 2001 elections, both local and international, concluded that the elections were far from being free and fair.[8] The EU, in fact, took a rare stand and waived the immunity of the head of the observer mission, Michael Meadowcroft, to testify for the opposition in the ensuing election petition.[9]

Huefner classifies the causes of disputed or failed elections in two categories: fraud and mistake.[10] Fraud means the deliberate unfair manipulation of the system, often by parties, candidates or their supporters.[11] On the other hand, mistake is the unintentional disturbance of the election process, usually caused by those administering the election.[12] Whether by mistake or fraud, failed elections deny the people their right to constitute the government according to their will in a transparent way. Distinguished Nigerian scholar, Ben Nwabueze, considers this 'robbery of the right of the people to participate in their own government' and 'therefore the greatest offence that can be committed against the constitution and the people'.[13] This is a correct observation because failed elections have the effect of taking away the consent of the people as the basis of the right to govern.

Almost all African constitutions or electoral laws recognise that things can go wrong with elections and provide for the possibility of redress. This is because election wrongs or allegations of wrongs often have a bearing on the legitimacy of the electoral process. A fair and

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7 EU Election Observation Mission Nigeria *Final Report: Presidential, National Assembly, Gubernatorial and State House of Assembly Elections* (2007).

8 See Coalition 2001 'December 27 2001 Tripartite Elections Preliminary Report (2002)'; interim statement by the SADC Parliamentary Forum Election Observation Mission on the Zambian Presidential, Parliamentary and Local Government Elections (2001); EU Electoral Observation Mission to Zambia *Final Report 27 December 2001 Presidential, Parliamentary and Local Elections* (2002).

9 See the case of *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others* ZR 138 (s C) L SCZ/EP/01/02/03/2002.

10 SF Huefner 'Remedying election wrongs' (2007) 44 *Harvard Journal on Legislation* 265-326.

11 As above.

12 As above.

13 B Nwabueze 'Nature and forms of elections rigging' *Niger Delta Congress* 21 July 2008 http://www. nigerdeltacongress.com/articles/nature_and_forms_of_elections_ri_htm (accessed 20 May 2014).

transparent redress mechanism, which commands the respect of the people, lends legitimacy and credibility to the election and 'serves as a peaceful alternative to violent post-election responses'.[14] On the other hand, a failure to put in place an effective electoral dispute mechanism 'can seriously undermine the legitimacy of an entire electoral process'.[15]

The article focuses on the post-election redress mechanisms available in the case of disputed presidential elections. It discusses the manner in which courts have handled complaints that seek to correct election results (in whole or in part) or, indeed, to void the whole election. In almost all African countries, this is a task entrusted to the judiciary. The only difference seems to be the stage in the judicial hierarchy at which the litigation is commenced. In countries such as Nigeria,[16] Namibia[17] and Kenya[18] (prior to the adoption of the 2010 Constitution) cases begin in lower courts and are appealed ultimately to the Supreme Court. In other countries, such as Ghana,[19] Zambia,[20] Kenya[21] (since 2010) and Uganda,[22] presidential election petitions are heard directly by the Supreme Court, allowing no appeal.

Tanzania seems to be the only African country with a constitutional provision that ousts the jurisdiction of the judiciary from hearing challenges to presidential elections. The Tanzanian Constitution categorically states:[23]

> When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this article, then no court of law shall have any jurisdiction to inquire into the election of that candidate.

Such a provision can only assume that elections will always be impeccable, something which, of course, is at variance with the

14 C Vickery 'Understanding, adjudicating, and resolving election disputes' IFES Conference Papers 14 February 2011. See also the Preamble to the document 'Toward an international statement of the principles of electoral justice (Accra Guiding Principles)' developed by the Electoral Integrity Group, 15 September 2011, Accra, Ghana.

15 The Carter Centre *Guide to electoral dispute resolution* (2010).

16 In Nigeria, presidential election petitions are commenced in the Court of Appeal and appealable to the Supreme Court. See art 139 of the Constitution of the Federal Republic of Nigeria 1999.

17 In Namibia, such cases are triable in the High Court. The election petition following the 2009 elections in the case of *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others* Case A01/2010, eg, was heard and determined by the High Court.

18 The case of *Mwai Kibaki v Daniel Toroitichi Arap Moi* Civil Appeal 172 of 1999 commenced in the High Court and reached the then highest court, the Court of Appeal, by way of an appeal.

19 In Ghana, presidential election disputes are settled by the Supreme Court at first instance. See eg the case of *Nana Addo v John Dramani* J2/6/2013 judgment of 29 August 2015.

20 See art 41 of the Constitution of the Republic of Zambia.

21 According to art 140 of the Constitution of Kenya 2010, only the Supreme Court has the competence to hear and determine a presidential election petition.

22 Art 104 Constitution of the Republic of Uganda.

23 Art 41(7) Constitution of the United Republic of Tanzania.

African experience. This is a blatant denial of the possibility to seek judicial redress in the case of a grievance, and contrary to article 17(2) of the African Charter on Democracy, Elections and Governance (2007), which obliges member states to establish and strengthen national mechanisms that redress election-related disputes in a timely manner. Even where grievances are ill-founded, the offer of a possible judicial remedy provides a peaceful means of venting frustration instead of resorting to violent protests.

In order to be of any significance, the adjudication or judicial determination of election disputes must offer aggrieved persons a genuine possibility of redress for their grievances. In order to do this, Huefer identifies at least three factors that need to be embedded in the adjudication process. First of all, the process must be fair and perceived as fair by litigants and the public.[24] This requires that the process treats the parties to a dispute equally and offers them an equal opportunity to present their case. It also requires that the process resolves disputes impartially and meritoriously. A process that only decides in favour of the incumbent or incumbent party, whatever the strength of evidence presented against it, cannot be considered fair. Second, the process must be transparent, that is, when an election is disputed and a court adjudicates on the dispute, it must do so in a way that is understandable (based on prior existing rules) and must make a fair analysis of evidence as it relates to the competing claims.[25] Finally, the process must be prompt and cases should be determined with finality.[26] As is often said, justice delayed is justice denied.

Before moving to the next section which looks at the challenges that assail the adjudication of presidential election disputes in Africa, it is important to briefly discuss the art of adjudication. The traditional view of adjudication has been that judges simply re-state the law as enacted by the legislature and exercise no discretion. Their decisions, therefore, are nothing more than a discovery of the intention of the legislature.[27] This, however, is now recognised as an oversimplification as the adjudication process is inherently imbued with discretion.[28]

Hart, for example, considers the law to be open-textured.[29] This means that 'when a judge confronts a rule, he is not met by a bloodless category but by a living organism which contains within itself value choices'.[30] Hart offers at least three reasons for this discretion: first, that it is due to indeterminacy or ambiguity of

24 Huefer (n 10 above) 265-326.
25 As above.
26 As above.
27 M Freeman *Lloyd's introduction to jurisprudence* (2014) 1378 1389.
28 As above.
29 HLA Hart *The concept of law* (1961) 128.
30 Freeman (n 27 above).

language or words; second, that rules usually use only general standards (for example, 'reasonableness' and 'just') which need to be related to or distinguished from specific circumstances; and third, the indeterminacy inherent in the doctrine of precedents where judges have to relate current decisions with prior decisions.[31]

Although Dworkin has virulently criticised Hart's theory of adjudication, for purposes of this article it is sufficient to note that Dworkin still recognises that there is discretion in adjudication, albeit constrained by law. What Dworkin does is to distinguish between 'weak' and 'strong' discretion.[32] Strong discretion is where one is not bound by any standards set by the authority in question, while weak discretion is constrained by standards.[33] Dworkin gives as an example the difference between a sergeant who is ordered to pick five men for patrol and another sergeant who is ordered to simply select his five most experienced men for patrol. The sergeant who is ordered to simply select five men for patrol is considered to have strong discretion compared to the one who has to choose five most experienced men, which is weak discretion.[34] As can be seen, Dworkin considers that judges only have weak discretion as they are constrained by law.

The point is that adjudication is a value-laden process and judges have to choose between competing claims and values. As will be seen in the next section, African judges in presidential election disputes appear to inhibit the growth of democracy on the continent or, in the telling words of Muhammadu Buhari, have chosen to 'stunt the growth of democracy'.[35]

3 Challenges associated with domestic adjudication of presidential election disputes in Africa

This section discusses the record of African courts in adjudicating disputed presidential elections. Sifting through the judgments, common threads or patterns emerge that disappointingly negate the advancement of democracy. The five patterns discussed here are the following:

(a) All cases are decided in favour of the incumbent candidate, the candidate sponsored by the ruling party, or the presumptive winner.
(b) Many cases are dismissed on minor procedural technicalities without consideration of the merits.
(c) There is misuse of the substantial effect rule.

31 Hart (n 29 above) 124-141.
32 Freeman (n 27 above) 1398.
33 As above.
34 As above.
35 E Anya 'INEC leaders corrupt, judiciary partial-Buhari' http://myondostate.com/w3/inec-leaders-corrupt-judiciary-partial-buhari/ (accessed 23 May 2014).

(d) In some countries, the resolution of disputes is inordinately delayed so as to render the whole process nugatory.
(e) Judges simply fail to address the issues presented before them by constraining themselves from making appropriate decisions.

3.1 All judgments are in favour of the *status quo*

One of the most notable trends in decisions on disputed presidential elections is that all decisions of the courts tend to serve one purpose, namely, maintaining the *status quo*. These decisions are always given in favour of the incumbent,[36] the candidate sponsored by the incumbent party[37] or the presumptive winner of the election.[38] This seems, inter alia, to stem from judges' misconstrued understanding of their role as that of ensuring political stability rather than deciding cases fairly, according to the facts presented to them, in line with the applicable law.[39] This seems to be the overriding driving force in adjudication, impelling judges to uphold all elections that are brought in litigation for their determination. For example, in the judgment following the petition to Ghana's December 2012 elections, the Supreme Court stated:[40]

> For starters, I would state that the judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives, in public interest, to sustain it.

It is submitted that 'striving' to uphold an election is not a judicial role, but a political decision. This means that, even before the case is presented, the judiciary is only prepared to preserve the election results that have been announced. As a result, any discrepancies are most likely to be explained away as inconsequential or, as discussed below, 'not substantial'. It is, therefore, hardly surprising that, despite the African continent being replete with sham elections, the judiciary, when called upon to adjudicate, has always (except for the Côte d'Ivoire Constitutional Council in 2010, discussed further below) upheld these disputed elections.

When this happens, the process of adjudication loses meaning. Adjudication is ideally meant to offer litigants a formal method of taking part in the decision making of the court through presenting

36 Eg, *Akashambatwa Mbikusita Lewanika & Others v Chiluba* Supreme Court Judgment 14 of 1998; *Kizza Besigye v Museveni* Electoral Petition 1 of 2001; *Kizza Besigye v Museveni* Presidential Election Petition 1 of 2006.

37 See eg *Mazoka* (n 9 above); *Abubakar & Others v Umaru Yar'adua & Others* SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008; and *Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others* J2/6/2013 Judgment of 29 August 2015.

38 Eg, *Raila Odinga v The Independent Electoral and Boundaries Commission & Others* Supreme Court Petition 3, 4 & 5 (consolidated) of 2013.

39 M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 165.

40 See the majority judgment of Atuguba JSC in *Nana Addo* (n 37 above) 40.

their evidence and reasoned arguments for a decision in their favour.[41] Judges should, therefore, only reach a decision after hearing the presentation of evidence from both sides of the case and make a determination according to the strength of the evidence presented. As Fuller states, 'participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is ... hopelessly prejudicial'.[42]

Although the Côte d'Ivoire Constitutional Council decision in 2010 is the only available judicial decision to interfere and reverse announced results, its effect is the same as other decisions that uphold disputed elections, as that decision was made in favour of the incumbent, President Laurent Gbagbo, who had clearly lost the election.[43] The circumstances of this case are revealing.

After years of conflict and instability, Côte d'Ivoire finally held elections in 2010. The first round did not produce an outright winner, leading to a run-off election, pitting incumbent Laurent Gbagbo and main opposition candidate Alassane Dramane Ouattara against each other.[44] The Chairperson of the Independent Electoral Commission, Youssouf Bakayoko, announced Ouattara as the winner, with 54,1 per cent of votes against Gbagbo's 45,9 per cent. Gbagbo made a prompt appeal to the Constitutional Council to annul the election of Ouattara based on claims that the elections had been rigged in the northern stronghold of Ouattara. Without giving audience to the other party, the Constitutional Council hastily invalidated about 600 000 votes from Ouattara's stronghold and declared Gbagbo the winner of the election with 51,45 per cent.[45] Some of the grounds on which the Constitutional Council based its decision to annul the election of Outtara are clearly spurious. For example, the Constitutional Council indicated the fact that the results were announced from a hotel instead of the offices of the Independent Election Commission seemed suspicious, and that the results were not announced within the prescribed time of three days.[46] There was actually no evidence presented to the Council in support of the serious claims of ballot-stuffing and tampering with results. It is, therefore, difficult to see how the Constitutional Council reached a prompt decision to annul Outtara's election within hours, without affording the other party an opportunity to present its case.

The recent Kenyan presidential petition epitomises a judiciary willing to go to the extent of legislating and re-writing the

41 LL Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353-409.

42 As above.

43 See Verdict of the Constitutional Council of Côte d'Ivoire of 3 December 2010 147.

44 DD Zounmenou & AR Lamin 'Côte d'Ivoire's post-electoral crisis: Outtara rules but can he govern?' (2011) 10 *Journal of African Elections* 6-21.

45 As above.

46 Verdict of the Constitutional Council of Côte d'Ivoire (n 43 above).

Constitution in order to uphold an election. This is manifest in the election petition brought by Raila Odinga challenging the election of Uhuru Kenyatta in the March 2013 elections.[47] The Kenyan Constitution, enacted in 2010, under which the election was held, required in part that only a candidate who had garnered 'more than half of *all votes cast in the election*' shall be declared President.[48] The former Constitution, replaced in 2010, had simply required the winner to be the candidate 'who receives a *greater number of valid votes* in the presidential election than any other candidate'.[49]

Following the election, the Independent Electoral and Boundaries Commission (IEBC) announced Uhuru Kenyatta as the outright winner, with 6 173 433 out of a total of 12 338 667 votes (50,07 per cent of the votes), while Raila Odinga, the main challenger, had received 5 340 546 votes (43,31 percent). However, the percentage by which Uhuru was declared the winner was based on the number of valid votes, contrary to the constitutional provision that required it to be based on 'all votes cast in the election'. The importance of the difference is that, if the computation is based on the percentage of all votes cast, then that would take into account *all* votes, that is, including those declared invalid. The consequence would have been that Uhuru would have had less than 50 per cent of overall votes to prevent a run-off and that, therefore, he would not have been declared the winner of the election.[50] Stating that it was interpreting the Constitution purposefully, the Supreme Court held that 'all votes cast in the election' actually 'refers only to valid votes cast', and does not include rejected votes.[51] If this were correct, why did the framers of the Constitution, and affirmed by the people in a referendum in 2010, deliberately and consciously change the language of this provision? This approach obviously altered the language of the framers of the Constitution and effectively meant that the judiciary assumed a legislative role. It is an approach which assumes that the change of wording in the Constitution from 'valid votes' to 'all votes cast' was a mistake and not really what the framers of the Constitution wanted. In other words, the framers of the Constitution did not mean what they wrote. It is respectfully submitted that interpreting the provision as it is written in the Constitution would not have led to any absurdity. There was, therefore, no need for the judiciary to tamper with the language of the Constitution.

47 *Raila Odinga* (n 38 above).
48 Art 138(4)(a) Constitution of the Republic of Kenya 2010.
49 *Raila Odinga* (n 38 above) para 40.
50 *Raila Odinga* paras 6, 20, 22 & 283.
51 *Raila Odinga* para 285.

3.2 Sacrificing substantive justice for procedural technicalities

Adjudication is a formal and institutionalised method of reasoned (rational) conflict resolution.[52] Its goal is to settle disputes fairly and on the basis of applicable laws. In order to decide cases fairly and to render substantive justice, courts need procedural or technical rules to guide the handling of the cases before them. It can be said that courts fly on two wings of rules: substantive and technical or procedural rules. Those rules that apply to the fairness or merits of the case are considered substantive rules, while those that govern the manner of resolving a dispute are considered technical or procedural.[53]

Procedural rules and technicalities are manifestly 'handmaids rather than mistresses'[54] of substantive justice. These technical rules are instruments available to the judiciary to help it to render substantive justice and are, therefore, not ends in themselves. This was stated by Lord Penzance in 1878 as follows:[55]

> Procedure is but the machinery of the law after all – the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.

Although in theory this distinction is obvious, it is usually not so in practice, as the British legal historian, Holdsworth, aptly observed:[56]

> One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.

In modern societies people submit their conflicts to courts in order that courts may look at their merits without being unduly fettered by technicalities, and have the cases decided fairly. Judges, therefore, have a duty to do substantive justice. In some countries, this has been made a constitutional norm. The Constitution of Kenya, for example, requires that 'justice shall be administered without undue regard to procedural technicalities'.[57]

A review of presidential petitions across Africa, however, reveals a disappointing record of courts that 'shy away from this sacred duty by

52 Fuller (n 41 above) 353-409.
53 GA Morrison et al *Common law reasoning and institutions* (2004) 36.
54 CE Clark 'The handmaid of justice' (1938) 23 *Washington University Law Quarterly* 298-320.
55 *Henry JB Kendall & Others v Peter Hamilton* [1878] 4 AC 504.
56 WS Holdworth *History of English law* (1922) 251.
57 Art 159(2)(d) Constitution of the Republic of Kenya 2010.

hiding behind technicalities.'[58] Often, presidential petitions have been struck out by courts on curable technical grounds, without considering the merits of the case. When an aggrieved petitioner is sent away from the court without consideration of the merits, this often shatters their confidence in the justice system and negates both the rule of law and the consolidation of democracy.[59]

Where judges render decisions without much regard for substantive justice, as retired Tanzanian High Court Judge James Mwalusanya aptly stated, 'the people will offer the verdict and the judiciary will find itself without any credible support'.[60] This in effect negatively affects the consolidation of democracy in a country. As Julius Nyerere, first President of Tanzania, warned, unless judges do their work properly, 'none of the objectives of our democratic society can be implemented'.[61]

Below follows a discussion of case examples of how the judiciary in Africa has avoided doing substantive justice in presidential election cases and dismissed them on procedural technicalities.

3.2.1 *Mwai Kibaki v Daniel Toroitichi Arap Moi*[62]

This was a presidential election petition brought by the then main opposition candidate, Mwai Kibaki, against the election of President Daniel Arap Moi, following Kenya's 1997 elections. According to official results, Mwai had received 1 895 527 votes while Moi had received 2 440 801 votes.[63] Mwai brought an action to void the election because of several electoral malpractices violating electoral rules. The petition, however, was thrown out on technicalities relating to the service of the petition.

The relevant rule on serving petitions stated:[64]

> (1) Notice of presentation of a petition, accompanied by a copy of the petition, shall within ten days of the presentation of the petition, be served by the petitioner on the respondent.
> (2) Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent under Rule 10 or by posting them by a registered letter to the address given under Rule 10 so that, in ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or such address has been given, by a notice published in the Gazette stating that the petition has been presented and that a

58 B Ugochukwu 'Election tribunals: Has anything changed?' http://www. utexas. edu/conferences/africa/ads/1164.html (accessed 21 September 2012).
59 As above.
60 JL Mwalusanya 'Checking the abuse of power in a democracy: The Tanzanian experience' in H Kijo-Bisimba & CM Peter *Justice and the rule of law in Tanzania: Selected judgments and writings of Justice James L Mwalusanya and commentaries* (2005) 587.
61 Mwalusanya (n 60 above) 582.
62 Court of Appeal Civil Application 172 [Election Petition 1of 1998].
63 *Kibaki* (n 62 above).
64 *Kibaki* 8.

> copy of it may be obtained by the respondent on application at the office of the Registrar.

The petitioner had served the petition by way of publication in the Government Gazette, since the respondent had not furnished details of his advocates as provided for in the rule. The petitioner did not effect personal or direct service because the respondent, as President, 'is surrounded by a massive ring of security which is not possible to penetrate'.[65]

The court held that the rule did not compel the respondent to provide contact details of his advocates. According to the court, a petitioner could undertake service through publication in the Gazette only if the petitioner had attempted and failed to do so through personal service, service through advocates and/or registered mail. Only then could a petition be presented by way of publication in the Gazette and, because this had not been done, the petition failed and the court dismissed it for improper service.[66]

In Kenya, this was not an isolated incident but a common method the judiciary followed to annihilate presidential election petitions without hearing the merits. For example, following the 1992 presidential elections, the losing opposition candidate, Kenneth Matiba, brought a petition challenging the election of Daniel Arap Moi.[67] However, before the elections Matiba became physically incapacitated and unable to write and, therefore, unable to personally sign the election petition as required by the rules of service. The petition was signed by his wife, to whom he had given a power of attorney. The court, however, struck off the petition for failure by the petitioner to sign the petition personally.[68]

3.2.2 *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others*[69]

This was an election petition brought by the opposition following the 2009 presidential and parliamentary elections in Namibia. The petition sought to void the presidential election, inter alia, for non-compliance with electoral laws.[70] Section 10 of the Electoral Act, 1992, required that election petitions could only be presented within 30 days of the results being announced. The petitioners presented their petition on the thirtieth day at 16:30 and, therefore, within the statutory requirement. The Registrar of the High Court accepted the petition. However, a rule of court did not allow the filing of a process

65 *Kibaki* 18.
66 *Kibaki* 17-19.
67 *Kenneth Stanley Matiba v Daniel Toroitichi Arap Moi & Others* Civil Application NAI 241 (1993) [Election Petition 27 of 1993]. See also *Handbook on election dispute in Kenya: Context, legal framework, institutions and jurisprudence* (2013).
68 As above.
69 [High Court] Case A01/2010.
70 As above.

on any day after 15:00. Because the petition was filed after 15:00, the Court held that the petition was invalid for being filed out of time and, therefore, in the eyes of the law there was no valid petition to adjudicate on.[71]

3.2.3 *John Opong Benjamin & Others v National Electoral Commission & Others*[72]

In this case, the petition was brought by the losing opposition leader, John Opong Benjamin, and other opposition leaders against the election of Ernest Bai Koroma during the Sierra Leone elections of 2012.[73] Article 55(1) of the Constitution provides that anyone with a grievance in a presidential election should petition the Supreme Court within seven days of the results being declared. The election was held on 17 November and the results were declared only on 23 November.[74] The petitioners filed their petition on 30 November, the seventh day after the declaration of results. Further rules of court required that petitioners leave the names of the advocates acting for them at the court registry in a separate notice, and that, within five days of filing the election petition, the petitioners make payment for security of costs.[75] The petitioners' lawyers had indicated their contact details by endorsing these on the petition, but not in a separate notice, and made security of cost payments on 5 December. The Court, however, struck out the petition, holding that it had been filed out of time due to a delay in payment for costs and for not complying with the requirement of lawyers' contact details to be in a separate notice.

3.2.4 *Atiku Abubakar & Others v Umaru Musa Yarsa Ya & Others*[76]

This is the final case in the list of examples of presidential election disputes dismissed on the basis of procedural technicalities without consideration of the merits of the case. The petition arose from the 21 April 2007 Nigerian elections. The petitioner, Atiku Abubakar, had polled 2 637 848 votes against the winner, Umaru Musa Yarsa Ya, who had received 24 638 638 votes.[77] Prior to the election, the Independent Electoral Commission of Nigeria (INEC) had disqualified the petitioner from the election and his name had been excluded from the ballot papers. This was based on the INEC's erroneous view that the petitioner had been indicted for corruption and embezzlement-related criminal offences and was therefore unsuited

71 *Rally for Democracy and Progress* (n 70 above) paras 44 & 45. See also the concurring judgment of Damaseb J, para 18.
72 SC 2/2012 [Supreme Court of Sierra Leone Judgment of 14 June 2013].
73 As above.
74 C Thorpe 'Statement from the NEC Chairperson on the Conduct and Results of the Presidential Elections held on 17 November 2012' (23 November 2012).
75 *Benjamin* (n 73 above) paras 25-29.
76 SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008.
77 See the majority judgment of Katsina-Alu JSC in *Atiku Abubakar* (n 76 above).

for presidential office.[78] His name was finally printed on the ballot papers, only four days before the election, through a ruling to that effect by the Supreme Court.[79]

The petitioner sought to challenge the election of Yar'adua on the following grounds:[80]

(a) The 1st petitioner [Abubakar] was validly nominated by the 3rd petitioner [Abubakar's party] but was unlawfully excluded from the election; alternatively that:
(b) The election was invalid by reason of corrupt practices.
(c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, as amended; and
(d) The 1st respondent was not duly elected by majority of lawful votes cast at the 21 April 2007 presidential election.

The applicable provision, on which the majority based its decision, states:[81]

An election may be questioned on any of the following grounds:

(a) that a person whose election is questioned was, at the time of election, not qualified to contest the election;
(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;
(c) that the respondent was not duly elected by majority of lawful votes cast at the election; or
(d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

The majority reasoned that grounds (a), (b) and (c) above were separated from ground (d) by the use of the word 'or', a disjunctive used to express an alternative or choice.[82] Since the petitioner's name ultimately made it onto the ballot paper and he took part in the election, he could not, therefore, plead ground (d) as he had not been excluded from the election. In the view of the majority, the use of the word 'or' meant that the petitioner had to choose between the alternatives and could, therefore, only plead one set of grounds.

Having considered the fact that the petitioner's name was on the ballot paper, the Court declined the invitation to consider whether his initial disqualification may have constituted constructive exclusion from the election as it had left him with barely four days to campaign.[83] But for the majority, since the petitioner took part in the election, his petition on the basis of ground (d) collapsed and, since the word 'or' denoted alternatives, the rest of the petition collapsed and, therefore, other grounds would not be entertained.[84] This decision is surprising, considering that the same court, in a different

78 As above.
79 As above.
80 As above. See concurring judgment of Kutigi JSC.
81 Sec 145(1) Electoral Act 2006.
82 n 77 above.
83 As above.
84 As above.

case, strongly condemned judges occupying themselves with technicalities at the expense of substantial justice and held that judges had a duty to shy away 'from submitting to the constraining bind of technicalities'.[85]

The decision of the majority was fraught with many flaws, and at least three of them may be mentioned here. First, the majority noted that the petitioners had pleaded two sets of inconsistent claims. Even if they were true, there was no legal basis for the Court to choose which set of inconsistent grounds to deal with. The Court never explained why they chose one ground on which to dispose of the petition. They could as well have chosen the set of claims which had merit and left the impugned alternative ground.[86] Second, the practice of pleading in the alternative and even inconsistent claims has long been established in the common law tradition. This practice is aimed at staving off the possibility of inundating courts with a multitude of successive suits relating to the same facts, and allows courts to deal with all matters in one suit.[87] This was, for example, allowed in the Zambian 2001 presidential election petition.[88] Similarly, in Uganda, where trials of presidential election petitions are largely by affidavit, the court in 2001 allowed defectively-drafted affidavits, holding that technical weaknesses should not be allowed to vitiate the quality of documents.[89] Third, the manner in which the majority dealt with the principal claim of exclusion was nothing more than a trivialisation of the issue and a negation of the right to an effective remedy.

The evidence, accepted by the Court, indicated that the INEC had gone out of its way to exclude the petitioner and had printed the first version of ballot papers without his name. The INEC was forced by order of court to print new ballots four days before the election. This left the petitioner with just four days to campaign and effectively put him at a disadvantage.[90] The Court took a narrow and simplistic interpretation of this exclusion, which negated the need to offer candidates an equal opportunity to campaign.

3.3 Misuse of the substantial effect rule

Although all politically-stable African countries have laws and regulations that govern the conduct of elections, these do not of themselves guarantee free and fair democratic elections. Often, election results are affected by honest mistakes, the incompetence of election officials, corruption, fraud, violence, intimidation, cheating

85 See *Amaechi v Independent National Election Commission & Others* Supreme Court of Nigeria Judgement of 18 January 2008 22 32 93.
86 As above. See dissenting opinion of Oguntande JSC.
87 As above.
88 See *Mazoka* (n 9 above) 24.
89 See *Kizza Besigye* (2001) (n 36 above) 210.
90 As above.

and other irregularities. Some of these irregularities may be minor and inconsequential. However, others are significant and have a bearing on the fairness and legitimacy of an election.

When courts are faced with an election petition, there is, therefore, the need for a legal device or mechanism whereby they will determine which irregularities are minor and inconsequential and which are significant and in need of redress. The substantial effect rule does this. For many Anglophone African countries, this is an old rule inherited from the English legal system. The gist of the rule is that elections should not be nullified for minor irregularities or infractions of rules.[91]

This rule is enacted in the English statute, the Representation of People Act, which has a history going back to the 1800s,[92] as follows:[93]

> No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary election rules if it appears to the tribunal having cognisance of the question that -
>
> (a) the election was so conducted as to be substantially in accordance with the law as to the elections; and
> (b) the act or omission did not affect its results.

The idea behind the rule is that flimsy mistakes, omissions and commissions should not lead to the annulment of an election, provided that, overall, the fairness of the election was not vitiated. Lord Denning identified three strands to this rule:[94]

> (1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
> (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls- provided that it did not affect the results of the election.
> (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and did affect the results – then the election is vitiated.

The substantial effect rule can sometimes be expansive to include criminal acts, such as acts of corruption, cheating and other illegal electoral malpractices. Equally, the rule here has three strands:[95]

> (a) corrupt or illegal practices or illegal payments ... were committed by someone;

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91 See *John Fitch v Tom Stephenson & Others* Case M324/107[2008] EWHC 501 (QB) para 38.

92 See A Eggers & A Spirling 'Guarding the guardians: Partisanship, corruption and delegation in Victorian Britain' (2014) 9 *Quarterly Journal of Political Science* 337.

93 Sec 23(3) Representation of People Act 1983. See also sec 48 of the same Act.

94 *Morgan v Simpson* [1975] 1 QB 151.

95 *Simmons v Khan* M/326/07 [2008] EWHC B4 (QB) para 35.

(b) they were committed at an election for the purpose of promoting or procuring the election of a candidate; and
(c) they prevailed so extensively that they may be reasonably supposed to have affected the result of the election.

The substantial effect rule produces a major challenge where illegal acts or substantial flouting of electoral laws do not lead to the automatic voiding of the election, unless it be proved that that had a bearing on the results. Such a rule is defeatist and a carry-over, in the case of the British, from the times when electoral corruption and cheating were considered inevitable to the electoral process.[96] It seems inappropriate in a modern democracy to saddle a litigant, who has proved a substantial breach of electoral laws and/or corruption, with also proving that this had an effect on the results. Every voter in a modern democracy is surely entitled to an honest, fair and transparently-democratic election. It would certainly not be appropriate for a successful candidate to be heard to say: 'I accept I was elected following widespread fraud carried out in my favour but, if you cannot demonstrate to a court that the fraud affected the result, my election stands.'[97]

The substantial effect rule has worked in the most disingenuous way in Africa to uphold elections fraught with major irregularities and fraud. As will be seen from the following case examples, election petitions that manage to survive being thrown out on technicalities are usually decided and dismissed for want for satisfying the substantial effect rule.

3.3.1 *Kizza Besigye v Yoweri Kaguta Museveni*[98]

This petition was brought by the main opposition losing candidate, Dr Kizza Besigye, challenging the election of the incumbent, President Museveni, following the February 2006 election. The relevant statutory provision under which the case was decided states: [99]

> The election of a candidate as a president shall only be annulled on any of the following grounds, if proved to the satisfaction of the court:
>
> (a) non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a substantial manner.

At the hearing of the petition, the following issues for decision were framed by the Supreme Court:[100]

96 *Simmons* (n 95 above) para 36. See also C Kam 'Four lessons about corruption from Victorian Britain' http://www.indiana.edu/workshop/colloquia/materials/papers/kam_paper.pdf (accessed 23 August 2014); Eggers & Spirling (n 92 above).
97 *Simmons* (n 95 above) para 39.
98 Presidential Election Petition 01 of 2006.
99 Sec 59(6)(a) Presidential Election Act.
100 See the majority judgment of Odoki CJ in *Kizza Besigye* (2006) (n 36 above).

(1) whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act, in the conduct of the 2006 presidential election;
(2) whether the said election was not conducted in accordance with principles laid down in the Constitution, Presidential Elections Act and Electoral Commission Act;
(3) whether, if either issue (1) or (2) or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner;
(4) whether the alleged illegal practices or any electoral offences in the petition were committed by the second respondent personally, or by his agents with his knowledge and consent or approval.

As regards the first two issues, the Supreme Court judges were unanimous that the election had been vitiated by the disenfranchisement of voters by unlawfully deleting their names from the voters' register; the wrongful counting and tallying of results; bribery; intimidation; violence; multiple voting; and ballot stuffing.[101] On the third issue, by a majority of four to three, the Court held that the failure to comply with the provisions and principles in statutes as found in issues (1) and (2) did not affect the election in a substantial manner.[102] On the fourth issue, by a majority of five to two, the Court held that, although there had been illegal practices and other irregularities, these had not been committed by the respondent or his agents, nor had they been committed with his knowledge or approval.[103]

The third issue (substantial effect), however, was the main issue around which the petition revolved and was mainly resolved. The majority dismissed the petition, holding that, in determining whether the irregularities and malpractices had affected the results in a substantial manner, numbers were the sole measuring yardstick. That is, the Court could only be persuaded if 'the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt'.[104] Since there was nothing indicating that the margin of 1 580 309 votes between respondent and petitioner would have been significantly reduced, the election stood.[105]

There are many shortcomings to be noted from both the wording of section 59(6)(a) of the Presidential Election Act, which provides for the substantial effect rule, and the manner in which the majority applied it. Four flaws may be noted here.

First, section 59(6)(a) requires that the court should not only be satisfied that there was non-compliance with electoral laws, but also that the non-compliance affected the election results in a substantial manner. This provision is difficult to implement objectively, as the requirement to evaluate whether or not the non-compliance had an

101 *Kizza Besigye* (n 36 above) 5.
102 As above.
103 As above.
104 *Kizza Besigye* (n 36 above) 103.
105 *Kizza Besigye* 94.

effect on election results in a substantial manner is no longer a legal exercise premised on the evidence before court. It basically requires judges to make a subjective evaluation of the consequences of their prospective decision. As Kanyeihamba JSC stated in his dissenting opinion, the provision 'transports the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment'.[106]

Second, the numerical test applied by the majority is manifestly and inherently wrong. While certain malpractices, such as ballot stuffing, voting by ineligible persons and the wrong tabulation of results, may be cured by reference to numbers, others, such as intimidation, violence and deploying the military throughout the country, cannot be captured in a mechanical sense of numbers. If, for example, soldiers kill a person and tell many people that anyone who votes against the incumbent will meet the same fate, how would this be reflected in numbers? It was unanimously accepted by the judges that violence and intimidation were widespread, and the Constitution and other electoral laws were seriously flouted. This should have been enough to assure that there was the necessary deleterious consequence on the elections. It is strange jurisprudence that, after adjudging the election not to have been transparent, free and fair, the majority of the court then backtracked and held that the irregularities were of no substantial effect.

Third, the numerical approach taken by the majority seems at odds with the concept of the rule of law and constitutionalism. The judges were unanimous that the elections had been held in a manner that violated constitutional and other statutory provisions on the conduct of transparent and democratic elections. The decision of the majority effectively means that gross violations of the Constitution and other laws are of no consequence, provided that the petitioners cannot by reference to numbers demonstrate that the gap in results would have been diminished. It goes without saying that this violates the principle of the supremacy of the Constitution.

Fourth, and finally, by overlooking serious electoral malpractices at the expense of numbers, a dangerous precedent for rewarding electoral cheating is entrenched with the full imprimatur of the court. This takes away any incentive for honest behaviour in politics and elections. Ironically, it means that one has to cheat so much that the gap in results should be numerically large to avoid judicial interference with the results. It is hardly surprising that exactly the same pattern of electoral irregularities was handled by the Supreme Court during the 2001 election petition.[107] This is because the precedent set by the

106 *Kizza Besigye*, dissenting opinion of Kanyeihamba, JSC, 304. See also BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 9 *African Human Rights Law Journal* 1.

107 See *Kizza Besigye* (2001) (n 36 above).

Court offers no disincentive for committing electoral malpractices, especially by those in power.

These four shortcomings generally apply to other case examples discussed below and will therefore not be repeated.

3.3.2 *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others*[108]

This case was brought following the 2001 Zambian general elections. In the Zambian situation, the substantial effect rule was not a statutory requirement, but one effectively legislated into existence by the Supreme Court in the first-ever presidential election petition that followed the 1996 general election.[109] The Supreme Court admitted that there had been many flaws in the electoral process, which included the use of the national intelligence service in a partisan way, the unlawful use of public resources by the incumbent party, and the abuse of resources from para-statal companies.[110]

The Supreme Court held that it could not grant any remedy or interfere with the result of the election because, taking into account the national character of the presidential election, 'where the whole country formed a single electoral college', it could not be said that the proven 'defects were such that the majority of the voters were prevented from electing the candidate whom they preferred'.[111] In the view of the Court, the petitioners were supposed to prove that the flaws 'seriously affected the result' to such an extent that it could no longer be viewed as a true reflection of the majority of voters.[112] To demonstrate this, the petitioners should have proved 'electoral malpractices and violations of the electoral laws in at least a majority of the constituencies'.[113]

While this case was decided in a similar way as the Ugandan case discussed above, it differs significantly in that here the substantial effect rule was expanded to include the wide geographical spread of irregularities, in addition to the numbers. The same flaws noted in relation to the reasoning of the Ugandan Supreme Court apply here. However, the subjective nature and arbitrariness of the decision are made clear when one takes into account that the winner and the runner-up in the election were separated by less than two percentage points. It is, therefore, possible that any slight anomaly in even one isolated part of the country could have had an effect on the results. Considering that the election was very close, it seems that the court deliberately added the geographical spread element to the substantial

108 SCZ/EP/01/02/03/2002.

109 See *Akashambatwa Mbikusita Lewanika & Others v Fredrick Jacob Titus Chiluba* (ZR.49/SC) SCZ Judgment 14 of 1998.

110 *Mazoka* (n 9 above).

111 *Mazoka* 119.

112 *Mazoka* 18.

113 As above.

effect rule, knowing that the numerical test would not be easy to sustain considering that the result was very close.

3.3.3 *Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others*[114]

This case arose from the 2012 Ghanaian elections. The main issue raised by the petitioners included allegations of over-voting; voting without biometric verification as required by law; absence of signatures of presiding officers on some results sheets, contrary to the law; and the occurrence of the same serial numbers for different polling stations.[115] The situation was that if votes tainted with these anomalies were deducted, then the president-elect, Mahama, would not have had the 50 per cent-plus-one-vote constitutionally-required majority to be considered the elected President.

Although the majority gave various reasons for upholding the election, the common theme was that, even if there were these noted anomalies, the election itself was 'conducted substantially in accordance with' the Constitution and other laws.[116] However, such jurisprudence should be worrying. The anomalies were contrary to the Constitution and other laws, and thus could not just be wished away. Taking them into account meant that the declared winner did not really win the election. The decision does not seem to be legally supportable and was probably based on other considerations. Adinyira, JSC, for example, made it clear that in her view, 'public policy favours salvaging the election and giving effect to the voter's intention'.[117] The decision is in sharp contrast with the guidance of Lord Denning, discussed above, to the effect that even if an election is substantially held in accordance with the law, but is assailed with minor infractions that have an effect on the result, the election is vitiated and voidable.

3.4 Delayed justice

An effective judicial mechanism for the determination of election disputes should not only be fair, but must also be timely and efficient. Many African states allow the swearing in of the President upon declaration of the results, without waiting for the resolution of election disputes by the courts. In Nigeria, for example, Olusegun Obasanjo proceeded to be sworn in in 2003, despite a court order restraining him and his running mate from presenting themselves for swearing in, pending the determination of the substantive election petition.[118] In Zambia, for example, article 34(9) of the Constitution requires the person who has been declared the winner to be sworn in

114 J1/6/2013.
115 As above. See the majority judgment of Atuguba JSC.
116 *Akufo-Addo* (n 114 above). See separate judgment of Adinyira JSC.
117 *Akufo-Addo* (n 114 above) 145.
118 *Buhari v Obasanjo* Suit SC 133/2003 17 NWLR 587.

and to assume office immediately and not later than 24 hours after the declaration. Where a president-elect is sworn in even before election disputes are settled by the courts, the need for an efficient resolution of cases becomes even more sensitive. Indeed, the element of time is inherent in the concept of fair adjudication, making justice a time-bound concept.[119]

There are some African countries that are exemplary with regard to the timely resolution of presidential election petitions. In Uganda, for example, the law requires the hearing and determination of presidential election disputes to be finalised within 30 days of presentation of the petition. The Ugandan Supreme Court in both the 2001 and 2006 elections managed to determine the cases within the set time limit.[120] In Kenya, the 2013 election petition, the first since the promulgation of a new Constitution in 2010, was promptly resolved within 30 days of presentation of the petition.[121] However, as was noted by the Ugandan Supreme Court in both 2001 and 2006, the pressure to complete election petitions was at the cost that the judges had to rely on mostly evidence by affidavit and, therefore, largely did not have the benefit of having witnesses examined before them so that they could judge their demeanour. The speedy resolution of disputes, while valuable, may mean not giving enough time to the process of fact finding and there is therefore the risk of having important decisions based on inadequate information.

There are, however, still several countries where cases are habitually delayed, rendering the whole adjudication process an exercise in futility. In Nigeria, for example, it is estimated that a presidential election petition takes about two years to finalise, which is actually half of the presidential tenure.[122] Perhaps Zambia has the poorest record of inefficiency in the adjudication of presidential election disputes. The presidential election dispute that arose from the 2001 elections, for example, was only determined in 2005, just about a year before another general election.[123]

The delayed determination of election petitions, where one candidate has already been sworn in, presents numerous challenges. First of all, it raises the issue of the legitimacy of appointments and decisions made by such a president, considering that there is a cloud of uncertainty about his or her election until the court finally determines the matter. Second, delays often increase uncertainty and anxiety in a nation. It is not uncommon that delays in determining election petitions precipitate military *coups* or *coup* attempts. In

119 Electoral Integrity Group 'Towards an international statement of the principles of electoral justice' (Accra Guiding Principles) 2011.

120 See *Kizza Besigye* (2001) and *Kizza Besigye* (2006) (n 36 above).

121 *Raila Odinga* (n 38 above).

122 BA Adejumo 'The judiciary and the rule of law: Challenges of adjudication in the electoral process in Nigeria' http://www.nigeriavillagesquare.com/articles/akin-oyebode/the-role-of-the-judiciary-in-the (accessed 21 September 2012).

123 *Mazoka* (n 9 above) 3-4.

Zambia, for example, the disputed presidential elections of 1996 and the delayed determination of the subsequent election petition is thought to have influenced the 1997 military *coup* attempt.[124] Similarly, the military takeover in Egypt of July 2013 came amidst the delayed determination of the election petition filed by the losing opposition leader, Ahmed Shafiq, during the 2012 elections.[125]

Third, although there has been no judicial voiding of a presidential election on the continent so far (with the exception of Côte d'Ivoire), where justice is delayed and where an election is overturned, that would lead to a distortion of the tenure of the person who merits to be the President. In the case of Zambia where, for example, it took almost four years to conclude the election petition, had the court determined that the opposition candidate was the rightful winner, that would have left the genuine winner with just a year of office. The illegitimate candidate would then have ruled the country for the better part of the presidential tenure. This, of course, would violate the people's right to choose their leaders and for the rightful leaders in turn to represent their people.

The Nigerian case of *Amaechi v INEC*,[126] although a governorship case, is illustrative. In this case, the Nigerian Supreme Court held that the person who was declared the winner of the state governorship position, in fact, was not the rightful winner and, therefore, the Court annulled his election and declared the petitioner as the legitimate governor.[127] Had this been in relation to a presidential election where, for example, a term runs from one election to the next, it would mean that the wrong person served as president and, consequently, would have had their term unfairly reduced.

Fourth, if the election were to be overturned or nullified, it would mean that the wrong person was allowed to earn a presidential salary and other benefits for a protracted period, to which he or she was not entitled. It is unlikely that such benefits would be reimbursed and, therefore, delayed justice leads to the 'abuse' of public resources.

The requirement under the new Kenyan Constitution which requires elections to be held prior to the expiration of the term of office of the incumbent and that election disputes should be resolved prior to the swearing-in of the new President, would seem to be a better alternative here.[128]

124 M Ndulo 'The democratisation process and structural adjustment in Africa' (2003) 10 *Indiana Journal of Global Legal Studies* 315-368.

125 IFES *The electoral framework in Egypt's continuing transition: February 2011-September 2013* (2013).

126 *Amaechi* (n 85 above).

127 As above.

128 Arts 141 & 142 Constitution of the Republic of Kenya 2010.

3.5 Coming to no decision

Courts sometimes refrain from making any meaningful decision or simply defer to the executive instead of making a final and binding determination. In the Nigerian case of *Buhari,*[129] for example, the losing candidate, Muhammadu Buhari, sought and was granted an injunction by the court restraining Obasanjo and his running mate from presenting themselves for swearing-in into office pending the determination of the main election petition.[130] The respondents, in violation of the court order, went ahead and were sworn in, whereupon the applicants appealed to the Supreme Court for a determination, inter alia, as to whether the President had been validly sworn in when it was done in violation of a valid court order. The Supreme Court held that the appeal was no longer of any relevance since the respondents had already been sworn in and, therefore, the injunction would only be an academic exercise that had no *res* or *status quo* to protect. In any case, the Court felt that the injunction was not directed at the Chief Justice not to swear in the respondents.[131] The Supreme Court considered that the applicants would not suffer any loss as the courts would still go ahead and determine the main election petition objectively and on its merits.

It goes without saying that such an approach can only lead to cynicism about the commitment of the court to doing justice. It is common knowledge that a person, once sworn into office, can improperly influence the court into passing a favourable decision, considering the state power and resources at his disposal. The then Nigerian chief justice, for example, later revealed that President Obasanjo had made efforts to influence the judges by either bribery of intimidation.[132] In this case, the court simply refrained from addressing the consequences of the swearing-in, which had gone ahead despite a court order to the contrary.

The Zimbabwean 2008 election is another example of self-imposed impotence by the judiciary. Following the 29 March 2008 election, the Zimbabwe Electoral Commission (ZEC) inordinately delayed announcing the results, prompting the opposition Movement for Democratic Change (MDC) to seek an order of the court compelling the ZEC to release the results.[133] Judge Uchena accepted that the delay had been inexplicable and unjustified.[134]

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129 *Muhammadu Buhari & Others v Olusegun Obasanjo & Others* SC 133/2003 17 NWLR (2003).

130 *Buhari* (n 129 above) 3.

131 *Buhari* 5.

132 'How pressure was brought to bear on judiciary to do Obasanjo's will concerning Buhari's 2003 presidential election petition' http://saharareports.com/news-page/dateline-2005-how-pressure-was-brought-judiciary-do-obasanjo%80%99s-will-concerning-buhari%E2%80%99s-20? (accessed 1 May 2014).

133 *Movement for Democratic Change & Others v The Chairperson of the Zimbabwe Electoral Commission & Another* HH37-08 EP24/08 Judgment of April 2008.

134 *Movement for Democratic Change* (n 133 above) 13.

However, Judge Uchena decided the case on the basis of section 67(A)(7) of the Electoral Act, which stated that the Commission's decision on whether or not to order a recount and the extent of the recount 'shall not be subject to an appeal'. According to Judge Uchena, this provision gave the ZEC a wide discretion and, therefore, its decisions were final, not subject to inquiry by the Court.[135] The Court was therefore 'not entitled to intervene and order the respondents to announce the results'.[136]

The reasoning of Judge Uchena is defective in many ways, as pointed out by Odhiambo.[137] First of all, the action was not an appeal against a decision of the ZEC, but it simply sought an order of *mandamus* to compel the ZEC to perform its statutory duty. The provision the judge based his decision on was, therefore, completely irrelevant to the case. Second, an ouster clause like section 67(A)(7) should not have been applied literally without ascertaining whether it passed the constitutionality test, especially when important national matters were at stake.[138] Judge Uchena had the responsibility to review the consistency of that provision with constitutional provisions that give courts unlimited power of judicial review of administrative action. Third, as stated above, Uchena admitted that the delay had been unreasonable. This finding by the judge, therefore, required him not simply to restate section 67(A)(7), but to inquire into the causes of the delay and the consistency of the causes of the delay with the constitutional obligations of the ZEC to conduct transparent and democratic elections.[139]

In discussing these shortcomings of judicial decisions in presidential election petitions, it should be noted that the desire is not to impress that all petitions presented before court have merit and, therefore, judges should have found for the petitioners in all cases. There have been some cases that have genuinely lacked in merit, at least in the way the grievance was framed, and that were rightfully dismissed. For example, in the Nigerian case of *Chukwuemeka Odumegu Ojukwu v Olusegun Obasanjo*,[140] the main complaint was that Obasanjo was not qualified to serve another term in office due to the fact that he had served as a military head of state, which the petitioners construed to have been Obasanjo's first term in office. This, it was argued for the petitioners, was contrary to section 137(1)(b) of the 1999 Constitution of Nigeria, which required that 'a person shall not be

135 *Movement for Democratic Change* 17-18.

136 *Movement for Democratic Change* 18.

137 EO Abuya 'The role of the judiciary in promotion of free and fair elections' http://www.indabook.org/preview/NTC_NPQZr4ClNhNxrEjoy9F3j8CeiGeBAVzhBlHE_fM,/THE-ROLE-OF-THE-JUDICIARY-IN-PROMOTION-OF-FREE.html?query=Kenya-Elections (accessed 12 December 2013).

138 As above.

139 As above.

140 *Chukwuemeka Odumegu Ojukwu v Olusegun Obasanjo & Others* SC 199/2003 Supreme Court Judgment of 2 July 2009.

qualified for election to the office of President if he has been elected to such office at any two previous elections'. Obasanjo's ascent to power as a military ruler was not on the basis of any election as contemplated under the Constitution and, therefore, the term limit set in the 1999 Constitution did not affect him. The petition was, therefore, rightly dismissed.

Cases dismissed for lacking merit are, however, very few. Many cases, as discussed above, usually raise genuine concerns, but judges have routinely passed decisions that seem to inhibit the further consolidation of democracy on the continent.

4 Conclusion

It is no secret that many presidential elections in Africa have been assailed with major irregularities. When this occurs, it usually falls on the judiciary to protect the rights of people to choose their leaders in a free and transparent atmosphere. The record of the judiciary, however, has been overwhelmingly disappointing. The judiciary has routinely upheld clearly defective elections, erroneously considering it their duty to salvage defective elections as a matter of public policy. To achieve this, the courts have largely applied two techniques. The first is to simply dismiss election petitions on curable procedural technicalities without considering the merits of the case. Second, the courts have wrongly applied the substantial effect rule to uphold disputed elections, even in the face of glaring evidence indicating serious violations of constitutional and other statutory provisions. In other circumstances, judges have simply refrained from making an appropriate decision. Further, while in some countries such as Uganda and Kenya (since 2010), judges have been exemplary in determining cases efficiently, in many countries such cases are still characterised by inordinate delays that negate the whole purpose of adjudication.

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Mandatory mediation: An obstacle to access to justice?

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Summary

The article evaluates the efficacy of mandatory mediation in attaining access to justice, in particular with reference to the resolution of labour disputes in Mozambique and South Africa. First, what is meant by mediation, both voluntary and mandatory, and what is meant by 'access to justice' is ascertained. The advantages and disadvantages of mediation are highlighted. It is argued that mandatory mediation is the antithesis of mediation and that, therefore, it denigrates the process and can ultimately divest it of most, if not all, its advantages. It is concluded that, although mediation can be a quick, efficient and cost-effective means of resolving some disputes, it is not suitable to every dispute. Consequently, mediation should be encouraged, but it should not be made mandatory.

Key words: *Mandatory mediation; labour disputes; access to justice; ADR; dispute resolution*

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1 Introduction

The right of access to justice[1] is considered to be a fundamental right in many countries,[2] including South Africa[3] and Mozambique.[4] As such, it is worthy of fierce protection.[5] In this context, the terms 'access' and 'justice' are difficult to define in concise terms. Furthermore, the phrase 'access to justice' may contain contradictions. This is so because access to a dispute resolution process does not necessarily mean justice. Many legal systems are plagued by high costs, delays, complexity and uncertainty. The result of these factors, many argue, is, at best, a retardation of access to justice and, at worst, a denial of the right of access to justice. The use of mediation is proposed as a method of overcoming these problems and securing access to justice. The argument, simplistically stated, is that mediation provides a quick, cheap and effective method of dispute resolution; in short, a solution to the crisis faced by many judicial systems.

The purpose of the article is to evaluate the efficacy of mandatory mediation in the attainment of access to justice, in particular with reference to labour disputes, in Mozambique and South Africa. What is meant by mediation, both voluntary and mandatory, and what is meant by 'access to justice' is ascertained. The advantages and disadvantages of mediation are highlighted. It is argued that mandatory mediation is the antithesis of mediation and that, therefore, it denigrates the process and can ultimately divest it of most, if not all, its advantages.

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1 The precise meaning ascribed to this term is discussed hereunder, under the heading 'Access to justice'.

2 It is a right that is protected in terms of international instruments, eg, art 10 of the UN Declaration of Human Rights declares the right of an individual to a hearing by an 'independent and impartial tribunal'. The African Charter on Human and Peoples' Rights provides in art 7 for the right to an 'impartial tribunal'. This guarantee also appears in the International Covenant on Civil and Political Rights, the European Convention and the American Convention.

3 Sec 34 of the Constitution provides: 'Everyone 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.'

4 Art 62(1) of the Mozambican Constitution provides: 'The state shall guarantee that citizens have access to the courts …'

5 This sentiment was expressed by the Constitutional Court in *Chief Lesapo v North West Agricultural Bank & Another* [1999] ZACC16; 2000(1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) para 22 as follows: 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation reasonable and justifiable.'

The article is limited to an evaluation of the law regarding mandatory mediation in the resolution of labour disputes in South Africa and Mozambique, with a view to determining whether mandatory mediation either promotes or acts as an obstacle to the constitutional right of access to justice.

Finally, the conclusion is reached that, under certain circumstances, mediation may assist in the attainment of the right of access to justice. However, it is also concluded that this is not the case where mediation is mandatory. When mediation is compelled, it is likely to create an obstacle to the attainment of access to justice.

2 Essence of the process of mediation

Mediation is a form of alternate dispute resolution (ADR). The reason it is termed 'alternate' is that it is a dispute resolution method that is perceived to be an alternative to the traditional system of court procedures. Mediation may be described as the continuation of a negotiation process between the disputants, with a third person, namely the mediator, assisting the disputants in, first, identifying and understanding their underlying concerns and needs and, based on these, in negotiating a settlement that is acceptable to both parties. Mediation has been defined as[6]

> a flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The focus is on settlement. This differs from court procedures where the focus is on the attainment of justice. It follows that, if the parties are not willing to settle because, for example, the dispute concerns a matter of principle, or where there are no prospects of success in reaching a settlement, mediation is not an appropriate tool to deal with the dispute. This is one of the reasons why mediation should not be mandated for all disputes in a one-size-fits-all manner. Since the focus of mediation is settlement, a willingness of the parties to settle is of paramount importance. Mandatory mediation loses sight of the essence of mediation.[7] Mediation is defined as a voluntary process, not only because it is a process that is undertaken voluntarily, but also

6 Definition published by the Centre for Effective Dispute Resolution (CEDR) in 2008.

7 See D Quek 'Mandatory mediation: An oxymoron? Examining the feasibility of a court-mandated mediation programme' in J Cardozo (ed) *Of conflict resolution* (2010) 484, where it is stated: 'The principal objection is that mandatory mediation impinges upon the parties' self-determination and voluntariness, thus undermining the very essence of mediation.'

because the outcome is voluntarily attained by the parties,[8] that is, no outcome can be imposed on the parties as is the case with arbitration or adjudication by court process. Coercion as to entering the process as well as to the outcome represents the antithesis of the essence of mediation.

Furthermore, the fact that disputants are forced into pursuing a certain method of dispute resolution may contribute to their unwillingness to co-operate and reach a settlement.[9] The result hereof is precisely the opposite of what proponents of mediation attribute to the process of mediation, namely, that mediation is an effective tool in the attainment of access to justice. The result is an extra, obligatory and futile step in the long journey of access to justice, imposing on the parties extra time delays and extra costs. In such a situation, mandatory mediation may be described as an obstacle to access to justice.[10]

Although there is a difference between coercion to enter the process of mediation and coercion to settle, coercion to enter a mediation process may lead to coercion to settle.[11] Other commentators argue that the distinction between coercion to enter the process of mediation and coercion to settle are distinct and independent, and that coercing parties to attempt conciliation is not necessarily tantamount to enforcing settlement.[12]

Another essential element of mediation is that it is a confidential process that is without prejudice. It follows that, if a mediation process can later be scrutinised by a court with the power to castigate a party with adverse costs, should the court be of the view that the particular party was unreasonable in either not entering into the process of mediation at all,[13] or in not reaching settlement during the

8 The US Model Standards of Conduct for Mediators (2005), cited in J Nolan-Haley 'Consent in mediation' (2008) *Dispute resolution magazine* 4-5, emphasises voluntary decision making and focuses on self- determination as a controlling principle.

9 See RL Wissler 'The effects of mandatory mediation: Empirical research on the experience of small claims and common courts' (1997) 1 *Willamette Law Review* 581, where it was indicated that mandatory mediation resulted in lower rates of settlement than where mediation was voluntarily undertaken by the parties.

10 Dyson LJ stated as follows *in Halsey v Milton Keynes General NHS Trust* (2004) EWCA (Civ) 579 para 9: 'It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is quite another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on the right of access to the courts.'

11 See Quek (n 7 above) 485.

12 Quek 486.

13 In terms of the English Civil Procedure Rules 26:4 & 44, '[t]he court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR'.

process,[14] there can be no confidentiality in the process. This is a means to mandate not only the use of mediation as a dispute resolution method, but ultimately also a means whereby to mandate settlement by the parties, who may settle despite an unfair settlement for fear of incurring a punitive costs order against them should they decide not to settle but to pursue their rights through the court process. In this manner, the distinction between a compulsion to enter into mediation and a compulsion to settle is blurred. When this happens, the traditional advantages of mediation are relinquished.[15] In the English case of *Halsey v Milton Keynes General NHS Trust*,[16] the courts were prohibited from compelling unwilling parties to refer their dispute to mediation. However, more recently, in *Wright v Wright*,[17] the Court of Appeal expressed the view, *obiter,* that in light of developments in mediation practice in the past decade, perhaps a 'bold judge' may revisit the decision in the *Halsey* case and rule that a court may compel unwilling parties to attempt mediation. Nevertheless, compelling litigants to participate in a voluntary process by threat of sanction, such as adverse costs orders, is not only ironic, but also divests the process of its essence. In fact, mandatory mediation is an oxymoron. Worse, still, is a compulsion to settle. If the compulsion ends at entering the process, the parties are free not to settle and to pursue their rights in a court of law. If compelled to settle, however, justice is not only retarded, but denied.

3 Access to justice

According to the United Nations Development Programme (UNDP),[18] access to justice is more than the ability to obtain legal representation and have access to the courts. It refers to the ability to seek and obtain a remedy to a grievance through an institution, be it formal or informal. The notion of access to justice has evolved from a rather narrow concept that refers merely to the ability to gain access to legal services and state services, such as courts and tribunals, to a wider concept that encompasses social and economic justice.[19] The meaning ascribed to 'justice', for purposes of this article, is a narrow one. It does not refer to a universal kind of justice. It is simply the kind

14 The English Civil Procedure Rule 44.5 provides that the court, in determining adverse costs orders, must have regard to the conduct of the parties, including conduct before as well as during the proceedings and, in particular, the efforts made before and during the proceedings to resolve the dispute.

15 DS Winston 'Participation standards in mandatory mediation statutes: You can lead a horse to water, but it cannot be forced to drink' (1996) 11 *Ohio State Journal on Dispute Resolution* 193.

16 [2004] EWCA Civ 576.

17 [2013] EWCA Civ 243.

18 United Nations Development Programme, Programming for Justice *Access for all: A practitioner's guide to human rights-based approach to access to justice* (2005).

19 Open Society Foundation of South Africa 'Access to justice round-table discussion', Parktonian Hotel, Johannesburg, South Africa, 22 July 2003 5.

of man-made justice that one should expect from a civil justice system. It is the 'justice' that constitutions refer to when they protect, as a fundamental right, the right of 'access to justice'. This brand of justice may be called 'civil justice'. In order to ascertain how a civil justice system delivers this particular brand of justice, the starting point is that a civil justice system is a 'public good'.[20] As such, a civil justice system, in putting into practice the attainment of its ultimate goal, namely, justice, produces certain by-products, such as social order, certainty of the law and economic prosperity. In the words of Genn:[21]

> My starting point is that the civil justice system is a public good that serves more than private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community's defence against arbitrary government action. They promote social order and facilitate the peaceful resolution of disputes. In publishing their decisions, the courts communicate and reinforce civic values and norms. Most important, the civil courts support economic activity. Law is pivotal to the functioning of markets. Contracts between strangers are possible because rights are fairly allocated within a known legal framework and are enforceable through the courts if they are breached. Thriving economies depend on a strong state that will secure property rights – and investments.

In providing civil justice, a civil justice system also settles disputes. Dispute resolution, however, is not its primary objective or focus. It is merely a by-product of the main objective, namely, justice. With mediation, by contrast, the primary focus or objective is the resolution of disputes, not justice. Admittedly, it is possible for the mediation process to produce a just result, but this becomes less likely where mediation is mandated, either directly or indirectly. Mandatory or compulsory mediation relegates to private parties the job of attaining justice. But, as mentioned earlier, civil justice is a public service provided for by the civil justice system. As explained by Genn,[22] '[t]he public courts and judiciary may not be a public service like health or transport systems, but the judicial system serves the public and the rule of law in a way that transcends private interests'.

Mediation cannot do this: Firstly, mediation is a confidential process which consequently cannot produce any publicised precedents which, in turn, are essential for the creation and maintenance of civic values and norms and, ultimately, legal certainty, on which both social justice and economic prosperity are dependent. The fact that the focus and ultimate objective of mediation is settlement, as opposed to justice, means that justice is not necessarily delivered, especially in

20 H Genn 'What is civil justice for? Reform, ADR, and access to justice' (2012) 24 *Yale Journal of Law and the Humanities* 397.

21 As above.

22 Genn (n 20 above) 398.

cases where litigants are compelled to mediate. Unlike the outcome of a judicial process (a judgment), which is available to the public and must be justifiable and contain justifiable reasons for the outcome, the outcome of mediation cannot be made public and no reasons need to be put forward to justify it. It is simply a settlement agreement which remains between the parties. It is a 'private interest' which remains confidential. Consequently, it cannot have a part to play in serving the public as a 'public good' in a state where the rule of law is applied.

Second, when mediation is mandatory it is less likely that settlement will ensue and, if it does, it is less likely to be just. This will be the case, for example, when compulsion to enter the process of mediation as well as to settle is indirectly imposed under threat of adverse costs, by empowering a court to impose an adverse order for costs after having due regard for the conduct of the parties, including conduct before as well as during the proceedings, and, in particular, the efforts made before and during the proceedings to resolve the dispute.[23] Litigants faced with such compulsion may settle on terms that are less than acceptable or fair and just for fear of adverse legal costs being imposed on them should the matter at a later stage be adjudicated by a court. This cannot be the same as access to justice.

Some commentators are of the view that mandatory mediation does not deny litigants access to justice.[24] They argue that mandatory mediation simply suspends access to the courts as disputants cannot be forced into agreement, and that, more often than not, unwilling participants in the mediation process settle.[25] If no settlement is reached, this argument seems rather strained, given the fact that those advocating mediation as an alternative to traditional adjudication see it as resolving the problems of high costs and delays associated with the judicial system and the consequent denial of access to justice. Where the mediation process does not achieve settlement, mediation is nothing more than an extra step exacerbating the traditional obstacles to access to justice associated with a judicial system. In the event that unwilling participants in a mandatory mediation process reach settlement, there is no guarantee that the settlement is fair or just. This cannot be access to justice.

23 Rule 44.5 of the English Civil Procedure Rules.

24 See speech given by Lord Phillips of Worth Matravers on 29 March 2008 in India, http://www.cedr/news/item+Lord-chief-Justice-calls-for-greater-take-up-of-ADR (accessed 9 July 2014).

25 'An analysis and evaluation of alternative means of consumer redress other than redress through the ordinary judicial proceedings' (2007) European Commission, SANCO, The Study Centre for Consumer Law, Centre for European Economic Law, Katholieke Universiteit, Leuven, Belgium, http://ec.europa.eu/consimers/redress/reports_studies/index_en.htm (accessed 17 September 2014).

4 Advantages of mediation

The proponents of mediation often perceive the process as a viable alternative to court proceedings. In my view, mediation can only be perceived as an alternative to court proceedings in a very narrow sense, namely, in the sense that under certain circumstances a negotiated settlement can bring about a resolution rendering court proceedings unnecessary. Mediation cannot be an alternative to court proceedings in the sense that it can replace court proceedings. This is because, as discussed above, mediation cannot perform all the functions of court proceedings. At best, mediation can be a part or a component of the civil justice system. To argue that mediation is an alternative to court proceedings loses sight of the differences in the ultimate objective or focus of each process. The fact that the main objective of each process is very different obviously highlights the fact that the processes should not be viewed as alternatives. Rather, the different processes should be seen as acting in conjunction with each other to complement each other in the attainment of access to justice. Some disputes are better suited to the process of mediation and others should be dealt with by the courts. Furthermore, mediated settlements are often reached with reference to what would in all probability happen should the matter be determined by a court. Therefore, mediation should be perceived as a voluntary option if circumstances are ripe for a negotiated settlement. If mediation is perceived in this light, it has many advantages.

The idea of a negotiated settlement to avoid court proceedings, or even *in lieu* of court proceedings, is not a new one. Nobody is more acutely aware of the perils of court proceedings than those facing them. For this reason, most civil claims in most countries are settled between the parties and they do not reach the courts.[26] Obviously, disputants settle out of court because they want to avoid the costs and other adverse consequences of court proceedings. Mediation, as a continuation of the negotiation process, therefore, can assist in increasing the number of out-of-court settlements. If parties are unable between themselves to reach consensus at the negotiation stage, the assistance of a knowledgeable and competent mediator serves to bring down barriers to settlement that the parties alone cannot conquer.

Aside from cost savings, the mediation process offers other advantages. Usually a mediation that results in settlement brings about an end to the dispute in a far shorter period than court proceedings. The fact that the settlement is voluntarily agreed to by the parties, and the parties, themselves, control the outcome, usually

26 According to Lord Phillips of Worth Matravers (n 24 above): 'Any sensible person who finds himself party to a dispute will wish to resolve it, if possible, by negotiation. Over 90% of actions that are commenced in England end in a negotiated settlement before trial.'

means that the parties are satisfied with the outcome. Mediated settlements are not restricted to remedies set out in law. The parties can be very creative in fashioning settlements as they are not confined by any limits imposed by law. This makes it possible to craft settlements that are more meaningful and acceptable to individual parties. An outcome imposed by a court, on the other hand, may leave neither party satisfied. Given the litigious and adversarial nature of court proceedings, any relationship between the parties is generally soured for good. With mediation, on the other hand, a settlement that is acceptable to both the parties may also result in a relationship between the parties being salvaged. Mediation can often cure a myriad of disputes between the parties, whereas a court decision usually deals with one narrow dispute only. Mediation processes are private and confidential. As mentioned above, judgments are public documents. In certain circumstances, the advantage of confidentiality may be considered essential by one or both parties in sensitive matters. Mediation takes away the risk and uncertainty associated with court proceedings because the parties themselves control the outcome.

5 Disadvantages of mediation

If mediation does not result in settlement, it is simply an extra step on the road to justice. Obviously, this entails a waste of time and wasted costs. Second, if mediation is undertaken for improper purposes and is not undertaken in good faith, it can result in the innocent party later being prejudiced in court proceedings because the party who acted in bad faith has become privy to information that would otherwise have been privileged. Examples of the tactical advantages that may be gained by a party who enters into mediation in bad faith include the following: Mediation is entered into for the purpose of making an illicit discovery; to test the opponent's resolve; or simply to intimidate the other party.

Not all matters are suitable for mediation. Mediation may not be appropriate in situations where there is a marked imbalance of power between the parties. In such a situation, the party in whose favour the balance of power lies can take advantage of the mediation process to manipulate and pressurise the other side to enter into an agreement which is blatantly unfair. In court proceedings, on the other hand, the judge, whose aim it is to achieve justice, determines the outcome. Imbalances of power between the parties may, therefore, influence the outcome in favour of the weaker party, or not at all. Chances of a fair solution are better in court proceedings than in a mediation settlement where the balance of power is skewed in favour of one of the parties.

In some cases, neither party wants a mediated settlement. They simply want a judicial determination of their rights. Issues that involve illicit or fraudulent behaviour are usually not suitable for settlement in

a mediation process. This is because the polarised positions of the parties do not allow for any type of negotiated settlement. Secondly, the matter might involve a matter of principle and one of the parties is simply not willing to negotiate and wants his or her rights vindicated.

It is obvious that if parties are compelled to enter into a mediation process in circumstances where a dispute is one not suitable for settlement by mediation, the result is either gross unfairness, if a settlement is reached, or unnecessary time delays and increased costs, the very ills mediation is supposed to cure, if there is no settlement.[27]

Although a negotiated settlement achieved by means of mediation may produce justice for the individual parties, such a settlement is confidential and produces no precedent. Consequently, the settlement is of no use to the community at large. For example, if the dispute concerned racial inequality, and the parties settled the matter, the settlement does not generate a precedent for the community on the wider and important issue of racial discrimination. Another individual facing the same discrimination in the future cannot benefit from the mediated settlement. In other words, m[28] iated settlements, unlike court judgments, do not create precedents that benefit society at large. In short, the justice achieved by mediated settlements is justice only for the individuals concerned, but mediation does not address civil justice issues for the community at large and it does not allow for the assertion of individuals' rights.

In conclusion, the attributes of mediation that result in benefits and advantages can usually be achieved only in circumstances where the process of mediation is voluntarily undertaken. Conversely, where mediation is voluntarily entered into by the parties, the disadvantages associated with mediation are less likely to be present. When mediation is compelled and at least one of the parties is an unwilling participant, it is likely that mediation will result in wasted costs and time.

6 Resolution of disputes by mediation[28] in South Africa

6.1 Labour Relations Act

In terms of the Labour Relations Act (LRA),[29] all legal disputes covered by that legislation must first be referred to conciliation before they can

27 In *Hurst v Leeming* [2002] EWHC 1051(Ch), Lightman J, whilst bemoaning the high costs and time delays associated with civil litigation, power and better party may with impunity refuse to proceed to mediation where there was no objective prospect of its succeeding.

28 This term is used synonymously with the term 'conciliation'.

29 Act 66 of 1995.

either be arbitrated or adjudicated or, if they are disputes of interest, industrial action can take place.

Unfair dismissals are dealt with in chapter VIII of the LRA. The following types of dismissal disputes must be referred to mediation or conciliation before they can be arbitrated or adjudicated: dismissal for misconduct[30] or incapacity;[31] constructive dismissal;[32] where the reason for dismissal is not known;[33] automatically unfair dismissals;[34] dismissal based on operational requirements;[35] dismissal for participating in an unprotected strike;[36] dismissal in the context of closed-shop;[37] dismissal as a result of the failure by an employer to renew a fixed-term contract of employment on the same or similar terms, where the employer offered to renew it on less favourable terms, or did not renew it, or the failure by an employer to retain the employee in employment on an indefinite basis, but otherwise on the same or similar terms as the fixed-term contract, in circumstances where the employee had a reasonable expectation of such indefinite renewal;[38] refusal by the employer to reinstate an employee after maternity leave;[39] selective non-re-employment;[40] dismissal in the context of transfer of employment contracts;[41] dismissal because the employee made a protected disclosure in terms of the Protected Disclosures Act;[42] and dismissal relating to probation.[43] In terms of section 191(5)(a) of the LRA, other unfair dismissals must also first be referred to conciliation or mediation.

In terms of the LRA, all unfair labour practices must also be referred to conciliation or mediation before any forum can have jurisdiction to either arbitrate or adjudicate a dispute. Unfair labour practices are dealt with in chapter VIII of the LRA. Unfair labour practices regarding promotion, demotion, training, the provision of benefits, disciplinary action short of dismissal, an employer's failure or refusal to reinstate already employing terms of any agreement,[44] an occupational detriment other than the dismissal in terms of the Protected Disclosures Act,[45] and unfair employer conduct relating to probation

30 Sec 188 LRA.
31 Sec 191(5)(a)(i).
32 Sec 186(1)(e).
33 Sec 191(5)(a)(iii).
34 Sec 191(5)(b)(i).
35 Secs 192(5)(b)(ii) & 191(12).
36 Sec 192(5)(b)(ii).
37 Sec 192(5)(b)(iv).
38 Sec 186(1)(b).
39 Secs186(1)(c) & 187(1)(e).
40 Sec 186(d).
41 Sec 191(5)(b)(l).
42 Act 26 of 2000 and sec 191(5)(b)(l) LRA.
43 Sec 191(5A) LRA.
44 Sec 191(5)(a)(iv).
45 Act 26 of 2000 and secs 191 (5)(b) & (13) LRA.

(excluding dismissals related to probation)[46] must all be referred to conciliation as a first step in the dispute resolution process.

Section 191 of the LRA deals with disputes about dismissals and unfair labour practices, and provides as follows:

> (1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to -
>
> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
>
> (ii) the Commission, if no council has jurisdiction.
>
> (b) A referral in terms of paragraph (a) must be made within -
>
> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
>
> ….
>
> (2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.
>
> ….
>
> (3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.
>
> (4) The council or the Commission must attempt to resolve the dispute through conciliation.
>
> (5) If a council or commission is satisfied that the dispute remains unresolved, or of 30 days had expired since the council or the commission received the referral and the dispute remains unresolved -
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if -
>
> (i) the employee has alleged that the reason for the dismissal is related to the employees conduct or capacity…
>
> (ii) the employee has alleged that the reason for the dismissal is that the employer made continued employment intolerable or their employer provided the employee was substantially less favourable conditions or circumstances at work after a transfer ...
>
> (iii) the employee does not know the reason for the dismissal; or
>
> (v) the dispute concerns an unfair labour practice; or
>
> (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for the dismissal is …

46 Sec 191(5A) LRA.

Collective labour law disputes, such as disputes regarding freedom of association,[47] organisational rights[48] and collective agreements,[49] must all be referred to conciliation or mediation before any forum can have jurisdiction to either arbitrate or adjudicate the dispute.

Disputes of interest,[50] be they individual or collective, also must be referred to conciliation or mediation as a first step in the resolution of the dispute. If conciliation fails, the dispute may be settled by the flexing of industrial muscle of the respective parties. In other words, the employees may embark on a protected strike and the employers may lock out employees, provided certain procedural requirements have been met. Matters including refusals to bargain,[51] unilateral changes to terms and conditions of employment[52] and matters concerning picketing[53] must all be referred to mediation.

The dispute resolution services provided for by the Commission for Conciliation, Mediation and Arbitration (CCMA) are free of charge. The CCMA receives its funding from government. However, if the parties elect to use the services of private mediators, this will obviously not be a free service.

On the face of it, therefore, most, if not all, labour disputes dealt with in terms of the LRA must be referred to mediation and conciliation as a first step in the dispute resolution process. There is case law to suggest that the mediation or conciliation process is mandatory and that, without it, no forum has jurisdiction to proceed with a further dispute resolution process,[54] be it by means of an arbitration process or adjudication by the courts. For example, in *Sambo & Others v Steytler Boerdery*,[55] the court, referring to *Intervale (Pty) Ltd v NUMSA*,[56] stated:

> The Labour Appeal Court has made it clear that conciliation is a prerequisite for this Court to entertain a dispute before it. If it has not been conciliated, this court has no jurisdiction.

Also in *Caci Beauty Salon & Spa v Van Heerden & Another*,[57] the employee referred an unfair labour practice dispute to the CCMA for

47 Sec 9 LRA.
48 Secs 16, 21 & 22.
49 Secs 24, 26(11) & 33A.
50 Sec 64.
51 Sec 64(2).
52 Secs 64(1) & (4).
53 Secs 69(8) & (11).
54 See *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 (LAC) 160A, where Zondo AJP (as he then was) stated: '[T]he wording of sec 191(5) imposes the referral of a dismissal dispute to conciliation is a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication.' See also *Intervale (Pty) Ltd, BHR Piping Systems (Pty) Ltd v National Union of Metalworkers* [2014] ZALAC 10.
55 (C592/13 [2014] ZALCCT 33, para 18.
56 *Intervale* (n 54 above).
57 [2001] 7 BLLR 737 (LC).

conciliation. When the dispute remained unresolved, the employee referred an unfair dismissal dispute for arbitration at the CCMA. The Labour Court held that the CCMA lacked the jurisdiction to arbitrate the unfair dismissal dispute because the dispute had not been referred to conciliation first, as is required in terms of the section 191 of the LRA.

It is noteworthy that, in finding that the court had no jurisdiction to hear the matter as a result of non-compliance with the procedures set out in section 191 of the LRA, the Labour Appeal Court referred to the non-participation, not as a failure to take part in the conciliation process, but rather as not being cited as a party in the referral of the dispute for conciliation.[58] In other words, if the party had been cited in the referral for conciliation, even if conciliation had not taken place, the court may still have had jurisdiction. This is in line with the actual wording of the LRA which imposes only the referral of a dismissal dispute to conciliation as a precondition before the dispute can either be arbitrated or referred to the Labour Court for adjudication. This is evident from section 191(5) of the LRA, which provides that '[i]f a council or Commission is satisfied that the dispute remains unresolved, or if 30 days had expired since the council or the Commission received the referral and the dispute remains unresolved', the dispute may either be arbitrated or adjudicated, depending on the nature of the dispute. Therefore, even if the issue has not been mediated, as long as it was referred to mediation and 30 days have lapsed since the date of referral to mediation, it may then proceed either to arbitration or adjudication if it is a dispute of right. If it is a dispute of interest, the union may embark on a protected strike, provided all the other procedural requirements provided in the LRA have been adhered to.[59]

6.2 Rules

In terms of the Rules for the Conduct of Proceedings before the CCMA, a party who avoids conciliation or mediation faces the possible consequence of forfeiting the right to have the dispute arbitrated or adjudicated by the relevant forums.

Rule 13, headed 'What happens if a party fails to attend or is not represented at conciliation', provides:

> (1) The parties to a dispute must attend a conciliation in person, irrespective of whether they are represented.
>
> (2) If a party is represented at the conciliation but fails to attend in person, the commissioner may -
>
> (a) continue with the proceedings;
> (b) adjourn the proceedings; or

58 *Intervale (Pty) Ltd, BHR Piping Systems (Pty) Ltd v National Union of Metalworkers* Case JA24/2012 (LAC); *Driveline Technologies* (n 54 above) 160A.

59 Sec 65 LRA.

(c) dismiss the matter by issuing a written ruling.

(3) In exercising a discretion in terms of subrule (2), a commissioner should take into account, amongst other things -

(a) where the party has previously failed to attend a conciliation in respect of that dispute;
(b) any reason given for that party's failure to attend;
(c) whether conciliation can take place effectively in the absence of that party;
(d) likely prejudice to the other party of the commissioner's ruling;
(e) any other relevant factors.

(4) If a party to a dispute fails to attend in person or to be represented at the conciliation, the commissioner may deal with it in terms of rule 30.

Rule 30, headed 'What happens if a party fails to attend proceedings before the Commission', provides:

(1) If a party to a dispute fails to attend or be represented at any proceedings before the Commission, and that party -

(a) had referred the dispute to the Commission, a commissioner may dismiss the matter by issuing a written ruling; or
(b) had not referred the matter to the Commission, the commissioner may -
(i) continue with the proceedings in the absence of that party; or
(ii) adjourn the proceedings to a later date …

On a literal interpretation of the Rules for the Conduct of Proceedings before the CCMA, a party who refers a matter to the CCMA for conciliation and fails to attend the conciliation proceedings runs the risk of having the matter dismissed. That will then be the end of the matter and there will be no chance to have the matter either arbitrated or adjudicated. If the respondent fails to attend a conciliation proceeding which he or she has been notified to attend, he or she faces the risk of the conciliation taking place in his or her absence. Despite this, in *Premier Gauteng & Another v Ramabulana & Others*[60] the Labour Appeal Court held that the dismissal of a matter at conciliation stage was not permissible. The Court based its conclusion on section 138(5) of the LRA. This subsection regulates the powers of the Commission when a referring party does not attend a scheduled arbitration hearing. The subsection does not entitle a commissioner to dismiss a matter at conciliation stage. Therefore, if the referring party is not present at the conciliation proceedings, the commissioner may not, as is provided for in terms of the Rules for the Conduct of Proceedings before the CCMA, dismiss the matter. In these circumstances, the commissioner simply issues a certificate of non-resolution. It follows that, if a commissioner may not dismiss a

60 (2008) 29 ILJ 1099 (LAC).

matter if the referring party is not present at the conciliation, by the same token, a commissioner may not dismiss a matter if the respondent is absent at the conciliation.

It follows, therefore, that if parties are unwilling to participate in a mediation or conciliation procedure, they may avoid it by simply not attending the process. Since the commissioner may not dismiss the matter, and must issue a certificate of non-resolution, the parties will have abided by the procedures provided for in terms of section 191 of the LRA. Consequently, the parties may then proceed to either adjudication by the Labour Court or arbitration procedure. In this sense, conciliation or mediation is only theoretically mandated in terms of the LRA. In practice, the parties can avoid conciliation or mediation with impunity by simply not attending the procedure, and they will not be denied access to further dispute resolution procedures as a consequence of such non-attendance. All that needs to be done is that the matter be referred for conciliation by the applicant.

A party who avoids a conciliation or mediation process as described above is not denied access to further dispute resolution procedures, has not incurred costs because the mediation process is free, and no adverse costs or other orders can be made against that party on the basis of that party's non-attendance at the conciliation procedure. In these circumstances, it is difficult to argue that the conciliation or mediation process in terms of the LRA is mandatory.

6.3 The 'con-arb' process

Section 191(5A) of the LRA, introduced in terms of the 2002 amendments of the LRA, introduces a process called 'con-arb'. In terms of this process, if conciliation is unsuccessful, the commissioner must immediately commence with the arbitration process. All dismissals and unfair labour practice disputes that may be arbitrated by the CCMA are referred to the Commission for a con-arb process. This process must be applied if the dispute concerns the fairness of a dismissal during the probationary period or an unfair labour practice relating to probation, and parties may not object to the use of the process. It is compulsory. For disputes concerning any other unfair labour practice or dismissal that may be arbitrated by the CCMA, if neither party has objected to the process, the process is applicable. In terms of Rule 17(2) of the Rules for the Conduct of Proceedings before the CCMA, a party wishing to object to the con-arb process must do so in writing at least seven days prior to the scheduled con-arb date. If the referring party objects to the con-arb process, this may be done by simply signing the referral form. No reasons need to be provided for objecting to the process. A simple objection will suffice to prevent the process from being conducted.

A party wishing to avoid conciliation or mediation in situations where a con-arb process is applicable simply needs to object to the con-arb process (unless the matter concerns a dispute relating to the fairness of a dismissal during probation or an unfair labour practice

relating to probation), whereupon the usual procedure will be followed, and arbitration will not follow immediately after conciliation has taken place.

In summary, the only situation where a party cannot avoid the conciliation or mediation process with impunity is where the con-arb process is compulsory, namely, in the case of disputes about the fairness of a dismissal during the probationary period or an unfair labour practice relating to probation. In situations where the con-arb procedure has not been objected to or is obligatory, a party who fails to appear for the procedure does so at his or her own peril.

The conciliation procedure cannot produce settlement unless both parties are present. With only one party present, the inevitable result of the conciliation process is the issuing of a certificate of non-settlement. In terms of Rule 30 of the Rules for the Conduct of Proceedings before the CCMA, the commissioner may dismiss the matter if the referring party is absent. If the other party is absent, the commissioner may either continue with the proceedings in the absence of that party or adjourn the proceedings. What usually happens is that, after issuing the certificate of non- settlement, the commissioner will immediately commence with arbitration.[61]

A party who unwillingly enters into the mediation or conciliation process in a con-arb procedure simply because he or she wants to be present at the arbitration cannot be compelled to enter into a settlement agreement. Furthermore, any conduct that may be perceived as unreasonable during the conciliation or mediation process cannot be taken into account in the arbitration process. No adverse costs awards or any other punitive measures can be taken against a party who is perceived by the arbitrator to have been unreasonable in refusing to settle. In this sense, conciliation is only mandatory in the sense that the parties have to be present at the mediation or conciliation process. Nobody is obliged to settle. There are no cost implications or any other adverse consequences. The unwilling party simply has to be present at the conciliation.

In conclusion, the conciliation or mediation of labour disputes is mandatory in terms of the LRA in theory, but not in practice, unless the dispute concerns dismissal during a probationary period or an unfair labour practice relating to probation. In this case, an unwilling

61 There is contradictory case law as to whether or not a commissioner is permitted to proceed with arbitration in circumstances where one of the parties fails to appear at con-arb hearings. In *Inzuzu IT Consulting (Pty) Ltd v CCMA & Others* [2010] 12 BLLR 1288 (LC), the Labour Court held that rule 17 does not permit a commissioner to proceed with arbitration if one of the parties is absent. In *Pioneer Foods (Pty) Ltd t/a SASKO Milling and Baking (Duens Bakery v CCMA & Others* [2011] 8 BLLR 771(LC), the Labour Court disagreed and held that arbitration should commence immediately after conciliation if one of the parties is absent and the other party has no objection thereto. The CCMA has issued a practice note to the effect that the *Pioneer Foods* judgment should be followed.

party is only obliged to attend the conciliation procedure, which will immediately be followed by an arbitration procedure.

6.4 Constitutional challenges to mandatory mediation in terms of the LRA

Given the fact that the mediation or conciliation of labour disputes in terms of the LRA dispensation is only mandatory in theory and not in practice, it is not surprising that there have been very few challenges to the constitutionality of the mandatory mediation as provided for in terms of the LRA, on the basis that the mandatory mediation breaches the constitutional right of access to courts.[62] In *Intervale (Pty) Ltd & Others v NUMSA,*[63] such a challenge was made. In an appeal to the Labour Appeal Court, the applicants sought to set aside the order of the Labour Court joining them as respondent parties in an action instituted by the National Union of Metalworkers of South Africa (NUMSA). NUMSA had referred a dispute to conciliation and cited only one employer in the referral documents. At the conciliation it transpired that many of the members of NUMSA, on behalf of whom it referred the dispute, were not employed by the employer referred to in the referral document. It transpired that they were employed by other employers. Consequently, NUMSA made another referral for conciliation of the dispute. However, at the time it made this referral, the time period within which to make the referral had prescribed in terms of the LRA. An application for condonation of late referral was made. The condonation was refused. Thereafter, NUMSA filed a statement of claim at the Labour Court averring that its members had been unfairly dismissed. Again only one employer was cited. About seven months after filing this statement of claim, NUMSA brought an application to the Labour Court to join two other entities as respondent employers. The Labour Court granted the application joining the parties to the action. The employers who were joined launched an appeal to the Labour Appeal Court to set aside the order of the Labour Court joining them as respondent parties in the action instituted by NUMSA. The Labour Appeal Court held that NUMSA had failed to comply with section 191(1) read with section 191(5) of the LRA in that it had failed to refer the dispute against the respondent employers to conciliation on time. In the absence of conciliation, the Labour Appeal Court held that NUMSA was not entitled to refer its dispute to adjudication to the Labour Court as provided for in section 191(5). Consequently, the Court held that it did not have the jurisdiction to entertain the dispute.[64] NUMSA argued that to close the door to an action on the basis of non-compliance with section

62 Sec 34 of the Constitution provides: 'Everyone has the right to have any disputes that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

63 Case JA24/2012 (LAC).

64 Para 24.

191 of the LRA would represent 'an unbecoming approach to labour legislation and deny certain members of NUMSA from having the day in court'.[65] In response to this argument, the Court concluded:[66]

> Finally, on the issue of the constitutional right to have a day in court, this right is not to be exercised at a litigant's pleasure. The Act is clear. It makes provisions which must be complied with. There is nothing unconstitutional about that. One cannot fail to comply with the steps that are required to be followed to enforce a right and then complain that these steps which you have failed to follow now impinges on your constitutional right.[67]

7 Resolution of labour disputes by mediation in Mozambique

7.1 Labour legislation

Article 184 of the labour legislation[68] provides:

> (1) All disputes must be referred to mediation before they are submitted to arbitration or to employment courts, except in cases involving provisional remedies.
>
> (2) Arbitration or judicial bodies that receive cases which have not first been submitted to conciliation mediation shall notify the parties to comply with the provision of the preceding paragraph.

Article 187(4) provides:

> If the party that requested the mediation fails to appear on the day of the mediation hearing without justification, the mediator shall shelve the case, whereas if the other party fails to appear the mediator shall, of his own motion, refer the case to arbitration. In either case, the defaulting party shall have to pay a fine set by the mediation and arbitration centre.

Therefore, if the party who referred the dispute to conciliation fails to appear without justification, that is the end of the matter and the referring party will not have recourse to any other dispute resolution process. In short, access to justice is forfeited for failure to attend a mediation process. In addition, the referring party will pay a fine. If the other party fails to appear, the matter is referred to arbitration and that party will have to pay a fine.

All disputes have to be referred to mediation. Failure to attend by the referring party means that the matter is dispensed with. This renders mediation a compulsory step on the road to access to justice. Mediation is mandatory, both in theory and in practice, for a referring party. Failure to attend by the referring party will not only attract a

65 Para 19.

66 Para 23.

67 In *Imraahn Ismail Mukaddam v Pioneer Foods (Pty) Ltd & Others* Case CCT 131/12 [2013] ZACC 23 para 31, the Constitutional Court stated: 'However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute.'

68 Lei do Trabalho (Law of Work) 23 of 2007.

fine, but will also deny that party access to justice, since that party's absence from mediation renders the matter incapable of being referred to any other forum for the resolution of the dispute.

The fact that the consequence of a respondent failing to attend the mediation process is that the matter is referred to arbitration means that there will be an opportunity to have the matter resolved by another dispute resolution method. Therefore, access to justice in the strict sense is not denied. However, the fact that a failure to attend attracts a fine introduces an element of compulsion. Although this compulsion does not in a strict sense divest the respondent of his or her right of access to justice, it could be argued that the imposition of extra costs and the time wasted before having access to a further dispute resolution process constitute, if not a denial of the right of access to justice, at best, a retardation of access to justice. In addition, it could be argued that the monetary implications of the fine render access to justice unattainable for some.

Unlike the case in South Africa, where the mediation process is free of charge, Rule 20(4) of the Rules of the Labour Mediation and Arbitration Centre (COMAL)[69] provides that the parties referring a labour dispute to COMAL must pay for the mediation. Most applicants referring a dispute are employees and, more often than not, they cannot afford to pay the deposit.[70] Clearly, the fact that not all disputes are suitable for resolution by means of mediation simply means that the compulsory mediation and the obligatory deposit, in such cases, make the process nothing more than an unnecessary step in the acquisition of access to justice, serving only to waste more time and in the process incurring more costs for the applicant.

In short, section 184 of the labour legislation, combined with the procedural Rules of COMAL, can in certain circumstances limit, or at best retard, a citizen's exercise of his fundamental constitutional right of access to the courts.

7.2 Constitutional challenges to mandatory mediation in terms of the Mozambican Constitution

In a decision dated 7 October 2011,[71] the Constitutional Court of Mozambique declared article 184 of the labour legislation adopted in 2007 (and entered into force in 2008), a violation of, among others, articles 70[72] and 62(1)[73] of the Constitution of Mozambique, as it makes it mandatory for all labour disputes to be submitted to a

69 This is the Mozambican equivalent of the South African CCMA.

70 At present, the deposit payable is 9 000 Meticais.

71 Case 03/CC2011.

72 Art 70 entitled 'Right of recourse to the courts' provides: 'Every citizen shall have the right of recourse to the courts against acts that violate the rights and interests recognised by the Constitution and the laws.'

73 Art 60(1) entitled 'Access to courts' provides: 'This date shall guarantee that citizens have access to the courts and that persons charged with a crime have the right to defence and the right to legal assistance in aid.'

mediation process. This compulsion, the Constitutional Court concluded, denied workers and various citizens the right of free access to justice as enshrined in the Constitution.

The action in this case emerged from a contract of employment. The Constitutional Court investigated the constitutionality of article 184 of the labour legislation. The final conclusion by the Constitutional Court, that article 184 is unconstitutional, is based on the following reasoning:

Article 3 of the Constitution provides that the Republic of Mozambique is a state governed by the rule of law. Article 212(1) of the Constitution provides:

> It shall be the function of the courts to guarantee and strengthen the rule of law as an instrument of legal stability to guarantee respect for laws, to safeguard the rights and freedoms of citizens, as well as the vested interests of other bodies and entities that have legal existence.

Article 134 of the Constitution, in turn, provides for the principle of the separation of powers.[74] The essence of the right of access to courts is the assurance or guarantee of the rights and liberties of all citizens. The authority granted to government in terms of the Constitution to guarantee those rights in terms of article 62 must be in harmony with the principle of the separation of powers. The government guarantees the protection of rights and liberties within the limits of the exercise of governance and administration while respecting the function reserved for the judiciary. Unlike governance and administration, the judicial function is exercised by judges, as distinguished from government agents and administrators, for the sake of independence and impartiality.

The fact that it is the function of the courts to apply the law is typical of a democratic state and the principal of separation of powers. This, however, does not prohibit the existence of alternative mechanisms to resolve disputes. Juristic pluralism is recognised by the Constitution.[75] However, if an alternative method of resolving disputes imposes a conditional exercise of the fundamental right[76] of access to the courts as provided for in article 70, as is the case regarding article 184 of the labour legislation, such restriction is unconstitutional. This is because fundamental rights, such as the right of access to the courts, must be protected by ordinary legislation. It is not the fundamental rights that move within the ambit of the law, but

74 Art 134 provides: 'The sovereign public offices are established on the principles of separation and interdependence of powers enshrined in the Constitution, and shall owe obedience to the Constitution and the laws.'

75 Art 4 of the Constitution headed 'Legal pluralism' provides: 'The state recognises the different normative and dispute resolution systems that coexist in Mozambique in society, insofar as they are not contrary to the fundamental principles and values of the Constitution.' Also, Art 223(2) specifically provides for arbitration as a dispute resolution mechanism.

76 The right of recourse to the courts provided for in art 70 of the Constitution is a fundamental right because it appears in ch III of the Constitution.

it is the law that moves within the ambit of fundamental rights. Article 184 of the labour legislation creates a condition precedent to the exercise of a fundamental constitutional right. An analysis of article 184 of the labour legislation reveals that not only does it impose a restriction on the right of access to justice, but it also imposes a conditional exercise of that fundamental right. In other words, the exercise of the fundamental right of access to the courts is dependent on litigants abiding by the terms of article 184 of the labour legislation. This is contradictory and circular reasoning because it renders the right of access to courts conditional in order to guarantee that very right. Since the right of access to courts is a fundamental right, it should be directly applied[77] and cannot be conditional. Consequently, the imposition of a legal requirement to apply or found the right of access to courts does not enjoy a constitutional foundation.

The policy consideration for the promulgation of article 184 of the labour legislation was to speed up the dispute resolution process in labour disputes. The principle of direct applicability, however, does not always imply the immediate execution of these rights. Article 184 of the labour legislation attempts to speed up the process of dispute resolution in labour disputes by imposing alternatives to the judicial route. The Constitutional Court held that recourse to extrajudicial measures, such as mediation or arbitration, were not unconstitutional if the extrajudicial measures are optional and an alternative to judicial measures. This simply means that the citizen is not bound to call for the intervention of the courts. In other words, the citizen is reserved the authority to decide whether to go the extrajudicial or the judicial route in order to enforce his rights. However, article 184 of the labour legislation does not allow this option. In situations where the labour dispute is not suitable for resolution by means of mediation, article 184 of the labour legislation imposes obstacles to access to justice. By enacting this legislation, the state has failed to guarantee access to the courts to its citizens as it is required to do in terms of article 62 of the Constitution.

8 Conclusion

A one-size-fits-all approach to the resolution of labour disputes does not always result in justice, or access thereto. In fact, it can at times be a hindrance to justice. There is no denying that a mediation or conciliation can produce just results at a fraction of the price and in a much quicker time period than would have been the case had the

77 As a fundamental right, the right of recourse to the courts is directly applicable in terms of art 56(1) of the Constitution, which provides as follows: 'Individual rights and freedoms shall be directly applicable, shall bind both public and private entities, shall be guaranteed by the state, and shall be exercised within the constitutional framework and the law.'

parties resorted to court procedures. On the other hand, however, under certain circumstances the process of mediation or conciliation can only serve to waste costs and time. This is the case where a matter is not suitable for mediation, or where at least one of the parties is unwilling to settle and prefers a third party to impose an outcome. Where not only the process of mediation is compelled, but where settlement is indirectly compelled by allowing a subsequent court to impose costs on a party whom it believes was unreasonable it its unwillingness to settle, the process of mediation cannot be said to improve access to justice. Fortunately, neither the South African nor the Mozambican system of labour dispute resolution provides for such coercion to settle in the mediation process.

Although there is no compulsion to settle in the Mozambican system, the process of mediation is mandated. If the referring party fails to appear at the mediation, that is the end of the matter. If the other party fails to appear, the matter is referred to arbitration. Fines are imposed on a party who fails to attend the mediation. Furthermore, the process of mediation is not free, even though it is compulsory. In a situation where either of the parties does not wish to settle, this results in an unnecessary increase in costs and time delays. In South Africa, although mediation or conciliation is mandatory in theory, in practice it is not. This is because there are no costs involved for the litigants (aside from transport costs and costs involved with time spent at the mediation), and the time delay is at most 30 days from date of referral to the CCMA. There are no repercussions for non-attendance or a failure to settle. In this way, litigants are provided with an opportunity to settle at a minimal cost. Mediation, therefore, is encouraged in a practical manner, resulting in quick and easy access to justice should the conditions be appropriate for a mediation settlement. Where conditions are not conducive to settlement, the mandated mediation does not hinder access to justice.

The South African system, therefore, strongly encourages mediation or conciliation without mandating the process, to the extent that the compulsion robs the mediation or conciliation process of its advantages. To impose a process of mediation where there is no chance of settlement serves only to waste time and money. Nobody is more acutely aware of the costs and other disadvantages of litigation in the courts than the litigants themselves. Therefore, in all probability, if there is a chance of settlement, the parties themselves will usually settle the matter without any legal compulsion to do so. Therefore, it is preferable to create a culture of mediated settlements through education of the public and to provide the means for the public to have easy access to such processes rather than to impose them on disputants.

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Access to justice through clinical legal education: A way forward for good governance and development

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Summary

Access to justice is a fundamental right that ought to be universal, but a lack of effective access to justice is frequently identified as a major barrier to realising human rights. This relates especially to women. Nigerian women are not sufficiently protected by the legal system. Women in Africa, generally, and in Nigeria, in particular, face numerous barriers that hinder their access to legal services and assistance from legal institutions that are set up to redress wrongs. Under the Constitution of the Federal Republic of Nigeria 1999, it is the duty of government to ensure that all citizens have access to justice. Legal aid clinics have in the last decade developed alongside other governmental legal services. The article discusses the evolution of legal clinics in educational institutions and by non-governmental organisations in Nigeria and focuses in particular on how access to justice through the intervention of the Women's Law Clinic, University of Ibadan, has impacted on governance and development.

Key words: *Access to justice; clinical legal education; good governance; development*

1 Introduction

Access to justice is a fundamental right that ought to be universal, but a lack of effective access to justice is frequently identified as a major barrier to realising human rights. This relates especially to women. In Nigeria, there is marked social inequality. Many of ordinary citizens live in poverty, deprived of the basic necessities of life, such as food,

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shelter, health care, water, land and livelihood, and generally have less access to the protection of the state.[1]

Although the Constitution of the Federal Republic of Nigeria, 1999, provides for legal aid or free legal services,[2] access to justice remains a myth rather than a reality for many citizens, particularly the indigent and vulnerable. Section 46(4) of the 1999 Nigerian Constitution provides that the National Assembly makes laws to provide for financial assistance to any indigent citizen whose fundamental rights are violated; with a view to enabling him or her to engage the services of a legal practitioner. While this institution exists, the funding for it is inadequate to meet the needs of the people.

In 1976, the Legal Aid Act was enacted.[3] The Act, which entered into force on 2 May 1977, provided in section 7(1) for legal assistance in respect of capital offences and serious criminal cases. This Act was amended by the 1990 Legal Aid Act[4] and the 2004 Legal Aid Act,[5] which extended the cover to criminal cases such as malicious and unlawful wounding, assault occasioning harm, affray, stealing, rape and civil claims in respect of accidents and civil claims to cover cases involving the infringement of fundamental human rights under chapter IV of the Constitution. All the above-mentioned laws have been repealed by the 2011 Legal Aid Act.[6]

Section 8 of the 2011 Act provides that the Legal Aid Council created under the Act will provide legal aid, advice and access to justice in three broad areas. These areas are criminal defence service; advice, assistance and legal representation in court in civil matters; and community legal services. These services are based on merit and the level of indigence of the parties. Section 9 of the 2011 Act provides for a general legal aid fund from which the Legal Aid Council can draw funds. The source of the funds for the Council is to be appropriated annually by the National Assembly pursuant to section 46 of the Constitution of the Federal Republic of Nigeria.[7] At the inauguration of the Legal Aid Council, the Attorney-General of the Federation and Minister of Justice urged the members to provide greater access to justice, free legal services and advice to indigent Nigerians who otherwise could not afford such services in the event of a violation of their rights. He further stated that with this increased mandate, there would be an improvement in the administration of

1 OECD Guideline Series 'Participatory development and good governance development co-operation' 1995 http://www.oecd.org/dac/governance-development/31857685.pdf (accessed 22 June 2014).
2 Sec 46(1).
3 Legal Aid Act 56 of 1976.
4 Laws of the Federation of Nigeria Cap 205 1990.
5 Laws of the Federation of Nigeria Cap L9 2004.
6 Act 17 of 2011.
7 Sec 9(a) Act 17 of 2011.

justice in Nigeria.[8] Despite these laudable laws, there is no doubt that the funding for legal aid in Nigeria is inadequate. There has been a call for review of the 2011 Act due to challenges faced by the Council, which include funding, inadequate infrastructure and an insufficient number of lawyers.[9] The Chairperson recommended the creation of an access to justice fund that will enable the Council to receive donations from corporate organisations and individuals as one way of improving the funding.[10] The above discussion shows that there are existing laws to provide access to justice. However, the question is how efficient are the laws in reality.

Many developing countries suffer from weak legal and judicial systems. Women in Africa, generally, and in Nigeria, in particular, face numerous barriers that hinder their access to legal services and assistance from legal institutions that are set up to redress wrongs. Although the African Charter on Human and Peoples' Rights (African Charter)[11] provides for the right of access to justice for African people in general, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[12] provides for the right of access to justice to women in Africa in particular, Nigerian women are still not sufficiently protected by the legal system. The fact that the barriers exist suggests that legal institutions in Nigeria are weak and ineffective.

In Nigeria, there are institutions, such as Legal Aid, established by the government, and there are also those set up by the different civil societies. The 1999 Nigerian Constitution[13] provides for legal aid or free legal services. However, access to justice remains a myth rather than a reality for many citizens, particularly the indigent and vulnerable. The existing legal aid scheme is not only inadequate and deficient, but also limited in scope.

Law clinics at law faculties across Nigeria serve to fill the gap not adequately addressed by governmental legal aid programmes. There are 18 established law clinics in Nigeria. The introduction of clinical legal education was launched in Nigeria in 2005 with four pilot law

8 Y Ali 'Provide more access to justice for Nigerians, AGF tasks Legal Aid Council' *The Nation* 22 June 2012 http://www.thenationonlineng.net/2011/index.php/mobile/news/51311-provide-more-access-to-justice-for-nigerians-agf-tasks-legal-aid-council (accessed 22 June 2014).

9 Legal Aid Council of Nigeria 'Legal Aid Council call for review of the Legal Aid Act 2011' (2012) http://legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=101%3Alegal-aid-council-calls-for-review-of-2011-act&Itemid=145 (accessed 11 June 2014).

10 n 8 above.

11 Adopted on 12 June 1981, entered into force 21 October 1986, http://www.achpr.org/instruments/achpr/ 18 (accessed 25 July 2015) arts 3 & 7.

12 Adopted 7 November 2003, entered into force 25 November 2005, http://www.achpr.org/instrument/women-protocol/ (accessed 25 July 2015) art 8.

13 Sec 46(1).

clinics, which were later increased to six in 2007, ten in 2008 and in 2015 18 law clinics.[14] These clinics are ABSU Law Clinic, Abia State University, Abia State; AKUNGBA Law Clinic, Adekunle Ajasin University, Ondo State; MAIDUGURI Law Clinic, University of Maiduguri, Bornu State; UNIUYO Law Clinic, University of Uyo, Ebonyi State; EBSU Law Clinic, Ebonyi State University, Uyo; AAU Law Clinic, Ambrose Ali University, Ekpoma, Edo State; Women's Law Clinic (WLC) University of Ibadan, Ibadan, Oyo State; UNIABUJA Law Clinic, University of Abuja, Abuja; ABU Law Clinic, Ahmadu Bello University, Zaria, Kaduna State; NSUK Law Clinic, Nasarawa State University, Keffi, Nasarawa State; UNEC Law Clinic, University of Nigeria, Enugu Campus, Enugu State; OOU Law Clinic, Olabisi Onabanjo University, Ago Iwoye, Ogun State; Community Law Clinic, University of Ilorin, Ilorin, Kwara State; Nigerian Law School Law Clinic, Law School Headquarters, Bwari, Abuja; and Legal Advice Centre, Nigerian Law School, Augustine Nnamani Campus, Agbani, Enugu State. These clinics, including the WLC, the only specialised clinic for women in Nigeria, are filling the wide gap created by inadequate governmental institutions set up to redress injustices. Legal clinics are having an impact on the Nigerian administration of justice.

There is no doubt that there is a correlation between access to justice, governance and development. Governance is important for development performance. It is the duty of government to ensure that all citizens have access to justice. According to a statement in the United Nations Millennium Project:[15]

> There is no excuse for any country, no matter how poor, to abuse its citizens, deny them equal protection of the law or leave them victims of corruption, mismanagement or economic irrationality.

In the course of this work it was noted that, although there is significant literature on governance and development, not much has been done about the link between the advantages of legal clinics developed as a result of clinical legal education, good governance and development in Nigeria. The findings discussed in this article were the result of a qualitative study of a random selection of cases handled in the Women's Law Clinic at the University of Ibadan, Nigerian laws and statutes and scholarly materials.

2 Access to justice: Background and definition

Access to justice is the hallmark of a civilised society. It is of paramount importance and a fundamental right that ought to be

14 Network of University Legal Aid Institutions (NULAI Nigeria) 2008-2012 Activities Report (2013) 4.

15 United Nations Millennium Project 2002-2006 http://www.unmillenniumproject.org/reports/why8.htm (accessed 2 June 2014).

universal. It is a need and not a luxury. Robins[16] traced the origin of the concept of access to justice to an Italian jurist, Mairo Cappelleti, who stated that 'it is the most basic requirement, the most basic human right of a system which purports to guarantee legal rights'.[17]

It is generally agreed that the concept of access to justice is vague. It is also agreed that it has no singular meaning.[18] According to Oputa,[19] the concept can be viewed from a narrow or wider sense. In the narrow sense, it refers to access to the law court. It is believed that this is a precondition for access to justice.[20] According to Ojukwu,[21] access to justice is a concept that embraces the nature, mechanism and even the quality of justice obtainable in a society as well as the place of the individual within the judicial matrix. It is also an important barometer for assessing not only the rule of law in any society, but also the quality of governance in that society. Access to justice is the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.[22]

According to the Global Alliance Against Traffic in Women (GAATW), access to justice means access to a fair, respectful and efficient legal process, either through judicial, administrative or other public processes, resulting in a just and adequate outcome.[23] It involves legal protection, legal awareness, legal aid and counsel adjudication and enforcement. There is no access to justice where members of a society (especially marginalised groups) fear the system, see it as alien and do not access it, where the justice system is financially inaccessible, where individuals have no lawyers, where they do not have information or knowledge regarding rights, or where there is a weak justice system.[24] Access to justice entails that a population understand their rights and the means of claiming such

16 J Robin 'Access to justice is a fine concept: What does it mean in view of the cut to legal aid?' *The Guardian* 6 October 2011 https//www.theguardian.com/law/2011/oct/06/access-to-justice-legal-aid-cut (accessed 27 May 2014).

17 M Cappelletti & G Bryant *Access to justice. A world survey* (1978) cited in Robin (n 16 above).

18 P Morris et al *Social needs and legal action* (1973).

19 CA Oputa *Rights in the political and legal culture of Nigeria* (1989).

20 CN Okogbule 'Access to justice and human rights protection in Nigeria: Problems and prospects' (2005) 3 *Sur - International Journal on Human Rights* 96-97.

21 E Ojukwu et al *Handbook on Prison Pre-Trial Detainee Law Clinic* (2012).

22 United States Institute of Peace 'Necessary conditions: Access to justice' http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice (accessed 6 June 2014).

23 'Access to justice. The global alliance against traffic in women' http://www.gaatw.org/index.php?option=com_content&view=article&id=446:access-to-justice&catid=157:what-we-do&Itemid=12 (accessed 22 June 2014).

24 United States Institute of Peace (n 22 above).

rights.[25] It, therefore, contributes to an enabling environment for achieving the Millennium Development Goals (MDGs).

The lack of effective access to justice is a major barrier to people to realise their human rights. The rule of law is an essential factor for the effective functioning of society and the economy. It has been stated that a predictable and accessible legal environment, with an objective, reliable and independent judiciary, is an essential factor for good governance and the realisation of human rights.[26] Injustice, inequity and inefficiencies in the legal system of a country obstruct development.

Apart from poverty, other factors militating against access to justice include mass illiteracy, ignorance and financial incapacity, corruption, delays in the court system, backlogs, and uncertainty associated with expected court outcomes, lawlessness of the executive arm of government and its agents, procedural rules (criminal and civil) and constitutional limitations.[27]

Ladan[28] attributes inadequate and unequal access to justice to discriminatory laws, and expensive, slow and complex legal processes.

The lack of effective access to justice particularly affects low-income populations and vulnerable persons in society. Women and children, in particular, are affected as they are not adequately protected by the legal system. Women's access to justice is of paramount importance in ensuring political and economic development in any society. The reality is that there are gross discriminatory practices against women which greatly limit their access to justice. In a Consortium Development Partnership Report,[29] it was noted that the practices mentioned above are sanctioned by various institutions, including the formal legal system.

A question that arises from the above discussion is whether there is a link between access to justice, good governance and development.

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25 United Nations 'Access to justice in the promotion and protection of the rights of indigenous peoples' (2013) http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session6/A-HRC-EMRIP-2013-2_en.pdf (accessed 6 June 2014).

26 OECD Guideline Series (n 1 above).

27 O Bamgbose et al 'Community lawyering – An intervention of the University of Ibadan Women's Law Clinic in the case of stray bullet killings at Arulogun Idi-Omo community – A case study' (2012) 1 *African Journal of Clinical Legal Education and Access to Justice*.

28 MT Ladan *Justice sector reform: Imperatives for a democracy* (2012) http://www.abu.edu.ng/publications/20121110-134151_3901.Doc (accessed 22 June 2014).

29 O Bamgbose et al 'Final report on access to justice and human rights for women project under CDP 11' (2011) *Council for Development Social Science Research in Africa* under an Initiative of the Consortium For Development Partnerships, November 2011.

3 Good governance: Definition and discourse

The World Bank[30] defines governance as 'the method through which power is exercised in the maintenance of a country's political, economic and social resources for development'. Governance is the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It is said to comprise the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.[31] Good governance entails, amongst other things, a legal framework for development which includes justice and respect for human rights and liberties.[32]

Where good governance prevails, the voices of the poor and vulnerable are heard. A characteristic of good governance is participation. This includes access to judicial and administrative redress. Fair, responsive and effective institutions and the protection of human rights are components of good governance. The ability to participate should exist regardless of social or economic status. Good governance, therefore, suggests that the voices of the poorest and most vulnerable should be heard and they should receive just, fair and equitable treatment.[33]

While good governance promotes equity and sustainable development, bad governance is a barrier to economic development and leads to the collapse of a nation. Weak governance affects the delivery of services and benefits to those who need them most.[34]

This article adopts the simple definition of governance, as stated by De Vries,[35] that 'governance is the conduct of government'. One of the sets of values guiding the working of a government are human rights principles, one of which is access to justice. They inform the content of good governance.[36] Good governance implies a willingness of the state to protect the weak and promote the interests of the poor.

30 World Bank *Governance* (1993).

31 United Nations Development Programme *Human Development Report* http:// hdr.undp.org/en.humandev (accessed 6 June 2014).

32 Ladan (n 28 above).

33 United Nations Development Programme (n 31 above).

34 UNDP *Governance for sustainable human development. UNDP Policy Document* (1997) http:// reform.gov.bb/page/good-governance.pdf (accessed 6 June 2014).

35 M de Vries 'The challenges of good governance' (2013) 18 *The Innovation Journal: The Public Sector Innovation* 4.

36 Office of the UN High Commissioner for Human Rights *Good governance practices for the protection of human rights* (2007), http://www.ohchr.org/documents/ publications/GoodGovernance.pdf (accessed 6 June 2014).

4 Development: Definition

The use of the term 'development' in this article is that of the *Collins English dictionary*, meaning 'growth, progress or advancement'.[37] Development for this purpose, therefore, suggests a systematic rather than a random change. It is used in terms of both infrastructural and human development in respect of the wellbeing of persons. The article adopts a simple non-technical definition for the use of the term 'human development'. However, a cue is taken from the definition attributed to Sen, which states that 'human development is basically advancing the richness of human life and it is discussed in relation to the human right of access to justice'.[38] The question then arises as to whether improving and/or removing barriers to access to justice will advance the human development of women in Nigeria.

5 Development of clinical legal education

Clinical legal education is a multi-disciplinary, multi-purpose education which can develop the human resources and idealism needed to strengthen the legal system.[39] A lawyer, the product of such education, would be able to contribute to national development and social change in a constructive manner.[40] It is a new pattern of legal education, as distinguished from the traditional method of education which focused on theory and provided minimal opportunity for law students to learn and apply practical problem-solving skills.

The traditional pedagogical style based on formality, theory and lecturing methods was the dominant teaching method in most law faculties of African universities for many years. This did not allow law students to interact with live clients or to acquire practical legal skills.

Clinical legal education introduces a method of instruction whereby students get the opportunity to apply the theoretical aspect of law training to real-life situations. Law students undergoing clinical legal education are taught the 'how to' of the law in order to address injustices in society. Through the establishment of law clinics under clinical education programmes, law students are exposed to societal responsibilities in addition to professional duties, and also to the fact that they meet the legal needs of the poor and underrepresented in society.

37 C Harper *Collins English dictionary – Complete and unabridged* (2003).

38 Cited in the United Nations Development Programme (n 31 above).

39 AHM Kamal & S Talukder 'Diversification of legal education: Understanding the dichotomy of practical and theoretical knowledge' (2010) 4 *ASA University Review* 117.

40 As above.

Clinical legal education (by way of law clinics) trains law students in the spirit of social justice and public service, and provides desperately-needed legal services to poor communities and underprivileged persons. Law clinics serve to fill a gap not adequately addressed by governmental legal aid programmes, poverty and other factors created by issues of governance that deprive ordinary persons of legal protection.

6 Link between access to justice through clinical legal education, governance and development

The intervention by legal clinics in providing legal aid, advice and access to justice to indigent persons in Nigeria has no doubt brought relief to a group of Nigerians who otherwise would not have had access to justice due to the insufficiency of funds and the inadequacy of legal aid facilities provided by government. Access to justice contributes to an enabling environment for achieving the MDGs. It can spur economic growth and help to create a safe and secure environment. These clinics are known to be effective institutions that supplement the work of the legal aid programmes of the government in protecting the rights of people, therefore promoting good governance and contributing to human development.

The author agrees with Kofi Annan, a former United Nations Secretary-General, that good governance is perhaps the most important factor for promoting development.[41] To further buttress the point on the effectiveness of legal clinics in promoting access to justice, the government has given backing to the existence of these clinics. Section 17 of the 2011 Act authorises the Council to collaborate with or otherwise engage the services of non-governmental organisations (NGOs) and law clinics engaged in the provision of legal aid or assistance to persons who are entitled to legal aid. Public interest lawyering is a development that emerged in the Nigerian legal system in 2005. Rokosh et al state that the term 'public interest law' was widely adopted in the United States of America in the 1960s.[42] Between 1960 and 1970, young graduate lawyers sought to make themselves and the law profession relevant by having an impact on society on social issues.[43] The term was adopted to distinguish these lawyers from the '"corporate adjuncts" referred to by Brandeis'.[44] According to the Network of University Legal Aid Institutions (NULAI) in Nigeria, public interest lawyering is a process of legal empowerment aimed at capacity building of everyday people

41 United Nations University *Policy notes world governance assessment* (WGA) (2002) http://archieve.unu.edu/p&g/wga/index.html (accessed 22 June 2014).

42 E Rekosh et al (eds) *Pursuing the public interest: A handbook for legal professionals and activists* (2001).

43 As above.

44 As above.

towards using the law and its institutions to bring about social change.[45] It is not disputed that the law and legal process can be used effectively in the public interest for the enforcement of social rights.

The emergence of legal clinics is to supplement government-established legal aid centres and not to replace them. The activities of legal clinics (in the form of counselling, legal education, legal support in diverse ways, and providing all other forms of legal services to members of the community who are in dire need) provide an avenue for *pro bono* and volunteering work by legal practitioners and training of law students as future public interest lawyers through training as para-legals. The engagement of law students in clinical work can help to alleviate poverty and injustice in the community. Paralegals in legal aid clinics contribute in no small measure to social and economic development. The form of aid which legal aid clinics give to existing legal institutions is vital to good governance. Public interest lawyering, as provided for in legal aid clinics, therefore, remains a veritable tool for the lawyer to bring about good governance, accountability, quality and responsive leadership in governance.[46] Public interest lawyering is an important tool in the legal protection of human rights.[47]

To fully achieve the MGDs by 2015, access to justice for the poor must continue to be properly addressed and the creation of more legal clinics is an effective way of intervention.

7 Access to justice: Role of the University of Ibadan's Women's Law Clinic

Like many law faculties in Africa, the Law Faculty at the University of Ibadan, Nigeria, for many decades adopted the traditional lecturing method to impart legal education to students. This entailed the use of theoretical teaching methods with little or no attention to practical aspects. However, embracing clinical legal education at the University of Ibadan may be traced back to the All-African Colloquium on Clinical Legal Education which took place in Durban, South Africa, from 23 to 28 June 2003, where university-based clinics were introduced. The meeting brought together clinical teachers from long-established law clinics in Kenya, South Africa and in Zimbabwe.

45 Peace and Collaborative Development Network 'Public interest lawyering and clinical legal education' 19 March 2012 http://www.internationalpeaceandconflict.org/profiles/blogs/public-interest-lawyering-and-clinical-legal-education?xg_source=activity#.VbP_FZ-D7IU (accessed 25 July 2015).

46 A Adedimeji 'Nigeria: Judicial activism and public interest litigation' *Daily Independent* 13 August 2009 http://allafrica.com/stories/200908130402.html (accessed 22 June 2014).

47 CE Obiagwu *Promoting economic, social and cultural rights using domestic legal mechanisms* (2003).

Kenya introduced practical skills into its legal education as early as 1994, with the establishment of the Faculty of Law at Moi University. Also, participants from the then newly-established clinics in Mozambique and Sierra Leone and prospective faculties interested in establishing clinics attended the colloquium. At the time, the Law Faculty of the University of Ibadan fell in the latter category.

After the Durban meeting in June, an NGO known as Network of University Legal Aid Institution (NULAI, Nigeria) was established in October 2003. This is an association of university law clinics promoting clinical legal education, legal aid and access to justice. NULAI has developed a clinical legal education (CLE) curriculum for Nigerian university law faculties/clinics and this curriculum was introduced as part of the undergraduate LLB programme in the 2008/2009 session. The Law Faculty of the University of Ibadan is a registered member of NULAI.

In February 2004, NULAI, in partnership with the Open Society Justice Initiative, hosted the first Nigerian clinical legal education colloquium, where participating law faculties supported the introduction of clinical legal education in Nigeria. At the meeting it was resolved, amongst other issues, that law faculties would facilitate the introduction and sustainability of clinical legal education in Nigeria.

7.1 Conception of the Women's Law Clinic

The idea of the Women's Law Clinic (WLC) at the University of Ibadan is closely linked to the need to reform legal education, the notion of the development of the justice system and the promotion of human rights in relation to access to justice for vulnerable groups. In respect of the last aspect, the aim is basically to pursue a social justice goal. There was a need to strengthen access to justice through the use of the 'informal sector' to enhance the reach and effectiveness of, and compliance with, human right standards. This was the whole idea behind the conception of the WLC, namely, to bring about greater social justice to indigent, poor or vulnerable communities.

7.2 Birth of the Women's Law Clinic

While some university clinics have relatively long histories, others have existed only a few years. The WLC was formally inaugurated on 18 July 2007. It is a law school-based, in-house clinic with its main office located in a separate building within the Law Faculty of the University of Ibadan. Due to the large clientele and the expansion of the access to justice programme, the WLC opened an annex in a property bequeathed to the Faculty in the Ibadan suburb approximately four kilometers away from the University's main campus. With the opening of the annex, the WLC has made legal services more accessible to more groups of women. It is a specialised clinic, in the sense that it concentrates on women. The clinic started by offering legal services in the areas of human rights and family law,

which are in fact very wide areas, and has since expanded to accommodate other areas of law.

One of the goals of the WLC is to provide legal services to less advantaged women in society, that is, to serve a disadvantaged sector of the community, with the aim of improving the lives of women, securing justice, and advancing civil, political, economic, social and cultural rights. In Nigeria, with a population of over 150 million people, no adequate state-run legal service programme exists. Marginalised persons, including women and particularly indigent women, suffer. The WLC and other law clinics are often the only options available to these women.

The WLC is a walk-in clinic operating from Mondays to Fridays, except on public holidays, when the hours are from 09:00 to 16:00. The work at the WLC involves personal sacrifice and commitment to the cause of justice and humanity, for the benefit of victims or vulnerable persons. It is a public service with no remuneration in monetary terms.

7.3 Case study in the Women's Law Clinic: Access to Justice Programme

The Access to Justice Programme is aimed at contributing to improving legal education, the training of law students as paralegals, imbibing in them a public lawyering interest, providing legal aid and representation to the indigent population, and improving research on access to justice as it affects women in Ibadan, a big city in the south-west of Nigeria.

A few cases, randomly selected from cases handled in the Clinic, are used in the case study below.

7.3.1 WLC/CAS/023

The complainant approached the Clinic on 13 February 2008 for assistance in enforcing the judgment of a grade C customary court that ordered her husband to pay a certain amount for the maintenance of their children, an order the husband refused to carry out.

Action taken: On 4 July 2008, the WLC wrote to the court registrar requesting enforcement of the judgment on behalf of the client. The WLC further summoned the husband to the clinic to educate and counsel him on the implications of not carrying out the court order. The husband came to the clinic and after discussions with him he agreed that he would deposit the monthly allowance at the WLC and also make provision of food.

Remarks: The husband kept his promise and after a few months of compliance, a more convenient arrangement was made by the parties. The case file was closed.

The complainant in this case approached the WLC because she could not afford the fees of a lawyer because of her indigent position.

Nigeria is a patriarchal society, and this fact, alone, puts women in a disadvantaged position. In order for the complainant to exercise her legal right to claim maintenance for the upkeep of herself and her children, the intervention of a legal institution was required for the enforcement of the court order. The award of money by the customary court without ensuring enforcement is an injustice to the complainant. The indigent position of the complainant denied her access to justice, coupled with the non-compliance by her husband with the order of court. Additional costs in terms of money and time would have been a burden on the complainant going back to the customary court. The intervention of the WLC went a long way towards assisting the complainant to protect her interests and to exercise her legal rights. In addition, the husband, through counseling, was able to meet his obligations and the couple, through mediation, settled their differences to the extent that they could come to a consensus on the way forward a few months after the intervention of the WLC.

7.3.2 WLC/CAS/25

On 14 February 2008, a client came to the WLC to report a case of neglect of fatherly responsibility against a legal practitioner. She expressed the fact that she feared that she would be deceived by the respondent as she could not stand up against him due to his position as a lawyer. The WLC counselled her as to her rights and the legal position.

Action taken: The legal practitioner refused the invitation to come to the WLC. However, he telephoned the WLC and intimated to the Clinic that steps had been taken concerning the case and that an agreement had been concluded with the client. The client was contacted and she confirmed that she was satisfied with the agreement with the lawyer and that she would prefer the case to be closed.

Remarks: The client expressed her appreciation and thanked the Clinic for the immediate intervention and the explanation regarding her rights. She promised to inform other women in her neighbourhood about their rights and about the Clinic that protects the helpless.

Access to justice is seeking and obtaining a remedy without fear. The complainant in this case had no trust in the legal system because of her husband's legal profession. The Clinic allayed the fears of the complainant through counselling and education, which the court might not have had the time to do. At the Clinic she could exercise her right to information regarding the Nigerian legal system, and through the intervention by the Clinic, the case was resolved.

7.3.3 WLC/CAS/112

The client, a widow, approached the Clinic on 20 April 2010 complaining that her in-laws were trying to deceive her by depriving her of the property her late husband had left to her and her children. She alleged that her daughter was one of the next-of-kin, but her brother-in-law was attempting to change it and to substitute his own name to enable him to collect the letter of administration. She alleged that her brother-in-law did so because she could not afford a lawyer.

Action taken: The WLC immediately contacted the office of the late husband to confirm the true status of the document. Upon confirmation that the client was correct, a letter was written on her behalf to the appropriate probate registry entering a *caveat* on the granting of the letter of administration to the brother-in-law. The WLC then sent a letter to all parties concerned with the aim of settling the mater amicably. The parties were counselled on their rights in accordance with the law. The brother-in-law was advised to return all documents to the widow. He refused to do so and the matter was referred to a lawyer.

Remarks: The WLC followed up the case on behalf of the widow and ensured that the documents were returned to her.

Widowhood is a multi-faceted tragedy for a woman under Nigerian customary law. Traditional practices during widowhood, which are deeply embedded in many Nigerian societies, can generally be described as cruel and inhuman. A widow is usually discriminated against after the death of her husband and subjected to humiliating burial rites and mourning practices under the guise of tradition. Nwadinobi says at the death of a spouse, a widow is dethroned, defaced and disinherited.[48] Elaborating upon these phrases, Nwadiobi explains that a widow is disinherited and dispossessed of all the property she had acquired together with her husband.[49] The concept of a widow under the traditional system is that of a defenceless, vulnerable, marginalised and invisible being. The above discussion explains the plight of the complainant who approached the Clinic. The needs of the complainant, coupled with widowhood, place her in a position where, without intervention, she may be disenfranchised. The intervention of the WLC enabled the complainant to have access to justice without any financial strain, and brought about the desired relief which otherwise would have been impossible. Traditionally, women are not expected to own any property. A major challenge the complainant would have faced, had it not been for the intervention of the WLC, was a show-down with her in-laws and an allegation that she had been responsible for the death of her husband so that she could inherit his property. This allegation arises from a misconception

48 E Nwadinobi 'Fighting back against prejudice and discrimination' paper presented at the Widows Without Rights Conference, London, 6-7 March 2001.

49 As above.

that all property in the family belongs to the man who is the head of the family, notwithstanding the fact that women bear a large burden and are legally involved in the economic enterprise of the family, in addition to being responsible for childbearing and taking care of the household.[50] The intervention of the WLC enabled the voice of the complainant to be heard and allowed her to participate in a matter affecting herself. These are the characteristics of good governance.

7.3.4 WLC/CAS/139

The client, a widow, approached the WLC on 7 January 2011 complaining that her influential father-in-law was attempting to take her husband's property from her.

Action taken: The WLC immediately wrote to the father-in-law summoning him to the Clinic. The meeting at the Clinic did not materialise as other family members became involved in the matter and the client requested that it should be resolved amicably within the family.

Remarks: The case file has since been closed.

The above case is similar to the case in WLC/CAS/112 discussed above. The only distinguishing factor was that the WLC did not pursue the case to its logical conclusion. The end result of the case could not be determined as the client requested that the case be amicably settled with the family. The WLC could not ascertain whether the client had been intimidated into withdrawing the case or not.

7.3.5 WLC/CAS/198

The client, a petty trader, approached the WLC on 25 June 2012 requesting the Clinic to assist her to collect her husband's entitlement which her in-laws were contesting.

Action taken: The WLC requested the client to provide the names of the family members who were contesting her entitlement. The client has since shown no interest in the case.

Remarks: The case file has been closed.

This case, like the case of the widow in case WLC/CAS/139, was terminated because the client did not show any further interest in the case when the WLC wanted to take steps to access justice on her behalf. There can be no access to justice when a member of a marginalised group, such as the client in the above case, fears the system. In all probability, this was the position of the client in this case.

50 O Bamgbose 'The Nigerian woman under the traditional system' (2012) (unpublished paper).

7.3.6 WLC/CAS/225

The client, an elderly retiree, approached the WLC on 11 March 2013 complaining about the non-payment of house rental by the respondent, her tenant.

Action taken: The WLC wrote to the respondent, who refused to co-operate with the clinicians in settling the debt owed to the client. The WLC therefore contacted the employer of the tenant informing him of the tenant's attitude. With the intervention of the employer, the respondent gave an undertaking in writing to pay the client all monies owed to her.

Remarks: The Clinic ensured that all monies owed was paid through the clinic to the client.

The above case may be understood in the context of the position of pensioners in Nigeria. The delay in payment and often non-payment of pension money as and when due place pensioners in a serious predicament and render them vulnerable. The position of the client in this case may, therefore, be the denial of her source of livelihood from the government and her tenant. The case complained about was the refusal by the tenant to pay rent. The position of the client in this case would have made it difficult for her to pursue a case in a formal court because of expensive legal fees. The age of the client, the tedious court process and the legal fees were all factors that would have denied the client access to justice. The intervention of the WLC brought the client the desired relief and protected her interests.

7.3.7 WLC/CAS/269

On 19 November 2013 the client, a young school teacher, was brought to the Clinic by her mother to report the forceful removal of their daughter and granddaughter by the respondent, who had earlier, during pregnancy and the birth of the child, denied paternity. The client learnt about the Clinic through a staff clinician.

Action taken: The WLC wrote to the respondent, but he was evasive and did not present himself at any of the meetings as he alleged that he was too busy with his boss who was an influential politician. He therefore sent elders of his family to represent him. Due to concern about the welfare of the child, who it was alleged was not being adequately taken care of, the matter was reported and transferred to the state social welfare office. Due to the concerns of the client and her mother that justice would not be served, the WLC followed up the case at the social welfare office. At the social welfare office, the matter was taken to the Juvenile Court with the WLC in attendance representing the client. The court ordered that it was in the best interests of the child to be with the client and the child was handed over to the client, while the respondent was ordered to pay for the maintenance of both mother and child. The father was given visiting rights.

Remarks: The mother and child are doing well and the child has returned to her former school. The case file has been closed.

The position of the Nigerian child *vis-à-vis* the mother is succinctly described in the following statement by President Robert Mugabe:[51]

> The child born of a woman despite the nine months spent in her womb was never hers by customary right of ownership. The child remained her child only as long as the marriage between her and her husband was good.

For the client in this case to be said to have had access to justice, she must have confidence in the system whereby her case is to be resolved. The influential position of her husband in society caused her to lose confidence in the legal system which should have afforded her protection. The intervention of the WLC gave her the confidence necessary to go through the legal process.

Apart from the cases discussed above, there are a few cases labelled 'classified cases', which are very sensitive in nature. They include cases of rape, indecent assaults on children and child adoption. These cases are followed up by clinicians from the WLC together with other units inside and outside of the University. These units include the police, hospitals and state social welfare and legal aid offices which are government units, partnered by NGOs such as the Nigerian Bar Association (Ibadan Branch) and the International Federation of Women Lawyers (FIDA, Nigeria). The WLC is linked with other units within the University to provide services to women who are not University staff but are within the catchment area of the Clinic.[52] The units include the social work, guidance and counselling and psychology departments of the University of Ibadan. There are instances of referrals from governmental units to the WLC. Children from juvenile courts and their parents are sometimes referred to the WLC for counselling. This has been attributed to the insufficient number of qualified social workers in government service.

A descriptive analysis of the cases above and the services rendered by the WLC reveals that the Clinic maintains a relationship and collaboration with government and NGOs.[53] It is thus clear that legal aid clinics play a prominent role in access to justice. The WLC also engages private legal practitioners in the community to provide *pro bono* services.

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51 Opening speech by Robert Mugabe, Prime Minister of the Republic of Zimbabwe, President of the Zimbabwe African National Union (Patriotic Front) May 1979 in 'Liberation through participation: Women in the Zimbabwean revolution. Writings and documents from ZANU and the ZANU Women's League' http://freedomarchives.org/Documents/Finder/DOC52_scans/52.Liberationthroughparticipation.zanu.pdf (accessed 25 July 2015).

52 *Women's Law Clinic newsletter: History of the Clinic* (2011) Women's Law Clinic, Faculty of Law, University of Ibadan Newsletter 7.

53 O Olomola & O Bamgbose 'Collaborating with other disciplines: Best practice for legal clinics – A case study of the Women's Law Clinic, University of Ibadan Nigeria' (2013) 19 *International Journal of Clinical Legal Education Practice* 355.

It is also clear from the case studies that the WLC takes a holistic approach to the representation of indigent women. The Clinic provides legal and counselling services, educates women regarding their rights, and encourages dispute resolution mechanisms as opposed to litigation. The WLC also takes cognisance of the culture of the people in providing services to the client, therefore maintaining the integrity of the community and ensuring its legitimacy.[54] The WLC tries as much as possible to settle disputes without resorting to filing actions in court. This is because of a cultural saying amongst the Yoruba people of the south-west of Nigeria which, when literally interpreted, means that 'you do not take a person to court and you ever remain as friend'.

A few testimonials extracted from the newsletter of the WLC confirm that the services rendered by the Clinic have gone a long way towards improving the lives of women in the community. A female client said:[55]

> The clinic has assisted me on several occasions with my domestic problems. I appreciate the fact that the clinicians were never tired of my numerous complaints.

Another female client said:[56]

> The clinic helped me and my children during my crisis period. I rate the clinic with a pass mark of 95 per cent.

8 Conclusion

There is no doubt that there are concerted efforts by the government in dealing with women's access to justice issues in Ibadan. However, these efforts lack sufficient funding.[57] Another problem impeding the government's efforts is inadequate personnel to tackle the number of cases. The referrals of cases from governmental agencies to the WLC mentioned in the case study above attest to this fact. Government agencies lack experts to focus on research that would clarify the underlying issues affecting access to justice. This problem is solved by legal aid clinics, such as the WLC, that do research in this area. These were some of the challenges facing legal institutions in Nigeria.

The establishment of campus-based law clinics in Nigeria, of which the WLC is one, through the introduction of clinical education into the curriculum of the Nigerian law school and law faculties, has improved the rule of law and strengthened legal institutions. It has proved to be a way of improving access to justice for women, in

54 O Bamgbose & O Olomola 'Clinical legal education and cultural relativism – The realities in the 21st century' (2014) 20 *International Journal of Clinical Legal Education* 579.

55 Women's Law Clinic Newsletter (n 52 above).

56 As above.

57 OECD Guideline Series (n 26 above).

particular, in Nigeria. The services rendered by the existing 18 campus-based law clinics have gone a long way towards supporting the work of government in different parts of Nigeria. With the adoption of clinical legal education curricula through the establishment of law clinics at many other law faculties in Nigeria, and the legal clinics supplementing the efforts of government, the legal system will be more effective, which is evidence of good governance and development in Nigeria.

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Raising legal giants: The agency of the poor in the human rights jurisprudence of the Nigerian Appellate Courts, 1990-2011

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Summary

This article examines the extent to which the jurisprudence of the Nigerian appellate courts has expanded, maintained or contracted the opportunities of the poor for exercising as robustly as possible their own 'agency' to act to redress human rights abuses committed against them during the period between 1990 and 2011. In doing so, the article mostly utilises a critical socio-legal framework which situates Nigeria's human rights law relating to the agency of the poor within its historical, social, economic and political context. Specifically, it utilises – among others – the kernel ideas of Upendra Baxi's seminal trade-related market-friendly human rights theory. While it is often assumed that the weak, excluded and deprived are passive victims of their condition, the starting position of the article is that, where sufficient opportunities exist in law and policy, or are allowed by the adequate availability of resources, or are made possible through pro-poor judicial action, the poor are actually able to resist this characteristic and to struggle to transform their life conditions. The main

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question the article addresses is the extent to which the Nigerian appellate courts have – in the course of developing their human rights praxis – helped to provide or restrict opportunities for poor Nigerians to exercise their agency within the legal system so as to more effectively 'struggle to transform their life conditions'. With what conceptual apparatuses have these courts examined and decided the relevant cases in ways that expand or contract the agency of the poor to seek legal redress and social justice? We argue that many factors interact in this regard to produce certain outcomes, some within and others outside the control of the courts. We also believe that courts should, where necessary, ameliorate the factors within their control such that the poor can more robustly exercise their agency in this regard.

Key words: *Nigeria; courts; human rights; agency; poverty*

1 Introduction

The process of translating human rights norms into practical effect/ reality centrally engages the question of the place of the 'agency' of victims of human rights violations themselves in the struggle to vindicate their rights and redress their grievances.[1] But what is meant by a victim's 'agency'? As used in this article, 'agency' means the exercise of the capability to deal with an issue, question or problem.[2] This is the sense in which the term is used in Giddens's widely-accepted and highly-influential work on this concept. Understood in this way, the concept suggests that the victim of a human rights violation should ordinarily have a significant role to play in challenging that violation or seeking to redress it. As such, the exercise of 'agency' by a victim or victims of a human rights violation denotes the capability that that individual or group has of 'fighting' to resolve the human rights problems or challenges that confront them.

The article examines the extent to which the jurisprudence of the Nigerian appellate courts (namely, the Court of Appeal and the Supreme Court) has expanded, maintained or contracted the opportunities of the poor of exercising as robustly as possible their own 'agency' to act to redress human rights abuses committed against them in Nigeria during the period 1990 to 2011 (focused upon here because it was during this period that the most ferment occurred in the areas of the law that are focused on in this article). In doing so, the article mostly utilises a critical socio-legal framework which, among other things, situates Nigeria's human rights law

1 A Sen 'Elements of a theory of human rights' (2004) 32 *Philosophy and Public Affairs* 319 ('Human rights generate reasons for action for agents who are in a position to help in the promoting or safeguarding of the underlying freedoms').

2 See A Giddens *The constitution of society: Outline of the theory of structuration* (1984); S Loyal *The sociology of Anthony Giddens* (2003); R Stones *Structuration theory* (2005).

relating to the agency of the poor within its historical, social, economic and political context. Specifically, it utilises – among others – the kernel ideas of Baxi's seminal trade-related market-friendly (TREMF) human rights theory.[3] This theory sees a deep connection between the increasing displacement of a much more people-centred Universal Declaration of Human Rights paradigm by a TREMF human rights paradigm that emphasises the promotion and protection of the collective interests of powerful governmental actors and various formations of global capital. This socio-economic and legal drama, Baxi claims, is often enacted at the direct expense of human beings and communities, especially the poor and the relatively excluded.

The article's argument and analysis also build upon the tradition of human rights scholarship which not only sees the transformative possibilities of human rights law, but also maps its limitations. For example, one of the questions raised by this tradition of human rights scholarship is whether human rights law, which ostensibly is aimed at ameliorating the effects of poverty and suffering, could also harbour factors, norms, doctrines, rules and tendencies that inhibit the ability of the poor and those suffering abuses to exercise their 'agency' to seek remedies. In addition to Baxi's TREMF theory, note is also taken in the article of Kennedy's assertion that the human rights language is 'absolutist' and reduces inter-group and inter-individual sensitivity.[4] He argues that[5]

> encouraging people [agents] to imagine themselves as rights holders, and conceptualising rights as largely absolute, make the negotiation of distributive arrangements among individuals and groups less likely and less tenable.

As importantly, he concludes that[6]

> the legal vocabulary of rights makes it hard to assess distribution among favoured and less favoured rights holders and forecloses the development of a political process for tradeoffs among them, leaving only the vague suspicion that the more privileged got theirs at the expense of the less privileged.

The gendered nature of poverty in Nigeria (as elsewhere) should also be kept in mind in conducting the kind of pro-poor analysis undertaken in the article.[7]

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3 U Baxi *The future of human rights* (2002) 132. See also U Baxi 'Market fundamentalism: Business ethics at the altar of human rights' (2005) 5 *Human Rights Law Review* 1.

4 D Kennedy 'The international human rights movement: Part of the problem?' (2002) 15 *Harvard Human Rights Journal* 113.

5 As above.

6 As above.

7 See N Aniekwu 'Gender and human rights dimension of HIV/AIDS in Nigeria' (2002) 6 *African Journal of Reproductive Health* 30. See also N Ezumah 'Gender issues in the prevention and control of STIs and HIV/AIDS: Lessons from Awka and Agulu, Anambra State, Nigeria' (2003) 7 *African Journal of Reproductive Health* 89.

While it is often assumed that the weak, excluded and deprived are passive victims of their condition,[8] the starting position of the article is that, where sufficient opportunities exist in law and policy, or are allowed by the adequate availability of resources, or are made possible through pro-poor judicial action, the poor are actually able to resist this characteristic and to struggle to transform their life conditions.[9] Against this background, the main question the article addresses is the extent to which the Nigerian appellate courts have – in the course of developing their human rights praxis – helped to provide or restrict opportunities for poor Nigerians to exercise their agency within the legal system so as to more effectively 'struggle to transform their life conditions'.[10] With what conceptual apparatuses have these courts examined and decided the relevant cases in ways that expand or contract the agency of the poor to seek legal redress and social justice? We argue that many factors interact in this regard to produce certain outcomes, some within and others outside the control of the courts. We also believe that courts should, where necessary, ameliorate the factors within their control such that the poor can more robustly exercise their agency in this regard.

It is granted, of course, that this category of persons may suffer material, physical and psychological limitations and that these concrete circumstances often combine to render them insufficiently equipped to resist their victimisation or struggle against their impoverishment in an effective way. Yet, the point is that the fact that sometimes government policies and judicial attitudes align to perpetuate rather than ameliorate the factors that hinder the poor from exercising their agency to resist their oppression through the utilisation of the institutions and processes of human rights law, requires us to take a closer look at the ways in which these dramas of oppression are enacted and legitimised.[11]

Since the analysis in the article is largely based on an inquiry into a specific portion of the jurisprudence of the Nigerian appellate courts, it follows that case analyses and the examination of the legal reasoning central to the development of that jurisprudence will be a major methodological pillar of the article. This will, for the most part, take the form of reading and understanding the relevant pool of cases and assessing the reasoning presented in each of them for the extent to which it exemplifies or challenges the TREMF and other socio-legal theories that are utilised here.

The article has been organised into five main sections, including this introduction. Section 2 considers the position that the poor can in

8 See N Webster & L Engberg-Pedersen (eds) *In the name of the poor* (2002).

9 See eg IG Shivji 'Constructing a new rights regime: Promises, problems and prospects' (1999) 8 *Social and Legal Studies* 253.

10 As above.

11 See H Yusuf 'Oil on troubled waters: Multi-national corporations and realising human rights in the developing world, with specific reference to Nigeria' (2008) 8 *African Human Rights Law Journal* 79.

fact exercise their agency in the struggle to ameliorate their own social conditions (something that must be possible for the courts to even have a role to play in expanding or constricting that agency), and hopefully refutes the contrary argument. In section 3, we consider a number of objective factors that shape the capacity or otherwise of the poor to ameliorate their own human rights situation (that is, the extent to which the poor use the courts in the first place, the challenges presented by the architecture and nature of the courts, the role of standing rules, and the role of certain conceptual dichotomies). Thereafter, in section 4 we critically examine the role that the Nigerian appellate courts have played or not played in shaping the capacity of the poor in the country to exercise their agency in the hope of ameliorating their human rights conditions, and the role that these courts can in fact play in doing so in the future. Also included in this section is a critical analysis of the actual and potential contribution of Nigeria's 2009 Fundamental Rights Enforcement Rules to this process of enhancing or restricting the exercise of pro-poor agency in human rights litigation in Nigeria. Thereafter, the article ends with a few concluding comments.

2 Lifting legal power from the depths of weakness?

How much of a 'burden' to redress their poor social conditions should be borne by the relevant victims? Do real opportunities to utilise the human rights resources and processes that can help them ameliorate their deprivation and exclusions even exist? If these opportunities do in fact exist, how might the poor utilise them to ameliorate their condition, and to what effect? In the course of carrying out its adjudicatory tasks, does the Nigerian judiciary (and specifically the appellate courts) bear any particular responsibility for the expansions or restrictions that have occurred during the period under study regarding access of the poor to those ameliorative resources and processes?

Before discussing the question of how the poor might or might not be able to utilise the available human rights resources and processes (within the courts) to resist the systems that exclude and impoverish them, and how the courts may facilitate this process, let us first dispense with the opposite argument. This position holds that the poor are all too often complicit in their own exclusion and impoverishment, and that this complicity robs them of the necessary agency to resist their oppression. An author describes this phenomenon in terms of the theory of 'false consciousness' in which victims of a social problem seem to actively support mechanisms and practices that are inimical to their own interests and agendas.[12] While she discusses this issue from a feminist perspective, we suggest that it

12 S Mahmood *Politics of piety: The Islamic revival and the feminist subject* (2005) 2.

could be extrapolated to this article's concern with the agency of the oppressed in the context of human rights litigation before the Nigerian appellate courts.

The same questions that are raised within a feminist framework might be equally relevant to an analysis of the agency of the poor in pursuing or sabotaging solutions to their own human rights problems. When the poor accept human rights violations perpetrated against them because they do not possess sufficient education or lack the power or resources to pursue their claims for redress, they exhibit some of the characteristics of supposed Muslim feminine passivity and submissiveness described by Mahmood.[13] The danger that this poses for the robust exercise of the agency of the poor is compounded by the fact that, as has been argued, there also seems to be a 'middle class linguistic enclosure'[14] that inhibits ordinary people who, although they are 'proficient in their own languages', are not adept at speaking the 'languages of the law, government and business, … from influencing the reconceptualising of the dominant human rights discourse'.[15]

Weighed against Griffen's description of agency, the danger becomes even clearer.[16] According to Griffin:[17]

> To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own course through life – that is, not be dominated or controlled by someone or something else (autonomy). And one's choice must also be real; one must (second) have at least a certain minimum education and information and the chance to learn what others think. But having chosen one's course one must then (third) be able to follow it; that is, one must have at least the minimum material provision of resources and capabilities that it takes. And none of that is any good if someone then blocks one; so (fourth) others must also not stop one from pursuing what one sees as a good life (liberty).

This conceptualisation of agency recognises that individual or group autonomy is not self-executing, but is contingent upon the existence of other objective factors. However, it should be kept in mind that, merely because victims of human rights abuses may sometimes be docile to their conditions does not mean that they cannot ever be

13 See S Mahmood 'Feminist theory, embodiment, and the docile agent: Some reflections on the Egyptian Islamic revival' (2001) 16 *Cultural Anthropology* 205.

14 PT Zeleza 'The struggle for human rights in Africa' (2007) 41 *Canadian Journal of African Studies* 494.

15 As above.

16 See J Griffin 'First steps in an account of human rights' (2001) 9 *European Journal of Philosophy* 311.

17 As above. See also J Griffin 'Discrepancies between the best philosophical account of human rights and the international law of human rights' (2001) 101 *Proceedings of the Aristotelian Society* 4; D Jacobson & GB Ruffer 'Courts across borders: The implications of judicial agency for human rights and democracy' (2003) 25 *Human Rights Quarterly* 75, where agency is defined as implying 'the ability of the individual to act as an "initiatory" and "self-reliant" actor, and to be an active participant in determining his or her life, including the determination of social, political, cultural, ethnic, religious, and economic ends'.

roused to challenge or overcome them.[18] Instead, it may well be that they simply lack the additional resources and other circumstances upon which the effective exercise of their agency may depend.

3 Nigeria, human rights and agency of the poor

The discussions in the previous section are especially relevant to Nigeria where, despite significant strides in poverty reduction recently recorded, poverty is still a widely-prevalent phenomenon notwithstanding the country's wealth in natural resources.[19] Poverty is the enemy of human rights, in part, because of its connection to the depletion of the people's agency to act towards the protection of their rights. As is often stressed, poverty has both a materialistic aspect dealing with socio-economic goods and services, as well as a capability dimension that is related to access to justice and the exercise of human rights.[20] What is not in doubt is that when poverty prevails, especially in its material form, it tends to denude to a great extent the human 'agency' to seek redress (whether in the courts or through other means). For this and other connected reasons, the poor too often constitute the most marginalised segment of all too many legal systems.

In the Nigerian and other contexts, therefore, where the human rights abuses carried out against the poor are all too often unlitigated and unredressed, it may not be because of a failure of the autonomous exercise of agency on the part of the victims, but rather due to an absence of certain objective factors. The following questions could be asked in this regard: To what extent has the jurisprudence of the Nigerian appellate courts either facilitated or hindered the efforts of the poor to ameliorate their own social conditions? Further, to what extent has that jurisprudence provided or failed to provide a real basis for, or complement to, the more effective social mobilisation of the poor, thus advancing their capacity for an effective human rights struggle? Even where the poor accept human rights atrocities committed against them on account of the disempowering conditions that they have been forced to endure, could the courts be helpful in

18 Mahmood (n 12 above) 15.

19 A Oluwarotimi 'Poverty: World Bank rates Nigeria among extremely poor countries' *Leadership* 3 April 2014 http://leadership.ng/news/362263/poverty-world-bank-rates-nigeria-among-extremely-poor-countries; S Oshewolo 'Galloping poverty in Nigeria: An appraisal of government interventionist policies' (2010) 12 *Journal of Sustainable Development in Africa* 264-274; JS Omotola 'Combating poverty for sustainable human development in Nigeria: The continuing struggle' (2008) 12 *Journal of Poverty* 496; O Ogunleye 'Towards sustainable poverty alleviation in Nigeria' (2010) 4 *African Research Review* 294; C Ucha 'Poverty in Nigeria: Some dimensions and contributing factors' (2010) 1 *Global Majority E-Journal* 46.

20 See FD Costa 'Poverty and human rights: From rhetoric to legal obligations: A critical account of conceptual frameworks' (2008) 9 *Sur - International Journal on Human Rights* 83.

enhancing their agency in resisting those conditions and vindicating their human rights in any significant manner?

Before addressing these questions, we will first examine, albeit necessarily in outline, the objective factors that tend to shape the ability of any group (including the poor) to effectively exercise their agency in human rights litigation and other struggles. Our analysis proceeds from an initial understanding that these factors discourage the poor from coming forward with their human rights claims. The next section, therefore, builds upon the intimate connection that we think exists between these factors and the paucity of human rights cases that are litigated in the courts, generally, and those involving the poor, in particular.

3.1 Where are all the poor litigants?

It is beyond debate that human rights violations in Nigeria are endemic.[21] The period covered in this study is not exempt from this trend and, almost needless to state, most of these violations are perpetrated against the poor and the excluded. Yet, one would also notice that the cases that are examined in the article appear relatively sparse. This would seem to contradict the claim that human rights violations are institutionalised, endemic and widespread. The question implied by this situation, therefore, is the following: If, indeed, a host of incidences of serious human rights abuses against the poor do occur in Nigeria, why are these claims not reflected in the number of cases being taken to the courts, and specifically the appellate courts?

This is a very legitimate concern. Nonetheless, it is one that could very easily be accounted for. First, there is no inherent contradiction in the fact that there are fewer cases filed in the courts relative to the degree of human rights violations alleged. Second, the fact that fewer cases are filed, especially by the poor, may simply indicate that the victims were prevented by factors outside their control to pursue their grievances (in other words, that their agency is restricted) than for other considerations. Our contention is that, if there are not many poor litigants placing human rights claims before the courts, it could be because of the factors discussed in this section.

In fact, some may even argue plausibly that expecting a person to be poor and at the same time to possess the agency necessary to pursue legal grievances in a context such as Nigeria's is too optimistic. This could be for a variety of reasons, some of which are explained below. In the first place, the cost of litigation in Nigeria (as in many other similarly-situated legal jurisdictions) is very high.[22] The Nigerian courts act only on the basis of cases that are actually presented before

21 See US State Department *Country Reports: Nigeria* http://www.state.gov/j/drl/rls/hrrpt/ humanrightsreport/index.htm (accessed 24 June 2015).

22 In the case of *General Oil Ltd v Oduntan* [1990] 7 NWLR (Pt 63) 433, Justice Niki Tobi, then of the Nigerian Court of Appeal, stated that '[i]t is common knowledge that litigation is a very expensive thing in this country, and the present economic

them. Nigerian judges cannot take any proactive steps to initiate litigation, even if they notice wrongs being committed against citizens. For most would-be litigants in Nigeria, taking the initial steps towards challenging a human rights abuse is not done lightly. It requires a careful analysis and balancing of the costs against the anticipated benefits. Even where it is possible to strike the balance between costs and benefits, the fact of a deprived economic condition often causes the costs to weigh more significantly on the prospective poor litigant than whatever benefits may be anticipated.

What is more, even if poor litigants expect to win their cases at the courts of first instance, they have to consider the cost of defending those victories on appeal in the event that the relevant adversarial party decides to exhaust his or her rights to appeal, and the more cases move up the jurisdictional ladder, the more likely it is that the cost of maintaining lawyers and travelling to and from venues will escalate steeply.[23] Therefore, there is a limited incentive for deprived citizens to effectively challenge human rights violations through judicial means, especially when it is recognised that, even if victory is achieved in court, there is no guarantee that the judgment will be implemented by the government.[24] Thus, when this scenario is considered, taking appeals to the appellate courts in Nigeria seems, therefore, to be more or less an elite entitlement.

To be clear, the reference to the cost of litigation here is to the resources that litigants expend in moving their cases from inception until they have received the full vindication that they requested from the courts. It includes official fees paid to the bureaucracy to commence and maintain the suit, legal fees paid to lawyers, transportation and other incidental costs and, if they succeed in their claims, the cost of enforcing the court judgment.

In Nigeria, there is widespread acknowledgment that these costs could impede the ability of the poor and not so poor to exercise their agency to seek legal redress for human rights violations committed against them. For instance, in *General Oil Limited v Oduntan*,[25] the Court of Appeal, speaking through Justice Niki Tobi (as he then was), stated that '[i]t is common knowledge that litigation is a very expensive thing in this country, and the present economic situation has made the position worse. Filing fees have over the years risen. So have fees for counsel.' Brems and Adekoya echo this assertion when they state:[26]

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situation has made the position worse. Filing fees have over the years risen. So have fees for counsel.'

23 See NS Okogbule 'Access to justice and human rights protection in Nigeria: Problems and prospects' (2005) 2 *Sur - International Journal on Human Rights* 101.

24 See *The Nation* 27 October 2014 http://thenationonlineng.net/new/addressing-the-rate-of-disobedience-to-court-orders/ (accessed 24 June 2015).

25 [1990] 7 NWLR (Pt 63) 433.

26 E Brems & CO Adekoya 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' (2010) 52 *Journal of African Law* 264.

> Protecting or enforcing one's right in a court of law in Nigeria can be very expensive. Litigants have to bear several costs, such as filing fees, which in some cases depend on the plaintiff's claim. An additional cost that should not be underestimated is that of transportation to and from court, for each sitting. For people living in poverty, access to justice can indeed be hindered by the impossibility of physically reaching the court building. The inability of people living in poverty to bear any expense for transport often forces people to walk to the court.

As significantly, an empirical study on the challenge of access to courts in Nigeria found that 75,3 per cent of all the lawyers surveyed identified a 'lack of funds' as a very important constraint, while 13,6 per cent of these respondents viewed it as an important constraint.[27] In the specific field of oil mining-related litigation, the author of this report made a significant discovery in terms of its relevance to the theme of this article. He found that there was more reluctance to pursue this kind of litigation because of 'the financial imbalance between the affluent oil companies, on the one hand, and the poor village communities, on the other hand'.[28] This imbalance ensured that oil companies clearly had more resources that they could spend on the best lawyers and expert witnesses in a way that poor individual litigants and local communities could not.[29]

3.2 Appellate courts as Jacks of all trades, long delays, and restricted access for the poor

The truism that 'Jacks of all trades tend to end up as masters of none' may apply to courts as well. The point being made here is developed in step-by-step fashion. First, appeals to the Supreme Court and Court of Appeal of Nigeria often take several years to be concluded, and the longer it takes to pursue the appeal to its conclusion, the more the litigant pays by way of time and resources. Physical as well as financial fatigue and exhaustion occur in such instances, which are prevalent. Thus, secondly, this further discourages litigants from considering litigation (even human rights litigation) as a viable option for seeking redress. Thirdly, there are possibly two major reasons why it takes inordinately long to conclude appeals at the Nigerian Supreme Court in particular. For one, the Court is not restricted in its appellate jurisdiction to purely constitutional questions in the fashion of contemporary constitutional courts,[30] for example. What is more, the Nigerian Supreme Court does not control its docket and, as such, does not have the same control over the kinds of cases that it receives

27 See JG Frynas 'Problems of access to courts in Nigeria: Results of a survey of legal practitioners' (2001) 10 *Social and Legal Studies* 405.

28 Frynas (n 27 above) 406.

29 As above.

30 See A Harding & P Leyland *Constitutional courts: A comparative study* (2009); S Gardbaum 'The new commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative Law* 717.

for adjudication as is the case with similar courts in other jurisdictions.[31]

Expanding on the first reason for delays at the Nigerian Supreme Court, it must be noted that, in addition to the jurisdiction it possesses as the final court in all constitutional matters, it is also the final arbiter in almost all other forms of litigation in the country.[32] The only exception is that, aside from the fact that the Supreme Court adjudicates all presidential and governorship election petitions, the Court of Appeal is the final appellate court for all other election challenges.[33] The fact that the jurisdiction of the Supreme Court, for instance, presents opportunities to all litigants in this manner, therefore, creates a situation in which its docket is perennially cluttered by a variety of cases, ranging from the serious to the inconsequential. Human rights cases, which ordinarily should be accorded preference because of their nature and constitutional importance, suffer long delays alongside routine appeals.[34] The burdensome nature of the Court's case load, therefore, negatively affects the quantity and quality of its decisions.

Even so, the Court of Appeal presents the same challenges to litigants as does the Supreme Court, and this has been so notwithstanding the fact that the former has always been far more decentralised than the latter. It suffers from a clogged docket and the delays in the dispensation of justice that also afflicts the highest court. This aside, the poor also suffer the same manner of deprivation in the lower courts. As such, it could be said that financial circumstances are critical to whether or not an ordinary Nigerian would pursue a case in court, irrespective of the court's status to redress a perceived legal wrong.

Furthermore, in calculating the costs that could be incurred and benefits that could accrue from litigation, account must also be taken of the fact that the enforcement of judicial decisions in Nigeria is all too often inconsistent. In some cases, the government has not honoured court verdicts that it disagrees with.[35]

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31 Contrast the US and Canada.

32 Sec 233 Constitution of the Federal Republic of Nigeria 1999.

33 Sec 246(1)(b) Constitution of the Federal Republic of Nigeria.

34 The former Chief Justice of Nigeria, Justice Dahiru Musdapher, who was appointed after the retirement of Justice Ignatius Katsina-Alu, at his confirmation hearing before the Nigerian Senate proposed that the Constitution be amended to limit the number of appeals coming before the Supreme Court. See I Shaibu 'Diversion of funds: CJN blasts governors' *Vanguard* 22 September 2011 http://www.vanguardngr.com/2011/09/diversion-of-funds-cjn-blasts-govs/ (accessed 26 June 2015).

35 JA Dada 'Judicial remedies for human rights violations in Nigeria: A critical appraisal' (2013) 10 *Journal of Law, Policy and Globalization* 11.

3.3 Narrow standing rules that impede access

Apart from the cost of litigation and its collateral consequences, the agency of the poor could also be impaired by a narrow judicial view of who is legally qualified to present a particular kind of claim of human rights violations. In many jurisdictions, the question of whether or not the poor are able to secure remedies for the human rights violations that have been meted out to them often involves a contest over the doctrine of standing or *locus standi*.[36] Until recently, opportunities for poor Nigerians to exercise their agency and access the Nigerian human rights justice system, either by themselves, through their representatives or through those who purport to be acting in the public interest, were notoriously and actively constricted in too tight a fashion by the Nigerian courts, including the Court of Appeal and the Supreme Court.

As Ogowewo correctly noted (at the relevant time):[37]

> The Nigerian standing rule has a very narrow concept of personal standing (one that focuses on private legal rights) and no concept of representative standing. Hence, persons with a real interest in an issue of local or national importance invariably will be denied standing; even if what is assailed involves obvious illegality.

Despite occasional flashes of liberalism over the years, the courts have been mostly consistent in holding that the breach of a public right, constitutional or statutory provision, without any infringement of personal legal rights, does not confer standing on an individual.[38]

The Supreme Court of Nigeria reinforced this position in the case of *Attorney-General, Adamawa State v Attorney-General, Federation*[39] when it held that '[i]t is not enough for a plaintiff to merely state that an Act [law passed by the federal legislature] is illegal or unconstitutional. The plaintiff must also show how his civil rights and obligations are breached or threatened.' This rather unfortunate rule has often created injustice in glaring cases, resulting in the insulation of all too many unconstitutional acts from being challenged by victims who belong to a larger social constituency or other public-spirited individuals.

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36 Defined first as 'entitlement to seek judicial remedy apart from questions of the substantive merits and the legal capacity of the plaintiff', and then more narrowly as 'the interest of the plaintiff in the matter to be decided'. See TA Cromwell Locus standi: *A commentary on the legal standing in Canada* (1986) 7.

37 TI Ogowewo 'Wrecking the law: How article III of the Constitution of the United States led to the discovery of the standing to sue in Nigeria' (2000) 26 *Brooklyn Journal of International Law* 529.

38 See, eg, Fatayi-Williams's *dictum* in *Adesanya v President of Nigeria* (1981) 2 NCLR 359. See also *Fawehinmi v Akilu & Togun: In re Oduneye* [1987] 4 NWLR (Pt 67) 797.

39 [2005] 18 NWLR (Pt 958) 581.

3.4 Dichotomising 'main' and 'accessory' human rights claims

Finally, on the list of factors that could shape (for good or ill) the exercise of the agency of the poor in human rights cases is the curious main/accessory binary that the Supreme Court has created in such litigation. This doctrine simply holds that, whoever has a human rights complaint and wishes to present it to a court under the generally more beneficial Fundamental Rights Provisions[40] of the Constitution, must have that human rights component as the main claim and not as an accessory to a different claim that may not be of a human rights nature. This is derived from the decision of the Supreme Court in *Tukur v Government of Taraba State*.[41] The complaint in this case was that the aggrieved had been deposed as the Emir of Muri in Taraba State without a hearing contrary to the constitutional requirement of a fair hearing. However, in its judgment the Court held that the issue of fair hearing was only collateral to his claim and was not the major question raised therein. It concluded, therefore, that the case ought to have been commenced by a writ of summons and not by an application to enforce a fundamental human right.

This decision has been criticised in the literature for setting a bad, gratuitous precedent.[42] The reasoning was also described as 'dubious, irrelevant … impossible to make and leads to a miscarriage of justice'.[43] Notwithstanding this criticism, the decision has produced a long line of precedents that can only increase the burden of litigation, especially for the poor who may not have the resources to multiply law suits into as many distinct claims as could be required to redress a grievance arising out of a single legal relationship. The following are some of the instances where the application of this doctrine overshadowed the very redress that victims of human rights abuses were seeking before the courts.

In *Nigeria Social Insurance Trust Fund Management Board v Adebiyi*,[44] the question was whether a claimant who essentially claimed to be restored to a position from which he claimed to have been removed without a fair hearing could legitimately present the case as a human rights complaint. The Court of Appeal held that he could not do so. It concluded that the main claim hinged on the wrongful termination of employment, which is predicated on contract and not the violation of

40 These provisions are beneficial to the extent that they are justiciable and thus contrast very sharply with non-fundamental rights provisions in the Constitution, enshrined as non-justiciable Fundamental Objectives and Directive Principles of State Policy in Part Two of the Constitution. See, eg, S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225; D Olowu 'Human rights and the avoidance of domestic implementation: The phenomenon of non-justiciable constitutional guarantees' (2006) 69 *Saskatchewan Law Review* 39.

41 [1997] 6 NWLR (Pt 510) 549.

42 ES Nwauche 'The dubious distinction between principal and accessory claims in Nigerian human rights jurisprudence' (2008) 52 *Journal of African Law* 66.

43 Nwauche (n 42 above) 67.

44 [1999] 13 NWLR (Pt 633) 16.

a fundamental human right. The same was the case in *Sea Trucks (Nigeria) Ltd v Payne*,[45] where the applicant had been removed from his post because of his insistence on joining a particular trade union as of right. Apparently, his employers felt otherwise. As in the earlier case, the Court concluded that it bordered on wrongful termination of employment more suited for commencement by writ of summons and not a fundamental human rights application.

Further, in the case of *Ibrahim Abdulhamid v Talal Akar & Another*,[46] the main question was whether an allegation of harassment, intimidation and seizure of personal property could ground a fundamental human rights suit. The Supreme Court concluded that a common law claim could properly be joined to an application to enforce infringed fundamental human rights, but that this case was different because the common law claim was secondary or ancillary to the claimed breach of human rights. The Supreme Court also held in *University of Ilorin v Oluwadare*[47] that a claim alleging the wrongful expulsion of a student from a university could not be commenced as a human rights suit.

A similar decision had been reached in the earlier case of *Sokoto Local Government & Others v Tsoho Amale*.[48] The judgment of the Court of Appeal in that case was that, where the dispute was over title to land, it could not validly be presented as a human rights enforcement claim. Granted that this factor is as much a hindrance to the poor and the not-so-poor in pursuing human rights cases, there is, however, the likelihood that the poor are more vulnerable to its damaging consequences than would be the case for the more financially well-to-do.

4 Ball in their courts: What have the appellate courts done and what can they do?

While the discussion in the last section may not exhaust the factors that could shape the ability of the poor to exercise their agency in search of judicial redress for violations of their human rights, it is in light of the significant challenges identified in that discussion that one must assess judicial performance in Nigeria in the area of the expansion or restriction of the poor's agency in the area of human rights litigation.

The factors that are considered here include the administrative costs of litigation (in terms of time and resources); the existence of constitutional provisions which permit the excessive cluttering of the dockets of the appellate courts; the interpretation that the courts offer

45 [1995] 6 NWLR (Pt 607) 514.
46 [2006] 13 NWLR (Pt 996) 127.
47 [2006] 14 NWLR (Pt 1000) 751.
48 [2001] 8 NWLR (Pt 714) 224.

regarding 'standing' requirements; and the attitude of the courts to the principal/accessory claim dichotomy.

The question that then arises is what the Nigerian courts have done, and what they could do, in relation to each of these categories of factors, to ensure that they tend to enhance rather than inhibit the exercise by the poor of their agency in human rights litigation.

Although the question of costs in the administration of the justice system in Nigeria is, in general, not really of the making of the courts, it could still be argued that the courts are well placed to take some action to block some of the avenues through which needless costs are incurred in litigation. One such area is in relation to the extended time that litigation and appeals last. While the Nigerian Constitution[49] and Rules for enforcing human rights claims in Nigerian courts are geared towards the expeditious disposal of such claims, in actual practice there is a departure from this expectation. And even though bureaucratic and administrative bottlenecks are contributing factors in this regard, the laziness of some judges or their failure to take control of their courts is also explanatory in this regard.

These two issues require further discussion. While important efforts have been made in the last few years to reform the judiciary, it is common knowledge that some judges in Nigeria apply themselves only minimally to their duties.[50] The lack of effective judicial oversight of their courtrooms and the challenges of ensuring proper accountability in the judicial system (despite some ameliorative efforts) further make this a significant problem.[51] According to Okogbule, delays in the dispensation of human rights justice in Nigeria could arise from 'lawyers writing letters of adjournment of cases, inability of judges and magistrates to deliver judgments on time, failure of the police or prison authorities to produce accused persons in court for trial …'[52]

Some of these problems can fairly easily be redressed by a determined judge. A letter from a lawyer asking that a case be adjourned is hardly a superior dictate to the relevant judge. The judge must be satisfied that such a letter was written in good faith and not merely intended to stall or obstruct progress in a case. But among the strongest proof of the weakness of all too many judges in Nigeria is their easy susceptibility to the bullying tactics of unscrupulous lawyers.[53] These lawyers, who in most cases belong to the profession's top echelon, often intimidate judges by their sheer

49 Sec 36(1) of the 1999 Constitution provides for a fair hearing within a reasonable time in all cases involving a determination of civil rights and obligations. For a judicial interpretation of 'reasonable time', see the case of *Gozie Okeke v The State* [2003] 15 NWLR (Pt 842) 25.

50 See 'CJN threatens to sack lazy judges' *The Punch* 20 May 2013, http://www.punchng.com/news/cjn-threatens-to-sack-lazy-judges/ (accessed 31 July 2014).

51 As above.

52 See Okogbule (n 23 above) 99.

53 As above.

presence.[54] On some occasions, however, the courts have in fact indicated quite clearly their unwillingness to countenance frivolous applications for adjournment. It happened once in the case of *Shell v Udi*,[55] where a claim for compensation was launched against an oil company for destroying fish ponds and economic trees while engaged in oil exploration activities. The Supreme Court frowned at a letter seeking adjournment filed by the oil company's lawyer for no other reason than that the lawyer had to attend a law conference. The trial judge read the application for adjournment on such a flimsy reason as an 'example of wilful refusal or neglect to comply with the Rules of Court',[56] refused to grant the adjournment and ruled in favour of the plaintiff. The Court of Appeal affirmed the decision, holding that 'the grant of an adjournment in a case is a matter entirely within the discretionary jurisdiction of the court which the court should exercise in accordance with the particular facts and circumstances of the case'.

The problem of the failure of all too many judges to deliver their judgments in a timely manner can also fairly easily be solved by judges themselves. There is even a constitutional provision that regulates the length of time needed to write up decisions after hearings have been completed. The Nigerian Constitution of 1999 provides:[57]

> Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.

If judges cannot abide by this precise constitutional requirement, that should be a cause for concern. It is in fact the failure to put this provision to as robust a use as possible that makes it seem as if there is nothing judges can do about the problem of undue delays in court proceedings or that it is a problem that is outside their control.

Just as important, certain problems that hinder the ability of the poor to robustly exercise their agency to seek legal redress for human rights violations could even more easily be resolved by the courts than the issues of costs and delays. For one, a much more liberal interpretation of the standing doctrine could be helpful in this regard. This issue is examined in some detail in the paragraphs that follow, before a much briefer consideration of the ways in which the Nigerian appellate courts could also boost the agency of the poor and their participation in the human rights process by reconsidering the dichotomy that they themselves created between so-called main and accessory human rights claims.

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54 As above.

55 [1996] 6 NWLR (Pt 455) 483.

56 JG Frynas 'Legal change in Africa: Evidence from oil-related litigation in Nigeria' (1999) 43 *Journal of African Law* 146.

57 Sec 294(1) Constitution of the Federal Republic of Nigeria, 1999.

4.1 Liberalising Nigeria's *locus standi* rules

In examining how judicial attitudes to the *locus standi* doctrine could hinder the exercise of the agency of the poor in human rights litigation, the analysis will be limited to mostly two strands of cases. The first strand consists of cases filed against the executive branch of government, while the second strand consists of cases filed against oil companies by some indigenes of Nigeria's oil-producing communities. The concentration on these two strands of cases here is justified by the fact that it is in relation to such cases that the *locus standi* defence is utilised most robustly by the relevant defendants. We will also discuss changes brought about to the standing doctrine by the Fundamental Rights (Enforcement Procedure) Rules promulgated in 2009.

The law relating to *locus standi* is one of the most contentious aspects of Nigeria's body of legal norms. While the courts sometimes view it as 'troubling', scholars see the problem it creates as a 'perennial' one.[58] The main Nigerian case on the subject remains *Adesanya v President of the Federal Republic of Nigeria*,[59] where the Supreme Court held that 'standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of'.[60] Disturbingly, in the end, the Court came to a conclusion in this case which detracted from the reasoning it formulated.[61]

This judgment notwithstanding, the Supreme Court showed a more favourable tone regarding standing in the case of *Adediran v Interland Transport*[62] regarding whether a private person could sue for a public wrong. In that case, residents of a housing estate formed a housing association which filed a suit against Interland Transport, a transport firm with offices nearby. The facts were that Interland Transport used its premises as a workshop and tractor-trailer park. The plaintiffs complained about the traffic of the trailers, which blocked the access roads to the estate, knocked down electric poles, damaged roads and generated noise.[63] Although the Court found that Interland Transport had committed a private rather than public nuisance, it still departed from its past tradition of upholding the common law position that only the Attorney-General could petition to protect a public right. In the words of Karibi-Whyte JSC (as he then was):[64]

58 T Ogowewo 'The problem of standing to sue in Nigeria' (1995) 39 *Journal of African Law* 1.

59 [1981] 1 All NLR 1.

60 *Adesanya* (n 59 above) 39.

61 Ogowewo (n 58 above) 7; see also LA Atsegbua '*Locus standi*: Beyond section 6(6)(b) of the 1979 Constitution of Nigeria: A comparative study' (1990) 2 *African Journal of International and Comparative Law* 314.

62 [1991] 9 NWLR (Pt 214) 155.

63 See Frynas (n 56 above) 134.

64 *Adediran* (n 62 above) 180.

> I think the high constitutional policy involved in section 6(6)(b) [of the 1979 Constitution] is the removal of the obstacles erected by Common Law requirements against individuals bringing actions before the court against the government and its institutions, and the preconditions of the requirement of the consent of the Attorney-General. This becomes the more important when the provisions are procedural encrustments designed to protect peculiar social or political institutions.

Although, as a result of this decision, private persons no longer required the authorisation of the Attorney-General to commence litigation intended to protect a public right, it is as yet still unclear whether the decision is consistent with the 'civil rights' test laid down in *Adesanya*. Ogowewo is in fact of the view that the decision in *Interland* signifies that the courts now proceed only on a case-by-case basis, intuitively deciding who should have standing and who should not.[65]

In terms of how the dominant restrictive attitude to the doctrine of *locus standi* impacts the decisions of the Nigerian courts in substantive cases, it appears that the courts tend to be less liberal in applying the standing rules in cases where the government or oil companies are defendants in the relevant suits. However, in fairness to the Nigerian courts, they have on many occasions held oil companies responsible and legally liable where oil communities had sued for compensation regarding the harmful impact of oil industry activities.[66] According to Frynas, in the 1990s various Nigerian oil communities won high-profile cases against oil companies. This includes cases such as *Shell v Farah*,[67] where the relevant community won about $210 000 in compensation (according to the then official exchange rate).[68] He went further to state that this line of cases[69] could indicate a changing judicial posture in the Nigerian context.[70] At the same time, there are a range of cases that suggest either 'government interference'[71] and/or judicial complicity in constricting the space for this kind of litigation through a narrower view of the standing requirement.

An important case with regard to both possible government interference and judicial complicity is that of *Oronto Douglas v Shell Petroleum Development Company Limited*,[72] where the plaintiff alleged that the mandatory provisions of the Nigerian Environmental Impact

65 Ogowewo (n 58 above) 17.
66 See Frynas (n 56 above) 142.
67 (1995) 3 NWLR (Pt 382) 148.
68 Frynas (n 56 above) 121.
69 *Shell Petroleum Development Company Ltd v Councillor F Farah & 7 Others* [1995] 3 NWLR (Pt 382) 148; *Edise & Others v William International Limited* [1986] 11 CA 187; *Elf (Nigeria) Limited v Sillo* [1994] 6 NWLR (Pt 350) 258; *Shell Petroleum Development Company Ltd v Tiebo* [1996] 4 NWLR (Pt 445) 657.
70 Frynas (n 56 above) 52; see also JG Frynas *Oil in Nigeria: Conflict and litigation between oil companies and village communities* (2000).
71 R Temitope 'Judicial recognition and enforcement of the right to environment: Differing perspectives from Nigeria and India' (2010) 3 *NUJS Law Review* 438.
72 Unreported Suit FHC/2CS/573.

Assessment Act had not been complied with in establishing the liquefied natural gas project that was at the time about to be commissioned. As plaintiff, Mr Douglas sought declaratory and injunctive orders that the defendants could not lawfully commission, carry out or operate their project at Bonny without complying strictly with the provisions of the Act, which mandated that for such new projects, an environmental impact assessment had to be carried out. The plaintiff also sought to restrain the defendants from carrying out or commissioning their project until an environmental impact assessment had been carried out with public participation by those to be affected. The trial court struck out the suit on the ground, *inter alia*, that the plaintiff had no standing to institute it. The court reasoned that in the absence of the plaintiff showing that he had suffered a personal loss by the failure to conduct the environmental impact assessment, his suit could not be sustained.

Interestingly, the verdict in this case must be mixed for, as it turned out, the Court of Appeal reversed the lower court's judgment and ordered a new trial. However, and quite disappointingly, the new trial which had been ordered could not take place because apparently there was nothing left to try, as the project in question had been commissioned while the case was being heard at the lower court. It is nevertheless clear that the Court of Appeal in this case seemed to prefer a more liberal reading of the standing requirement than the lower court, one that was in effect more pro-poor and anti-oil company.

The kind of strict construction of standing rules that frustrated the pro-poor litigation that Mr Douglas had embarked on in the former case has long been known to make human rights litigation difficult (although not impossible) in Nigeria. This situation has had significant negative consequences for the poor who tend to lack the resources to robustly exercise and give effect to their agency, and who could not (largely because of the restrictive nature of the standing rules) count on public-spirited individuals or groups (like Mr Douglas) to come to their aid. These strict standing rules tended to discourage what is commonly known as public interest litigation.[73]

This position has, however, changed significantly since 1 December 2009, largely in favour of the poor – at least on paper. On that date, the Fundamental Rights Enforcement Procedure Rules of 2009 (FREPR 2009) were effectively issued by the then Chief Justice of Nigeria to

73 SL Cummings & DL Rhode 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 603; JK Krishnan 'Public interest litigation in comparative context' (2001-2002) 20 *Buffalo Public Interest Law Journal* 19; LG Trubek 'Crossing boundaries: Legal education and the challenges of the "new public interest law"' (2005) 2005 *Wisconsin Law Review* 455; T Abayomi 'Continuities and changes in the development of civil liberties litigation in Nigeria' (1990-1991) 22 *University of Toledo Law Review* 1035; R Atuguba 'Human rights and the limits of public interest law: Ghana's reaction to a messy world phenomenon' (2008) 13 *UCLA Journal of International Law and Foreign Affairs* 97.

replace the older 1979 version of that document. On the conceptual level, the *raison d'être* of the FREPR 2009 is, as Dakas has recently put it, 'enhanced access to justice' in a defined set of fundamental human rights cases 'for all … especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented' (categories which all too often coincide in respect of poor Nigerians).[74] The Rules even go so far as to enjoin courts of law to encourage public interest litigation; to seek to greatly liberalise the formerly narrow scope of *locus standi* or standing requirements in Nigeria, perhaps virtually to the point of allowing the *actio popularis* (but see Order II Rule 1); and to encourage 'expansive and purposeful interpretation in human rights litigation'.[75] What is more, Order II Rule 2 of the FREPR 2009 dispenses with the requirement under the previous 1979 Rules that 'leave' of court be obtained first before a human rights matter is commenced under the Rules.[76] This is to help fast-track human rights cases through the courts. Another improvement introduced by the FREPR 2009 that aims to help this kind of fast-tracking is the charge that the Rules place on the courts to ensure that all documentation in human rights cases is frontloaded, and the related insistence in paragraph 3(g) of the Preamble, that priority in time allocation is given to human rights cases in 'deserving' circumstances.[77] Lastly, the Preamble of the FREPR 2009 also voids the applicability of any statutes of limitation to human rights cases.[78]

All these features of the new FREPR 2009, in our own view, expand the opportunities for poor Nigerians to exercise their agency in human rights cases.[79] This is, therefore, a highly commendable development, one that clearly lends itself to the preliminary conclusion that the Nigerian Supreme Court has in some respects exhibited a pro-poor orientation. How these Rules are to be applied in practice is yet to be tested at the level of the superior courts. However, the government is already expressing its anxiety regarding some specific portions of the new Rules. In one particular case, the government showed displeasure that the new Rules were ever passed, accusing the Chief Justice of Nigeria of exceeding his powers in doing

74 See DCJ Dakas 'Human rights litigation in Nigeria under the Fundamental Rights (Enforcement Procedure) Rules: Novelties and perplexities' in E Azinge & CJ Dakas (eds) *Judicial reform and transformation in Nigeria* (2012) 334.

75 Dakas (n 74 above) 9-11. See also the Preamble, para 3(e) of the 2009 Rules.

76 Dakas 13.

77 Dakas 13-14. See also A Sanni 'Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform' (2011) 11 *African Human Rights Law Journal* 511; E Nwauche 'The Nigerian Fundamental Rights (Enforcement Procedure) Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria' (2010) 10 *African Human Rights Law Journal* 502.

78 Dakas (n 74 above) 11.

79 See OC Okafor 'Poverty, agency and struggle in the human rights praxis of the Supreme Court of Nigeria (1990-2010): A preliminary assessment' in E Azinge & DCJ Dakas (eds) *Judicial reform and transformation in Nigeria* (2012) 311.

so.[80] The real impact of the new Rules will become apparent in the coming years as cases in which the Rules are used find their way to the appellate courts.

What these cases and literature show is that there is much uncertainty regarding the interpretation and application of the standing doctrine in the Nigerian judiciary, as the courts blow hot and cold from time to time. In fact, because oil is very central to the Nigerian economy, the courts initially started from the position of tending to exercise their discretion in favour of the oil corporations.[81] It is not entirely clear how deliberate this culture of doctrinal ambiguity is that makes it difficult to pin the courts down to a clear jurisprudential standard that could aid the prediction of future outcomes. When cases are approached in an unstructured case-by-case manner, it only promotes the shifting rationalisation of court decisions and creates room for the legitimisation of even the most blatant human rights violations. It certainly provides a handy refuge for judges who would want to align their decisions with either the policies of the government of the day and/or the interests of global/local oil-producing capitalism, all at the expense of the human rights of the poor (as is impliedly predicted by Baxi's TREMF theory). Over the years, the courts have decided many of the cases brought to them in ways that suggest that they are reluctant to render judgments that have the potential to disrupt the flow of oil to the international market. This, in the end, is not a wise strategy for, as Amechi argues:[82]

> When the poor cannot access the machinery of justice in order to defend themselves against the polluting or degrading activities of individuals, multinational corporations or state-sponsored companies, it constitutes a disincentive for them to either take action against persons whose actions degrade their property values, or invest in natural resource management.

4.2 Abolishing the main/accessory claims dichotomy

What is true of the impact of *locus standi* requirements on anti-government and oil production-related human rights litigation in Nigeria also holds true, at least substantially, in regard to the effect of the main/accessory binary distinction on all kinds of human rights claims in Nigerian courts. While the reason(s) for the judicial invention of this doctrine are not widely known, it has nevertheless achieved the dubious distinction of placing an undue and overly-technical burden on those who would challenge the violation of their human rights in Nigerian courts.

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80 *Registered Trustees of Socio-Economic Rights and Accountability Project & Others v Attorney-General of the Federation & Another* Unreported Suit FHC/ABJ/640/10.

81 Frynas (n 56 above).

82 EP Amechi 'Poverty, socio-political factors and degradation of the environment in sub-Saharan Africa: The need for a holistic approach to the protection of the environment and realisation of the right to environment' (2009) 5 *Law, Environment and Development Journal* 116.

A cursory look at some of the cases that were discussed earlier in the context of this technical dichotomy shows that the major victims of the rule are workers challenging the wrongful termination of their employment (for instance, the Sea Trucks and Nigeria Social Insurance Trust Fund cases), and students litigating their unlawful suspension from school (for example, the Oluwadare case). In the Nigerian context, these two categories of citizens often find themselves in opposition to either the interests of global/local capitalism and/or the policies of the government. Nigerian workers and their labour movements have for long been in the vanguard of defiance to what they often see as either flawed government policies (such as excessive privatisation and commercialisation) and/or grossly unfair labour practices (excessive staff rationalisations and casualisation).[83] This often brings them into confrontation with global/local capitalism and the government alike, with them tending to be worsted in the encounter, à la the Baxian TREMF theory.[84] For their own part, Nigerian student movements have often protested the reduction of public expenditure on education, an element of the privatisation and commercialisation fundamentalism that has hitherto reigned almost everywhere, and which was all too often stated as a so-called conditionality for economic assistance from the Bretton Woods institutions.[85]

Needless to state, the main/ancillary claim dichotomy that the Supreme Court created and which the Court of Appeal has equally embraced, as the latter must under the doctrine of precedent, has clearly undermined the agency of the generally-poor Nigerian workers and student groups to pursue the vindication of their human rights through litigation. It should therefore be abolished. And, since it was the appellate courts that created and explicated this binary, it is also to them that we must turn to abolish it. Fortunately, this is well within their power.

5 Conclusion

The major question investigated in this article is the degree to which the human rights jurisprudence of the Nigerian appellate courts has expanded, maintained or contracted the opportunity for exercising the 'agency' of the poor to pursue their own liberation and vindication through the courts of law during the period under study. The starting positions were the critical socio-legal insights that the poor do not tend to be passive subjects and often desire to take steps

83 See OC Okafor 'Assessing Baxi's thesis on an emergent trade-related market-friendly human rights paradigm: Recent evidence from Nigerian labour-led struggles' (2007) 1 *Law, Social Justice and Global Development Journal* 1.

84 As above.

85 As above.

to redress violations of their human rights, and that one never ought to assume that human rights jurisprudence is necessarily pro-poor.

After defining, albeit briefly, the understanding of 'agency' that applies to this article, and counteracting the notion that the poor are somehow inherently unable to exercise their agency, it was argued that the ability of the poor to exercise their agency within the context of human rights litigation depends, in large measure, on a number of objective factors. These factors, over which the poor tend to have little control, tend to hinder their ability to mobilise their agency in a way that effectively utilises the courts in support of their human rights causes. The question then was whether the appellate courts in Nigeria have through their jurisprudential activities helped or not helped to overcome the obstacles that hinder the exercise of the agency of the poor in human rights litigation. In this regard, several factors that could shape the capacity of the courts to attain this objective were examined. While some of them were well within the control of the courts themselves, others were not as much within that zone.

In the final analysis, the conclusion is that, while the Nigerian appellate courts are in a position to catalyse and strengthen the poor's agency in the context of human rights litigation, they have been rather ambivalent in this regard. While they have in some cases and respects (such as a more liberalised 'standing' doctrine in human rights cases) demonstrated a certain capacity to articulate jurisprudence that gives the poor the chance of exercising their agency, they have in other respects (such as with regard to the main/ancillary binary) taken the opposite approach. The reasons for this ambivalence can be traced to the pressures and counter-pressures on the courts from the poor and those who press claims on their behalf, on the one hand, and powerful governmental and global/local capitalist forces, on the other.

We have described various factors that could hinder the ability of the poor to exercise their agency in defending their rights. Some of these factors are within judicial control – expanding the standing requirements, abolishing the main/accessory claims distinction, delivering judgments with more clarity, showing that time-wasting tactics that increase the cost of litigation would not be tolerated. Some of these factors are outside the control of the courts, such as certain costs of litigation and dockets burdened by constitutional provisions on jurisdiction. Yet, the poor cannot be entirely priced out of the legal system. There are as such opportunities as well as threats to their effective participation in the legal system. In terms of exercising their agency for redressing human rights violations perpetrated against them, the opportunities for the poor have to be enhanced, while threats ought to be tackled.

In our considered view, this conclusion strengthens a number of pre-existing critical socio-legal human rights insights, including Baxi's theory on the emergence in our time of a TREMF human rights paradigm that emphasises the promotion and protection of the

collective interests of powerful governmental actors and various formations of global capital, at the expense – mostly – of the poor and the relatively excluded; Kennedy's theory that the very way in which human rights have been conceptualised in the dominant liberal legalist idiom (in largely individualistic and oppositional terms) makes the negotiation of (re)distributive arrangements that could favour the poor and the excluded less likely and less tenable; and the general insight of critical human rights scholars that efforts must be made not just to analyse the transformative possibilities of human rights law, but also to map its limits.

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Child marriage in Nigeria: (Il)legal and (un)constitutional?

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Summary

The article refers to a recent article on child marriage in Nigeria, published in this Journal*, as a broad context to examine two issues. The first is the statutory elaboration of the constitutional protection of children, and the second is the suggestion that religious marriages trump children's rights in Nigeria's constitutional jurisprudence. These issues are discussed together in the context of the belief that the absence of statutory protection of children is not fatal to their human rights protection, and that neither an Islamic nor any other religious marriage trumps the rights of children in Nigeria. The article recommends a negotiated consensus in determining the minimum age for child marriage, given Nigeria's plural and religious constituents.*

Key words: *Child marriage; Child Rights Act; Child Rights Law; 1999 Constitution*

1 Introduction

In this article I reflect on two aspects of the article on child marriage in Nigeria by Braimah.[1] My first concern relates to the nature and extent of statutory elaboration of the constitutional protection of children in a dualist and religiously-plural federal country. My second concern is the view that the 1999 Constitution of the Federal Republic of Nigeria (1999 Constitution) recognises religious marriages as trumps in the Nigerian Bill of Rights jurisprudence. In this regard, I specifically address the contention in Braimah's excellent article that section 61 of Part I of the Second Schedule to the 1999 Constitution

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1 TS Braimah 'Child marriage in Northern Nigeria: Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Law Journal* 474.

supports the legality of religious child marriages in Nigeria. The concerns raised above are related and will be discussed together in the context of the belief that the absence of statutory protection of children is not fatal for their human rights protection, and neither an Islamic nor any other religious marriage trumps the rights of children in Nigeria. Methodologically, even though this comment draws generally from Braimah's article to provide some of the context important for my comments, it is not a direct refutation of some of Braimah's conclusions in respect of child marriage. In sum, my comments are a modest contribution to the important debate on the nature and structure of the protection of human rights in Nigeria.

2 Statutory elaboration of human rights: The Child Rights Act and the protection of children in Nigeria

In this part of my comment I address the effect of a constitutional design that expressly or impliedly relies on statutory elaboration as a means of providing content to human rights in Nigeria, where the protection of children is principally through the Child Rights Act (CRA) and Child Rights Law (CRL) promulgated in many of Nigeria's 36 states. These Acts are domestic manifestations of Nigeria's ratification of the UN Convention on the Rights of the Child (CRC)[2] and the African Charter on the Rights and Welfare of the Child (African Children's Charter)[3] pursuant to section 12(1) of the 1999 Constitution, which requires all treaties to be domesticated before they can create domestic legal obligations.[4] The CRA was promulgated by the National Assembly pursuant to its plenary powers to legislate for the federal capital territory Abuja,[5] but not for the Federation, since children are part of the residual list in the Nigerian Constitution[6] and, therefore, within the legislative preserve of states in

2 Nigeria signed the CRC in January 1990 and ratified it on 16 April 1991.

3 Ratified by Nigeria on 23 July 2001.

4 See sec 12(1) of the 1999 Constitution. See also the cases of *Registered Trustees of the National Association of Community Health Practitioners of Nigeria & Others v Medical and Health Workers Union of Nigeria* [2008] 2 NWLR (Pt 1072) 575; *Fawehinmi v Abacha* [2000] 6 NWLR (Pt 660) 228. See also AO Enabulele 'Implementation of treaties in Nigeria and the status question: Whither Nigerian courts' (2009) 17 *African Journal of International and Comparative Law* 326; CA Nwapi 'International treaties in Nigerian and Canadian courts' (2011) 19 *African Journal of International and Comparative Law* 38; A Oyebode *International law and politics: An African perspective* (2003) 9.

5 See sec 299 of the 1999 Constitution.

6 Nigerian constitutional law theory recognises three lists sharing power between the federal and state governments. Two of these lists, the exclusive and concurrent lists, are recognised in the 1999 Constitution, while the third list, the residual list, is consequential. See *Attorney-General Abia State & 35 Others v Attorney-General of the Federation* (2002) 3 SC 106.

the Nigerian Federation in accordance with sections 12(2) and (3) of the 1999 Constitution.[7] Domestic legislation on matters such as children (that are not on the exclusive legislative list)[8] requires the consent of the majority of Houses of Assembly of the states of the Nigerian Federation. Even though it became necessary after the National Assembly had legislated the CRA that each of the 36 states do the same, it was thought that the CRA should be a model since it closely followed the CRC. It is important, however, to point out that no state of the Federation is bound to adopt the CRA,[9] and those that have done so have done it at their discretion. Accordingly, a unique challenge exists in the domestication of treaties in Nigeria where there is a divergence in federal and state legislation. While Nigeria's treaty commitments[10] may be in issue in such a case, divergent state legislation is constitutional and binding. Even though most CRL adopts the CRA in respect of the definition of a child, there are differences, especially that of the Islamic northern states of the Federation where, instead of the age of 18 stipulated by the CRA,[11] the physical and psychological condition of the child – evident in the requirement of 'puberty' – is the threshold in determining the capacity to marry.[12]

It is clear from the foregoing that the protection of children in Nigeria appears entirely statutory, and it may be easy to conclude that the Bill of Rights of the 1999 Constitution does not specifically protect

7 See secs 12(2) & (3) of the 1999 Constitution, which provide: '(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty. (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.'

8 See sec 4(2) of the 1999 Constitution.

9 The position would have been different if the national domestication legislation were within the legislative competence of the federal government. Thus, in the case of the domestication of the African Charter through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act ch A9 Laws of the Federation of Nigeria 2004 (Nigerian African Charter Act), no state legislation would be permissible and, if made, could be impugned on the ground of conflict with the national legislation. See V Ayeni 'The impact of the African Charter and Women's Protocol in Nigeria' in Centre for Human Rights *The impact of the African Charter and Women's Protocol in selected African states* (2012) 121.

10 See *Abacha* (n 4 above).

11 It is important to note that three provisions of the CRL deal directly with child marriages. While sec 21 provides that no person under the age of 18 years is capable of contracting a valid marriage and, accordingly, a marriage so contracted is null and void and of no effect whatsoever, sec 22(1) provides that no parent, guardian or any other person shall betroth a child to any person. Sec 22(2) provides that a betrothal in contravention of subsec (1) of this section is null and void. Sec 23 criminalises aspects of child marriage and provides that a person who marries a child or to whom a child is betrothed or who promotes the marriage of a child or who betroths a child, commits an offence and is liable on conviction to a fine or imprisonment for a term of five years or to both such fine and imprisonment.

12 See, eg, S Sawyer et al 'Adolescence: A foundation for future health' (2012) 379 *Lancet* 1630.

children except to the extent that they may be described as human beings. This erroneous contention perhaps is fuelled by the provisions of section 17(3)(f) of the non-justiciable chapter two of the 1999 Constitution (Fundamental Objectives and Directive Principles of State Policy) which directs the policy of the Nigerian state towards ensuring that children, young persons and the aged are protected from any exploitation whatsoever, and against moral and material neglect. The idea that the protection of children is exclusively statutory cannot be supported on any juridical ground. The text relating to protected rights in Nigeria's Bill of Rights begins with the word 'any person', consistent with the fact that all persons in Nigeria, including children, are beneficiaries of the rights contained therein. That children are not specifically provided for may have been an honest omission, but in no way means that they have no protection in the states that have either not promulgated the CRA, or have CRL that is inconsistent with Nigeria's treaty obligations. There is no special mention of 'women' in the Nigerian Bill of Rights, yet it would appear absurd to say that only men are entitled to the rights therein. Even though the 1999 Constitution describes the subjects of its protection as 'individual' in section 34 and 'citizen' in sections 41 and 42, the rest of the Bill of Rights uses the term 'person' in such a way that the words 'individual' and 'person' mean the same thing. It is obvious that children are contemplated as 'individuals' and 'persons'. It is also important to note that the 1999 Constitution does not define 'person' and 'individual' and uses the term 'citizen' for the purposes of chapter three as a category of 'person'. For example, section 25(1) in chapter three provides:

> The following persons are citizens of Nigeria by birth, namely (a) every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria: Provided that a person shall not become a citizen of Nigeria by virtue of this section if neither of his parents nor any of his grandparents was born in Nigeria; (b) every person born in Nigeria after the date of independence either of whose parents or any of whose grandparents is a citizen of Nigeria; and (c) every person born outside Nigeria either of whose parents is a citizen of Nigeria.

From this definition it is clear that children are persons first, and citizens if they meet the citizenship requirements of the 1999 Constitution. To imagine, therefore, that children are not protected by the 1999 Constitution would fly against all canons of constitutional interpretation and would pander to technicalities. As the Nigerian Supreme Court has consistently stressed, constitutional interpretation should strive to do away with technicalities and seek substantial justice.[13]

13 See *Attorney-General of Bendel State v Attorney-General of the Federation* (1982) 3 NCLR 1; *The State v Gwonto* (1983) 1 SCNLR 142; and *Aliu Bello v Attorney-General of Oyo State* (1986) 12 SC 1.

It is plausible that the idea of statutory protection of children's rights is an unintended outcome of the laudable advocacy of the United Nations Children's Fund (UNICEF). For example, in its campaign literature, UNICEF states that '[i]ssues of child rights protection are on the residual list of the Nigerian Constitution, giving states exclusive responsibility and jurisdiction to make laws'.[14] The use of the phrase 'exclusive' conveys the meaning that children's rights are at the mercy of states, which is not entirely correct.

Another report echoes this sentiment:[15]

> To date, only about 20 among the 36 states in Nigeria have enacted corresponding state laws of the Child Rights Act via the state legislative arms of government. As such, the protection of children's rights (at least by law) as envisaged by the regime of the CRC and the ACRWC is not guaranteed across the board all over Nigeria since the governments of the states where the Child Rights Act has not been enacted or translated into law, are under no obligation to fulfil the protection of those rights.

Again, it is clear from the above comment that the protection of children is predicated on the statutory scheme and neglects the Bill of Rights. It is important to draw attention to other statutory schemes prohibiting conduct that is potentially implicated in child marriage and, therefore, important in states without CRL. Thus, section 361 of Nigeria's Criminal Code[16] prohibits, on the pain of a seven-year term of imprisonment, the taking away or detention of a female of any age against her will with the intent to marry her or have sexual intercourse with her or to encourage another to marry her or have sexual intercourse with her. There is also the possibility that child marriage could result in the offence of rape, especially where there is no consent or where it is doubtful whether a child can be considered capable of consenting to marriage, thereby destroying the immunity granted to a husband by Nigerian law.[17] In addition, the Penal Code applicable in Northern Nigeria and the Criminal Code set the ages of 14[18] and 13[19] respectively as the age that a child is incapable of giving consent and, therefore, a child marriage involving a girl of this age could amount to a crime. Furthermore, the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 also criminalises sexual intercourse with a person under 18 years and

14 See UNICEF 'Nigeria Fact Sheet: Child rights legislation in Nigeria' http://www.unicef.org/nigeria/Child_rights_legislation_in_Nigeria.pdf (accessed 3 February 2015).

15 See The Africa Child Policy Forum 'The harmonisation of children's laws in West and Central Africa' 84, http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa%/Publications/supplementary-acpf-harmonisation-cb-wc_en.pdf (accessed 12 September 2015). See also CLEEN 'Rights of the child in Nigeria: Report on the implementation of the Convention on the Rights of the Child' http://www.cleen.org/nigeria_ngo_report_OMCT.pdf (accessed 3 February 2015.)

16 Criminal Code Act Cap C34 Laws of the Federation of Nigeria, 2004.

17 See secs 6 & 282(2) of the Criminal Code.

18 Sec 282(1) Penal Code.

19 Sec 218 Criminal Code.

could, therefore, be the basis of criminal prosecution of persons involved in child marriages.

One of the fundamental constructs of the Nigerian Constitution is its declaration in section 1(1) that '[t]his Constitution is supreme and its provisions shall have binding force on authorities and persons throughout the Federal Republic of Nigeria'. Section 1(3) further provides that '[i]f any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void'. Nigerian courts have interpreted this provision in a number of cases, including *Attorney-General of Lagos State v Attorney-General of the Federation*[20] and *Inspector-General of Police v All Nigeria Peoples Party & Others*[21] in a literal sense, and have struck down state and federal legislation that breaches the Nigerian Constitution.[22] The supremacy of the Nigerian Constitution subjects all statutes, including the CRA and CRL, to the tenor of its provisions generally, and to the rights contained therein. For example, a Nigerian court would be within its rights to review a contention that all or some parts of a CRL or a CRL conflict with the Bill of Rights. Rights available to children in the Bill of Rights are also applicable in states that have no CRL. It is therefore difficult to imagine that children have no protection in states that have no CRL. Their protection is contained in the Bill of Rights. It is, therefore, important to briefly review the rights which potentially protect children from child marriage against the background that all rights in the Bill of Rights potentially protect children. First, section 34 of the 1999 Constitution provides that every individual is entitled to respect for the dignity of his person and no person shall be subjected to torture or to inhuman or degrading treatment. Second, section 35(1) protects the personal liberty of the girl child. Third, section 37 protects the right to private and family life of the girl child, while section 40 protects the right to peaceful assembly and association of the girl child. Given the widespread evidence of the effects of child marriage, there is no doubt that a Nigerian court would readily find that child marriage is contrary to the right to freedom from inhuman and degrading treatment. Apart from the Nigerian Bill of Rights, article 18(3) of the African Charter on Human and Peoples' Rights (African Charter) requires state parties such as Nigeria to ensure the protection of the rights of the child as stipulated in international declarations and conventions. It is important to remember that Nigerian courts have held that the Nigerian African Charter Act is

20 (2003) 12 NWLR (Pt 833) 1.
21 (2007) AHRLR 179 (NgCA 2007).
22 See *INEC v Musa* (2003) 3 NWLR (Pt 806) 72 and *Attorney-General Abia State v Attorney-General of the Federation* (2006) 16 NWLR (Pt 1005) 265.

superior to national legislation.[23] There is therefore no juridical basis why the Nigerian African Charter Act cannot be used to protect children in Nigeria. The dearth of such rights-based litigation is disturbing and surprisingly absent in the articulation of a protective mandate for children in Nigeria. Perhaps the reason may be found in the discussion in the next section, which seeks to demonstrate that Islamic and customary marriages are subject to the 1999 Constitution. It may well be that a contrary opinion, such as that of Braimah, is the reason for the reluctance to deploy relevant rights to protect the Nigerian child.

Having established that the Bill of Rights applies to all parts of Nigeria and to all persons, including children, it is important to dwell on the nature and extent of this protection in light of the design of the Bill of Rights as articulated by Nigerian courts.

3 Religious marriages as trumps

In this section I address the suggestion that, by virtue of section 61 of Part 1 of the Second Schedule to the 1999 Constitution,[24] Islamic and customary marriages are not subject to any restrictions. Braimah, for example, contends that '[t]here is a strong argument to be made that child marriage is not illegal in Nigeria under Second Schedule Part 1 item 61 of the Nigerian Constitution'[25] which, as part of the exclusive legislative list, endows plenary powers on the formation, annulment and dissolution of Islamic and customary marriages on states of the Federation because such marriages become part of the residual legislative list. He continues:[26]

> When a person marries a child under Islamic law in Northern Nigeria and is consequently in contravention of the Child Rights Act, such a person cannot be prosecuted because the federal government would be interfering with an Islamic marriage and would be in violation of Part 1 Section 61 of the 1999 Constitution. Therefore, in relation to child marriage, Part 1 Section 61 of the 1999 Constitution renders the Child Rights Act useless, as the 1999 Constitution serves as the supreme law of the land in Nigeria, overriding all other legislation.

It would appear that while he is correct that the CRA may not enable a prosecution for child marriage, it is not because of Part 1 section 61 of the 1999 Constitution, but largely – and this relates to criminal

23 See *Oshevire v British Caledonian Airways Ltd* (1990) 7 NWLR (Pt 163) 607 and *UAC (NIG) Lyd v Global Transport SA* (1996) 5 NWLR (Pt 448) 291. See OJ Ojigho 'Evaluating the application, implementation and enforcement of international human rights instruments and norms in Nigeria' (2005) 31 *Commonwealth Law Bulletin* 109.

24 Sec 61: 'The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto ...'

25 Braimah (n 1 above) 485.

26 As above.

prosecution – because there is neither a CRL nor other legislation that criminalises child marriage in the manner of the CRA. For example, section 15(1) of the Jigawa State CRL 2006 prohibits child marriage but defines a child in section 2(1) of that Law as a person below the age of puberty.[27] Accordingly, it would be correct to declare that Jigawa State criminalises child marriage to the extent that a girl has not reached puberty. This is possible because puberty is defined in section 2 of the Jigawa Law as the age at which a person is physically and physiologically capable of consummating a marriage. In addition, a court is to determine – according to the provisions of section 15(1) – the puberty of the child bride according to the circumstances of each case.

The lack of appropriate legislation immunises Islamic or customary marriages from the Bill of Rights because Part 1 of the Second Schedule to the 1999 Constitution merely determines how constituent parts of a federal Nigeria share power.[28] Such exercise of power is subject to other parts of the Constitution, including the Bill of Rights, by reason of the supremacy clause of the 1999 Constitution. It is important to remember that the radical legislative changes that introduced Islamic criminal law in the northern states of Nigeria acknowledged the supremacy of the 1999 Constitution.[29] Accordingly, CRL is subject to the Bill of Rights in a manner in which the Bill of Rights could be a sword and shield in respect of prosecutions for child marriage. CRL that permits child marriage (understood in the CRA form or elsewhere) could be impugned by the right to freedom from inhuman and degrading treatment, the right to personal liberty, the right to family and private life and the right to freedom of association, and struck down as unconstitutional. On the other hand, it is possible that the Bill of Rights could be used as a shield in the sense that relevant rights, such as the right to freedom of religion protected by section 38 of the 1999 Constitution, and the right to private and family life, become the basis of a defence to such criminal prosecution. As a shield, the first step is to acknowledge that Islamic and customary marriages are subject to the relevant human rights and that legislation such as the CRL could be struck down because of breaches of parts of the Bill of Rights and, as such, may be unconstitutional.

The prosecution of an Islamic or customary marriage alleged to be a child marriage is, in effect, a clash between the right to freedom of religion, possibly in favour of the husband, and other rights such as the right to personal liberty and the right to freedom from inhuman

27 See, eg, sec 27 of the CRL 2010 of Niger State (a state in Northern Nigeria), which provides that where there is a conflict involving questions of Islamic law with any of the provisions of the CRL, Islamic personal law shall prevail.

28 See BO Nwabueze *Federalism in Nigeria under the Presidential Constitution* (1983) 39.

29 See generally P Ostien et al (eds) *Comparative perspectives on Shari'ah in Nigeria* (2005).

and degrading treatment. The marriage of a senator, Yarima, to a 13 year-old Egyptian girl raised the question whether the right to freedom of religion trumps the CRA. In an apparent reaction to a request by Nigeria's National Human Rights Commission for intervention by the Senate and the House of Representatives (the National Assembly), the Supreme Council for Shari'a in Nigeria (Council) instituted an action against the federal government and National Assembly before a Federal High Court in Abuja over Senator Yarima's controversial marriage.[30] The Council also sought the nullification of some aspects of the CRA 2003, including section 21 (setting the minimum age of marriage at 18 years and declaring any such marriage null and void), which she alleged was not consistent with Islam and the practice of Shari'a, as well as Yarima's right to a private and family life, which she argued could not be subjected to invasion, intrusion or interference by any person, group of persons or institutions. In a 13-paragraph affidavit in support of the suit, the Council claimed that the Holy Quran and the traditions of the Holy Prophet Muhammad were in support of Yarima's marriage to the girl as his fourth wife. As stated above and contextualised by the Yarima incident, the human rights pleaded in this case in defence of child marriages suggest that a child is deprived of these rights. Since a child bride is entitled to the same rights as her husband, the criminal prosecution of an Islamic or customary child marriage appears to be a classic case of a clash of human rights.

The resolution of this clash is not an easy one, but would surely involve a proportionality analysis where Nigerian courts weigh the competing interests of the child and husband. It is alleged, as in the Yarima incident, that the child has no rights that trigger the derogation of rights in terms of section 45 of the 1999 Constitution. The argument may be cast in this way: Since section 45 of the 1999 Constitution provides that nothing in the right to private and family life (section 37), the right to freedom of thought, conscience and religion (section 38), the right to freedom of expression and press (section 39), the right to peaceful assembly and association (section 40) and the right to freedom of movement (section 41) shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interests of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedoms of other persons, it may be alleged by the girl child that the CRA and CRL qualify as such law. The husband, of course, could argue, as in the Yarima incident, that this legislation does not reach the threshold to limit the right to freedom of religion as well as the right to private and family life. As stated above, a proportional or derogation analysis clearly shows that Islamic

30 See K Nwezeh 'Yarima-Shari'a Council drags FG, National Assembly to court' 4 June 2010, http://www.allafrica.com/stories/201006071572.html (accessed 4 March 2015); A Ukwuoma *Child marriage in Nigeria: The health hazards and socio-legal implications* (2014) 51.

marriages are not trumps and absolutes. The substance of Islamic and customary marriages depends on rights which, in their interaction with other rights, may be found to be unconstitutional. A while ago, the Nigerian Supreme Court determined the limited scope of the right to freedom of religion and the right to privacy in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*.[31] The Court held:

> The right of freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief. The limits of these freedoms in all cases are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy.

There is, therefore, sufficient juridical basis to conclude that the rights to freedom of religion and to private and family life do not trump the CRA or CRL in all instances. The circumstances of each case will determine whether this is the case. It is therefore evident that in states that have not enacted child rights legislation, an Islamic marriage could still be unconstitutional based on the arguments set out above.

Even though religious marriages are not trumps, they call for a nuanced consideration of their impact and, in the context of this article, require a determination of what qualifies as a child marriage, which is relevant in determining the extent to which the right to freedom of religion justifies or negates such a marriage. The use of 'puberty' as a threshold for child marriage invites a consideration of whether biological characteristics[32] are as relevant as age in determining the capacity to marry.[33] Comparative perspectives from India indicate that 'puberty' has been used as a threshold in determining when a girl child is fit for marriage. Accordingly, it may be submitted that age could be a significant but not exclusive factor in determining the capacity to marry. It appears plausible that the age of marriage could be negotiated in Nigeria. The importance of introducing some flexibility in the age a child may be married is evident in constitutional and statutory provisions that recognise a lower CRA-mandated age in Nigeria. First, section 29(4)(b) of the 1999 Constitution provides that '[a]ny woman who is married shall be deemed to be of full age'.[34]

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31 (2001) 7 NWLR (Pt 711) 206.

32 See *Labinjoh v Abake* 5 NLR 3 and *Folata v Dawomo* (1970) NWLR 105, where the courts held that contractual capacity of a child in Islamic law depends on physical capacity and maturity.

33 See MA Ambali *The practice of Muslim family law in Nigeria* (2003) 155.

34 It should be noted that sec 29(4)(b) concerns the renunciation of citizenship. See also A Onuora-Oguno 'Constitutionalising the violation of the girl child in Nigeria: Exploring constitutional safeguards and pitfalls' 5 August 2013 Oxford Human Rights Hub http://www.ohrh.law.ox.ac.uk/constitutionalising-the-violation-of- the-girl-child-in-nigeria-exploring-constitutional-safeguards-and-pitfalls/ (accessed 4 March 2015).

Second, the CRL of Akwa Ibom State in the south of Nigeria defines a child as a person under 16 years of age.[35] In respect of Muslim Nigeria, it would appear wrong to describe Muslims as a monolithic community agreed on child marriages of girls under 18. To do that is to ignore the realities of the struggle within religious communities to overcome practices such as child marriages that would conform to orthodoxy. It is also to ignore the fact that the threshold of puberty offers a real opportunity to engage Muslim scholarship and hierarchy in, for example, finding a threshold. It could be suggested, for example, that a girl below 15 would not pass this threshold. Accordingly, the marriage of a girl between the ages of 15 and 18 years could be valid on the understanding that the girl is mature and understands the consequence of her actions. Comparative perspectives from India[36] reveal that the threshold of puberty is the age of 15, and a marriage at that age is voidable[37] until the child is 18,[38] which is the age of consent. This is also the position of Islamic law in India.[39] An-Na'im has correctly argued that many interpretations exist in Islamic communities and that an engagement with progressive forces in these societies would achieve an interpretation of Islam that recognises the dignity of all persons[40] which, of course, includes children.

Third, the best interests of the child, recognised in the CRA and also in child rights legislation by the Nigerian judiciary in *Williams v Williams*[41] and *Odogwu v Odogwu*,[42] are also relevant in determining an appropriate minimum age for child marriage. In *Odogwu*,[43] the Nigerian Supreme Court recognised the happiness and psychological development of a child as crucial in determining custody. It seems appropriate that the same considerations also apply in cases of child marriage. It is entirely possible that a child between the ages of 15 and 18 years could be happily married.

The importance of a negotiated national minimum age for child marriage in Nigeria cannot be overstated, given the widespread

35 See 'Akwa Ibom State Child Rights Law' http://www.aksg online.com.ws)33.alentus.com/child_rights_law.aspx (accessed 3 March 2015).

36 See, eg, *Idris v State of Bihar* 1980 Crl LJ 764; *Begum v State of Delhi* WP (CRL) 446/ 2012.

37 See sec 3(1) of the Prohibition of Child Marriage Act 2006, which declares a child marriage as voidable at the instance of the child.

38 Sec 2(a) of the Prohibition of Child Marriage Act 2006 declares a child as one who has not attained the age of 18.

39 See also *Furquan v State* WP(CRL) 1025/2012.

40 See, eg, A An-Na'im 'Human rights in the Muslim world: Socio-political conditions and scriptural imperatives' (1990) 3 *Harvard Human Rights Journal* 13. See also I Ogunniran 'Child Rights Act versus Shari'a law in Nigeria: Issues, challenges and way forward' (2010) 30 *Children's Legal Rights Journal* 62-80.

41 (1987) 7 NWLR (Pt 252) 187.

42 (1992) 2 NWLR (Pt 252) 539.

43 *Odogwu* (n 42 above) 589-560.

recognition of the ills of child marriage.[44] It is necessary to work from and within Nigerian Muslim communities to agree on a minimum age for child marriage.

4 Concluding remarks

The question of child marriage in Nigeria is intricately connected with the nature and extent of the protection of human rights in a multi-cultural and multi-religious constitutional democracy torn between different perspectives and ends. One perspective protects certain rights of human beings, including children, because they are human beings in the strongest liberal tradition, while the other perspective promotes the norms of the community that men, women and children are born into – religious or cultural communities – that often subordinate the interests of its members to the norms of the community. Child marriages in Nigeria illustrate how the material base of society affects the quality of protection that the recognition of human rights brings. It illustrates how the social and legal complement each other in the protection of human rights. Resolving Nigeria's religious pluralism within its socio-economic context is a challenge that requires negotiations and reasoned consensus that would not thrive in vilifying the 'other'. The struggle to ensure that child marriages are eradicated and/or curtailed would be significantly enhanced by an engagement with all communities to raise awareness of the social hazards of child marriages, thereby informing normative consensus on the appropriate minimum age for the marriage of a girl child.

44 These ills are discussed in I Ogunniran 'Child bride and child sex: Combating child marriages in Nigeria' (2011) 2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 85.

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Adolescent girls' access to contraceptive information and services: An analysis of legislation and policies, and their realisation, in Nigeria and South Africa

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Summary

Adolescents' early sexual debut contributes to their huge burden of sexual and reproductive ill-health, especially in sub-Saharan Africa. Reports continually reveal that female adolescents, in particular, constitute a large portion of the 34 million people living with HIV worldwide. Other consequences associated with early adolescent sexuality include unplanned pregnancies, unsafe abortions and sexually-transmitted infections. In light of this, the article analyses approaches adopted by Nigeria and South Africa in fulfilling their international law obligations to respect, protect and fulfil adolescent girls' right to access contraceptive information and services, specifically, in their domestic legislation, policy documents and court decisions. Sexuality education is compared, as well as actual access. There is extensive evidence of the measures put in place to ensure adolescent girls' access to contraceptive information and services in Nigeria and South Africa. Although the level and extent of the barriers faced by adolescent girls when accessing contraceptive services

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and information vary, the consequences are similar: We find that Nigerian and South African adolescent girls, generally, lack access to contraceptive information and services. Despite measures to ensure adolescent girls' access to contraceptive information and services in Nigeria and South Africa, several gaps remain.

Key words: *Adolescent girls; access to health care; contraceptive information and services; Nigeria; South Africa; sexuality education*

1 Introduction

At present, 88 per cent of the world's adolescent population resides in developing countries,[1] many of them in sub-Saharan Africa where one in every five inhabitants is an adolescent.[2] Such a large adolescent population presents an opportunity for economic development and is a foundation for remodelling the future of countries in the African region.[3]

Adolescence presents an opportunity to establish a foundation for a healthy and productive adulthood, but it is also a period of risk for sexual and reproductive health (SRH) problems with immediate or future consequences.[4] Statistics indicates that adolescents start engaging in intimate sexual relations at a progressively younger age,[5] and this behaviour has been linked to an increase in adolescent pregnancies and sexually-transmitted infections (STIs).[6] Consequently, it is of vital importance that adolescents gain access to comprehensive reproductive health care, including contraceptive services and information, in order to reduce the threats occasioned by the expression of their sexuality.

Regrettably, access to comprehensive contraceptive services and information continues to elude adolescents in sub-Saharan Africa, and

1 UNICEF *Demographic trends for adolescents: Ten key facts* http://www.unicef.org/sowc2011/pdfs/Demographic-Trends.pdf (accessed 31 March 2014).

2 As above; RJ Cook et al *Reproductive health and human rights, integrating medicine, ethics and law* (2003) 276.

3 Population Reference Bureau 'The time is now: Invest in sexual and reproductive health for young people' (2012) http://www.prb.org/pdf12/engage-youth-key-messages.pdf (accessed 31 March 2013); EY Jimenez et al *World Development Report 2007: Development and the next generation* (2006) 26-28.

4 WHO *Strengthening the health sector response to adolescent health and development* (2010) 2.

5 AS Madkour et al 'Early adolescent sexual initiation and physical/psychological symptoms: A comparative analysis of five nations' (2010) 39 *Journal of Youth and Adolescence* 1213; BO Nwankwo & EA Nwoke EA 'Risky sexual behaviours among adolescents in Owerri municipal: Predictors of unmet family health needs' (2009) 13 *African Journal of Reproductive Health* 136.

6 Nwankwo & Nwoke (n 5 above) 136; RS French & FM Cowan 'Contraception, best practice and research' (2009) 23 *Clinical Obstetrics and Gynecology* 234.

it is adolescent girls, in particular, who bear the burden of sexual and reproductive ill health.[7] A considerable number of new HIV infections occur in young African women.[8] In addition, while the occurrence of unintended pregnancies among adolescents is a common public health problem worldwide,[9] the situation is particularly grave in sub-Saharan Africa, where teenage fertility rates in 2013 amounted to a staggering 101 per 1 000 adolescents. Early pregnancy is a major cause of morbidity and mortality among adolescent girls between the ages of 15 and 19 in Africa.[10] Also, female adolescents account for over 14 per cent of unsafe abortions that occur yearly as a result of unwanted pregnancies.[11]

Because of this dire situation, numerous human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[12] which guarantee adolescents' right to health care,[13] and other consensus documents, led by the ICPD Programme of Action,[14] have been promulgated. They all support the idea that a successful transition into adulthood requires the realisation of access to adolescent-friendly health services and access to health-promoting information on sexual and reproductive matters.[15]

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7 E Durojaye 'Access to contraception for adolescents in Africa: A human rights challenge' (2011) 44 *Comparative and International Law Journal of Southern Africa* 2.

8 UNAIDS *Special report: How Africa turned AIDS around* (2013) 6-7; UNAIDS *World AIDS Day report* (2011) 10.

9 S Ramos 'Interventions for preventing unintended pregnancies among adolescents' (2011) *WHO Reproductive Health Library Commentary* (2011) http://apps.who.int/rhl/adolescent/cd005215_ramoss_com/en/index.html (accessed 31 March 2014).

10 As above; Population Reference Bureau *The world youth: 2013 data sheet* (2013) 11.

11 RJ Cook et al 'Respecting adolescents' confidentiality and reproductive and sexual choices' (2007) 98 *International Journal of Gynecology and Obstetrics* 183.

12 In this article we do not present an overview of the guarantees of adolescents' right to health care in each international and regional human rights instrument. For such an overview, see Durojaye (n 7 above); OA Savage-Oyekunle & A Nienaber 'Adolescent girls' access to contraceptive information and services in South Africa: What is going wrong?' (2015) *Journal of Contemporary Roman-Dutch Law* (in press); and OA Savage-Oyekunle 'Female adolescents' reproductive health rights: Access to contraceptive information and services in Nigeria and South Africa' unpublished LLD thesis, University of Pretoria, 2014 ch 2.

13 Cook et al (n 11 above).

14 International Conference on Population and Development Programme of Action 1994 http://www.unfpa.org/public/publications/pid/1973 (accessed 31 March 2014).

15 SJ Jejeebhoy et al 'Meeting the commitments of the ICPD Programme of Action to young people' (2013) 21 *Reproductive Health Matters* 18.

In a large number of countries, also on the African continent, human rights guarantees regarding adolescents' right to health care have been incorporated in domestic legislation. With this in mind, the article reports on a study which compares the approaches adopted by Nigeria and South Africa in fulfilling their international law obligations to respect, protect and fulfil adolescent girls' rights of access to contraceptive and reproductive health care and, specifically, the steps taken by each country in their domestic legislation to realise adolescent girls' access to contraceptive information and services.

Nigeria and South Africa were chosen for a comparative analysis for a number of reasons, in addition to the two authors' familiarity with the two countries' legal systems. Reasons for focusing on Nigeria and South Africa include the following:

(a) Nigeria and South Africa both display societal factors reflecting the subordination of women due to cultural factors which place men as 'natural' superiors over women.
(b) The two countries are signatories to various international human rights instruments and declarations which provide for the recognition and protection of women's reproductive health care rights.
(c) Although the two countries exhibit different legal traditions and histories, both are governed by an array of domestic legislation aimed at addressing their populations' health rights. Legislation granting the right to reproductive health care to women and adolescent girls is clearly defined in South Africa. In the case of Nigeria, it is not. Reasons for differences between the two countries in this regard may be enlightening.
(d) Both countries are regarded as sub-regional economic powers on the African continent. The ability of adolescents to effectively access health care information and services has important implications for the two countries' economic development.

Below we examine the national legislation of Nigeria and South Africa regarding adolescent girls' rights to independently access and consent to confidential contraceptive information and services, after which we survey the two countries' approaches to teaching sexuality education and the realisation of adolescent girls' access to sexual and reproductive health care services. In other words, the focus here does not extend to a discussion of the international normative framework. In so far as it is integrated into the domestic legal regime, international law, however, remains relevant. Next, we compare the role played by the courts in both countries in ensuring government compliance with the duty to respect, protect and fulfil the right to health care of adolescent girls so as to draw conclusions in the final section of the article.

2 National legislation of Nigeria and South Africa ensuring adolescent girls' access to contraceptive information and services

Several similarities, but also differences, exist in the legal frameworks adopted by Nigeria and South Africa in protecting the human rights of their citizens, as well as with regard to the rights of adolescent girls to contraceptive information and services. Although both Nigeria and South Africa are signatories and parties[16] to human rights treaties and declarations affirming the protection of the right to health and sexual and reproductive health, they differ in their methods of interpretation, protection, enforcement and in the limitations placed upon the enjoyment of these rights. The central focus in this section, therefore, is on highlighting these similarities and differences in relation to the findings of the article.

Both countries have legislation and policies in place to protect children's rights and both countries have domesticated international and regional human rights instruments guaranteeing the rights of children. In addition to the Child Rights Act (in Nigeria) and the Children's Act (in South Africa), which domesticate provisions of the CRC and African Children's Charter, Nigeria and South Africa have other statutes and policies that guarantee and protect female adolescents' SRH rights, including their right to access contraceptive services and information.[17]

However, despite the above similarity, it is important to point out that the level of commitment invested in ensuring female adolescents' protection and access to contraceptive information and services differs in the two countries. An example to support this assertion relates to the fact that, whereas South Africa recently adopted the National Contraception and Fertility Planning Policy and Service Delivery Guidelines to establish a system that is constantly monitoring the implementation of its policies in order to correct shortcomings,[18] in the case of Nigeria the opposite is the case, as the current National

16 It is necessary to highlight the fact that South Africa only ratified the ICESCR in January 2015. For an in-depth comparative study of the relevant treaties and their incorporation in the two countries, see OA Savage-Oyekunle & A Nienaber 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria' (2015) 48 *Comparative and International Law Journal of Southern Africa* 98.

17 While Nigeria has in place the National Health Policy 2004, the National Reproductive Health Policy 2001, National Policy on Health and Development of Adolescents and Young People 2007, and the National Youth Policy 2009, among others, South Africa has the National Health Act, the Choice on Termination of Pregnancy Act, the Integrated School Health Policy and the National Contraception and Fertility Planning and Service Delivery Guideline 2012, among others.

18 Para 6.1.2 National Contraception and Fertility Planning Policy and Service Delivery Guidelines http://www.doh.gov.za/docs/policy/2013/contraception_fertility_planning.pdf (accessed 3 May 2013).

Reproductive Health Policy, which replaced the Maternal and Child Health Policy, was adopted as long ago as 2001 with no further amendment made to it to date.[19] In Nigeria there is no recent policy on SRH, especially for adolescents in the country: The present National Policy on Health and Development of Adolescents and Young People was adopted in 2007.

In Nigeria there are no genuine efforts to co-ordinate the implementation of existing policies or effectively monitor their performance. The above assertion is based on the reasoning that the existence of frequent monitoring mechanisms would reveal defects in need of review in the existing policies, resulting in action for their correction.[20]

South Africa's recently-adopted Integrated School Health Policy, which enables adolescents to access SRH care services and information in the school context, is a positive step. This is a major area of difference in the approaches adopted by Nigeria and South Africa in fulfilling the rights of female adolescents to access contraceptive information and services: Nigeria presently does not have a programme of this kind. In addition, South Africa has succeeded in passing a National Health Act which has been in operation since 2005, whereas Nigeria's proposed National Health Bill has been a source of serious contention among various health groups since 2008 when moves towards its adoption were initiated.[21]

Finally, unlike the African Youth Charter and South Africa's National Youth Policy,[22] which extend the scope of protection offered in terms of age to between the ages of 14 and 35 years and which contain various youth-oriented provisions, including those relating to the management of SRH issues, the Nigerian Youth Policy actually narrowed the scope of adolescents and youths protected to those between the ages of 18 and 35 years.[23] This move not only contravenes age stipulations contained in the African Youth Charter, but also adopts an unrealistic attitude towards adolescent sexuality. Nigeria needs to correct its attitude in relation to the issues raised.

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19 The Maternal and Child Health Policy was replaced by the National Reproductive Health Policy due to a paradigm shift which sought to protect reproductive health, generally, rather than only maternal, child health and family planning.

20 NI Aniekwu *The development of reproductive health laws: Considerations for the Nigerian legal system* (2006) 1; NI Aniekwu *Engendering sexuality: Human rights issues in reproductive and sexual health* (2006) 38.

21 S Ayo-Aderele *Rid proposed Health Bill of contentious items – CSOs* (2013) http://www.punchng.com/health/rid-proposed-health-bill-of-contentious-items-csos/ (accessed 21 March 2013).

22 National Youth Policy 2009-2014 http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/YouthPublications/NationalYouthPolicyPDF/NYP.pdf (accessed 6 April 2013).

23 Para 1.3 Nigerian Youth Policy (n 22 above).

3 Comparing approaches to sexuality education in Nigeria and South Africa

Both Nigeria and South Africa currently have sexuality education programmes which address SRH information to adolescents: the Family Life and HIV Education (FLHE) curriculum in Nigeria and the Life Skills and HIV/AIDS Programme in South Africa.

Despite both having adopted policies and programmes in which sex education is taught, the curriculum and content of the information differs. Nigeria has a fixed curriculum which allows for uniform teaching of topics, ranging from puberty, decision making, self-esteem, communication skills, STIs, HIV and AIDS and abstinence; topics relating to contraception and pregnancy are avoided.[24] South Africa allows the teaching of more in-depth topics, including sexuality, teenage pregnancy, substance abuse, HIV and STIs, contraceptive and condom use, but does not present a fixed curriculum. The lack of a fixed curriculum for teaching sexuality education in South Africa results in a lack of uniformity as the topics taught vary from school to school, resulting in different outcomes.[25] In the case of Nigeria, although there is a fixed curriculum, this has not achieved much due to the fact that, despite national policy backing, the implementation of the FLHE education programme remains poor.[26]

South Africa makes compulsory the teaching of life skills, HIV and AIDS education from Grade R (usually at the age of six or seven), in accordance with directions from international bodies which support the introduction of sex education to children from an early age with a gradual advance in curriculum content.[27] In Nigeria, although the teaching of the FLHE curriculum has been introduced in secondary schools, the teaching thereof in upper primary and private schools was only recently introduced after encouragement and financial assistance from donors.[28] Despite this development, overall, sexuality education has not been successfully introduced in Nigeria.

South Africa's early introduction and 'actual' teaching of sexuality education in schools from a young age tally with what obtains

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24 Durojaye (n 7 above) 2; National family life and HIV education curriculum iii & 1-47.

25 MJ Visser 'Life skills training as HIV/AIDS preventive strategy in secondary schools: Evaluation of a large-scale implementation process' (2005) 2 *Journal of Social Aspects of HIV/AIDS* 206 211 214; RI Mpangana *Implementation of the life skills HIV and AIDs programme in Manyeleti circuit schools* unpublished LLM assignment, University of Stellenbosch, 2012 30.

26 AO Esiet 'Adolescent sexual and reproductive health in Nigeria' (2009) http://www.wilsoncenter.org/sites/default/files/Esiet%20Presentation.pdf (accessed 27 July 2013).

27 WHO 'The sexual and reproductive health of younger adolescents: Research issues in developing countries' (2011) 11 http://libdoc.who.int/publications/2011/9789241501552_eng.pdf (accessed 22 August 2013).

28 RC Abah *The universal basic education programme and the family life HIV education in Nigeria* (2013) 2.

internationally in countries such as Denmark, whereas Nigeria needs to adopt a realistic approach and accept the inevitability that allowing early in-depth teaching of sexuality and family life education in its schools is a positive way of disseminating and ensuring that important information on the protection of SRH generally becomes ingrained in the consciousness of adolescents.

In terms of similarities, a major resemblance in relation to the teaching of sexuality education in the two countries relates to the fact that what is accomplished by the teaching of sexuality education in schools depends on an open attitude on the part of the instructors teaching the subject. In both countries, most teachers, as a result of their religious and cultural beliefs, have reservations about teaching adolescents about sexuality.[29] Also, in both Nigeria and South Africa, parents, religious leaders and other societal gate-keepers express great reluctance to discuss sexuality issues with adolescent girls, unlike the case in relation to their male counterparts.

Therefore, there is certainly a need for societal and attitudinal changes in this regard in both South Africa and Nigeria. Societal and cultural gatekeepers need to face reality, and accept the changes that have occurred in relation to adolescent sexuality. Instead of preventing access to contraceptive and other SRH care information and services, urgent steps need to be taken to ensure that adolescents are adequately informed about how to maintain good SRH.

4 Comparing access to sexual and reproductive health care services in Nigeria and South Africa

Both Nigeria and South Africa have adopted and implemented policies aimed at ensuring that adolescents, generally, and female adolescents, in particular, have access to contraceptive and other reproductive health care services. However, here the similarity ends. The Nigerian government has not lived up to expectations in fulfilling its obligations to ensure that female adolescents have 'actual' access to life-saving contraception and other SRH care services.[30]

There are too few adolescent-friendly clinics operated by the government in Nigeria. Adolescent-friendly centres administered by non-governmental organisations (NGOs) are even fewer in number in

29 N Dlamini et al 'Empowering teachers to change youth practices: Evaluating teacher delivery and responses to the FLHE programme in Edo State, Nigeria' (2012) 16 *African Journal of Reproductive Health* 96-97; KA Smith & K Harrison 'Teachers' attitudes towards adolescent sexuality and life skills education in rural South Africa' (2013) 13 *Sex Education* 69.

30 WHO *The sexual and reproductive health of younger adolescents: Research issues in developing countries* (2011) 11, http://libdoc.who.int/publications/2011/9789241501552_eng.pdf (accessed 22 August 2013); G Sedgh et al *Meeting young women's sexual and reproductive health needs in Nigeria* (2009) 11-16 http://www.guttmacher.org/pubs/2009/06/03/ASRH_Nigeria.pdf (accessed 14 August 2013).

relation to what is required to service the nation's large adolescent population. Also, as Osanyin notes, in some of the few existing clinics adolescents have to pay for contraceptives, resulting in a situation where their right to access contraception is curtailed by their economic and financial circumstances.[31]

By contrast, the situation in South Africa is that adolescent girls have access to contraception because there are policies that ensure the availability and accessibility of free family-planning services at public health centres.[32] Additionally, collaborative efforts between the government and NGOs have resulted in the initiation of the National Adolescent-Friendly Clinic Initiative (NAFCI) programme which sets standards that are used in regulating the provision of adolescent-friendly services within the country (although not yet enough, the quantity is still greater than, presently, in Nigeria). These efforts have resulted in various adolescent clinics being operated in different parts of the country. Furthermore, the use of peer instructors increases patronage by adolescents.[33]

As stated earlier, the approach embraced by South Africa through the adoption of the Integrated School Health Policy, which allows adolescents access to on-site SRH services and counselling in schools, is not shared by Nigeria. Finally, from the above it is clear that there is a need for Nigeria to invest in a greater political and financial commitment towards assuring female adolescents access to contraceptive information and services, as is the case in South Africa.

5 An overview of the barriers preventing access to sexual and reproductive health care services in Nigeria and South Africa

Despite the differences in the extent to which their rights to access contraceptive information and services are guaranteed in the two countries, female adolescents in Nigeria and South Africa encounter

31 Y Osanyin *Report on assessment of facilities providing youth-friendly health services in Nigeria* (2011) 10, http://ncceonline.net/download/files/Assessment%20of%20Youth%20Friendly%20Health%20Centers%20and%20Services.pdf (accessed 3 August 2013).

32 P Maharaj & M Rogan *Reproductive health and emergency contraception in South Africa: Policy context and emerging challenges* (2007) 13.

33 MIET Africa *Literature review: Youth-friendly health services* (2011) 14-15 http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=6&cad=rja&ved=0CEMQFjAF&url=http%3A%2F%2Fwww.miet.co.za%2Fsite%2Fsearch%2Fdownloadencode%2FnLaaaqWMqp2zp4Sx&ei=MQw7Uov4INKRhQfq5YGQBg&usg=AFQjCNExpY0ySlTw7Y0u3wh8hNr7EFfy-g&bvm=bv.52288139,d.Yms (accessed 14 September 2013); AE Pettifor et al 'Challenge of evaluating a national HIV prevention programme: The case of LoveLife, South Africa' (2007) 83 *Sexually Transmitted Infections* 70.

similar barriers to access,[34] which not only prevent them from gaining access to essential contraceptive information and services but, ultimately, encourage their being denied the opportunity to enjoy their rights to access quality reproductive health care services, as recommended in human rights instruments and by their monitoring committees.[35] Although the levels of some of the barriers experienced in the two countries may differ, a major factor remains that similar consequences result from the existence of the barriers.

As noted in the introduction, in both Nigeria and South Africa, teenage pregnancy continues to constitute a problem. In Nigeria, the adolescent birth rate is currently estimated at 123 per 1 000, one of the highest in the world.[36] Despite having one of the lowest total fertility rates in the region, South Africa still has a high teenage fertility rate: Around 30 per cent of 15 to 19 year-old adolescent girls are reported as having been pregnant.[37]

In Nigeria and South Africa, the high rate of adolescent pregnancies is fuelled by several factors. In Nigeria it is stimulated by a lack of financial wherewithal to purchase contraceptives as free family-planning articles are not readily available or accessible, despite government claims. Factors common to both countries include socio-cultural and religious beliefs (namely, the hostile and unfriendly attitudes of health officers in charge of SRH services), general societal stigmatisation of adolescent girls who attempt to access contraception, and poverty, which encourages their engaging in transactional sex in the context of little or no bargaining power.

Another similarity occasioned as a result of inaccessibility to contraception in Nigeria and South Africa is adolescent girls' procurement of unsafe abortion services. Nigerian girls undergo these

34 The barriers which prevent female adolescents in Nigeria and South Africa from accessing contraceptive information and services range from socio-cultural, legal and religious barriers, to barriers associated with demography.

35 Art 12 ICESCR; art 25 Universal Declaration; art 12 CEDAW; arts 24(1) & 24(2)(f) CRC; art 16 African Charter; arts 14(1), 14(2)(b) & 14(2)(f) African Children's Charter; arts 14(1)(a), (c), (d) & (g) African Women's Protocol; para 12 General Comment 14 of the ESCR Committee.

36 WHO *The state of the world's midwifery: Delivering health, saving lives* (2011) http://www.unfpa.org/sowmy/resources/docs/country_info/profile/en_Nigeria_SoWMy_Profile.pdf (accessed 24 June 2013); A Udo et al 'Teenage pregnancy and adverse birth outcomes in Calabar, Nigeria' (2013) 17 *Internet Journal of Gynaecology and Obstetrics* http://ispub.com/IJGO/17/2/2995 (accessed 10 November 2014).

37 WHO (n 36 above) 40; S Willan *A review of teenage pregnancy in South Africa: Experiences of schooling, and knowledge and access to sexual and reproductive health services* (2013) 7 http://www.hst.org.za/sites/default/files/Teenage%20Pregnancy%20in%20South%20Africa%20Final%2010%20May%202013.pdf (accessed 18 September 2014); MR Ramulumo & VJ Pitsoe 'Teenage pregnancy in South African schools: Challenges, trends and policy issues' (2013) 4 *Mediterranean Journal of Social Sciences* 756; Statistics South Africa *General household survey* (2012) 18, http://www.statssa.gov.za/publications/P0318/P0318April2012.pdf (accessed 9 November 2013).

because obtaining safe abortion services is illegal,[38] whereas South African girls procure back-street abortions because of the social stigma attached to the termination of pregnancy in the country despite the country's legalisation of abortion and the provision of free termination of pregnancy services.[39]

Additionally, a major similarity between the countries relates to the feminisation of HIV and other STIs among adolescent girls. This process is a major result of the continuing existence of socio-cultural beliefs and values that encourage gender imbalance, especially in relation to SRH issues. In Nigeria, the National Agency for the Control of AIDS (NACA) states that not only do females constitute 58 per cent of persons living with HIV, but the prevalence rate among young women aged 15 to 24 years is estimated to be three times higher than that among their male counterparts.[40] The same situation applies in South Africa, as South African female adolescents constitute a larger percentage of adolescents infected with HIV. The prevalence rate of HIV among this group of women amounts to 11,9 per cent, compared to that of their male counterparts which stands at 5,3 per cent.[41]

Finally, in a majority of instances, female adolescents, Nigerian and South African, lose their chances of improving their economic and social status in life, a consequence of the denial of their right to SRH care due to the factors barring their access to contraceptive information and services. It is necessary to state here that the loss of economic empowerment occurs among South African adolescent girls despite the existence of legislation which provides that pregnant adolescents are neither to be expelled nor forbidden from returning to

38 Secs 228 & 229 Criminal Code cap c38 LFN 2004 and secs 232 & 233 Penal Code cap p3 LFN 2004.

39 *Unsafe abortion in South Africa: A preventable pandemic* (2012) http://www.ngopulse.org/blogs/unsafe-abortion-south-africa-preventable-pandemic (accessed 9 November 2013); C Day et al 'Health and related indicators' *South African Health Review* (2011) 178-180, http://www.hst.org.za/sites/default/files/Chap%2011%20Indicators.pdf (accessed 11 November 2013); C MacPhail et al 'Contraception use and pregnancy among 15–24 year-old South African women: A nationally representative cross-sectional survey' (2013) 5 *BMC Medicine* http://www.biomedcentral.com/content/pdf/1741-7015-5-31.pdf (accessed 26 June 2013).

40 NACA *Key statistics on HIV in Nigeria*, http://naca.gov.ng/index2.php?option=com_docman&task=doc_view&gid=110&Itemid=268 (accessed 9 November 2013).

41 UNICEF *South Africa statistics* http://www.unicef.org/infobycountry/southafrica_statistics.html#102 (accessed 28 October 2013); UNFPA *HIV prevention: Fact sheet* (2012) http://countryoffice.unfpa.org/filemanager/files/southafrica/HIV_Prevention_Fact_Sheet%20.pdf (accessed 28 October 2013); C Day & A Gray 'Health and related indicators' in A Padarath & R English (eds) *South African health review* (2013) 236.

school after giving birth, unlike the situation that normally occurs in Nigerian schools.[42]

6 Comparing the role played by the courts in ensuring access

The approaches adopted by the national courts of Nigeria and South Africa differ in relation to intervention in matters involving the protection of the rights of children, generally, and their right to health care, in particular. South African courts have been particularly helpful in advancing the protection of the socio-economic rights of children generally (including adolescent girls). This positive contribution is bolstered by the fact that in South Africa, children's rights to basic health care and other social amenities are constitutionally guaranteed. In Nigeria, issues relating to the protection of socio-economic rights (including the right to access health care) are merely mentioned in chapter two of the country's Constitution as directive principles that are not justiciable in court.[43]

South African courts have been actively involved in ensuring that the rights and best interests of children are protected in several cases: the *TAC* case,[44] in which the court declared a violation of sections 27(1) and (2) of the country's Constitution and ordered the implementation of a comprehensive programme to ensure universal access to Nevirapine, a drug used to prevent the transfer of HIV from mother to child, in public hospitals;[45] the *Minister of Welfare and Population Development v Fitzpatrick* case,[46] in which the Constitutional Court clearly declared that the 'best interests' of children principle, recognised as paramount in section 28(2) of the country's Constitution, encompassed the rights specified in section 28(1) to create a right on its own.[47] Section 28(1) guarantees children's access to health care services, amongst other things.

Particularly in relation to matters concerning the protection of the SRH rights of children, and in line with decisions of the English courts in *Gillick v West Norfolk and Wisbech Area Health Authority & Another*[48]

42 Statistics South Africa (n 37 above) 18; II Ayuba & G Owoeye 'Outcome of teenage pregnancy in the Niger Delta of Nigeria' (2012)22 *Ethiopian Journal of Health Sciences* 46; IN Onyeka et al 'Unintended pregnancy and termination of studies among students in Anambra state, Nigeria: Are secondary schools playing their part?' (2011) 5 *African Journal of Reproductive Health* 109-116; D Bhana et al 'South African teachers' responses to teenage pregnancy and teenage mothers in schools' (2012) 10 *Culture, Health and Sexuality: An international journal for research, intervention and care* 877.

43 Sec 6(6)(c) Nigerian Constitution, 1999.

44 *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC).

45 As above.

46 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

47 As above.

48 (1986) 1 AC 112; (1985) 3 All ER 402.

and *R (Axon) v Secretary of State for Health*,[49] that competent adolescents who understand the nature of the services requested and their implications can give consent and access confidential SRH services, South African courts in *Christian Lawyers Association v Minister of Health & Others (Reproductive Health Alliance as* amicus curiae*)*[50] refused to declare the country's Choice on Termination of Pregnancy Act of 1996 unconstitutional (this Act allows all women, including adolescents, abortion on demand up to the twelfth week of gestation). The applicants in this case argued that the Act was unconstitutional as it allowed adolescent girls, who are incapable of giving consent, access to abortion services without parental involvement. In rejecting their argument, the court explained that the Act had in place ways of ensuring that only adolescents who were mature enough to give informed consent could access abortion services in hospitals, and this preserved the rights of female adolescents in the country to confidentiality when accessing SRH care services, especially where such an adolescent staunchly refuses to inform her parents.

Also, in the recent decision of the Constitutional Court in the *Teddy Bear Clinic* case,[51] the court, in declaring some portions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act unconstitutional, noted that children enjoyed fundamental rights granted to everyone as individual bearers of human rights. According to the South African Constitutional Court, the rights to dignity of children are not only of special importance, but are also independent of the rights of their parents, and their rights are not held in abeyance until they reach a certain age.

As explained above, the right to health is not recognised as a justiciable right under the Nigerian Constitution. Nevertheless, other rights, such as the rights to life, dignity, privacy and information relevant to the right to health, are protected in the country's Constitution and can be used by the country's courts to interpret the Nigerian government's obligation to fulfil not only the rights to health care of children, but also adolescent girls' rights to access contraceptive health care services and information The Indian courts set such an example in *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Another.*[52]

Additionally, taking note of the provision of the Fundamental Rights Enforcement Procedure Rules[53] that mandate courts to take judicial notice of human rights instruments when determining the infringement of human rights cases, the domestic courts in Nigeria

49 (2006) EWHC 37 (Admin).

50 2005 (1) SA 509 (T).

51 *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC).

52 (1996) AIR SC 2426; (1996) 4 SCC 37.

53 Para 3(b) Preamble to Fundamental Rights (Enforcement Procedure) Rules, 2009.

are able to act proactively, not only by taking judicial notice of international and regional human rights instruments acceded to by the country, but by extensively using the provisions of the African Charter, domesticated in Nigeria, to hold the government responsible for breaches of its obligations on the right to health, especially if such a violation is not in the best interests of children.

In this regard, the finding of a Nigerian court in *Gbemre v Shell Petroleum Development Company and Others*,[54] holding the Nigerian government accountable and liable for endangering the health of its citizens in the Niger Delta region and thereby violating their right to life as protected in section 33 of the Nigerian Constitution and their right to health in article 16 of the African Charter, is a welcome development and may serve as a precedent in children's rights cases. Similarly, the recent decision of another court in *Georgina Ahamefule v Imperial Medical Centre & Alex Molokwu*,[55] holding the defendants liable for a violation of the provisions of article 16 of the African Charter, is encouraging.

7 Conclusions

As pointed out in the introduction to the article, the period of adolescence is fraught with challenges: Apart from being a stage of transition from childhood to adulthood, characterised by critical physical and psychological changes, it is also a phase in which the adolescent acquires sexual and social interaction skills that she carries with her to adulthood. As an integral function of humanity, the expression of sexuality by adolescents is natural and to be expected. However, if adolescents do not have adequate information or access to sufficient protection, this lack may have disastrous consequences.[56]

By virtue of the article being a report on a comparative study of female adolescents' access to contraceptive information and services in Nigeria and South Africa, we scrutinised the areas of similarity and difference in the legislation, policies and approaches adopted by the two countries, as well as barriers to access and some of the consequences of these barriers. Various issues relating to female adolescents' access to contraceptive services and information were highlighted and compared, with conclusions drawn. Also, areas of deficiency in need of reform were emphasised in order to single them out for correction.

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54 (2005) Suit FHC/B/CS/53/05 (unreported); http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html (accessed 7 March 2013).

55 (Unreported) Suit ID/1627/2000, http://www.scribd.com/doc/126185950/Georgiana-Ahamefule-vs-Imperial-Medical-Centre-Dr-Alex-Molokwu-ID-1627-2000-Judgement (accessed 8 March 2013).

56 G James 'Education and sexuality: Towards addressing adolescents' reproductive health needs in Nigeria' (2012) 4 *Current Research Journal of Social Sciences* 291.

We draw the following conclusions: First, it is clear from the discussion above and, particularly, from our analysis of the legislation and its interpretation by the courts in the two countries, that, although Nigeria and South Africa are signatories to various human rights conventions and declarations guaranteeing the right to health care, including reproductive health care, based on the comparison carried out above it is evident that South Africa's legal framework on female adolescents' access to health care, including contraceptives and other SRH services, is more consistent with international provisions on the right to reproductive health than that of Nigeria.

Second, although both countries have adopted policies providing for the teaching of sexuality education to adolescents, the study shows that the content of the curriculum is predicated upon the different views and approaches adopted in the two countries. Further, adolescent girls' access to contraceptives and other SRH services in Nigeria remains elusive, as adolescent-friendly centres where the services can be obtained fail to meet the needs of the country's adolescent population.

Third, South Africa's constant review of its policies on access to contraceptive services and information and SRH generally, as evidenced by the recent National Contraception and Fertility Planning Policy and Service Delivery Guidelines and Integrated School Health Policy, reveals that there is a continuing effort to fulfil international human rights obligations. In the case of Nigeria, and in agreement with Aniekwu[57] and Durojaye,[58] the existence of laws and policies on SRH care, including access to contraceptive services for adolescent girls, has not translated into the desired result as a consequence of a lack of adequate evaluation mechanisms necessary for monitoring and co-ordinating the implementation of existing policies in order, effectively, to monitor their performance.

Fourth, and finally, despite the fact that the level and extent of the barriers faced by adolescent girls in Nigeria and South Africa when accessing contraceptive services and information vary, the consequences of the existence of these barriers are similar: We find that Nigerian and South African adolescent girls, generally, lack access to contraceptive information and services.

This leads us to the conclusion that there is an urgent need to adopt Durojaye's suggestion relating to the need for the Nigerian and South African governments to ask the 'female adolescent question'. Only if we ask the 'female adolescent question' will we be able to appraise the current state of access of adolescent girls to contraceptive information and services in the two countries, and will we be able to

57 Aniekwu (n 20 above)
58 Durojaye (n 7 above).

put in place programmes to overcome the shortcomings evident in the legislation and policies.[59]

Undoubtedly, the Nigerian and South African governments have taken measures to ensure female adolescents' access to contraceptive information and services in their respective countries, but there are gaps in their strategy that require the collaboration of all interested parties if they are to be filled. Acceptance of the reality of adolescent sexual behaviour is a positive step towards the achievement of greater SRH results and benefits. Although the achievements realised by taking 'little' steps towards guaranteeing female adolescents' access to contraception may seem insignificant, continued advances will eventually lead to the desired result.

59 E Durojaye 'Realising access to contraception for adolescents in Nigeria: A human rights analysis' unpublished LLD thesis, University of the Free State, 2010 63.

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Rape as a weapon of war: Combating sexual violence and impunity in the Democratic Republic of the Congo, and the way forward

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Summary

Rape is both a consequence and a weapon of war, as may be seen throughout the crisis in the Democratic Republic of the Congo. The United Nations Joint Human Rights Office recently published a report that noted the necessity of moving these issues to the forefront of the international political agenda. Sexual violence in the region has led to mass human rights breaches that require the attention of the international community. With impunity plaguing the social and judicial structure of the DRC, combating this issue is more challenging. This is due to a number of obstacles: a lack of resources within the judicial system; the stigmatisation of victims (social and cultural); the costs of legal proceedings; and a lack of protection for victims. As such, the article examines sexual violence committed by military officers and rebel groups in the DRC in order to outline the failures of the domestic system. It also provides a brief historical overview of sexual violence in the DRC. The article uses Baaz and Stern's perception of 'rape as a weapon of war' to analyse the lack of protection mechanisms for victims and witnesses of sexual violence in the region. In doing so, the article examines the obstacles to fighting sexual violence in armed conflict in the DRC (stigmatisation and shame, and costs of legal proceedings). Finally, the article suggests that a mixed chamber or hybrid court be created in order to prosecute perpetrators of the worst human rights violations.

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Key words: *MONUSCO; international criminal law; United Nations; international human rights law; rape; international tribunals; impunity; rule of law*

1 Introduction

Women in the Democratic Republic of the Congo (DRC) have been the victims of a 'war within a war'[1] as the number of rapes and other forms of sexual violence soar in the region. Despite numerous attempts to implement peace agreements between warring states and parties, a democratically-elected government, the reformation of laws, a revised constitution, and the presence of the world's largest United Nations (UN) peacekeeping force,[2] the rule of law in the DRC remains weak. This leaves a deplorable situation concerning sexual violence and, as such, places nearly every woman in the region at risk. Rape is not only a consequence of war,[3] but also a weapon of war to intimidate local communities and to punish civilians for collaboration with armed military groups.[4] Specifically, one may argue that rape is enhanced as a tool by military forces to destabilise and humiliate individuals or groups. However, as a result of the 'pervasive and destructive effects of conflict',[5] rape is the product of both armed groups and civilians in the region.[6] In addition, the United Nations Joint Human Rights Office (UNJHRO) underscores the concept of rape being committed as a 'crime of opportunity alongside other human rights violations'[7] in the DRC.

Moreover, rape cases still escalate at alarming rates,[8] with Congolese gynaecologist, Dr Dennis Mukwege, stating that 'the word "rape" or "sexual violence" cannot fully translate the horror that

1 Human Rights Watch *The war within the war: Sexual violence against women and girls in Eastern Congo* (2002); see also J Mantz 'Improvisational economies: Coltan production in the Eastern Congo' (2008) 16 *Social Anthropology* 34; S Meger 'Rape of the Congo: Understanding sexual violence in the conflict in the Democratic Republic of Congo' (2010) 28 *Journal of Contemporary African Studies* 119.

2 United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) United Nations Security Council Resolution 1925 (1 July 2010).

3 Office of the High Commissioner for Human Rights (OHCHR) *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of the Congo to the High Commissioner of Human Rights*, March 2011, para 142.

4 OHCHR 'Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo' (April 2014) (UNJHRO Report) 5.

5 As above. See also S Brownmiller *Against our will: Men, women and rape* (1975).

6 J Mansfield 'Prosecuting sexual violence in the Eastern Democratic Republic of Congo: Obstacles for survivors on the road to justice' (2009) 9 *African Human Rights Law Journal* 367 370.

7 UNJHRO Report (n 4 above).

8 UN News Centre 'New UN statistics show alarming rise in rapes in strife-torn eastern DR Congo' 30 July 2013 http://www.un.org/apps/news/story.asp?NewsID =45529#.Vjf2adIrKt8 (accessed 31 October 2015); United Nations Office of the High Commissioner for Human Rights 'DRC: Some progress in the fight against

hundreds of thousands of women are living with in this part of the world'.[9] Alarmingly, he notes that in certain villages, over 90 per cent of women have been victims of sexual abuse.[10] As such, a plethora of obstacles hamper attempts at combating impunity for sexual violence in the DRC. Aside from the severe lack of resources and human capacity in the judicial system which 'exacerbates impunity', the stigmatisation of victims and a reluctance to pursue the matter further, the high cost of legal proceedings, the lack of protection for victims and witnesses, as well as the increasing dogmatisation and stigmatisation on 'shame' within society also contribute.[11]

The article examines sexual violence committed by military officers and rebel groups in the DRC in order to outline the failures of the domestic system. An examination of recent cases on the issue is undertaken. The article also provides a brief historical overview of sexual violence in the DRC. It uses Baaz and Stern's understanding of 'rape as a weapon of war' to analyse the lack of protection mechanisms for victims and witnesses of sexual violence in the region. In doing so, it examines a number of obstacles when fighting impunity for sexual violence in armed conflict in the DRC (such as stigmatisation and shame, and costs of legal proceedings). Finally, the article suggests a mixed chamber or hybrid court in order to prosecute perpetrators of the worst human rights violations. It provides a comparative analysis of the suggested chamber and the Special Court for Sierra Leone.

2 DRC and the origins of sexual violence in the region

The following analysis provides only a brief overview on the history of sexual violence in the DRC as a detailed analysis is beyond the scope of the article. Scholars such as Banwell,[12] Mantz[13] and Meger[14] contend that the genesis of the armed conflict in the region may be traced back to 1998 when 'Africa's World War' occurred. Understanding this conflict may be best interpreted in the context of

impunity but rape still widespread and largely unpunished – UN report' http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14489& (accessed 31 October 2015).

9 'Rape as a weapon of war: Accountability for sexual violence in conflict: Hearing before the Sub-Committee on Human Rights and the Law of the Committee on the Judiciary' 110th Congress, 2nd session, 1 April 2008.

10 As above.

11 Mansfield (n 6 above) 370; for a review on 'shame', see K Engle & A Lottman 'The force of shame' in C McGlynn & VE Munro (eds) *Rethinking rape law: International and comparative perspectives* (2010).

12 S Banwell 'Rape and sexual violence in the Democratic Republic of Congo: A case study of gender-based violence' (2014) 23 *Journal of Gender Studies* 45.

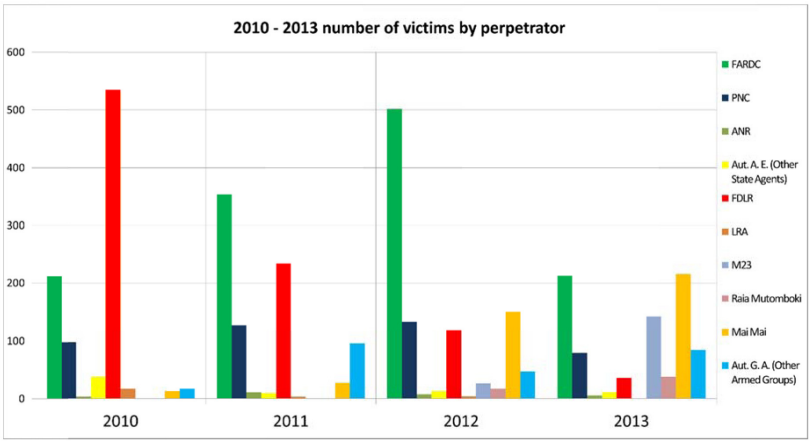
13 Mantz (n 1 above) 34.

14 Meger (n 1 above) 119.

local conflicts, such as the Rwandan genocide, as well as the Sudanese, Ugandan and Angolan civil wars.[15] Alliances were formed between rebel forces and government groups which created an 'internal and an international dimension to the conflict'.[16] Specifically, in 1996 Laurent Kabila overthrew President Mobutu and was supported by the Rwanda Patriotic Army and Uganda's People Defence Force. Working from a position of power, Kabila 'turned his back on Rwanda and Uganda and in 1998, began removing Rwandans from high-ranking positions within his government'.[17] Such ostracism created hostility and a schism between neighbouring governments and produced multiple attempts to remove Kabila from his position. Due to their inability to remove him from power, Rwanda and Uganda supported anti-government rebel forces in fighting Kabila in Eastern DRC. Groups included the *Rassemblement Congolais pour la Démocratie* (RCD) and *Le Mouvement de Libération du Congo* (MLC) and, later on in the attacks, the *Forces démocratiques de libération du Rwanda* (FDLR) joined in, mainly comprised of Rwandan *Interahamwe genocidaires*.[18] Violence continued to expand, with power shifting between the Congolese army, the FDLR and a number of other rebel groups, such as the Mayi Mayi in the Eastern DRC.

In 2002, a peace agreement was signed, instituting a transition government, and general elections in 2006. However, the violence continued. As a result of this occurrence, a second peace agreement was drafted in 2008 and signed by 22 armed groups. This agreement contained instructions for the Congolese government to protect civilians in addition to demonstrating respect towards international humanitarian law and international human rights law.[19] However, a number of organisations, such as Human Rights Watch, reported that sexual assault continued unabated after the agreement had been signed.[20] The UNJHRO reported that women were being raped systematically while carrying out chores, working on farms, going to the market and when fetching fresh water.[21] Alarmingly, from January 2010 to December 2013, more than 3 635 cases of sexual assault were reported in the DRC, with the majority of these cases being victims of the *Forces Armées de la République Démocratique du Congo* (FARDC).[22] Over 1 200 rapes were committed in the context of military operations against armed rebels in North and South Kivu.

15 Banwell (n 12 above) 47.
16 Banwell 48; see also M Chrispin 'Congo rebels to return to talks but not to army' *Reuters* 8 September 2013.
17 Banwell (n 12 above).
18 As above. See also Mansfield (n 6 above) 372.
19 As above.
20 Human Rights Watch *Update on protection of civilians in Eastern Congo's peace process* (July 2008).
21 UNJHRO Report (n 4 above) 8.
22 UNJHRO Report 9.



Statistical graph from the United Nations Joint Human Rights Office at the United Nations Organisation Stabilisation Mission in Democratic Republic of the Congo 2010-2013 number of victims by perpetrator[23]

Reports indicate that sexual violence is higher in the conflict regions of North Kivu, South Kivu and Orientale, with rape cases increasing in the last seven years.[24] The UNJHRO noted that out of the 3 635 cases of sexual violence recorded from January 2010 to December 2013 in the DRC, 45 per cent (1 640 victims) were in North Kivu.[25]

2.1 Presence of international law in Congolese legislation

The Congolese government's attempt to address rape and sexual violence has been unsuccessful given the alarming rate of rapes still existing in the region. With its legislative obligations to prosecute all cases of sexual violence and with the act being criminalised under domestic Congolese criminal law,[26] challenges are evident at the domestic level. In addition, given that the DRC is a party to a number of international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture (CAT) and the Convention on the Rights of the Child (CRC), it is alarming that there is a lack of convictions for rape. In an attempt to combat sexual violence, a number of provisions have been enacted in the Congolese Constitution, including article 14, which expressly urges the state to combat all forms of sexual violence against

23 UNJHRO Report 10.
24 UNJHRO Report 7.
25 As above.
26 UNJHRO Report (n 4 above) 8.

women,[27] and article 15, which defines sexual violence as a crime against humanity.[28] Within the context of military forces, the DRC has succumbed to enormous pressures to adhere to international rules and regulations concerning the protection of girls and women during peace time and armed conflict. Nevertheless, the 2002 Military Criminal Code is viewed as incompatible with international instruments such as the Rome Statute of the International Criminal Court (ICC) and the Geneva Conventions, because of its failure to incorporate fully into Congolese legislation the criminal law provisions.[29] It is important to note, however, that the Military Penal Code was amended in 2006 to include protection against sexual violence.[30] Section II, Title VI and III, Title VI of the Penal Code incorporate provisions that address rape (articles 170-171 (*bis*)); indecent assault (articles 167-168); enforced prostitution and sexual slavery (article 174(e)); trafficking and exploitation of children for sexual purposes (article 174(j)); forced pregnancy (article 174(k)); enforced sterilisation (article 174(l)); and child prostitution (article 174(n)). The prohibition of spousal rape, however, is not included given the nature of the culturally-tabooed act of reporting such actions.[31]

The FARDC and non-state actors, including UN peacekeepers, have an obligation under international humanitarian and criminal law to

27 *Les pouvoirs publics veillent à l'élimination de toute forme de discrimination à l'égard de la femme et assurent la protection et la promotion de ses droits. Ils prennent dans tous les domaines, notamment dans les domaines civil, politique, économique, social et culturel, toutes les mesures appropriées pour assurer le total épanouissement et la pleine participation de la femme au développement de la nation. Ils prennent, des mesures pour lutter contre toute forme de violences faites à la femme dans la vie publique et dans la vie privée. La femme a droit à une représentation équitable au sein des institutions nationales, provinciales et locales. L'État garantit la mise en œuvre de la parité homme-femme dans lesdites institutions. a loi fixe les modalités d'application de ces droits.*

28 *Les pouvoirs publics veillent à l'élimination des violences sexuelles sans préjudice des traités et accords internationaux, toute violence sexuelle faite sur toute personne, dans 'intention de déstabiliser, de disloquer une famille et de faire disparaître tout un peuple est érigée en crime contre l'humanité puni par la loi.*

29 Banwell (n 12 above) 52; see also Human Rights Watch 'Seeking justice: The prosecution of sexual violence in the Congo war' March 2005, Vol 17 No 1(A) ; and OHCHR 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commission of Human Rights' March 2011.

30 ICRC 'Democratic Republic of the Congo: Practice relating to Rule 93. Rape and other forms of sexual violence' https://www.icrc.org/customary-ihl/eng/docs/v2_cou_cd_rule93 (accessed 31 October 2015).

31 Canada: Immigration and Refugee Board of Canada *Democratic Republic of the Congo: Domestic and sexual violence, including legislation, state protection, and services available to victims (2006-March 2012)*, 17 April 2012, COD104022.E, http://www.refworld.org/docid/4f9e5e532.html (accessed 3 November 2015). The author argues that because Congolese culture does not recognise spousal rape, women do not report it.

follow protocol and comply with legislative norms.[32] Yet, there is a systematic lack of compliance with this obligation. Common Article 3 of the four Geneva Conventions prohibits violence against the life and person as well as insults to personal dignity.[33]

The crime of rape is qualified as a war crime 'both in international and non-international armed conflicts, as well as a crime against humanity in the Rome Statute of the International Criminal Court',[34] to which the DRC has been a party since 2013. Despite the international legal framework that the DRC has adopted, rape and sexual violence go unpunished. As will be explained further below, reasons for this include women's hesitation to report the act; high fees associated with prosecution; difficulties in travelling costs for the victims or witnesses to get to the court; widespread corruption within the legal and judicial system; as well as bribery used to pay judges and political officials to influence the outcome of the trial.[35] Difficulties also extend to the majority of rape cases not being reported due to fear of retribution as well as victims being stigmatised by the community and therefore feeling shame and guilt. Such social stigma creates a growing barrier between rape and the sexual act, and ends in impunity. These elements are examined below.

3 Rape as a weapon of war: Obstacles faced by the sexually-abused

The classification and conceptualisation of sexual violence in the DRC as a 'weapon of war' have merit and place this issue high on the security agenda. Baaz and Stern underscore the importance of the distinction when classifying rape within the DRC context by placing an emphasis on the trends of rape being 'committed against any woman in general regardless of political or ethnic affinity with the perpetrator'.[36] Rape in this context is used as a military strategy by rebel forces in order to humiliate and intimidate. Baaz and Stern argue that the DRC's case demonstrates that 'while sexual and other violence is often used to humiliate and intimate, this humiliation and intimidation is also much less strategic and much more complex than

32 UNJHRO Report (n 4 above) 7; see also BF Klappe 'The law of international peace operations' in D Fleck (ed) *The handbook of international humanitarian law* (2013) 611 617; and PV Sellers *The prosecution of sexual violence in conflict: The importance of human rights as a means of interpretation* (2006).

33 UNJHRO Report (n 4 above) 7.

34 Banwell (n 12 above) 52.

35 Banwell 53.

36 ME Baaz & M Stern *Understanding and addressing conflict-related sexual violence* (2010) 1.

a combat strategy to further military/political objectives'.[37] When examining sexual violence in this context, several factors must be explored. These factors include (i) understanding the high levels of violence against civilians in light of the present circumstances of state security; (ii) the existence of a weak justice and penal system and widespread impunity; and (iii) rape occurring in the context of certain militarised ideals of masculinity and sexuality. These factors are critiqued in the analysis below.

3.1 The justice system and combating widespread impunity

A continuously weak justice and penal system[38] has contributed to the widespread violence and rape in the region. The UNJHRO noted that efforts had been made by the Congolese authorities to arrest and try alleged perpetrators of sexual violence. However, despite their efforts, such perpetrators rarely reached the court.[39] The majority of cases are rarely investigated and when investigations do take place, trials are not held or sentences are not served. The UNJHRO underscores the critical concern of the impunity 'enjoyed by a number of high-ranking officers alleged to be responsible for crimes of sexual violence'.[40] Proceedings on rare occasions target higher-ranking FARDC officers, although the cases are corrupted by judicial and political officials. Those convicted and imprisoned are provided with grounds of escape 'due to the dilapidated conditions and poor security in prisons across the country'.[41] Baaz and Stern go further to emphasise the impunity brought about by state security personnel. The UNJHRO noted this element and reported on concerns about the shortcomings in investigations into cases by FARDC personnel. The lack of resources and human capacity in the judicial system contributes to an increase in impunity and other obstacles in the 'fight against impunity include[ing] the stigmatisation of victims and their reluctance to pursue justice in the courts'.[42] Further, there is a preference by victims to resort to 'out-of court settlements, which tend to be perpetrator-centred and generally ignore the needs of the victim'.[43] In addition, there are difficulties where victims in the region cannot afford the legal fees and the travelling expenses associated

37 As above. See also 'Report of the Investigation Missions of the United Nations Joint Human Rights Office into the Mass Rapes and Other Human Rights Violations Committed in the Villages of Bushani and Kalambahiro, in Masisi Territory, North Kivu, on 31 December 2010 and 1 January 2011' 22 July 2011.

38 Report (n 37 above) 331.

39 UNJHRO Report (n 4 above) 13.

40 As above. See also R Lincoln 'Recent developments rule of law for whom? Strengthening the rule of law as a solution to sexual violence in the Democratic Republic of the Congo' (2013) 26 *Berkeley Journal of Gender, Law and Justice* 139 143.

41 As above.

42 UNJHRO Report (n 4 above) 16.

43 As above. See N Henry 'Witness to rape: The limits and potential of international war crimes trials for victims of wartime sexual violence' (2009) 3 *International Journal of Transitional Justice* 114.

with legal proceedings.[44] Access to justice is, therefore, one of the most prevalent obstacles faced by Congolese women.

A number of challenges exist in the DRC's judicial and legal framework. This analysis will be done later in the article when an examination of a possible tribunal will be conducted. In the DRC there are few protection programmes for victims and witnesses under national law, with no specific unit working on this issue.[45] In addition, there is a lack of legal provisions criminalising intimidation and threats made against victims of sexual violence. Under article 74*bis* of the Sexual Violence law, there is a requirement for judicial officers to adopt appropriate measures to provide security, physical and mental wellbeing as well as privacy and dignity to victims of sexual violence or those involved in the trials themselves. The UNJHRO, however, noted that judges were unwilling to take every measure to protect victims or those involved and, as such, the United Nations Team of Experts on the Rule of Law and Sexual Violence in Conflict have been petitioned to assist national efforts to establish appropriate protection mechanisms for victims and witnesses.[46] The UN's activity in this sphere is contributing towards the improvement of combating impunity and establishing a comprehensive and effective structure. Social stigma placed on rape victims is also a central element for widespread impunity and, because of this, victims are often ostracised by their families and communities. This causes Congolese victims to remain silent to avoid further victimisation, humiliation, social incrimination or the withdrawal of economic support.[47] The UNJHRO argues that '[s]hifting the stigma from the victims to the perpetrators would have a huge impact on the ability of victims to reclaim their dignity and rebuild their lives'.[48]

Furthermore, the fight against impunity for sexual violence in the DRC lacks the necessary law enforcement institutions. A lack of infrastructure and resources within the military jurisdictions presents a major obstacle to holding alleged perpetrators of sexual violence accountable. One may also argue that prosecutors and magistrates lack the financial and operational means of conducting proper trials and investigations when interviewing victims and witnesses. In addition, and what is of more concern, is the fact that a number of judicial authorities lacks the necessary knowledge when assessing the

44 Banwell (n 12 above) 52.

45 As above.

46 UNJHRO Report (n 4 above) 8. See also OHCHR 'Democratic Republic of the Congo – 1993-2003', Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (August 2010).

47 As above. See also Mansfield (n 6 above) 386.

48 UNJHRO Report (n 4 above) 22.

2006 laws on sexual violence, as well as skills to prosecute such crimes.[49] The lack of comprehensive, well-framed judicial and correctional structures (and infrastructures) has led to many concerns, not only about the country's questionable judiciary being able to successfully prosecute or provide a just legal system, but also about detention and imprisonment facilities. The lack of infrastructure in prisons as well as insufficient security (and security frameworks) have led to several prison breaks involving a number of high-ranking officials, including Lieutenant-Colonel Félix Djela (alias Bravo Tango) from the FARDC, who escaped with other military inmates from Bukavu.[50] Such crimes constitute critical obstacles to the DRC's justice system, contributing to impunity in the region.

Further, the issue of corruption is one of the most fundamental obstacles identified by rape victims. Paradoxically, this notion is not considered an issue by the judiciary. Corruption appears to take two forms. The first is where litigants pay court officials in order to have the matter heard.[51] A non-governmental organisation (NGO) worker stated:[52]

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

This notion, therefore, may be viewed as a failure by the state to adequately finance its judiciary. The UN reports that monthly salaries range from US$ 13 for a domestic magistrate to US$ 30 for a senior Supreme Court judge, with the report noting that some judges had to wait years to receive small advances.[53] The public accuses judges of creating obligatory costs to supplement their annual salaries. Complainants are obliged to pay for a number of things in order to secure the attendance of the perpetrators.

The second form of corruption is that of influencing the court's decision. This prevents potential litigants from prosecuting the rapist.

Identifying the perpetrator is also noted as an issue.[54] This depends on whether the perpetrator is military or civilian. Although there has been an increase in civilians raping women, the majority of rape cases are identified as being committed by armed groups.[55] Military prosecutions are considered to be rare in the judicial system due to difficulties in securing the arrest of the convicted. This is because a

49 UNJHRO Report 19.
50 UNJHRO Report 20.
51 Mansfield (n 6 above) 400.
52 As above. See also interview with Richard, member of *Association de Secours auz Jumeaux et Leurs Parents en Detresse* (ASJPD) in Mansfield (n 6 above).
53 As above.
54 Mansfield (n 6 above) 389.
55 UNJHRO Report (n 4 above); see also Human Rights Watch 'Democratic Republic of Congo: Ending impunity for sexual violence – New judicial mechanism needed to bring perpetrators to justice' 10 June 2014.

number of military rapes occur at night with the perpetrators emerging from the bush.[56] The victims have no choice but to view these people as unknown individuals, identifying them simply by their uniform. In addition, it is more difficult to convince a perpetrator belonging to a rebel force or armed group to appear before a court.[57] One may, therefore, argue that it has no merit to commence proceedings against soldiers such as those from the FDLR as 'they are impervious to the Congolese legal system'.[58] Military commanders also protect their soldiers, with the International Crisis Group reporting that in the region, even the police were guilty of sexual violence. However, they did not appear in court.[59] Disturbingly, no military judge may hear a case in which a superior-ranked officer is accused.

3.2 Civilian violence and militarised masculinity

Rape is viewed in the context of militarised ideals of masculinity and sexuality common in most military institutions, including those of the DRC. Baaz and Stern argue that the male soldier's libido is described as a 'natural, virile and potent force, which ultimately requires sexual satisfaction from women'.[60] They contend that it is these ideals that contribute to an environment where sexual violence is considered the norm.[61] Scholars such as Hooper,[62] Canning,[63] Meger,[64] Zurbriggen[65] and Leatherman[66] emphasise this notion by underscoring the idea that men and boys develop a sense of masculinity and violent behaviour when in the military because of specially-designed programmes that aim at fighting and killing.[67] Such militarised masculinity and heterosexuality is required to be interpreted as 'institutionalised and globalised phenomena'.[68]

56 As above.
57 As above. See also Human Rights Watch *DR Congo: Peace accord fails to end killing of civilians* (July 2008).
58 Mansfield (n 6 above) 390.
59 International Crisis Group 'Congo: Five priorities for a peacebuilding strategy' (African Report 150) (2009) 5.
60 Baaz & Stern (n 37 above) 2.
61 As above.
62 C Hooper *Manly states: Masculinities, international relations and gender politics* (2001).
63 V Canning 'Who's human? Developing sociological understandings of the rights of women raped in conflict' (2010) 14 *The International Journal of Human Rights* 849.
64 Meger (n 1 above).
65 E Zurbriggen 'Rape, war, and the socialisation of masculinity: Why our refusal to give up war ensures that rape cannot be eradicated' (2010) 34 *Psychology of Women Quarterly* 538.
66 J Leatherman *Sexual violence and armed conflict* (2011).
67 Banwell (n 12 above) 51.
68 As above.

Further, Ohambe argues that the soldiers in armies and the military, mainly young men, are usually individuals who lack education, and who live in extreme poverty.[69] Such individuals also have a lack of alternative employment opportunities and, as such, view the military as a way of gaining 'an income and of acquiring social promotion and power'.[70] Baaz and Stern, as well as Banwell, explore these situations through the DRC's FARDC, and they conclude that soldiers 'relied heavily on construction of masculinity (and femininity)', which were 'formed and reinforced within the military institution'.[71] One may, therefore, argue that the motive or ideal which the Congolese military used to reinforce their notion of rape and sexual violence was that of the heterosexual, potent male fighter.[72] In this context, the sexual desires and needs of the military are viewed and accepted as 'natural driving force[s] which required "satisfaction" from women whose role it is to satisfy these needs'.[73]

Furthermore, when interpreting the gender element of sexual violence in the DRC, it is crucial to note that Congolese custom views women as 'disproportionately disadvantaged socially and economically',[74] even though the literacy rate of males is lower. This also extends to women in positions of power, which is rarely seen in the region, and such a gender bias is reflected in Congolese law. Ohambe argues that in the DRC, in order for a woman to open a bank account, the husband's consent is necessary. Such gender bias also extends to the purchase and sale of land or property, as well as finding employment.[75] Gender differences are, therefore, encouraged by Congolese society and this, in turn, creates the divide that increases the 'right' of Congolese males to rape females. Brownmiller discusses a similar notion about the mentality of men, arguing that a man's structural capacity to rape and woman's corresponding structural vulnerability are as basic to the physiology of both sexes as the primal act of sex itself.[76] Her argument is that sexual violence is nothing more than a continuous process of intimidation by which men force women into a state of fear, and contributes to a man's discovery of his genitalia serving as a weapon.[77]

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69 MCO Ohambe et al 'Women's bodies as a battleground: Sexual violence against women and girls during the war in the Democratic Republic of Congo, South Kivu (1996-2003)' (2005) *Réseau des Femmes pour un Développement Associatif, Réseau des Femmes pour la Défense des Droits et la Paix International Alert.* See also Banwell (n 12 above) 51.

70 Banwell (n 12 above) 51.

71 As above.

72 ME Baaz & M Stern 'Why do soldiers rape? Masculinity, violence and sexuality in the armed forces in the Congo' (2009) 53 *International Studies Quarterly* 495 505.

73 As above.

74 Banwell (n 12 above) 52.

75 As above.

76 Brownmiller (n 5 above).

77 Brownmiller 22.

Within academic discourse, distinctions are made between masculinity and femininity and their implications for sex. To an extent, war and its psychological effects allow males to have contempt for women, and this is because of the 'brute power of weaponry exclusive to [men's] hands, the spiritual bonding of men at arms, the manly discipline of orders given and orders beyond, the simple logic of hierarchical command'.[78] When examining the DRC from a gender-discriminatory perspective, one may argue for the position taken by Brownmiller that the 'winning side is the side that does the raping'. Contributing this to two reasons, Brownmiller notes that 'a victorious army marches through the defeated people's territory, and thus it is obvious that if there is any raping to be done, it will be done on the bodies of the defeated enemy's women' and, second, 'rape is the act of a conqueror'.[79] Such a theory, however, may be challenged based on the factual scenarios in the DRC. The attacks described by the UNJHRO report challenge the 'victorious' scenario theory, since a number of these cases occurred whilst soldiers were either fleeing or retreating from the front lines due to losses. The UNJHRO, in its 2014 report, outlined the following cases:

(1) During the period between 30 July and 2 August 2010, 387 people were raped by a coalition of FDLR, Mayi Mayi combatants, and combatants of Colonel Emmanuel Nsengiyumva in 13 villages found along the Mpofi-Kibua axis, the Walikale territory, North Kivu province.[80] Here, it is important to note that one of the armed leaders who assisted in the preparation of the attack on these districts was the Mayi Mayi Sheka leader, Sheka Ntabo Ntaberi, who stood as a candidate in the National Assembly in the Walkikale electoral district in November 2011. As may be seen, this was an orchestrated attack by a number of rebel forces.

(2) Between 31 December 2010 and 1 January 2011, the UNJHRO reported that at least 46 women and one girl were sexually abused by armed men who were believed to be from the FARDC, in the villages of Bushani and Kalambahriro in North Kivu province. On the instructions of the UNJHRO, Congolese authorities attempted to bring the perpetrators to justice. However, the military prosecutor's file was a total failure with the North Kivu justice authorities not proceeding with the investigation.

(3) The UNJHRO noted the sexual violence occurring between 9 and 25 June 2011 in Mutongo and the surrounding villages, Walikale territory, North Kivu province, during fighting between Mayi Mayi and APCLS combatants. It was reported that at least 80 people, including 12 young girls and a man, were raped or had sexual violence performed on them (in addition to other human rights violations being committed). The report noted that a number of the rape cases were committed by APCLS combatants 'who targeted Mutongo villages in the forest after they had fled the fighting'.[81] In detailing the sexual acts, the report noted that a majority of the victims were 'gang-raped by two to five combatants and were

78 Brownmiller 23.

79 Brownmiller 24.

80 See also P Worsnip 'UN's ban sends top aide to Congo after mass rape' *Reuters Africa* 24 August 2010.

81 UNJHRO Report (n 4 above) 15.

reportedly targeted for belonging to the Nyanga ethnicity' (an ethnicity of the Mayi Mayi Sheka group).

(4) The final case reported is the Minova case file where between 15 November and 2 December 2012, a number of human rights and international humanitarian law violations occurred, including mass rape by the FARDC soldiers 'as they were retreating from the front lines and regrouping in and around the town of Minova, Kalehe territory, South Kivu province, following fighting with M23 combatants and their occupation of Goma and Sake, North Kivu'.[82] In this case, as many as 102 women and 33 girls were reportedly raped or sexually abused. From 20 November 2013, the Operational Military Court of North Kivu has been hearing the case of the FARDC, even though limited military judicial personnel have been working on the matter.

As demonstrated, Brownmiller's theory may fall short in the context of the DRC as a majority of the sexual abuse and rape cases have been without the necessary element of a 'victorious army'. Cohen, Green and Wood argue that there are a number of misconceptions regarding these theories, including the position that war time rape is common among rebel forces when compared to state militaries.[83] Studies have shown that there is a greater possibility of state armed groups being the perpetrators of rape and sexual violence. The recent PRIO discourse of African conflicts noted that, between the years 2000 to 2009, there was a greater possibility of armed state actors being perpetrators than rebel or militia groups. The reason for this, according to Cohen, Green and Wood, remains unanswered.[84] This premise is disturbing since states are mostly better trained and resourced when compared to rebel forces and, as such, both elements are thought to minimise the likelihood of sexual exploitation of non-combatants.[85] What is suggested by the authors is that states tend to use sexual violence as a tool to torture detainees as well as civilians.[86] Green contends that rape by states is used in the context of interrogations.[87] Conversely, certain rebel groups require civilian support for resources (more than state forces) and are commonly fighting to become the new leaders of a country, factors that may make some types of rebel groups less likely to take advantage of civilian populations. This said, Cohen, Green and Wood argue that rebel groups, such as the M23, use 'exploitative violence against civilians for a variety of reasons'.[88]

82 As above.

83 DK Cohen et al 'Wartime sexual violence: Misconceptions, implications and ways forward' United States Institute of Peace Special Report 323 (February 2013).

84 As above.

85 Cohen et al (n 83 above) 28.

86 As above.

87 JL Green 'Collective rape: A cross-national study of the incidence and perpetrators of mass political sexual violence, 1980-2003)' PhD thesis, Ohio State University, 2006.

88 Cohen et al (n 83 above) 4; see also J Weinstein *Inside rebellion: The politics of insurgent violence* (2006).

Moreover, when examining sexual violence in the DRC, one may argue that marginalised males are eagerly attempting to retain their 'hegemonic constructions of masculinity'.[89] This hegemonic construct is that of heterosexuality, and Hooper asserts that such forms of masculinity are linked to phallocentrism, and states that[90]

> [b]oth the image of the penis as weapon and the conventional construction of heterosexual relations revolve around phallocentric discourse. Hegemonic masculinity, then, can be seen to be largely, but not exclusively, phallocentric.

Masculinity in the DRC is represented by a high sex drive, in order for the man to have multiple partners, to confer gifts in exchange for sexual favours, and to have the ability to financially purchase multiple wives. Such a view represents the need for a man to have the physical, social and economic ability to protect his wife from other men.[91] However, a number of ethnic, cultural and, more importantly, socio-economic elements exist that restrain them from achieving this premise. Banwell contends that subordinate or subsidiary masculinity evolves into a form of hypermasculinity, which is linked to elements of roughness, aggression and violence, and this form of masculinity 'offers these marginalised men the opportunity to take advantage of the chaos of war to challenge their marginal position within the gender hierarchy'.[92] In addition, men in these scenarios can acquire symbolic 'rewards' (women) and wealth (minerals) in order to re-establish lost hegemony. In the context of the DRC, Baaz and Stern argue that for the FARDC, it was the 'failure' to retain the expectation of providing for their partners, and being sexually potent fighters, 'alongside negative and sexualised images of women, that led them to rape'.[93] As such, one may argue that, in the context of the DRC, factors such as socio-cultural and socio-economic elements, as well as the notion of hegemonic masculinity, cause the region to be a breeding ground for rape and sexual violence becoming possible and justifiable.[94]

In order to understand the complexities of the gender structure within the DRC, shame as an obstacle is also a cause for concern. Shame is considered one of the key obstacles to prosecution, with Goma Tribunal Militaire de Garnison Judge Solomon stating that 'sex is taboo, rape is dishonourable, and that one must hide it'.[95] The Military Tribunal in *Auditeur Militaire v Eliwo Ngoy*[96] held as follows:[97]

89 Banwell (n 12 above) 53.
90 Hooper (n 62 above) 59-60.
91 As above.
92 As above.
93 Banwell (n 12 above) 53.
94 As above.
95 Mansfield (n 6 above) 387.
96 RP n 084/2005 RMP n 154/PEN/SHOFO5.
97 As above.

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

Rape is viewed as dishonourable, with many husbands refusing to continue to live with a wife who has been raped. Consequently, women lose their husbands because of the stigma associated with being raped. When speaking to a rape victim, Mansfield asked whether they would assist in initiating proceedings against the rapist, and she responded by saying that '[t]hey wouldn't accompany me. They don't love me; they've abandoned me since the rape.'[98] This leads one to believe that ostracism by the community is a further psychological obstacle associated with this element. Such ostracism may lead to police lacking the necessary skills and sensitivities to conduct and assist in investigations. The justice system lacks the tools to ensure confidentially and the anonymity of rape victims and witnesses, and this creates the further dilemma of causing women to be reluctant to discuss their experiences in front of male officers. Engle and Lottman contend that criminal justice may be viewed as a means for attacking shame, with Nowrojee asserting that criminal liability is therapeutic for victims, by noting that the ability of the victim to hold the perpetrator responsible is an aspect of healing.[99] The future of the criminal justice system in the DRC is uncertain and the establishment of more concrete judicial infrastructures would further be seen as one of the remedies to the overarching problem of rape as a weapon of war, contributing also to positively influencing the gender-based arguments around the subject.

The conceptualisation of sexual violence in the DRC as a 'weapon of war' has both merits and challenges. Trends of rape in the region demonstrate the complex web around the subject. Baaz and Stern articulate the importance of the action regardless of the victim's political or ethnic affiliation to the perpetrator. Whether used as a military strategy, as a form of cultural humiliation or social intimidation, the prosecution of sexual violence is challenged due to the weak judicial infrastructure and correctional system in the DRC. A questionable judicial system, therefore, leads to the possibility of a specialised chamber, which is considered in the section below.

4 Establishment of a specialised chamber in the DRC

The DRC has been the 'face' of serious violations of international humanitarian and human rights law, with the International Criminal Court (ICC) opening investigations in the region in 2004.

98 Mansfield (n 6 above) 388.
99 Engle & Lottman (n 11 above).

Consequently, the urge to hold those accountable remains 'tremendous and national authorities retain the primary obligation to bring to justice those responsible'[100] for crimes under the Rome Statute. Further, the judicial system seems to be fundamentally flawed with its underfunded administration, lack of sustainable regulation and its interference by both the political and military hierarchy in the region.[101] In 2008, the United Nations Independent Expert on the Situation of Human Rights in the Democratic Republic of the Congo reported that 'little progress has been made to date with regard to the administration of justice and the fight against impunity, and thus it seems that a climate of virtually generalised impunity persists throughout the Democratic Republic of the Congo'.[102] The DRC issued draft legislation allowing the implementation of its obligations under the Rome Statue and, therefore, giving the ICC the power to extend its jurisdiction for crimes within the statute to civilian courts.[103] The DRC Parliament adopted draft legislation implementing the Rome Statute in December 2013.[104]

Since 2004, numerous legal experts, NGOs and Congolese civil society organisations have suggested the establishment of a specialised mixed chamber or, in some cases, special international or hybrid tribunals to try individuals accused of crimes under the Rome Statute.[105] Understanding the distinctions between these, however, is critical to arguing which form of judicial authority would best address the needs in the country. The distinction is clear: Mixed chambers possess a national judicial framework with the inclusion of temporary international staff,[106] whereas hybrid tribunals have effective efforts by both the international community and national institutions, utilise both national and international judicial actors as well as incorporate the sophistication of both domestic and international law in their statutes.[107]

100 Human Rights Watch 'Accountability for atrocities committed in the Democratic Republic of Congo: Supporting the government's proposal to establish specialised mixed chambers and other related judicial reform' April 2014.

101 *Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo*, Report for the International Legal Assistance Consortium and International Bar Association Human Rights August 2009.

102 *Report of the Independent Expert on the Situation of Human Rights in the Democratic Republic of the Congo* 29 February 2008 UN Doc A/HRC/7/25 para 5.

103 S Willis *Hybrid and internationalised criminal tribunals: Selected jurisdictional issues* (2012) 157.

104 Adopted by the National Assembly's Commission on Politics, Administration and Justice.

105 Human Rights Watch 'Tackling impunity in Congo: Meaningful follow-up to the UN mapping report: A mixed chamber and other accountability measures' October 2010.

106 Human Rights Watch 'DR Congo: A "mixed chamber" for Congo?' 5 October 2009.

107 D Cohen 'Hybrid justice in East Timor, Sierra Leone, and Cambodia: "Lessons learned" and prospects for the future' (2007) 43 *Stanford Journal of International Law* 1 2.

Further, the United Nations Office of the High Commissioner for Human Rights released a mapping report outlining human rights violations between 1993 and 2003 and concluded that, despite several attempts at reforming the DRC's judicial framework, the system as it stands has 'neither the capability nor the credibility required in order to step up efforts to the fight against impunity for the many violations of fundamental rights committed … in the past'.[108] There are a number of reasons for the possible implementation of a specialised mixed chamber in the DRC:

(1) The creation of this chamber would be consistent with the DRC's primary obligations under international law when trying offenders in the region.
(2) The chamber would be incorporated into existing efforts to amend the current legal and judicial system and, as such, it would assist to develop expertise at the local level.
(3) A mixed chamber could be established within a short timeframe with fewer financial implications.
(4) 'International involvement in key posts would offer greater guarantees of impartiality and independence and thus have greater credibility.'[109]
(5) The Congolese would claim ownership of the process as well as the institution. What has been seen as an impediment to the fight against impunity is the lack of independence of the DRC's judiciary, and the ability of non-Congolese staff to be present would assist in 'buffering the chambers from interference from the executive and the military hierarchy'.[110]
(6) There is the possibility for the DRC to become an open-ended territorial jurisdiction.[111]

The development of such a system also has its complications and challenges. The mapping report outlines the following challenges:[112]

(i) the lack of credibility of the national judicial system in the eyes of the Congolese people …;
(ii) the chronic lack of capacity in the Congolese judicial system could endanger this new mechanism … The judicial system in the DRC suffers from a significant lack of structures, financial and operational resources, human resources and general capacity to enable all those involved in it to fulfil their functions adequately and be sheltered from financial concerns. Significant and consistent support from the international community would be essential for the success of such a mechanism, both in terms of the initial set-up and its ongoing operation.
(iii) It would be more difficult to ensure that third party states would co-operate with these new chambers, given that they would be under no general obligation to collaborate and would probably be more

108 OHCHR 'Democratic Republic of the Congo – 1993-2003' Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010 para 979.
109 Willis (n 103 above).
110 As above.
111 OHCHR (n 108 above) paras 1043-1046.
112 OHCHR para 1045.

> reticent to co-operate with them than they would be towards an international body independent of the Congolese judicial system.

The suggested alternative of a hybrid model, based on that of the Special Court for Sierra Leone,[113] was deemed to be unsuitable due to the lengthy timeframe of it being established, in addition to a possible treaty being required between the UN and the DRC. It was also viewed as an '*ad hoc* institution, with little impact on wider issues of impunity and capacity building within the DRC, and would involve a greater impact on the sovereignty of the DRC',[114] as the DRC would need to give jurisdiction in criminal matters (of its own nationals) to an independent international court. In addition, the Special Court for Sierra Leone created unrealistic expectations, and it is this 'legacy' that warrants scholars and practitioners to question the benefit of a hybrid court in the DRC. On this note, it may be argued that what is mostly criticised about international tribunals is the fact that they neglect to assist with national reconciliation in a country and, therefore, they rarely contribute to the reinstitution of the rule of law after a conflict.[115]

A mixed chamber gives civil society confidence that it would counter this notion due to its functioning and existing within the conflict-pressured society. Research conducted by the United Nations Development Programme, together with the International Centre for Transitional Justice, specified that the majority of Sierra Leoneans believed that the Court did justice to the region by leaving a more prominent legacy rather than prosecuting a number of individuals.[116] In addition, the ideals provided by establishing such a framework also led a number of people to believe that the court would 'contribute to institution building … helping to rebuild a shattered judiciary, revitalise legal education, and assist in legal reform even as it is expected to contribute to reconciliation'.[117] Whether the court has the ability to support capacity building is debatable due to the limited resources provided.

With regard to the prospect of the court rebuilding a dysfunctional judicial system, it is argued that having the court as an entity separate from the domestic system creates concerns for practitioners and members of the court. This concern is that there will be no legacy and that such a legacy assists in strengthening the domestic legal and

113 The Special Court was officially established by a bilateral agreement between the government of Sierra Leone and the United Nations that was signed in the Sierra Leonean capital, Freetown, on 16 January 2002. Act 9, Special Court Agreement, 2002 (Ratification Act).

114 Willis (n 103 above) 159. See also UNHRC 'The human rights situation in the Democratic Republic of the Congo and the strengthening of technical co-operation and advisory services' 21 March 2011 UN Doc A/HRC/RES/16/35 para 6.

115 CL Sriram 'Wrong-sizing international justice? The hybrid tribunal in Sierra Leone' (2005) 29 *Fordham International Law Journal* 472 490.

116 Sriram (n 115 above) 497.

117 Sriram 498.

judicial system. In the context of Sierra Leone, this is viewed as critical since the domestic judicial system lacks a number of fundamental elements, such as law reports and decisions previously handed down. Sierra Leone has a resemblance to the DRC in that its system is scoured with corruption, financial challenges and bribery.[118] Such issues create a cause for concern where both states are attempting to create judicial independence, something that is currently far from being achieved.

Informing the wider community is also a mandate that needs to be focused on when establishing these tribunals. In the case of the Special Court for Sierra Leone, a number of court staff members have engaged with the public in order to provide information and to develop basic legal capacity to have society use the Court to its full potential. There has been some scepticism regarding the relationship between the Court and national justice mechanisms, because of the Court enticing a number of legal experts away from current or future roles in the national legal system.[119] In addition, the Court has 'taken land from the prison service, including land intended for a new training school'.[120]

In an effort to make the work of the Court appealing and comprehensible, outreach staff have attempted to develop training programmes for local chiefs and community leaders by linking international legal standards of due process to domestic and traditional mechanisms of justice, as well as the rule of law.[121] Such collaboration would seek to benefit the mixed chambers approach in the DRC, as a number of cultural and traditional judicial standards are still held in the eastern province. In addition, the majority of both Congolese and Sierra Leoneans are 'little affected by the formal legal sector', yet still partake in and follow traditional frameworks. However, certain scholars[122] argue that a more appropriate way of addressing crimes of the past would be through traditional avenues, including 'purification and cleansing ceremonies, and certainly that at the very least these traditional activities ought to supplement more formal ones'.[123] Moreover, a number of international and external actors involved in the functions of the court note their eagerness for the court to have an impact on victims and the wider community, something that can be seen in other mixed tribunals.[124] There have, however, been 'negative effects on local capacity, and outreach is as

118 Sriram 499.
119 As above.
120 As above.
121 As above.
122 Sriram interviewed Alfred Carew, head of the National Forum for Human Rights, Freetown, 15 July 2004, See A-S Rodella 'Justice, peace, and reconciliation in post-conflict societies: The case of Sierra Leone' Fletcher School, Tufts University, May 2003.
123 As above.
124 As above. See also C Schocken 'The Special Court for Sierra Leone: Overview and recommendations' (2002) 20 *Berkley Journal of International Law* 436 452.

yet limited'.[125] One may argue that the court is not to be viewed as a building mechanism for national legal capacity, and that such an idea should be further critiqued. Only if the court side-tracks its attention and use of resources form other domestic needs should concerns arise within the domestic and international context.

The establishment of a mixed special chamber provides victims of sexual violence and extreme violations of their human rights, with the ability to fight impunity and to seek justice. In addition, its inclusion in the Congolese judicial system would directly assist in creating capacity-building initiatives which would develop safeguards that would protect it from being undermined by the DRC's political and military elite. However, significant endeavours would need to be made in order to guarantee credibility.[126]

5 The way forward: Combating sexual violence in the DRC by addressing existing obstacles

Combating sexual violence and addressing impunity require a number of obstacles to be removed. Arguably, the problem with prosecuting those who commit sexual violence in the DRC is not institutional, legal or sociological, but rather the pervading existence of insecurity in the region. The unrelenting insecurity facilitates the commission of rape, which causes a number of obstacles to justice.[127] Mansfield contends that the continued fighting in Eastern DRC has severely affected health services for rape victims, diverting attention away from prosecuting those involved.[128] Health services may be challenged, given the large number of rape victims requiring attention, as well as fighting affecting the actual clinics. As such, reforming the security dimension of the crisis is viewed as one of the fundamental dimensions to sexual violence. The Enough Project of John Predergast argues that[129]

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

125 As above.

126 OHCHR (n 108 above) 1046.

127 Mansfield (n 6 above) 404.

128 As above. Mansfield argues that due to the constant insecurity within the region, 'facilitates the commission of rapes … [and] also causes several obstacles to prosecuting sexual violence perpetrators', therefore creating a number of obstacles towards both the notion of justice and the Congolese justice system.

129 As above. See Enough Project John Prendergast 'Confronting rape and other forms of violence against women in conflict zones – Spotlight: DRC and Sudan' 13 May 2009.

Mansfield and Zongwe continue to argue that the DRC is the only country in the region that has its peace and stability in the hands of regional diplomatic relations.[130] One may, therefore, argue that in order to achieve stability and security, it is crucial to solidify regional military co-operation. This would allow neighbouring states, such as Uganda and Rwanda, to dispose of rebel forces and to 'extinguish the remaining pockets of insecurity in Eastern DRC and the entire Great Lakes region'.[131] In addition, the adoption of measures to stop the illegal trade in minerals must be implemented not only by the United Nations and international bodies, but should be driven by the Congolese government. This can be achieved by increasing security within mining districts. The international community should also insist upon accountability in the regulation of multinational corporations, in order to ensure that the minerals being traded do not emanate from armed and bloody conflicts.[132]

Moreover, with regard to combating impunity through justice, the DRC is facing a crisis due to corruption within its judicial and political system. Peace and justice will never be possible while arrests are being neglected, convictions set aside and perpetrators are escaping. The UN Security Council affirmed in Resolution 1820 that 'effective steps to prevent and respond to acts of sexual violence can significantly contribute to the maintenance of international peace and security'.[133] A current issue is the strategy necessary to assist with gender justice. As indicated previously, the establishment of a special mixed chamber would assist in combating this element. The model of transitional justice would be built on international support with the premise of building on the existing Congolese framework. Further, the Congolese government should also be required to continue to improve its domestic legal system in order to strengthen judicial institutions when combating sexual violence. Training specialised investigators, providing greater access to justice for victims and enforcing judgments (that is, ensuring reparation payments in addition to the imprisonment of those convicted) would assist with the process of combating sexual violence.

Importantly, however, gender must be seen at the forefront of these frameworks. It may be argued that international humanitarian law needs to be reviewed in order for a feminist order building to exist which focuses on punishing those who commit sexual violence against women. The criminal process should have a platform to allow women to tell their stories rather than to have these edited based on a

130 As above. See also DP Zongwe 'The legal justifications for a people-based approach to the control of mineral resources in the Democratic Republic of the Congo' 26 April 2008 *Cornell Law School Inter-University Graduate Student Conference Paper* 12 http://scholarship.law.cornell.edu/lps-clacp/12 (accessed 18 December 2015).

131 Zobgwe (n 130 above) 405.

132 As above.

133 UNSC Resolution 1820 (2008) of 19 June 2008.

patriarchal legal framework. Dixon[134] and Mertus[135] argue this point, with Mertus focusing on the *Foca* case, contending that[136]

> [t]he witnesses almost universally experience the trials as dehumanising and re-traumatising experiences … the narrative of the witness is contorted to suit the needs of the audience.

Consequently, the process suppresses women's stories and disempowers them in their time of need. The framework, therefore, has to make it clear that women's experiences are fully recognised by the legal system and, as such, women and gender are put first.

Moreover, with regard to gender maintenance in the legal system, Mansfield suggests that the state should persuade traditional chiefs to assist former soldiers, rape survivors and (certain) sexual offenders to reintegrate into their respective traditional communities.[137] Nevertheless, there is also the international requirement for the state to protect the rights of women, which 'implies developing customary law and circumscribing the criminal jurisdiction of traditional courts as certain aspects of customary laws discriminate against women'.[138] The state must, therefore, implement a legislative framework that defines the jurisdictional limits of traditional courts in order for them to comply with gender rights and international standards. Mansfield argues that[139]

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

Furthermore, Mansfield argues that a distinction is required in order to distinguish between statutory rape and violent rape against minors. The equal treatment of both these forms of rape 'inflates official rape prosecution statistics and leads one to an inaccurate perception of the number of violent rape cases handled by the courts'.[140] One may, therefore, argue that this is critical as it convolutes the assessment of the severity of sexual violence in the region, in addition to the 'urgency of measures needed to respond'.[141]

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134 R Dixon 'Rape as a crime in international humanitarian law: Where from here?' (2002) 13 *European Journal of International Law* 697.

135 J Mertus 'Shouting from the bottom of the well: The impact of international trials for wartime rape on women's agency' (2004) 6 *International Feminist Journal of Politics* 110.

136 Mertus (n 135 above) 112.

137 Mansfield (n 6 above) 408.

138 As above.

139 As above.

140 As above.

141 As above.

6 Conclusion

Crimes of sexual violence continue to occur, perpetrated by armed groups as well as members of the military and the police force. Sexual violence is punishable under Congolese national law as well as in terms of international legal obligations. However, the system that was built to protect civil society is flawed, and limited progress has been made with combating impunity. Outlined above are a number of cases that clearly demonstrate that sexual violence is on the rise in the DRC. A number of obstacles exist, with many cases not being investigated; perpetrators not being prosecuted due to, for example, limited efforts by the Congolese authorities to prosecute crimes of sexual violence; a corrupt judiciary; issues of domestic infrastructure; and traditional and cultural values. These obstacles and failures emphasise the notion that rape is a weapon of war, especially in the context of the DRC. The article has assisted in viewing rape and sexual violence as a key to understanding aspects of armed conflict.

The issue of militarised groups being the hub for men learning to associate violence with masculinity was also critiqued. As argued in the article, militarised masculinity and heterosexuality must be understood as institutionalised issues.[142] While there may be no single measure that will put an end to sexual violence in the DRC, an analysis of the situation in the region led the article to make recommendations on combating sexual violence and impunity. Noting this importance, I also argued the position that a specialised mixed chamber should be established for the DRC, and made a comparison between the idea of a mixed chamber and the reality of an existing hybrid court, namely, the Special Court for Sierra Leone. Evidently, the premise of the analysis was that the establishment of an international judicial body for the DRC would offer more grounded guarantees of success, as well as assist in strengthening the DRC's national system that is infected by political corruption.

142 Banwell (n 12 above) 56.

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The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo

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Summary

In the eastern Democratic Republic of the Congo, since 1996 conflict-related sexual violence against women and girls, particularly, has been a sad reality, even though these crimes are prohibited by international humanitarian law and criminalised by international and domestic criminal laws. When these violations occur, the perpetrators should be brought to justice. However, survivors face many challenges in holding perpetrators accountable, such as fear of speaking out due to cultural prohibitions, stigmatisation and fear of reprisals and rejection. The judiciary also faces challenges, including an insufficient budget, the lack of a competent court of law to deal with crimes of sexual violence in rural areas, poor equipment and a lack of education on crimes of sexual violence. In order to improve this situation, this research article argues that it is vital that the Congolese government establish competent courts of law to deal with crimes of sexual violence in rural areas and to ensure that officers of the judicial police are well trained, well remunerated and equipped to conduct investigations. Survivors should be adequately informed, encouraged and made aware of the fact that breaking the silence is an effective way of eradicating rape and other forms of sexual violence. Local communities should also be made aware and sensitised so that they do not reject survivors because unknown people have abused them.

Key words: *Sexual violence; crimes; armed conflict; access to justice; Democratic Republic of the Congo*

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1 Introduction

For almost two decades, the eastern part of the Democratic Republic of the Congo (DRC) has experienced an alarming number of ongoing non-international[1] and internationalised armed conflicts.[2] Domestic[3] and foreign[4] armed groups, as well as foreign armies,[5] are involved in these armed conflicts. On the one hand, civilians are often the potential victims of indiscriminate attacks or the primary targets of violence because they cannot defend themselves. On the other, 'because civilians are not seen as a distinct group separate from enemy combatants, it is often difficult to deal with them separately'.[6] In this regard, during different stages of these armed conflicts, all actors, including the armed forces of the DRC, or *Forces Armées de la République Démocratique du Congo* (FARDC), are alleged to have committed gross violations of human rights and serious violations of

1 According to art 1 of the Additional Protocol II, non-international armed conflicts are all armed conflicts which take place in the territory of a high contracting party between its armed forces and dissident armed forces or other organised armed groups fighting each other. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). In this case, the regular army was fighting against rebel groups such as *Rassemblement Congolais pour la Démocratie* (RCD), *Mouvement pour la Libération du Congo* (MLC) and *Congrès National pour la Défense du Peuple* (CNDP), but those armed groups were also facing resistance by other domestic small armed groups of May-May that wanted to protect their territories against occupation.

2 'The term "internationalised armed conflict" describes internal hostilities that are rendered international.' The circumstances that can achieve this are numerous and often complex: The term includes war between two internal factions, both of which are backed by different states; direct hostilities between two foreign states that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government. See JG Steward 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalised armed conflict' (2003) 85 *International Review of the Red Cross* 315, citing D Schindler 'International humanitarian law and internationalised internal armed conflicts' (1982) *IRRC 255*. In this case, internationalised armed conflicts occurred when foreign states such as Rwanda and Uganda supported domestic armed groups against the government of the DRC.

3 The DRC has experienced and is still experiencing activity by various armed groups/militias. Examples are the *Alliance des Forces Démocratiques pour Libération du Congo-Zaire* (AFDL); the RCD; the MLC; the *Union des Patriotes Congolais* (UPC); the CNDP, the *Patriotes Résistants Congolais/Forces Armées Populaires* (PARECO/FAP); and the *Mouvement du 23 Mars (M23)*, to cite only a few.

4 The Ugandan Allied Democratic Forces/National Army for the Liberation of Uganda (ADF/NALU), the Lord's Resistance Army (LRA) and the *Forces Démocratiques pour la Liberation du Rwanda* (FDLR) are among foreign armed groups terrorising civilian populations in the eastern DRC.

5 Foreign armies include the Rwandan Defence Force (RDF) and the Uganda People's Defence Force (UPDF).

6 T Elbert et al *Sexual and gender-based violence in the Kivu provinces of the Democratic Republic of Congo: Insights from former combatants* (2013) 37.

international humanitarian law.[7] Of these, mass rape and other forms of sexual violence against girls and women, and sometimes men and boys, are the most cruel, causing enormous pain and affecting victims and the community as a whole directly and indirectly. However, there are few reports or literature on men and boys who have been raped (or even exposed to sexual violence)[8] in eastern DRC because of a lack of disclosure due to shame and stigmatisation. The article therefore focuses on girls and women in the context of armed conflict.

Girls and women in the front line and in areas controlled or occupied by armed groups are particularly vulnerable. In 2008, Major-General Patrick Cammaert, the then Deputy Force Commander of the UN Mission in the DRC, declared that 'it is now more dangerous to be a woman than to be a soldier in modern wars'.[9] It is in this context that the article analyses sexual and gender-based violence as part of conflict-related sexual violence (CRSV) in the North Kivu province.

Indeed, prohibited by international humanitarian law, CRSV is criminalised by international and domestic criminal laws. When such violations occur, the perpetrators must be brought to justice. The article analyses the many challenges faced by survivors when attempting to hold perpetrators accountable.

The article first analyses the prevalence of CRSV globally and in the DRC. It explores the legal instruments prohibiting CRSV in armed conflicts. Second, it analyses the challenges faced by survivors in accessing justice and those faced by the judiciary in rendering justice. Third, it proposes a way forward.

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7 M Nest et al *The Democratic Republic of Congo: Economic dimensions of war and peace* (2006) 12; A Binder et al *Democratic Republic of the Congo* (2010) 22; OHCHR *Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (2010) paras 998-999; PT Shirambere *Culture of peace: Good governance in the Democratic Republic of the Congo* (2014) 7 217.

8 However, in their research project Johnson et al indicate that men and boys are also exposed to sexual violence. Thus, in a random sample, an exceptional study conducted found that 74,3% of women and 64,5% of men were exposed to conflict-associated sexual violence. Rape was reported as being the most common type of sexual violence, affecting 51,1% of women and 20,8% of men. See K Johnson et al *Association of sexual violence and human rights violations with physical and mental health in territories of the Eastern Democratic Republic of the Congo* (2010) 558 http://www.lawryresearch.com/553.full.pdf (accessed 6 October 2014).

9 S Chemaly 'Worldwide, it's "more dangerous to be a woman than a soldier in modern wars"' (2012) http://www.huffingtonpost.com/soraya-chemaly/rape-in-conflict_b_1501458.html (accessed 6 October 2014).

2 Prevalence of conflict-related sexual violence globally and in the DRC

2.1 Conflict-related sexual violence globally

In a situation of armed conflict, rape and other forms of sexual violence remain the predominant abuse perpetrated both by state actors (security forces) and non-state actors (rebel groups). In this regard, Rehn and Sirleaf argue as follows:[10]

> Violence against women during conflict has reached epidemic proportions. Civilians have become the primary targets of groups who use terror as a tactic of war. Men and boys as well as women and girls are the victims of this targeting, but women, much more than men, suffer gender-based violence. Their bodies become a battleground over which opposing forces struggle. Women are raped as a way to humiliate the men they are related to, who are often forced to watch the assault.

In the same vein, Vlahoud and Biason reveal that[11]

> [s]exual violence may be part of a calculated policy to attack the heart of a society, to demoralise and dishonour the opponent. The manner of the sexual violence is often such as to maximise the humiliation of the victim and their family and community and to ensure a level of powerlessness and fear that will remain entrenched.

Concerned about these atrocities in situations of armed conflict, the United Nations (UN) Secretary-General, in his report to the UN Security Council, uses the term 'conflict-related sexual violence' (CRSV). Indeed, as defined in his report of March 2015, the term CRSV refers to[12]

> rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is linked, directly or indirectly (temporally, geographically or causally) to a conflict. This link may be evident in the profile of the perpetrator; the profile of the victim; in a climate of impunity or state collapse; in the cross-border dimensions; and/or in violations of the terms of a ceasefire agreement.

Indeed, during the 1994 genocide[13] in Rwanda, between 250 000 and 500 000 women and girls were raped, and during the 1990 war

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10 E Rehn & EJ Sirleaf *Women, war and peace: The independent experts' assessment on the impact of armed conflict on women and women's role in peace-building* (2002) 10.

11 M Vlahoud & L Biason *Women in an insecure world: Violence against women facts, figures and analysis* (2005) 14 http://www.unicef.org/emerg/files/women_insecure_world.pdf (accessed 17 October 2014).

12 UNSC *Conflict-related sexual violence: Report of the Secretary-General*, 23 March 2015, S/2015/203 para 2 http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf (accessed 4 September 2015).

13 Rehn & Sirleaf (n 11 above) 9.

in Bosnia and Herzegovina, between 20 000 and 50 000 women were raped.[14] Survivors of CRSV are often rejected or abandoned by their husbands or partners and families and shunned by their communities.[15] Turshen states that rape causes lifelong physical and psychological suffering to victims and destroys families and larger social networks as well as individual economic capacity.[16] Besides, rape also tends to spread sexually-transmitted infections (STIs), including HIV,[17] and victims experience unplanned and unwanted pregnancies. On 25 November 2006 Kofi Annan, the then UN Secretary-General, observed:[18]

> Violence against women causes untold misery, harms families across generations, and impoverishes communities. It stops women from fulfilling their potential, restricts economic growth, and undermines development. When it comes to violence against women there are no civilised societies.

When assessing the situation, the UN Secretary-General, Ban Ki-moon, noted that[19]

> [a]ll too often, perpetrators go unpunished. Women and girls are afraid to speak out because of a culture of impunity. We must fight the sense of fear and shame that punishes victims who have already endured crime and now face stigma. It is the perpetrators who should feel disgraced, not their victims.

In December 1999, the UN Secretary-General stated his concern that violence against women and girls, inflicted by men, was widespread throughout the globe in developing and developed countries, affecting women, no matter what their race, ethnicity, social origin, property, birth or other status. On International Women's Day, Kofi Annan observed that violence against women was the most shameful human rights violation that must be recognised and condemned.[20] In this regard, following the Declaration on the Elimination of Violence

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14 J Ward *If not now, when? Addressing gender-based violence in refugee, internally-displaced, and post-conflict settings: A global overview* (2002) 81 http://www.rhrc.org/resources/ifnotnow.pdf (accessed 17 October 2014).

15 L Hovil *Gender, transitional justice, and displacement: Challenges in Africa's Great Lakes region* (2012) 6.

16 Turshin, cited by Elbert et al (n 6 above) 7.

17 Former CNDP combatants admitted that violence against women was practised by their group to spread AIDS in the victims' communities. See Elbert et al (n 6 above) 51.

18 K Annan 'International Day for the Elimination of Violence against Women on 25 November' (2006) http://www.un.org/News/Press/docs/2006/sgsm10738.doc.htm (accessed 4 October 2014).

19 B Ki-moon 'International Day for the Elimination of Violence against Women 25 November' (2012) http://www.un.org/en/events/endviolenceday/2012/sgmessage.shtml (accessed 4 October 2014).

20 K Annan 'Violence against women "most Shameful", pervasive human rights violation' http://www.un.org/press/en/1999/19990308.sgsm6919.html (accessed 11 November 2015). See also B Ki-moon 'Message for the International Day for the Elimination of Violence against Women, 25 November' (2011) http://www.un.org/News/Press/docs/2011/sgsm13955.doc.htm (accessed 4 October 2014).

against Women,[21] the UN General Assembly adopted Resolution 54/134, designating 25 November as the International Day for the Elimination of Violence against Women.[22] Nevertheless, violence against women and girls around the world did not cease or decrease. On 25 November 2012 Ban Ki-moon acknowledged that[23]

> [m]illions of women and girls around the world are assaulted, beaten, raped, mutilated or even murdered in what constitutes appalling violations of their human rights. From battlefield to home, on the streets, at school, in the workplace or in their community, up to 70 per cent of women experience physical or sexual violence at some point in their lifetime.

2.2 Conflict-related sexual violence in the DRC

Since 1996, when the first internationalised armed conflict started in the eastern DRC, rape and other forms of sexual violence against women and girls, in particular, have become a sad reality of war. National and foreign soldiers and members of armed groups involved are alleged to have committed violence, accompanied by the systematic use of rape and sexual assault.[24] Statistics often help to illustrate the pervasive use of CRSV in the North Kivu province, even though many cases go unreported. Cases of sexual violence over the last ten years are presented in Table 1.

Table 1: Incidents of sexual gender-based violence in North Kivu between 2004 and 2013

No	Year	Cases of sexual violence
01	2004	5 527
02	2005	5 190
03	2006	4 238
04	2007	3 063
05	2008	4 820
06	2009	4 026
07	2010	54 885
08	2011	6 898

21 UNGA Resolution 48/104 (1994).

22 UNGA Resolution 54/134 (1999) http://www.un.org/en/ga/search/view_doc.asp?symbol= A/RES/54/134 (accessed 6 October 2014).

23 Ki-moon (n 19 above).

24 OHCHR (n 8 above) para 35; Elbert et al (n 6 above) 19 29 43 46 57-59.

09	2012	7075
10	2013	3 177 (first semester only)

Sources: Cases of sexual violence from 2004 to 2009;[25] *cases of sexual violence in 2010;*[26] *cases of sexual violence in 2011;*[27] *cases of sexual violence in 2012;*[28] *cases of sexual violence in 2013 (first semester)*[29]

A number of authors have met soldiers and combatants who revealed several incidents of rape and sexual violence during armed conflict. According to the study by Elbert *et al*, poverty may explain why Congolese soldiers rape women. Due to their low salaries, soldiers are often unable to convince women to have consensual sex or to pay for it; they also have poor living conditions that cause their wives to love them less than they feel they deserve. The resulting frustration causes them to commit such harmful acts,[30] whereas the mission of the FADRC is to defend the integrity of the national territory and borders.[31] Unfortunately, tolerance and a lack of punishment at leadership level seems to have encouraged such misconduct.[32] This may be why Congolese soldiers are often prosecuted when the DRC is under international pressure,[33] but

25 NGOs *Présentation des cas incidents des violences sexuelles au Nord Kivu rapportés par les Commissions Territoriales de Lutte contre les Violences Sexuelles (CTLVS). Période couverte: Janvier à Décembre 2009*. Data collected at the office of the local NGO Dynamique de Femmes Juristes (DFJ), Goma, on 10 January 2015.

26 UNFPA *Cas incidents de violences sexuelles enregistrés en 2010 au Nord Kivu.* Data collected at the office of the local NGO *Dynamique de Femmes Juristes* (DFJ), Goma, on 10 January 2015.

27 *Indicateurs des violences sexuelles et basées sur le genre des territoires de la Province du Nord Kivu*. Data collected at the office of the local NGO DFJ, Goma, on 10 January 2015.

28 *Division du genre, famille et enfant du Nord Kivu en RDC. Présentation des données SGBV au Nord Kivu/ 2012*. Data collected at the office of the local NGO DFJ, Goma, on 10 January 2015.

29 UNFPA, *Réunion de validation des données des VSBG collectées au 1er Semestre 2013 dans la Province du Nord-Kivu.* Data collected at the office of the local NGO DFJ, Goma, on 10 January 2015.

30 Elbert et al (n 6 above) 19.

31 See art 187 of the Constitution, which provides (in French): '*Les Forces armées … ont pour mission de défendre l'intégrité du territoire national et les frontières*.'

32 Human Rights Watch *Les soldats violent, les commandants ferment les yeux: Violences sexuelles et réforme militaire en République Démocratique du Congo* (2009) 5.

33 During 2013, 61 members of the national defence and security forces were sentenced for crimes of sexual violence, including four members of the national police force, 33 FARDC members and 24 other state agents. In addition, in the *Minova* case, the operational military court of North Kivu province prosecuted 40 FARDC members, including five high-ranking officers alleged to have raped women in and around Minova between 20 November and 4 December 2012. However, rebels who fled into Rwanda and Uganda have not yet been tried. See Report of the Secretary-General to the UNSC on conflict-related sexual violence of 13 March 2014 S/2014/181, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_181.pdf (accessed 26 January 2015).

members of the rebel forces have not yet been prosecuted. Elbert *et al* interrogated national and foreign combatants such as those belonging to PARECO, CNDP and FDLR. While Congolese soldiers do not seem to have been given instructions, other combatants were given orders to rape women and girls. According to participants in the study,[34]

> [a]lmost one-third of former CNDP combatants affirmed that such orders were given. Furthermore, 14 per cent of former PARECO combatants and 16 per cent of former FDLR combatants reported orders to rape civilians.

However, despite media campaigns against rape and all forms of sexual violence against women and girls, without particular orders, some soldiers and combatants lost all discipline and raped women and girls under the influence of traditional local drugs and marijuana. Elbert et al argue that this can be seen as an excuse because 'in court trials, the defendant would not be considered as fully responsible if he were intoxicated with substances at the time of a committed crime'.[35]

Women give birth and through marriage unite families, communities and nations. In the Congolese tradition, they are traditionally and generally respected and, therefore, subjected to protection because they are the 'glue' that unites communities. In this regard, the humiliation of women becomes the communities' humiliation and women are destroyed because communities are destroyed. In other words, there are probably other ways to destroy a community but, unfortunately, an effective way is to destroy its women. Thus, CRSV goes beyond affecting women as human beings; it can be seen as violence against the community as a whole. In other words, it may be assumed that many goals are achieved when the leaders of armed groups order their combatants to perpetrate rape and other forms of sexual violence. Indeed, Elbert et al found that if women living in the territory controlled by an armed group are suspected of collaborating with the enemy, brutal forms of rape are used as a punishment,[36] humiliation, or to gain political attention.

In armed conflict, non-combatant women are part of the civilian population that should be protected; they are unarmed and therefore cannot defend themselves. The national army has a duty to secure its territory and to protect its civilian population. When the army is unable to do so, the vulnerability of women is exploited to weaken its morale; the opposing armed group may organise sporadic attacks on the territory controlled by the government and may rape women. This behaviour is seen as a defeat for the national army and, therefore, a victory for the armed group that perpetrated the raid.[37] In addition, women are also considered a 'precious resource'; as such, the ability to protect them demonstrates the strength of the national army.

34 Elbert et al (n 6 above) 43.
35 Elbert et al 30-31.
36 Elbert et al 57.
37 Elbert et al 58.

Thus, combatants invade the territory and rape women to 'demonstrate the group's superiority'[38] *vis-à-vis* the national army. An illustration is the M23 rebels' occupation of the town of Goma on 20 November 2012. The first thing they did inside the military camp of Katindo was to rape the wives of FARDC soldiers who had fled during their advance.[39] It is in this regard that Elbert *et al* find that 'women are not seen as independent agents or carriers of rights and dignity'.[40]

> Clearly, there are also tactical and strategic aspects of sexual violence in the Eastern DRC. SGBV may be employed to demonstrate a group's strength and to draw political/public attention to it, or to terrorise civilians into compliance with the armed group's rules. When looking at strategic motives, it is assumed that armed groups perpetrating SGBV intend overall political gain. From a tactical perspective, it is assumed that SGBV is perpetrated to achieve immediate objectives in a particular engagement. The research found evidence of underlying strategic (for example, to gain political attention), tactical (for example, to facilitate lootings), as well as of overlapping strategic and tactical (for example, to control civilians) aspects of SGBV in DRC.[41]

Considering the above, the author agrees with Aristotle, that '[f]or man, when perfected, is the best of animals; but, when separated from law and justice, he is the worst of all'.[42] The next section explores the laws prohibiting CRSV in armed conflict.

3 Legal instruments preventing and prohibiting conflict-related sexual violence

The law of armed conflict or international humanitarian law legally binds all parties (states and armed groups) and applies in both international and non-international armed conflicts. For instance, Common Article 3 to the Geneva Convention of 1949 is applied to and binds each party to armed conflict not of an international character. In addition, article 96(3)(c) of Protocol 1 of 1977 to the Geneva Convention of 1949 stipulates that 'the Conventions and this Protocol are equally binding upon all parties to the conflict'. Thus, contrary to the general principle of *pacta sunt servanda* in

38 Elbert et al 59.

39 See Report of the United Nations Joint Human Rights Office (UNJHRO) on human rights violations committed by the *Mouvement du 23 Mars* (M23) in North Kivu province between April 2012 and November 2013 in the Democratic Republic of the Congo, October 2014 8 http://www.ohchr.org/Documents/Countries/CD/UNJHROOctober2014_en.pdf (accessed 20 October 2014).

40 Elbert et al (n 6 above) 59.

41 Elbert et al 60.

42 Aristotle http://buf.no/pdf/ipo2010-paulkuse.pdf (accessed 14 October 2014).

international law,[43] non-state armed groups 'are bound as a matter of international customary law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity'.[44] However, two criteria need to be satisfied by armed non-state actors for the application of international humanitarian law. The first is 'the criterion of protracted armed violence as … referring to the intensity of the armed violence rather than to its duration',[45] and the second is the 'organisation' criterion to confront each other with military means.[46] The international humanitarian law is[47]

> a set of rules which seek for humanitarian reasons to limit the effects of armed conflict. International humanitarian law protects persons who are not or who are no longer participating in hostilities and it restricts means and methods of warfare.

The four Geneva Conventions of 1949 and the two additional protocols of 1977[48] constitute a major part of international humanitarian law. Thus, they provide legal protection to people who are not or are no longer participating directly in hostilities. Article 13(1) of Additional Protocol II stipulates that '[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations'. Article 27 of the Fourth Geneva Convention of 1949 relating to the Protection of Civilian Persons in Time of War provides that '[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. Therefore, the UN Security Council, through Resolution 1325 (2000),[49]

> [c]alls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.

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43 The principle *pacta sunt servanda* is provided for by art 26 of the Vienna Convention on the Law of Treaties (1969). The provision stipulates that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.

44 Special Court for Sierra Leone, Appeals Chamber 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty' Prosecutor against Morris Kallon (Case SCSL-2004-15-AR72(E) and Brima Bazzy Kamara (Case SCSL-2004-16-AR72(E), para 47, 13 March 2004 http://www.rscsl.org/Documents/Decisions/AFRC/Appeal/033/SCSL-04-16-PT-033.pdf (accessed 12 November 2015).

45 *International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Ramush Haradinaj* Case IT-04-84-T, para 49, 3 April 2008 http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf (accessed 12 November 2015).

46 *Prosecutor v Ramush Haradinaj* (n 45 above) para 60.

47 International Committee of the Red Cross (ICRC) *The domestic implementation of international humanitarian law: A manual* (2013) 13.

48 There are two Additional Protocols I and II of 1977, relating to the protection of victims of armed conflicts, and the third of 2005 (Additional Protocol III) relates to the adoption of an additional distinctive emblem.

49 UNSC Resolution 1325 (2000) http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1325%282000%29 (accessed 4 October 2014).

Indeed, from 1950 to 2000, 194 states ratified the Geneva Conventions of 1949 and Additional Protocols.[50] Therefore, these conventions are the most widely-accepted legal instruments. Like the rule of customary law, most of their provisions are considered as a norm of *jus cogens* that creates obligations *erga omnes* binding on all states without exception. These fundamental humanitarian principles 'developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles'[51] and the most highly-ratified treaties in the world. In this regard, they have gained greater authority and their impact on public international law is difficult to overestimate.[52] However, Nieto-Navia argues that[53]

> [i]t is suggested that many of the provisions cannot *truly* be described as *jus cogens* … only those principles underlying Common Article 3 … can be identified as having reached the relevant standard.

Indeed, by ratifying and incorporating the Geneva Conventions of 1949 and Additional Protocols into domestic law, the contracting parties send a strong message that they are committed to abiding by and applying international humanitarian law in good faith:[54]

> The ratification of international humanitarian law treaties creates the obligation for states to disseminate the rules and obligations they contain in order to have them respected by all parties to an armed conflict and to ensure a more humane conduct of armed conflict. In incorporating those conventions into domestic law, states have to provide for sanctions for serious breaches of their provisions.

In this regard, to ensure its commitment, the DRC ratified the Geneva Conventions of 1949 on 3 June 1982 and the Additional Protocol of 1977 on 12 December 2002. However, Additional Protocol III of 2005 relating to the adoption of an additional distinctive emblem has not yet been ratified by the DRC. The Convention on the Rights of the Child of 1989 (CRC) was ratified on 27 September 1990 and the

50 See *Comité International de la Croix-Rouge* (CICR) 'The Geneva Conventions of 1949 and their Additional Protocols' https://www.icrc.org/fre/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm#header (accessed 17 November 2014).

51 ICTY *The Prosecutor v Zejnil Delali_ & Others* Judgment, Case IT-96-21-A para 143, 20 February 2001 http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf (accessed 13 November 2015).

52 The Geneva Conventions and Public International Law British Foreign and Commonwealth Office Conference commemorating the 60th anniversary of the 1949 Geneva Conventions, London, 9 July 2009 https://www.icrc.org/eng/assets/files/other/irrc-875-geneva-convention-int-law.pdf (accessed 13 November 2015).

53 R Nieto-Navia 'International peremptory norms (*jus cogens*) and international humanitarian law' (2001) 27 http://www.iccnow.org/documents/WritingColombiaEng.pdf (accessed 13 November 2015).

54 ICRC (n 47 above) 20.

Optional Protocol on the involvement of children in armed conflict of 2000 was ratified on 11 November 2001.[55] Thus, as mentioned earlier, the aims of the international humanitarian law treaties are to protect persons who are not or who are no longer taking part in hostilities and to minimise the effects of armed conflicts.[56] Violations of international humanitarian law treaties constitute crimes under international law; nevertheless, no penal sanctions for persons alleged to have committed such crimes are provided. However, it is argued that a sanction or penalty is part of a coherent legal structure and the threat of punishment is a deterrent. Thus, international humanitarian law treaties impose an obligation on states to provide a system of criminal punishment in order to prosecute alleged perpetrators of serious offences, to seek to bring them before their own courts or to hand them over to another state for trial.[57] Therefore, there is no excuse for state actors (security forces) and non-state armed groups to breach international humanitarian law treaties.

As defined in the Rome Statute of the International Criminal Court (ICC), international crimes have been incorporated in the Military Criminal Code of the DRC in the same words. In this regard, the crime of genocide is covered in article 164 and crimes against humanity in articles 165 to 172. The death penalty is the sentence if a victim dies or if the acts cause serious harm to his or her body. Articles 173 to 175 of the Military Criminal Code provide for war crimes.[58] Since

55 ICRC treaties and state parties to such treaties https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=CD (accessed 22 October 2014).

56 J Kellenberger 'Foreword' in ICRC (n 47 above) 20.

57 Art 49 of the Geneva Convention I, art 50 of the Geneva Convention II, art 129 of the Geneva Convention III and art 146 of the Geneva Convention IV stipulate in the same manner that '[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by article 105 and those following the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.'

58 ST Shirambere 'International humanitarian law violations in the armed conflict in eastern part of DR Congo: The case of the National Congress for the Defence of People' (2012) 2 *Journal of International Law* 250.

11 April 2013, both military and civil courts have had jurisdiction over international crimes.[59]

Indeed, regarding conflicts not of an international character, Common Article 3(1) to the Geneva Conventions and to the APII specifies:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

The essence of this provision is to protect people who are not or who are no longer taking part in hostilities, whatever their gender. In this regard, article 3(1) of the Geneva Conventions and Additional Protocol II protects the human dignity of both men and women equally and does not consider the fact that women and girls are potential victims in conflict situations. However, if women are in prison, wounded or sick, international humanitarian law grants them specific treatment due to their sex, as favourable as that granted to men.[60]

As CRSV can be used to terrorise communities, article 13(2) of Additional Protocol II prohibits acts or threats of violence intended to spread terror among the civilian population. Article 12 of Geneva Convention I and Geneva Convention II, as well as article 14 of Geneva Convention III, provide that persons who are wounded, sick, shipwrecked or prisoners of war shall be treated humanely without any adverse distinction. These provisions state that women shall be

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59 Previously, military criminal courts and tribunals had exclusive jurisdiction over international crimes as provided for in art 161 of the Military Code or Law 024/2002 of 18 November 2002. Under art 91 of the Organic Law 13/011-B of 11 April 2013, civil courts have jurisdiction to deal with international crimes *(Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*).

60 See art 12 of the Geneva Convention of 1949 I & II, and art 14 of the Geneva Convention III.

treated with all consideration due to their gender. Here also, women and men enjoy equal protection, which varies according to the situations in which women find themselves. In this regard, article 76 of Additional Protocol I provides special measures to protect women and children. Paragraph 1 stipulates that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'. In the same vein, article 27(2) of Geneva Convention IV provides that women shall be especially protected against any attack on their honour, in particular against rape, forced prostitution, or any form of indecent assault. Article 75(2b) of Additional Protocol I states that outrages upon personal dignity, in particular humiliating and degrading treatment, forced prostitution and any form of indecent assault remain prohibited at any time and in any place whatsoever, whether committed by civilian or military agents. Further, article 4(2)(e) of Additional Protocol II outlines that outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, remain prohibited at any time and in any place whatsoever.

There are customary international humanitarian law rules in addition to international humanitarian law treaties.[61] Thus, according to Rule 93 of customary international humanitarian law relative to rape and other forms of sexual violence, state practice establishes the prohibition of rape and other forms of sexual violence as a norm of customary international law applicable in both international and non-international armed conflicts. In addition, Rule 94 prohibits slavery and slave trade in all their forms, and state practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. Rule 134 provides that the specific protection, health and assistance needs of women affected by armed conflict must be respected. The rule also prohibits sexual violence.

Rape is the violation of the right to physical integrity and the most common form of sexual violence committed in eastern DRC in violation of laws and customs of war. Rule 156 states that serious violations of international humanitarian law constitute war crimes. Thus, rape has been criminalised within different statutes of *ad hoc* international criminal courts and listed among crimes against humanity. This is the case in, for example, article 5(g)(i) of the Statute of the International Criminal Tribunal for the former Yugoslavia of 1993;[62] articles 3(g)(i) and 4(e) of the Statute of the International

61 JM Henckaerts & L Doswald-Beck *Customary international humanitarian law* Vol I: Rules (2009).

62 During the armed conflict between Bosnia Serbs and Bosnian Muslims in the area of Foča from April 1992 to February 1993, non-Serb civilians, especially Muslim women, were detained, killed and raped in violation of the laws and customs of war. Thus, three Bosnian Serb army officers, namely, Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, were accused of torture, rape and enslavement. See

Criminal Tribunal for Rwanda of 1994;[63] and articles 2(f), (g) and (i) of the Statute of the Special Court for Sierra Leone of 2000. However, articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute of the ICC list rape as a war crime.

At the regional level, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) encourages state parties to adopt and implement appropriate measures to ensure the protection of women from all forms of violence, particularly sexual and verbal violence (article 3(4)). In addition, article 4 stipulates that state parties shall take appropriate effective measures to enact and enforce laws to prohibit all forms of violence against women; take appropriate measures to prevent and eliminate such violence (c); punish the perpetrators (e); establish mechanisms for rehabilitation and reparation for victims (f); and provide adequate budgetary and other resources to monitor actions aimed at preventing and eradicating violence against women (i).

In the Great Lakes region of Africa, sexual violence against women and children is among the issues that member states combat through the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children (article 11). At the domestic level, the DRC has the duty to prevent acts of sexual violence and to prosecute and punish whoever is found guilty. Article 15 of the Constitution of the DRC of 2006, as revised in 2011, provides that any sexual violence committed against any person with the intention to destabilise or to displace a family and to make a whole people disappear is a crime against humanity.[64] In addition, two laws on sexual violence were adopted in July 2006. The first defines and criminalises different acts

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ICTY, *The Prosecutor v D Kunarac, R Kovač and Z Vukovič* Case IT-96-23 & IT-96-23/1-A, para 1-22 http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf (accessed 16 November 2015). In this regard, rape was used to implement a strategy of expulsion of the Muslims out of the region of Foča through terror. This was a way in which 'the Serbs could assert their superiority and victory over the Muslims'. See ICTY 'Kunarac *et al. Sexual enslavement and rape as crimes against humanity'* http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases (accessed 16 November 2015). Judiciously, the Trial Chamber found that the accused were guilty of crimes against humanity and, therefore, sentenced them respectively to 28, 20 and 12 years' imprisonment. The Appeals Chamber confirmed the sentences imposed on the appellants by the Trial Chamber. See ICTY *The Prosecutor v D Kunarac, R Kovač and Z Vukovič* Case IT-96-23 & IT-96-23/1-A, paras 10, 18, 22 & 414.

63 The International Criminal Tribunal for Rwanda in the case of the *Prosecutor v Jean-Paul Akayesu* Case ICTR-96-4-T, the Chamber defines rape as physical invasion of a sexual nature, committed on a person under circumstances which are coercive (para 598). Thus, Jean-Paul Akayesu, judged criminally responsible under art 3(g) of the Statute, was found guilty of a crime against humanity (rape), http://www.unictr.org/Portals/0/Case%5CEnglish%5CAkayesu%5Cjudgement%5Cakay001. pdf (accessed 25 November 2010).

64 Translated from the original French: '*Les pouvoirs publics veillent à l'élimination des violences sexuelles. Sans préjudice des traités et accords internationaux, toute violence sexuelle faite sur toute personne, dans l'intention de déstabiliser, de disloquer une famille et de faire disparaître tout un peuple est érigée en crime contre l'humanité puni par la loi.*'

of sexual violence,[65] and the second relates to criminal procedure, providing a maximum of three months for the duration of the judicial proceedings.[66]

4 Challenges for survivors in accessing justice

Before analysing the challenges that face survivors of sexual violence in gaining access to justice, this section analyses the guarantees of the right to justice.

4.1 Right to justice

The right to justice is guaranteed by a number of international and domestic instruments. These include the International Covenant on Civil and Political Rights of 1966 (article 2); the Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment of 1984 (articles 4, 5, 7 and 12); and the International Convention for the Protection of All Persons from Enforced Disappearance of 2007 (articles 3, 6 and 11). At the domestic level, article 19 of the Constitution of the DRC of 2006, as revised in 2011, guarantees the right to justice. This right requires proper administration of justice, regardless of a person's gender.

However, in the aftermath of armed conflict, it is common for post-conflict states to face challenges in rebuilding themselves. In the case of the DRC, as a result of various armed conflicts, some public institutions, including the judiciary and private infrastructures, were in poor condition. In this regard, assessing the state of the judiciary after conflicts, the UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, concluded that the judicial system was 'in a deplorable state'.[67] Often the judiciary in post-conflict countries lacks the financial resources to either rebuild itself or to prosecute crimes committed during the conflict.[68] It is reported that '[w]hile most countries spend between 2% and 6% of their national budgets on justice, the DRC only spent an average of 0,6% per year between 2004 and 2009'.[69] The budget of the Congolese judicial system remains insufficient to deal with crimes committed in conflict situations. Apart from this, judicial police officers and judges are not

65 *Loi no 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code Pénal Congolais.*

66 *Loi no 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais.*

67 OHCHR (n 8 above) para 895.

68 In this regard, the report of the OHCHR provides that '[i]n many respects the incapability of the justice system in the DRC is a direct result of a lack of adequate financial resources'. See OHCHR (n 8 above) paras 900-901.

69 OHCHR (n 8 above) para 901.

yet adequately paid and this seriously affects their work.[70] Another issue is that only major cities have complete tribunals and courts of law, which is not the case in rural areas.[71]

> Judicial sector personnel, in the best of situations, are poorly paid, if at all, lack operational and professional capacity and adequate training, and justifiably refuse to work in isolated zones where their security and basic daily needs (including housing) cannot be assured. At the same time, they express a strong desire to increase their own capacities and find their current working conditions profoundly frustrating and at times degrading.

The next subsection focuses on the challenges faced by survivors in accessing justice and those faced by the judicial system in rendering justice in the DRC.

4.2 Challenges to accessing justice

Humanitarian workers, health carers and human rights defenders report that thousands of women and girls pay a particularly heavy price, which includes the systematic use of rape and sexual violence allegedly committed by government forces, rebels and civilians.[72] The large scale of rape and other forms of sexual violence perpetrated against women and girls in North Kivu province occurred and continues in the rural areas where fighting between the Congolese army and the rebel movement occurs frequently. In these areas, as the author witnessed, local customs and cultures are followed by local communities.

Many aspects prevent access to justice for survivors: culture; stigmatisation; fear of being rejected by their partners or husbands; fear of being neglected by family members; fear of reprisals; fear of intimidation by the offender, especially if he is a member of the national army or the national police or of the occupying power (rebel group); lack of interest if the perpetrator is unknown, especially if he is a member of a foreign army or a foreign armed group; competent courts far away (geographical challenge); lack of training, professional development and specialisation among local police; lack of reparation; corruption within the judiciary; and impunity.[73]

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70 In 2010, the UN Human Rights Office of the High Commissioner delivered a report in which magistrates expressed their concern about the poor levels of remuneration, arguing that the 'vast majority of Congolese magistrates consider that salaries received by them and other personnel in the Congolese justice system do not provide a decent living standard'. OHCHR (n 8 above) para 940. Although the salary has been improved from around $450 to around $600, it is still not sufficient.

71 E Brusset et al *Joint evaluation of conflict prevention and peace building in DRC* (2011) 83 http://www.oecd.org/countries/congo/48859543.pdf (accessed 3 February 2015).

72 See OHCHR (n 8 above) para 35.

73 Amnesty International, Democratic Republic of Congo: Amnesty International submission to the UN Universal Periodic Review (2009) 5 http://www.amnesty.org/en/library/asset/AFR62/009/2009/en/536d63eb-4c71-4c19-bd19-c014966bb7cf/afr620092009en.pdf (accessed 9 February 2015).

> High levels of rape and other forms of sexual violence continue to be reported across the country, particularly in the east, as part of a broader pattern of violence and discrimination against women and girls. Soldiers and police, as well as Congolese and foreign armed groups, are among the main perpetrators. An increasing number of rapes by civilians are also reported. Many rapes, notably those committed by armed groups, involved genital mutilation or other extreme brutality. A number of armed groups also abduct women and girls as sex slaves. Few perpetrators of sexual violence have been brought to justice.

Using a sample of 900 survivors, research conducted in 2012 in the town of Goma and the territories of Masisi and Rutshuru in North Kivu province by the Centre for Research on Democracy and Development in Africa (CREDDA) and Heal Africa revealed the following findings:[74]

- Regarding trust in the Congolese courts and tribunals, 36,8 per cent of respondents said that a lack of trust in Congolese judges caused them not to bring offenders to justice; 26,5 per cent said that they did not have information on how to proceed; and 21 per cent said that they did not have the resources to bring cases to justice.
- Regarding the culture issue, 56,9 per cent of respondents said that it did not help women to report cases of rape to the courts; 42,4 per cent of respondents confirmed that local culture facilitates women to report cases of rape.
- Asked why the culture does not help women to report their assaults, 53,5 per cent of respondents said it was because they were afraid of being rejected by their husbands; 21,3 per cent said that it was due to fear of being stigmatised; and 11,7 per cent said that it was taboo.
- Concerning the alleged perpetrators, 30,9 per cent of respondents said that perpetrators were not afraid of the presence of NGOs, because rape continued and the number of victims increased; 13,1 per cent said that the state was weak, there was/is impunity and the judiciary was corrupt. Of the respondents, 12,1 per cent said that the alleged perpetrators were unknown.
- Regarding the persistence of rape, 42,8 per cent of respondents said that it continued regardless of the campaign against it. Of the respondents, 20,8 per cent said that it continued because the alleged perpetrators bribed authorities, and 12,2 per cent said that the alleged perpetrators remained free, which could not decrease the rates of rape.
- Concerning prosecutions, 74,8 per cent of respondents said that the alleged perpetrators were not prosecuted, but 23 per cent said the opposite. Giving reasons why perpetrators are not treated equally, 40,5 per cent of respondents said that it was because the military groups were untouchable and 31,9 per cent said that the military groups supported each other. Regarding the preference for resolving disputes outside the court, analysis found that 75,6 per cent of cases of sexual violence were resolved locally between the families of the victims and the perpetrators.
- Concerning the profile of perpetrators, 24,8 per cent of respondents said that the alleged perpetrators were foreign soldiers or combatants of armed groups, while 14,6 per cent said that they were military (wearing uniform); 8,6 per cent said that they were elements of the national police; 2,4 per cent said that they were agents of the

74 KK Bindu et al *Etude d'impact du projet genre et justice/Heal Africa et d'identification des obstacles socioculturels qui bloquent l'accès à la justice des survivants des violences sexuelles: Etude réalisée conjointement par Heal Africa et CREDDA/ULPGL* (2012) 61-66.

> National Intelligence Agency; 14 per cent said that they were civilians; 11 per cent said that perpetrators were either military (foreign and national, or rebels) or civilians, and 24,8 per cent said that they were unknown.

In the author's experience,[75] there are different reasons why survivors do not feel that justice exists. Among them, the following may be highlighted:

There are no courts of law in the rural areas that have jurisdiction over crimes of sexual violence. The only tribunal that exists in those areas is the *Tribunal de paix,* which deals with crimes punishable by less than five years' imprisonment, while crimes of sexual violence are punishable from five to 20 years' imprisonment. If rape is committed by a civilian and the alleged perpetrator is found guilty, article 170(d) of Law 06/018 of 20 July 2006 provides that he or she will be punished by a 'criminal sentence of five to twenty years and a fine not … less than 100 000 Congolese francs'. In addition, article 7*bis* (paragraph 4) of Law 06/019 of 20 July 2006 stipulates that the judicial police officer who receives a report of on offence related to sexual violence must notify the office of the public prosecutor to which he or she belongs within 24 hours. The issue is that the office of the prosecutor competent to deal with cases punishable by imprisonment of between five to 20 years is not in the rural areas, but only in towns such as Goma, Butembo and Beni in the case of North Kivu province. Moreover, only a limited number of officers are well trained; the judicial police in the rural areas are ill-equipped and they do not have the budget and means of transportation to conduct proper field investigations.

Taking the case of Masisi (around 80 kilometres from Goma), if the alleged perpetrator is arrested, there are often transportation problems for the judicial police in delivering the alleged perpetrators to the public prosecutor in Goma[76] and complying with the law regarding the 24 hour time limit. Another problem for the survivors is travelling to and staying in Goma while the prosecutor reviews files sent by the judicial police officer. If there is enough evidence, the case must be submitted to the tribunal for judgment. Until judgment is given, the survivor is required to stay in Goma in order to attend hearings, to witness the sentencing if the perpetrator is found guilty, and also to witness the sentencing fines. Often, survivors are

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75 Based on his field experience, but also on his previous research with local organisations, such the Centre for Research on Democracy and Development in Africa (CREDDA) and Heal Africa.

76 The North Kivu Province has six *territoires* (Beni rural, Lubero, Masisi, Nyiragongo, Rutshuru and Walikale) and three cities (Beni, Butembo and Goma). Goma is the capital city. In those cities, there are competent tribunals to deal with sexual violence in the towns, but not yet in all six *territoires*. Courts from Goma have jurisdiction to deal with crimes committed in Masisi, Nyiragongo, Rutshuru and Walikale; tribunals from Beni to deal with cases from the city of Beni and Beni rural; and tribunals from Butembo to deal with cases from the city of Butembo and Lubero.

vulnerable and do not have sufficient means to pay for their accommodation or for a lawyer to assist them in the court of law.

The above situation has driven international partners to support state institutions by providing the judicial police with office supplies, training judicial police officers and magistrates, and providing motorcycles to improve their mobility for investigators[77] in cases where rape and other forms of sexual violence occur. In addition, international partners financially support lawyers in assisting sexual violence survivors in courts of law. However, because the judicial police officers are not adequately remunerated, there is a risk that they will not do their job properly because of a lack of motivation. Consequently, considering the legal requirement to notify the public prosecutor of an incident within 24 hours, it can happen that investigations are not carried out properly and, therefore, because of a lack of sufficient evidence, the courts may acquit the accused.[78] The disappointed survivor may claim that the judges were corrupt. Furthermore, there are situations where the perpetrator is wealthy and tries to negotiate an arrangement with the survivor's family. If the survivor's family is convinced beyond reasonable doubt that, with the medical report attesting that rape had been committed, and that the perpetrator will be sentenced, they may refuse the informal arrangement. When the perpetrator is acquitted, it is often alleged that he or she had corrupted the judges. Even where this is the case, it is very difficult to provide evidence of the alleged corruption.[79]

Because there are no courts of law that have jurisdiction over rape and all forms of crimes of sexual violence in the rural areas, sometimes the government agrees to the support of international partners in organising mobile courts in areas where mass rape and other forms of sexual violence were perpetrated.[80]

On 20 November 2012, when the M23 rebel group occupied the town of Goma and its surroundings, it was reported that they had raped a number of women and girls, including 49 wives of FARDC soldiers, inside the military camp of Katindo. In addition, during their 'strategic retreats', Congolese soldiers are reported to have committed human rights violations, including rape, in Minova in the South Kivu province.[81] Following those allegations, on 5 May 2014 a mobile

77 The UN Mission in the DRC, the *Restauration du Système Judiciaire au Congo* (REJUSCO), the United Nations Development Programme (UNDP) and the American Bar Association (ABA) are among the partners involved.

78 On 28 June 2007, because of a lack of evidence, the military tribunal in Katanga acquitted five of the seven military personnel (see OHCHR (n 8 above) para 868). On 3 June 2004, because of a lack of evidence, the Bunia regional court acquitted Mathieu Ngudjolo because the prosecutor had no further evidence to support the accusations (see OHCHR (n 8 above) para 873).

79 See Bindu et al (n 74 above) 47-49.

80 See 'Citing new report, UN urges DR Congo to end impunity for "widespread" sexual violence' (2014) http://www.un.org/apps/news/story.asp?NewsID=47534#.VMizn8nsGDg (accessed 28 January 2015).

81 See UNJHRO (n 40 above) 8.

operational military court was organised in Minova, where it convicted a lieutenant colonel and a corporal of rape in a mass rape trial of 39 soldiers. They were sentenced to life and 10 years' imprisonment respectively.[82] Following the verdict, the Secretary-General's special representative on sexual violence in conflict, Zainab Hawa Bangura, expressed her disappointment, saying that the sentence 'does not reflect the magnitude of the crimes of sexual violence that were committed and fails to do justice to all victims who had the courage to bring this case to court'.[83]

In the Minova trial, it should be noted that the government had organised the mobile court after receiving international pressure to put an end to impunity for rape and other forms of sexual violence perpetrated by FARDC soldiers.[84] Organising such a mobile court is a good thing in the process of fighting against impunity. However, under customary international law, the state has an obligation to investigate and prosecute grave human rights violations and to take action against those responsible. If the state fulfils its obligation there is no need for international pressure.

Violations of the right to physical integrity were committed in an environment where health facilities for appropriate medical and psychological care were almost non-existent. The mobile court was set up 18 months after these violations had been committed, and it was, therefore, very difficult for it to find beyond reasonable doubt that the alleged perpetrators were guilty. Furthermore, the international community did not wish to put pressure on Rwandan[85] and Ugandan governments that still hosted rebels alleged to have committed rape and other forms of sexual violence, either to prosecute or to extradite them.

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82 A Kambale 'Two DR Congo soldiers convicted of rape in mass trial' (2014) http://reliefweb.int/report/democratic-republic-congo/only-three-dr-congo-soldiers-convicted-rape-mass-trial (accessed 28 January 2015).

83 See 'DR Congo mass rape verdict fails to deliver justice to victims, says UN envoy' (n 80 above).

84 On 9 April 2014, UN officials called on the government of the DRC to step up the fight against impunity for rape and sexual violence, which remain widespread and largely unpunished despite some progress in holding perpetrators accountable. Navi Pillay, then the UN High Commissioner for Human Rights, 'called on the government to prioritise the fight against impunity for crimes of sexual violence, to promptly complete effective and independent investigations, and to prosecute alleged perpetrators, including those suspected of having command responsibility'. See 'Citing new report, UN urges DR Congo to end impunity for "widespread" sexual violence' (n 80 above).

85 At the time of writing, there has been no international pressure requesting either to investigate and prosecute or extradite alleged perpetrators who fled in Rwanda and Uganda. However, some international pressure against both countries was exerted in order to stop any kind of support to M23 committing serious crimes. Eg, for its support to the M23 rebel group, the United States has moved to halt its military aid to Rwanda because the rebel group was recruiting, abducting and using child soldiers to participate actively in hostilities during the armed conflict in the neighbouring DRC. See A Ahmed 'US sanctions Rwanda, others over child soldiers' http://america.aljazeera.com/articles/2013/10/4/u-s-sanctions-rwanda othersoverchildsoldiers.html (accessed 7 September 2015).

5 Way forward and concluding remarks

Cases of CRSV are innumerable in the eastern DRC despite numerous initiatives to fight these heinous and serious crimes, and despite the adoption of two laws against sexual violence on 20 July 2006. Perpetrated in armed conflict situations, rape and others form of sexual violence are strongly prohibited and criminalised by the core bodies of international humanitarian law that have been ratified universally and that bind all concerned parties, including non-state actors. In order to hold perpetrators criminally responsible for rape and other crimes of sexual violence, the right to justice is well protected by a number of international instruments. However, survivors face many challenges in accessing justice. Among these are cultural norms, stigmatisation, fear of reprisal and rejection. The judiciary faces other challenges, including insufficient funds, poor representation in rural areas, poor equipment and a lack of education on crimes of sexual violence.

To improve this situation, it is argued that it is urgent that the Congolese government establish competent courts of law to deal with crimes of sexual violence in rural areas and to ensure that officers of the judicial police are well trained and well remunerated. The judicial police must be well equipped with means to conduct investigations rapidly and gather the elements of proof in order to bring the alleged perpetrators before the competent authorities in a timely manner and thus to comply with the law. Survivors should be well prepared, well informed and encouraged by psychologists to see that breaking the silence is an effective way of eradicating rape and other forms of sexual violence. Local communities should also be sensitised so that they do not reject survivors because they have been abused.

The Congolese army has a duty to train all integrated rebels in international humanitarian law and to ensure that they are sufficiently educated and have mastered the humane conduct of armed conflict before they are deployed on the battlefield. In this regard, in his report of March 2015, the UN Secretary-General[86]

> urge[d] the government of the Democratic Republic of the Congo to ensure full implementation of the armed forces action plan against sexual violence, to systematically bring perpetrators to justice and to deliver reparations to victims, including payment of outstanding compensation awards.

Realistically, it must be admitted that the large scale of rape and other forms of sexual violence perpetrated against women and girls in the North Kivu province is almost certainly linked to armed conflict and

86 UNSC (n 12 above) para 27.

insecurity.[87] Thus, it is urgent for the government to put an end to insecurity and to all armed groups and thereby to restore state authority. For the warlords who fled to neighbouring countries and are alleged to have perpetrated mass rape and other forms of sexual violence, it is the duty of the government to keep insisting that those countries either prosecute them or arrest and extradite them to the DRC, or to a neutral country exercising universal jurisdiction, or to the ICC, as these crimes were committed in the territory of a state party to the Rome Statute.

87 Eg, Brown finds that 'the insecurity that rapidly took hold in all areas of the province has led to acts of violence - pillaging, killing, rape, setting fire to houses – indiscriminately perpetrated by members of the various armed groups involved in the conflict'. See C Brown 'Rape as a weapon of war in the Democratic Republic of the Congo' (2011) 15 http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1046&context=socssp (accessed 11 November 2015).

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Human rights education in South Africa: Whose responsibility is it anyway?

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Summary

The enjoyment of human rights largely depends on the level of awareness of what these rights are and how to enforce them. Human rights education (HRE), therefore, is crucial in ensuring that people are empowered to access the rights to which they are entitled. There have been several programmes and plans of action aimed at HRE at international level, but 20 years after the advent of a new democratic and constitutional dispensation in South Africa, the level of public awareness in the country is still, unfortunately, inadequate. It is against this background that the roles and responsibilities of the main role players in HRE in South Africa are discussed and, where possible, assessed. This analysis is important, because without an understanding of all available infrastructure and the main actors involved in HRE, it is impossible to identify gaps or to make recommendations for future improvements. The role of government, human rights institutions, such as the South African Human Rights Commission, and non-state actors, such as non-governmental organisations and other civil society formations, are reviewed, after a presentation of background information on conceptual issues, the international dimension of HRE, and HRE in Africa. Recommendations for increased involvement in HRE – especially by government – are made. It is recommended that the state play a more dominant role in HRE, because it has the resources and the obligation and responsibility to do so.

Key words: *Human rights education; South African Human Rights Commission; state; non-state actors*

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1 Introduction

Over the last two decades, there has been a worldwide surge of interest in human rights education (HRE), and the concept has slowly but surely found its place into the language of relevant government departments, non-governmental organisations (NGOs), educational institutions, international human rights agencies, and other human rights groups. The need for HRE and its desirability have not only become increasingly urgent and pressing, but also abundantly clear. Accordingly, there is no lack of agreement and consensus among state and non-state actors on the rationale for HRE. This is because the effective enjoyment of human rights largely depends on the level of awareness of such rights – and how to enforce them. People cannot enforce rights that they are unaware of. HRE is, therefore, crucial in ensuring that people are empowered to access the rights they are entitled to. Accordingly, the primary objective of HRE is to build and strengthen a culture of human rights through the creation of public awareness of human rights. Such awareness leads to several individual and societal benefits. This is particularly pertinent and relevant to a country like South Africa in which – prior to 1994 – the large majority of people were marginalised, oppressed and denied not only basic services and resources, but also fundamental human rights.

In South Africa, HRE is, therefore, critical in societal transformation and redress and also in engendering social and political change. Moreover, it could be argued that HRE is important for fostering the basic tenets of democracy. This is because the three tenets usually ascribed to the meaning of democracy are that (i) it is a form of government in which all adult citizens have some share through their elected representatives; (ii) in a democratic society all citizens treat each other as equals without discrimination; and (iii) it is a form of government which encourages, allows, promotes and protects the rights of its citizens.[1] Creating public awareness helps to develop a better understanding of democratic values and encourages public participation in democratic processes.

The Universal Declaration of Human Rights (Universal Declaration) calls not only on states, but also on 'every individual and every organ of society … [to] strive by teaching and education to promote respect for these rights and freedoms'.[2] The responsibility for HRE is therefore collective – because the responsibility for human rights protection is collective. HRE cannot and should not be the responsibility of just one role player. It is against this background that the article poses the question: Whose responsibility is HRE in South Africa anyway? This is explored in the context of the roles of government, constitutional bodies such as the South African Human Rights Commission (SAHRC),

1 JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2013) 8.

2 Preamble to the Universal Declaration of Human Rights (1948).

and civil society. With a better understanding, it is possible to identify gaps and deficiencies and to make recommendations for the future.

It is, however, initially important to have a conceptual understanding of HRE as well as its international dimension. These aspects are, accordingly, now discussed.

2 Conceptual issues

There is far from universal agreement on definitional issues – let alone on theories about the definition of a concept like HRE. Like many such concepts, HRE is often defined in different ways, depending on the context and purpose of the definition. In *A survey of human rights education,*[3] Flowers gives an interesting analysis of the definitions of HRE, which she divides into three distinct groups. According to her analysis, definitions by governmental bodies[4]

> emphasise the role of HRE to create peace, continuity, and social order … [they] stress learning about international and regional instruments … [and they] increasingly indicate that it is the responsibility of governments to see that HRE is accomplished properly.

On the other hand, definitions by NGOs[5]

> emphasise violations, stressing the potential of HRE to enable vulnerable groups to protect themselves and challenge their oppressors … focus on opposition to and protection from abuse … [and] stress learning to analyse and eliminate the conditions that lead to negative forces, such as poverty, systemic inequalities of power and opportunities.

As for academics and educational thinkers, definitions 'tend to shift the emphasis from outcomes to the values that create and inform those outcomes'.[6]

It is in the context of the varying and sometimes disparate ways in which HRE is defined that the meaning of the concept has to be understood. Such definitions range from the basic version referring to HRE as 'all learning that develops the knowledge, skills and values of human rights',[7] to a more detailed United Nations (UN) version which proclaims that HRE is 'training, dissemination, and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes'.[8] Furthermore, HRE should be directed to[9]

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3 N Flowers 'What is human rights education?' http://www.hrea.org/erc/Library/curriculum_methodology/flowers03.pdf (accessed 30 September 2013).

4 As above.

5 As above.

6 As above.

7 A Stone 'Human rights education and public policy in the United States: Mapping the road ahead' (2002) 24 *Human Rights Quarterly* 538.

8 Flowers (n 3 above) 2.

9 As above.

> … strengthening of respect for human rights and fundamental freedoms … the full development of the human personality and the sense of its dignity … the promotion of understanding, tolerance, gender equality, and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups … the enabling of all persons to participate effectively in a free society … [and] the furtherance of the activities of the United Nations for the maintenance of peace.

The UN General Assembly has also defined HRE as 'a life-long process by which people at all levels of development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies'.[10] It is in this context that Sergio Viera de Mello – a former UN High Commissioner for Human Rights – argued that HRE means 'not only teaching and learning *about* human rights, but also *for* human rights: Its fundamental role is to empower individuals to defend their own rights and those of others.'[11] It is thus clear that an exact definition of HRE is debatable.

Before discussing HRE in Africa, and especially in South Africa, an understanding of the international perspective to HRE is necessary. This international perspective is now discussed.

3 International dimension of human rights education

In order to understand HRE in the South African context, an understanding of HRE in the international (global and regional) context is required.

The genesis and development of HRE is concomitant with the modern history of contemporary human rights. The Universal Declaration already referred to – which was adopted in 1948 to give substance to human rights and fundamental freedoms in the 1945 Charter of the United Nations – was the first major international human rights instrument to give emphasis and momentum to HRE. The Preamble to the Universal Declaration urges 'every individual and every organ of society … [to] strive by teaching and education to promote respect for these rights and freedoms'.[12] Article 26(2) states that HRE should include the 'development of the human personality and the strengthening of respect for human rights and fundamental freedoms'.

Although HRE is generally implied in several articles of the 1966 International Covenant on Civil and Political Rights (ICCPR), it is in the International Covenant on Economic, Social and Cultural Rights

10 UN Decade for Human Rights Education, General Assembly Resolution 49/184, 23 December 1994.

11 United Nations *ABC: Teaching human rights: Practical activities for primary and secondary schools* (2004) (Foreword) 5.

12 Universal Declaration (n 2 above).

(ICESCR) that it is given prominence. Article 13(1) of the ICESCR states:

> The States Parties to the present Covenant … agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Several other UN human rights treaties also highlight HRE. The Convention on the Eradication of All Forms of Racial Discrimination (1965) is a good example of this. Article 7 obliges state parties to 'undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information with a view to combating prejudices which lead to racial discrimination'. Furthermore, under article 29(1)(b) of the Convention on the Rights of the Child (CRC), '[s]tates parties agree that the education of the child shall be directed to … the development of respect for human rights and fundamental freedoms…'.

Furthermore, under the Convention against Discrimination in Education – adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) General Assembly in 1960 – state parties 'agree that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'. UNESCO's interest in HRE is further reflected in the Dakar Framework for Action, which was developed and adopted at the World Education Forum in 2000.[13] The Dakar Framework reaffirms the need for education programmes to 'promote the full development of the human personality and strengthen respect for human rights and fundamental freedoms'.[14] This wording is adopted from the Universal Declaration. The same applies to the 1993 Vienna Declaration and Programme of Action, which dedicates five paragraphs of Part II to HRE. In particular, paragraph 79 provides that '[s]tates should strive to eradicate illiteracy and should direct education towards the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'. This obligation is carried further by paragraph 82, which urges 'governments, with the assistance of intergovernmental organisations, national institutions and non-governmental organisations, [to] promote an increased awareness of human rights and mutual tolerance'.

In the introduction to this article, the notion that HRE is important for nurturing the basic tenets of democracy was introduced. Indeed,

13 See UNESCO 'The Dakar Framework for Action. Education for all: Meeting our collective commitment' http://unesdoc.unesco.org/images/0012/001211/121147e.pdf (accessed 3 October 2013).

14 As above.

there are strong links between HRE and democracy, and this warrants further mention in the international context. In this regard, the UN General Assembly, during its 67th session, passed a resolution on education for democracy.[15] The resolution referred to the second phase (2010-2014) of the World Programme for Human Rights Education, and also strongly encouraged

> member states to integrate education for democracy, along with civic education and human rights education, into national education standards and to develop and strengthen national and subnational programmes, curricula and curricular and extracurricular educational activities aimed at the promotion and consolidation of democratic values and democratic governance and human rights, taking into account innovative approaches and best practices in the field, in order to facilitate citizens' empowerment and participation in political life and policy making at all levels.

Most of the human rights instruments referred to above are drafted in such a way that states are obliged to 'agree' or 'undertake' to do certain things in terms of HRE. It is thus clear that – from an international human rights law perspective – the responsibility for HRE lies mainly with the state, and this is discussed later in the article.

At the regional level, and in the African context, the African Charter on Human and Peoples' Rights (African Charter) is perhaps the most succinct and straightforward human rights instrument, with reference to HRE. Article 25 states:

> State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

The African Charter was adopted on 27 June 1981 and was eventually ratified by all 53 Organisation of African Union (OAU) member states.[16] However, a lack of knowledge and information of human rights is still preventing African people from claiming and exercising their human rights. For example, by 1987, the African Charter was largely unknown in Liberia, as was the case in Sierra Leone 15 years later in 2003, while research in Zimbabwe (1994) and Kenya (1997) came to similar conclusions.[17] Africa may well have ratified numerous regional and international human rights treaties, but it also seems to have failed in teaching not only the weak and marginalised, but also society at large, about their human rights.[18]

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15 See United Nations Resolution A/67/L.25, adopted on 21 November 2012, http://www.ccd21.org/activities/education/pdf/UNGA_Resolution_Adopted.pdf (accessed 29 June 2015).

16 See 'African Charter on Human and Peoples' Rights' http://www.achpr.org/instruments/achpr/ (accessed 15 June 2015).

17 See N Horn 'Human rights education in Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 60.

18 Horn (n 17 above) 61.

The involvement of government in HRE in Africa is predominantly dealt with by the development of school curricula, while the training of officials has been left to NGOs, although there is certainly growing capacity among African universities.[19] The role of universities is mentioned further below. Importantly, however, the HRE initiative in Africa has driven the formation of national human rights commissions, which have grown remarkably in number: from six in 1996 to 38 by 1999, for example.[20] These human rights commissions have become pivotal in HRE in Africa. One of the more important and successful of the commissions, the South African Human Rights Commission, is discussed in further detail below.

It should be emphasised that civil society has played a very important role in HRE in Africa. Nigeria's relatively successful implementation of African human rights instruments, for example, can probably be attributed to its strong and numerous civil society organisations.[21] While civil society, often through NGOs, can conduct HRE programmes with important role players such as the police and military, they have unfortunately not been very successful in educating marginalised groups in African society.[22] However, despite their shortcomings, these NGOs still remain the main role players in the African context. Two of many examples can be mentioned. In Namibia, Women's Action for Development has been involved in empowerment and educational programmes for rural women since 1994.[23] A second important example is the African Human Rights Education Project (AHRE), which has been active since 2005. It is a regional programme, developed by Amnesty International, to promote human rights – through education – in 10 African countries: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Kenya, Mali, Senegal, Sierra Leone, Togo and Uganda.[24] Its primary goal is to empower marginalised communities by ensuring that people are aware of their human rights so that they can mobilise, form groups and identify local opportunities to promote or claim their rights, supported with the necessary skills, tools and resources.[25] In order to strengthen civil society's ability to implement HRE projects, Amnesty International has partnered with two local organisations in each of the countries. The local partners work with educators and activists, providing them with

19 JP Martin et al 'Promoting human rights education in a marginalised Africa' in GJ Andreopoulus & RP Claude (eds) *Human rights education for the twenty-first century* (1997) 444.

20 Horn (n 17 above) 65.

21 Horn 68.

22 As above.

23 Horn (n 17 above) 69.

24 See East and Horn of Africa Human Rights Defenders Project 'African human rights education project' http://www.defenddefenders.org/african-human-rights-education-project/ (accessed 15 June 2015).

25 As above.

the necessary training and resources to establish and deliver HRE projects.[26]

In Uganda, the programme is implemented in partnership with the East and Horn of Africa Human Rights Defenders Project (EHAHRDP) and the Agency for Co-operation and Research in Development (ACORD).[27] The programme is an innovative response to challenges in the protection and promotion of human rights in the daily lives of Ugandans who are faced with poverty and human rights violations. It addresses social issues by changing society through the creation of social change agents.[28]

Given Africa's large size and its limited resources, the support for HRE by African governments is critical. Ideally, civil society should work with governments on targeted HRE strategies in order to achieve common goals.[29] Sadly, though, African governments have rarely seen the importance of HRE in terms of the political and economic development of their countries.

The African Commission on Human and Peoples' Rights (African Commission) (an oversight body for the African Charter) has been mooted as being a potentially pivotal role player in the future co-ordination of HRE in Africa, by building partnerships with and among NGOs and relevant governmental institutions.[30] The African Commission has passed resolutions on HRE highlighting the legal framework available for the creation of a comprehensive continental mechanism. However, it has undertaken limited HRE activities.[31] The Commission could in the future establish a meaningful Africa-wide system for HRE through partnership and co-operation with governments and non-state actors, and also monitor the implementation by states of their obligation to educate in human rights, through the state reporting procedure and its special mandates.[32]

4 Human rights education South Africa

The central question posed in this article relating to the responsibility for HRE is now addressed, referring first to the role and responsibility of the government, then to those of the SAHRC and, finally, the role of non-state actors.

26 As above.
27 As above.
28 As above.
29 Martin et al (n 19 above) 452.
30 SA Yeshanew 'Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa' (2007) 7 *African Human Rights Law Journal* 205.
31 As above.
32 As above.

4.1 Role of government-supported formal education

Flowers's analysis of definitions of HRE by government bodies, mentioned earlier, is noteworthy.[33] In the analysis, the definitions by government bodies emphasise peace, continuity and governments' own responsibility to adequately accomplish HRE. It is in that context that the role of the South African government in HRE must be understood.

The main target audiences for HRE by the government appear to have been schools and educational institutions. With regard to schools and educational institutions, the most appropriate and effective approach is to incorporate human rights standards and issues into the curriculum. In fact, a Curriculum Review Committee, appointed in February 2000, recommended that HRE be infused into the curriculum, paying particular attention to anti-discriminatory, anti-racist, anti-sexist and special needs issues.[34] Furthermore, in 2005, the then Minister of Education committed the Ministry and Department of Education to the infusion of HRE across all levels of the education system.[35] As a result of the above initiatives, the General Education and Training (GET) Curriculum Statement (Grades R–9) has ensured that all Learning Area Statements contain principles and practices of human rights, as reflected in the Constitution. The same applies to the Further Education and Training (FET) Curriculum Statement (Grades 10–12). Both curriculum statements particularly capture issues of poverty, inequality, race, gender, disability and other human rights factors. As a consequence, these human rights issues are infused 'into the scopes, definitions, outcomes and assessment standards of all the learning and subject areas'.[36]

In the specific context of higher education institutions, HRE takes place through various approaches adopted mainly by law schools. These include the integration of human rights into the curriculum, organising moot courts, providing clinical legal education and conducting research. Of particular importance are street law programmes (discussed further below). In addition, some universities have established centres for human rights that play an important role in HRE. Examples of such centres include the Centre for Human Rights at the University of Pretoria (discussed further below) and the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) at the University of Johannesburg. It is submitted that by providing funding to public universities with law

33 Flowers (n 3 above) 3.

34 SA Department of Education 'A South African curriculum for the twenty-first century: Report of the review committee on curriculum 2005' http://www.dhet.gov.za/portals/0/documents/Reports/SOUTH%20AFRICAN%20CURRICULUM%20for%20THE%20TWENTY%20FIRST%20CENTURY.pdf (accessed 4 October 2013).

35 See A Keel & N Carrim 'Human rights education and curriculum reform in South Africa' (2006) 5 *Journal of Social Science Education* 102.

36 Keel & Carrim (n 35 above) 91.

schools that offer HRE, the South African government plays an indirect role in such education. In the general context of what government can and should do, however, such role is indeed minimal.

It is for this reason that the general assessment has to be that government has done little with regard to its HRE responsibility. Research surveys have consistently shown that levels of human rights public awareness remain low.[37] A recent survey conducted by the Foundation for Human Rights (FHR) sought to establish – inter alia – the status of human rights awareness among marginalised and vulnerable groups in the country.[38] The study concluded that the low levels of awareness of the Constitution, the Bill of Rights, human rights legislation, and chapter 9 institutions, was linked to low levels of education, low socio-economic status, and a lack of access to information.[39] Significantly, but alarmingly, the study established that 'less than 10 per cent of South Africans have read the Bill of Rights or have had any part of the Bill of Rights read to them'.[40] It should also be pointed out that in an earlier survey, 58 per cent of the respondents indicated that the government had not done enough to make people aware of the Bill of Rights in the South African Constitution.[41]

4.2 Role of the South African Human Rights Commission

With respect to targeting the general public, as an audience for HRE, the SAHRC has been particularly relevant. Indeed, human rights commissions are often seen as excellent vehicles for HRE.[42] However, it has been argued that because of the 'risk' that HRE carries, governments prefer to use human rights commissions to control, set the pace, and manage the HRE content.[43] This is because the more successful such education is, the more the public will challenge government action and demand redress and retribution for human rights violations. It is not clear whether this argument applies to the SAHRC. What is quite clear, however, is that the Commission has played, and continues to play, an important role in HRE in South Africa, as previously mentioned. A brief discussion of this role follows.

The SAHRC was established in 1995 after the enactment of the 1994 South African Human Rights Commission Act,[44] and was

37 One such survey was conducted by Community Agency for Social Enquiry (CASE) in 2000, another by the author in 2004 and, more recently, one was conducted by the Foundation for Human Rights in 2013.

38 These included farming communities, the urban and rural poor, LGBTI communities and migrants.

39 See Foundation for Human Rights 'Baseline survey: Awareness of, and attitudes to human rights' (April 2013) (unpublished).

40 TF Hodgson & M Finn 'Cherish our Constitution' *The Star* 10 December 2014.

41 JC Mubangizi 'The protection of human rights in South Africa: Public awareness and perceptions' (2004) 29 *Journal of Juridical Science* 62.

42 Horn (n 17 above) 65.

43 As above.

44 Act 54 of 1994.

constitutionalised through chapter 9 of the 1996 Constitution. The Commission has a wide constitutional and legal mandate, part of which is to conduct public education and promote public awareness of human rights.[45] The SAHRC has executed this particular mandate in various ways. First, it established a Human Rights Advocacy Unit, whose responsibility it is 'to promote awareness of human rights and to contribute to the development of a sustainable human rights culture in the Republic'.[46], Over the years, the Unit has done this through education and training, community outreach initiatives, public dialogue, conferences, workshops, seminars and presentations.[47] The SAHRC has also been involved in human rights curricular development. Initiatives in this regard include assisting and lobbying the national and provincial education departments, producing human rights educational documents and teaching materials, facilitating teacher training,[48] and sponsoring school activities on important occasions such as Human Rights Day.[49] In addition to curricular involvement, the SAHRC also provides professional training (including providing training programmes for target groups such as the police, health workers and teachers) and informal dissemination of human rights information, which includes taking out advertisements on radio and in newspapers.

One of the SAHRC's more formal efforts towards HRE was the establishment of the National Centre for Human Rights Education and Training (NACHRET) in 2000. This Centre has served to provide extensive human rights public education to both state and non-state actors, through workshops, courses and seminars. The creation of the Centre has been praised as a unique step by the SAHRC towards bridging formal and informal HRE efforts.[50] NACHRET has also been hailed as an impressive model that 'serves as an example of how educators from civil society and government can be brought together to co-ordinate focused human rights education'.[51] This has to be seen in the context of the fact that there are several centres and institutes based at universities which provide HRE, but these institutions lack a co-ordinated, systematic and dedicated approach that brings together different role players from government, higher education and civil society. The only university centre that gets anywhere near this

45 See sec 184 (2)(d) of the Constitution and sec 7 of the Act.

46 See Human Rights Advocacy Unit, South African Human Rights Commission http://www.sahrc.org.za/home/index.php?ipkContentID=36 (accessed 6 October 2013).

47 As above.

48 See S Cardenas 'Constructing rights? Human rights education and the state' (2005) 26 *International Political Science Review* 372.

49 As above.

50 Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions http://www.parliament.gov.za/content/chapter_9_report.pdf (accessed 6 October 2013). The Committee was chaired by Kader Asmal and was established by parliament to review the so-called ch 9 institutions, including the SAHRC.

51 Horn (n 17 above) 66.

approach is the Centre for Human Rights at the University of Pretoria, but as will be seen later, its functions and approach differ from those of NACHRET.

The role of the SAHRC in HRE is not without challenges and criticism, and three main issues are now discussed. First, the Commission is largely funded by the state, and as the proverb goes, 'He who pays the piper calls the tune'. Although institutional independence is constitutionally assured, there is nothing to prevent the state from controlling the agenda of the Commission through budgetary mechanisms. Indeed, as a state-funded institution, the SAHRC has often been criticised for not being hard enough on government to urge it to fulfil its commitments in enforcing the Commission's recommendations. Second, the SAHRC has been criticised for not being sufficiently accessible to the rural population and marginalised communities. The Kader Asmal Report observed, for example, that '[t]he Commission's public awareness campaigns remain, in essence, urban-based'.[52] Third, the SAHRC has a broad and extensive mandate. In view of the unique and problematic history of South Africa and the attendant historical human rights challenges, too much is perhaps expected from the SAHRC in terms of human rights promotion, protection, monitoring, investigating, and the redressing of violations. This requires enormous capacity and resources. When the aforementioned activities fall short, HRE is the aspect of the Commission's mandate that takes the brunt of criticism.

Despite the above challenges and criticism, the role and importance of the SAHRC in HRE in South Africa cannot be overemphasised. Moreover, that role should be seen in the context of the overall mandate of the Commission, which is to promote the observance of, respect for, and protection of human rights. This is aimed at promoting a culture of human rights. It could be argued that by achieving its overall mandate, the specific mandate of HRE is also achieved, since HRE 'is predicated on the central premise that a culture of human rights can be constructed'.[53] However, the current levels of human rights public awareness in South Africa do not support any assumption that a human rights culture has been sufficiently constructed. As previously mooted, the responsibility for HRE extends beyond the government and SAHRC – to include other role players such as non-state actors. These non-state actors are now considered and discussed.

4.3 Role of non-state actors

South Africa has a range of civil society organisations that play an important role in HRE. Collectively referred to as 'non-state actors', these organisations include civil society formations such as NGOs, community-based organisations (CBOs), and certain public interest

52 Report (n 50 above).
53 Cardenas (n 48 above) 374.

groups. These organisations not only play a very important watchdog role in the promotion and protection of human rights, but they also have an irreplaceable responsibility in the creation of a culture of human rights.

At one level, there are international human rights organisations which work systematically in raising human rights awareness worldwide. One such organisation is Amnesty International, which has already been discussed relative to other African countries. There are several HRE projects run by Amnesty International, some of which are relevant to South Africa. One such project is the Education for Human Dignity Project, which 'engages with young people to raise awareness, inform debate and stimulate action to tackle the human rights abuses that drive and deepen poverty'.[54] A second project is the Human Rights-Friendly Schools Project, through which Amnesty International 'supports schools and their wider communities … to build a global culture of human rights [by integrating] … human rights values and principles into all areas of school life'.[55] A third project is the Rights Education Action Project (REAP), which is a 10-year international HRE project led by Amnesty International (Norway), aimed at involving partner countries in addressing specific human rights issues (such as women's rights, socio-economic and cultural rights, children's rights, freedom of expression, discrimination and xenophobia) through HRE.[56] South Africa is a participating partner in this project.

At the local level, on the other hand, there are several NGOs involved in HRE. Their involvement ought to be seen in the context of Flowers's analysis of the definitions of HRE by NGOs, which emphasise human rights violations and the potential of HRE to enable vulnerable groups to protect themselves and challenge their oppressors.[57] Indeed, the Foundation for Human Rights (FHR), an important human rights NGO, sees education as 'key to ensuring that ordinary citizens and institutions are empowered to access rights set out in the Constitution'.[58] For this reason, the FHR runs a Human Rights Awareness Programme, the purpose of which it is 'to increase awareness and knowledge of human rights amongst South Africans and, in particular, vulnerable groups'.[59] To this end, the Foundation has, over the years, embarked on a range of projects involving research and advocacy, focusing on all human rights, especially socio-

54 See 'Education for Human Dignity Project' http://www.amnesty.org/en/human-rights-education/projects-initiatives/e4hd (accessed 7 October 2013).

55 See 'Human Rights-Friendly Schools Project' http://www.amnesty.org/en/human-rights-education/projects-initiatives/rfsp (accessed 7 October 2013).

56 See 'Rights Education Action Project (REAP)' http://www.amnesty.org/en/human-rights-education/projects-initiatives/reap (accessed 9 October 2013).

57 Flowers (n 3 above).

58 See Foundation for Human Rights 'Awareness and knowledge of constitutional rights' http://www.fhr.org.za/page.php?p_id=69 (accessed 8 October 2013).

59 See Foundation for Human Rights 'Human Rights Awareness Programme' http://www.fhr.org.za/page.php?p_id=19 (accessed 9 October 2013).

economic rights. In this regard, the FHR has conducted several major applied research projects, the latest of which dealt with the awareness of access and attitudes to human rights among marginalised and vulnerable groups.[60] In addition, the FHR partners with government in human rights campaigns such as the '16 Days of Activism for Non-Violence Against Women and Children'. It also funds education projects aimed at ending violence against vulnerable groups and at training people to deal with issues of inequality, racism, sexism and xenophobia.[61] Moreover, the FHR also funds and supports the development of human rights training materials, documentaries, and a manual.

Mention was made earlier of the Centre for Human Rights at the University of Pretoria. Based in the Faculty of Law, the Centre functions as both an academic department and an NGO. It works[62]

> towards human rights education in Africa, a greater awareness of human rights, the wide dissemination of publications on human rights in Africa and the improvement of the rights of … disadvantaged or marginalised persons or groups across the continent.

Of the several human rights centres at various universities in South Africa, the Centre for Human Rights at the University of Pretoria has been one of the most successful in the objective of achieving HRE. As a result, in 2006 it was awarded the UNESCO prize for Human Rights Education, and in 2012 it received the African Commission on Human and Peoples' Rights' NGO Prize for the Promotion and Protection of Human Rights.[63] The Centre is a good example of how HRE can be part of formal higher education. Moreover, the Centre also undertakes research and advocacy through several projects, such as the African Human Rights Moot Court Competition. This aspect foregrounds the Centre's role as an NGO.

Another NGO whose role and work are similar to those discussed above is the Human Rights Institute of South Africa (HURISA). Its vision is to create 'a society in which all people are aware of their human rights', and its mission is to 'offer professional service towards the promotion of a human rights culture … disseminating human rights information … and conducting research and advocacy'.[64] The training activities of HURISA focus mainly on children's rights, local government, socio-economic rights, rural women, refugees and the African system for the promotion and protection of human rights. As such, HURISA runs specific projects in these focus areas.

60 Foundation for Human Rights (n 59 above) 17.
61 Foundation for Human Rights 38.
62 See 'Centre for Human Rights, University of Pretoria' http://www1.chr.up.ac.za (accessed 11 October 2013).
63 As above.
64 See 'Human Rights Institute of South Africa (HURISA)' http://www.hurisa.org.za/about-us (accessed 11 October 2013).

The Black Sash, one of the longest-standing South African human rights NGOs, is another organisation that plays an important role in HRE in the country. With its main emphasis on women and children, the organisation's mission is 'making human rights real'.[65] As such, one of its main areas of operation is the provision of 'rights-based information, education and training'.[66] In its 2012 Annual Report, for example, the Black Sash details how it 'continued its work of rights education through the combination of materials development and dissemination and educational workshops and training'.[67] Its workshops, which were attended by more than 2 000 community leaders in 2012, included the Children's Rights and Responsibilities Presentation (Soweto); the Women and Disabilities Rights Education Awareness Workshop (Orange Farm); the Social Grants Workshop for Somali Women (Port Elizabeth); and the Consumer Rights Protection Workshops (KwaZulu-Natal). There were also local government workshops in the Western Cape, and social security workshops in three provinces: Gauteng, the Free State and Mpumalanga.[68]

Mention ought also to be made of the Constitutional and Bill of Rights Educational Project (CBOR), another civil society organisation the focus of which is on HRE. The CBOR 'seeks to educate civil society, particularly rural communities throughout South Africa, about their rights and duties under the Constitution'.[69] It does this through its materials, training workshops and community education programmes. For example, every year the CBOR conducts a seven-day national training workshop for paralegal trainers who, in turn, conduct training in each of the nine provinces. In addition to this provincial training programme, there is a community programme aimed at focus groups, consisting of community members. On average, about 80 workshops are conducted annually in each province.[70]

Finally, mention has to be made of the important contribution towards HRE and democracy education by street law programmes in South Africa; firstly by NGOs and secondly by university law school structures. A prime example of a street law NGO of this type is the not-for-profit company Street Law South Africa, which was established in 1986. It specialises in presenting participatory legal, human rights and democracy education. It also[71]

65 See 'Black Sash' http://www.blacksash.org.za/index.php/about-the-black-sash/about-the-black-sash (accessed 14 October 2013).

66 As above.

67 See 'Black Sash 2012 Annual Report' http://www.blacksash.org.za/images/ docs/BLACK%20SASH%20AN%20REP%202012.pdf (accessed 15 October 2013).

68 As above.

69 See 'Constitutional and Bill of Rights Educational Project' http://users.iafrica.com/k/ko/kogrady/html/home.htm (accessed 15 October 2013).

70 See 'Constitutional and Bill of Rights Educational Project, Core Activities' http://users.iafrica.com/k/ko/kogrady/html/activiti.htm (accessed 17 October 2013).

71 See Street Law 'About us' http://www.streetlaw.org.za/index.php/about-us/about-us (accessed 29 June 2015)

> provides opportunities for training in democracy, participatory development and policy development. The project provides preventative legal education to both formal and informal communities, promoting fundamental rights, freedoms, participation and democratic cultures.

Street Law South Africa has extensive experience with developing learner support material. Its workshops blend legal substance with innovative teaching strategies, aimed at increasing understanding and developing the values and attitudes needed by citizens in a democratic country.[72] Street Law South Africa also focuses on creating a culture of HRE among the youth, and over 300 South African schools countrywide receive weekly lessons on democracy, human rights and legal education, reaching over 30 000 learners annually.[73] Professor David McQuoid-Mason of the University of KwaZulu-Natal is the Chairperson of the Street Law South Africa Board, and he has also been chief editor of two seminal works in the field – manuals on South African street law, both for educators and learners.[74] These are obviously a valuable resource in the field.

Street law programmes are also run by university law schools across South Africa (currently at 17 out of 21 universities). These had their genesis at Georgetown University in Washington DC in 1972 and were initially developed in South Africa during the mid-1980s, at the height of the apartheid era.[75] The first programme was established at the University of Natal in 1986 by Professor McQuoid-Mason.[76] University street law programmes have been aimed at training law students to teach school children, prisoners and other communities about their legal rights and where to obtain help.[77] The programmes empower young people and others by explaining what the law expects of them in certain situations, what kinds of legal problems they should watch out for, and how they can resolve such problems.[78]

It is clear from the foregoing discussion that non-state actors – particularly NGOs – are key role players in the field of HRE. In South Africa, this role has to be seen in the context of the history of the country – a history that was characterised by gross human rights violations, institutionalised racism, and the denial of access to social and economic rights to the majority of the people. It is for this reason that most NGOs in South Africa perform their HRE functions with a

72 As above.

73 As above.

74 *Street Law: Practical law for South Africans: Educator's manual* (2015); *Street Law: Practical law for South Africans: Learner's manual* (2015).

75 See, eg, D McQuoid-Mason *Legal aid services and human rights in South Africa* http://clarkcunningham.org/LegalEd/SouthAfrica-McQuoid-Mason-PILI.pdf (accessed 29 June 2015); D McQuoid-Mason 'Street law as a clinical programme. The South African experience with particular reference to the University of KwaZulu-Natal' (2008) 17 *Griffith Law Review* 27-51.

76 As above.

77 As above.

78 As above.

transformative approach. That said, it must be noted that there is very little interaction between NGOs and the government in HRE programmes. This is hardly surprising, considering that government is often the culprit in human rights violations and, in addition to providing HRE, NGOs normally pressurise the government to respect its obligations in terms of promoting and protecting human rights.

5 Conclusion

The article began with a discussion of the importance and role of HRE. After mentioning definitional and conceptual issues, it reviewed international human rights instruments of relevance to HRE, presented an overview of HRE in Africa in general, before carefully analysing all the structures and bodies involved with HRE in South Africa: the South African government; the SAHRC; and a wide variety of non-state actors such as NGOs. This analysis of HRE in South Africa was considered to be strategically important. This is because a comprehensive understanding of HRE gives us an idea of the effectiveness of HRE in South Africa in general, an understanding of which HRE role players are functioning effectively in terms of their roles and responsibilities, and it also lays the foundation for making recommendations to improve the extent and impact of HRE in the country as a whole.

International law, through various human rights instruments, places much of the responsibility for HRE on the shoulders of the state, as states and not individuals are traditionally the subjects of international law. In South Africa, however, the government appears to be a relatively minor role player in HRE, with its direct role apparently restricted to infusing elements of HRE into the GET and FET school curricula at primary and secondary schools. How this has been implemented and how effective it has been in growing a human rights culture in South Africa is uncertain. However, what can be said very clearly is that the state can do a great deal more. In South Africa, the country's unique history – characterised by gross human rights violations under apartheid – is perhaps the strongest reason why the state should play a more dominant role in HRE. The South African government has the resources and the obligation and responsibility to do much more than it has done thus far. That levels of human rights awareness remain relatively low is a reflection of government's failure to take its HRE responsibility seriously, although, as mentioned previously, driving HRE programmes may be something of a poisoned chalice for government, as the more successful they become, the more the public will demand redress and retribution for human rights violations.

The SAHRC, as an independent chapter 9 constitutional body, has played a commendable role in HRE in South Africa. The SAHRC has executed its particular HRE mandate in various ways. It has established bodies like the Human Rights Advocacy Unit and the National Centre

for Human Rights Education and Training, which have been involved in a wide variety of formal and informal HRE initiatives. The SAHRC has also been involved in human rights curricular development, professional training, and the informal dissemination of human rights information. Despite critiques relating to its independence and performance, it has moved to accomplish its mandate as best it could, with limited resources, and across the very difficult terrain of the post-1994 political landscape.

South Africa also has a very richly-developed grouping of non-state actors involved with HRE, and it is clear that they have played and continue to play a very important role in HRE in the country. At one level, there are the various projects of international human rights organisations such as Amnesty International, while at the local level there are many and varied NGOs with an interest and focus on various aspects of HRE, including the Foundation for Human Rights; the Human Rights Institute of South Africa; the Black Sash and the Constitutional and Bill of Rights Educational Project.

Several factors have to be taken into account in determining the extent to which each role player (as discussed above) can exercise and execute its responsibility with regard to HRE. The state has all the resources, machinery, and the power to influence not only its own role, but also the roles of other players. On the other hand, the role of non-state actors may depend on the level of democracy and political will of government, while the role of individuals may depend on socio-economic factors and levels of education. The government should realise that in HRE, a partnership with civil society is ideally not an option but a necessity. Developing partnerships with NGOs and other representatives of civil society, such as academic institutions and citizens' groups, would go a long way in improving levels of human rights awareness through HRE in South Africa. However, the government would have to take the lead and this unfortunately has not been apparent.

In terms of the South African government improving its involvement in HRE, additional support for bodies such as the Centre for Human Rights at the University of Pretoria might be particularly relevant and instructive, as they are an intersection between civil society and a government-supported higher educational institution, are involved in education, research and advocacy, and will thus make a major impact. The African Commission was previously mooted as being a potentially pivotal role player in the future co-ordination of HRE in Africa, and the South African government should well consider this as part of any future HRE strategy. In terms of HRE in schooling, the government should consider approaches taken by other governments internationally and develop an HRE plan appropriate to the social and political context in the country. For example, the Australian Human Rights Commission has made detailed recommendations about including HRE in the Australian national school curriculum to ensure that young Australians develop an

understanding of and appreciation for human rights.[79] Further to this, a sizeable compendium of good practice on HRE at school level, published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) for Europe, Central Asia and North America, would be another valuable resource to refer to.[80]

79 Australian Human Rights Commission *Human rights education in the national school curriculum: Position paper of the Australian Human Rights Commission* (2011) https://www.humanrights.gov.au/our-work/education/publications/human-rights-education-national-school-curriculum-position-paper (accessed 30 June 2015).

80 ODIHR *Human rights education in the school systems of Europe, Central Asia and North America: A compendium of good practice* (2009) http://www.osce.org/odihr/39006?download=true (accessed 30 June 2015).

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Anti-terrorism measures in South Africa: Suspicious transaction reporting and human rights

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Summary

Terrorism has become a serious risk. Two factors exacerbate this threat: The first is the challenge of finding a definition suited to the terrorism phenomenon; the second is linked to the difficulty of detecting this crime. As it is accepted that terrorism causes human distress and suffering, and weakens the basic rights and freedoms of people, measures are taken to alleviate this scourge. In this article, mechanisms that relate to the duty to report transactions – so-called suspicious transaction reports – are analysed. It is accepted that these should operate in frameworks that show respect for human rights, for example, the rights to privacy and confidentiality. Accordingly, suspicious transactions should be reported reasonably and must be justifiable in the circumstances.

Key words: *Cyberspace; cyber-terrorism; suspicious transactions reporting; suspicious transactions records*

1 Introduction

Terrorism poses a grave threat to society. It is reported that the consistent increase in terrorist acts continues to be a major drawback to countries' development.[1] In Africa alone, four terrorist groups, namely, al-Shabaab, Boko Haram, al-Qa'ida and the Islamic State of

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1 United States Department of State 'Country reports on terrorism 2013 – Executive summary' (2014) http://www.state.gov/documents/organization/225050.pdf (accessed 19 February 2015).

Iraq and the Levant (ISIL), are identified as sources of terrorist activities.[2] The terrorist threats that these groups pose are not limited to activities that occur in the real physical world; for example, the bombing of physical infrastructures. They also extend to those that occur in virtual circles (cyberspaces), that is, cyber-terrorism.[3] In this instance, the activities are designed to weaken and attack the security and stability of a country's critical information infrastructures (CIIs).[4]

Challenges exist in relation to describing terrorism with precision,[5] and the cumbersome nature of processes to investigate this occurrence. This has led some to compare terrorism to human distress and unhappiness.[6] Terrorism threatens the fundamental rights and freedoms of people. Examples of these rights and freedoms are,

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2 United states Department of State (n 1 above) 11. See also the case of *S v Okah* [2013] ZAGPJHC 75, where a South African citizen was convicted on 13 charges of having been involved in and/or leading in the carrying out of the activities of a terrorist group called Movement for the Defence of the Niger Delta.

3 Denning defines cyber-terrorism as the 'convergence of terrorism and cyberspace. It is generally understood to mean unlawful attacks and threats of attack against computers, networks, and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives. Further, to qualify as cyber-terrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear.' See DE Denning 'Cyber-terrorism testimony before the Special Oversight Panel of Terrorism' (2000) http://bit.ly/16rUw3i (accessed 14 January 2012).

4 MN Njotini 'Identifying critical data and databases – A proposal for a risk-based theory of implementing Chapter XI of the ECT Act' (2013) 34 *Obiter* 96 97-98. CIIs encompass information security structures that are designed to protect information or data that are recoded or kept or stored on computers or computer software. See NK Katyal 'Criminal law in cyberspace' (2001) 149 *University of Pennsylvania Law Review* 1003-1006.

5 It is generally difficult to provide an accurate definition of the term 'terrorism'. This difficulty leads some to resort to phrases such as 'you know it (terrorism) when you see it' (S Sloan *Terrorism: The present threat in context* (2006) 19). Notwithstanding the above-mentioned difficulty, attempts are made to define the term. On the one hand, terrorism is the 'pre-meditated or repeated use of actual violence or threat to use violence against innocent civilians in order to achieve an objective or acts of reprisal' (B Raman *Terrorism: Yesterday, today and tomorrow* (2008) 1-6). Conversely, terrorism is an 'illegal use of extreme force and violence for the purpose of coercing a governmental entity or population to modify its philosophy and direction' (WE Dyson *Terrorism: An investigator's handbook* (2012) 5). It is submitted, however, that not all acts of terrorism are directed against humans or civilians. Contemporary terrorism acts particularly compromise or threaten to compromise a country's essential or key information infrastructures, for example, data and databases. Therefore, the article avers that the definitions above are inadequate to cover novel forms of terrorism or terrorist occurrences, for example, cyber-terrorism. For the aforementioned reason, the term 'terrorism' is described as meaning any act or conduct that directly or indirectly causes death, serious bodily injury or discomfort to an inhabitant or any other person or that is intended to intimidate a population, or to compel a government or an international organisation to carry out or to abstain from carrying out any act.

6 HO Agarwal *International law and human rights* (2003) 613-614. See also Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Human rights, terrorism and counter-terrorism' http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf (accessed 10 May 2013) (OHCHR Fact Sheet 32).

amongst others, the rights to life, physical integrity and personal freedom.[7] These rights and freedoms are significant in that they provide 'appropriate protections and benefits for all people of the world'.[8] They entitle the holders to claim an exercise free from interference by other persons or governments.[9] However, uncertainty persists regarding the proper approach in the fight against terrorism. It is asked whether the fight against terrorism could be reconciled with the protection of human rights. For example, is a suspension of human rights and certain constitutional guarantees justified when fighting the scourge of terrorism?[10] It is further asked whether it is fair and just to apply the principles of 'fair treatment' to a criminal in cases where this application disregards the concerns of victims.[11] In other words, is it logical or rational to apply the principles of fair treatment to a terrorist who is not part of the 'law-abiding majority who play by the rules and think (that) others should too'?[12]

The article examines these questions at length. It is investigated whether human rights should be suspended when dealing with terrorism. This scrutiny is premised on the fact that the success(es) of an anti-terrorism framework generally depend on the success(es) of a culture[13] of human rights.[14] Internationally, human rights measures are contained, *inter alia*, in the Charter of the United Nations of 1945 (UN Charter of Rights) and the Universal Declaration of Human Rights of 1948 (Universal Declaration).[15] Having accepted the need to reconcile the fight against terrorism with a human rights culture, it is acknowledged that the measures to alleviate terrorism are plentiful. There are measures to criminalise terrorism, to provide for the confiscation and forfeiture of the proceeds of terrorism, and to prevent terrorism. In this article, transaction reporting is identified as an essential mechanism to prevent terrorism. It is argued that a

7 HO Agarwal (n 6 above) 613-614.

8 T Ward et al 'Human rights and the treatment of sex offenders' (2007) 19 *Sex Abuse* 195.

9 Ward et al (n 8 above) 198.

10 M Ignatieff *The lesser evil: Politics in an age of terror* (2004) vii.

11 T Blair 'Our nation's future – The criminal justice system' in R Garside & W McMahon (eds) *Does criminal justice work? The 'right for the wrong reasons' debate* (2006) 92.

12 Blair (n 11 above) 89.

13 The term 'culture' is not used in its ordinary and traditionally-exclusive sense, but as a notion that has a bearing on human rights and freedoms.

14 National Commission on Terrorist Attacks upon the United States (9/11 Commission) Report 2004 (2004) http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/pdf/GPO-911REPORT.pdf (accessed 11 February 2015).

15 It is acknowledged that several human rights treaties also provide guidance on the promotion of human rights. These are, amongst others, the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (1981); the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984); the Convention on the Rights of a Child (1990); and the Convention on the Elimination of all Forms of Racial Discrimination (1981).

leading international approach to transaction reporting is not dealt with in the UN instruments as such. The latter is or could be abstracted from the reports of certain organisations that exist outside of the UN. These are, amongst others, the Organisation for Economic Co-operation and Development (OECD),[16] the Financial Action Task Force (FATF)[17] and the International Monetary Fund (IMF).[18] It is submitted that an appropriate scheme to report transactions is one that is founded on or accepts the importance of a human rights culture. Consequently, the UN human rights framework becomes essential. In studying transaction reporting in an environment where human rights are promoted, the article is divided into four sections. The first section examines the relevant UN human rights measures. This investigation is made with a view to weighing up their significance to an anti-terrorism paradigm. The second section studies the general scheme of transaction reporting. This study focuses on the approach to transaction reporting that is adopted by, amongst others, South Africa. Thirdly, the approach is evaluated and tested against the background of the need to protect human rights. The UN human rights measures and related instruments or treaties are used to undertake such a test or evaluation. The fourth section concludes the article and identifies the strengths and weaknesses of current approaches to transaction reporting. Further, it recommends measures to improve the identified weakened areas, and an attempt is made to propose a framework that strikes a balance between transaction reporting and the protection of human rights.

2 Human rights measures

2.1 Overview

Measures to protect human rights are a culmination of efforts by leaders around the globe. These measures particularly espouse and promote the idea of peace and security. Peace and security are

16 The OECD was established in 1948. It provides a forum in which governments can work together to share experiences and seek solutions to common problems. See OECD 'What we do and how' http://www.oecd.org/about/whatwedoandhow/ (accessed 15 September 2015).

17 The FATF is an inter-governmental body established in 1989. It sets standards and promotes the effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. It currently has about 34 member countries (including South Africa) and two observer countries. See FATF 'Who we are' http://www.fatf-gafi.org/pages/aboutus/whoweare/ (accessed 15 September 2015).

18 The IMF is the brain child of the UN. It was established during 1944. It has about 188 member countries. South Africa is one of the members. See IMF 'Why the IMF was created and why?' http://www.imf.org/external/about.htm (accessed 14 September 2015).

essential for the 'survival of man (or woman)'.[19] In addition, they are relevant to[20]

> [preconditions for] survival, namely with an order worthy of the designation 'peace' [and security] not only because it guarantees the prevention of war but also because it makes it possible the development of human dignity and basic rights.

The association of peace and security with human dignity and basic rights is indispensable to the general UN framework for human rights protection. For example, the failure of the League of Nations to achieve one of its mandates, that is, to promote international peace and security, resulted in efforts to restore stability and peace in the world. The UN Atlantic Charter of 1941 is but one such an effort. This Charter sought to ensure, amongst others, that 'all men in all lands may live their lives in freedom from fear and want'.[21] This freedom from fear and want was to be achieved by guaranteeing the free movement of civilians and abandoning the use of force.[22] These efforts, furthermore, were followed by the introduction of the UN Charter of Rights. The UN Charter provides, amongst others:[23]

> [We] the peoples of the United Nations, [are] determined to reaffirm faith in fundamental human rights, in the dignity and the worth of the human person, in the equal rights of men and women and of the nations large and small.

The issue related to the 'dignity and the worth of the human person' requires some elaboration. It is indeed true that human dignity is the precondition for or the basis of peace and security.[24] It is not an extra benefit which is 'conferred upon a person by social contract or positive law'.[25] Rather, it is inherent in a person[26] and granted to the latter at birth.[27] In the former sense, human dignity is the starting point for 'humanness'.[28] In other words, it guarantees the worth of a human person or a fundamental human significance.[29] In addition, human dignity is a specific 'cultural understanding of the inner moral

19 K Kaiser 'Problems and tasks of peace and conflict research' (1973) *Law and State* 1 7.

20 Kaiser (n 19 above) 7.

21 Principle 6 of the Atlantic Charter.

22 Principle 7 read with principle 8 of the Atlantic Charter.

23 Preamble to the UN Charter.

24 EK Quashigah 'Protection of human rights in the changing international scene – Prospects in sub-Saharan Africa' (1994) 6 *African Journal of International and Comparative Law* 93 94.

25 C Smith *What is a person? Rethinking humanity, social life, and the moral good from the person up* (2010) 434.

26 See Preamble to the Universal Declaration.

27 RE Howard 'Dignity, community, and human rights' in AA An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1992) 83.

28 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 60-61 and *S v Makwanyane* 1995 (3) SA 391 (CC) 144.

29 *National Coalition for Gay and Lesbian Equality* (n 28 above) 60-61 and *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) 35.

worth of the human person and his or her political relations with society'.[30] With this in mind, the UN Charter enjoins UN member states to undertake particular tasks. These tasks are designed to preserve the dignity and/or the worth of the human person. They relate to a practice of tolerance and of living together as good neighbours; unity of strength in order to maintain international peace and security; ensuring that armed forces are not used, save in the common interest; and to employ international machinery for the promotion of the economic and social advancement of all peoples.[31]

It is important to note that the UN human rights measures were prepared immediately after World War II. Accordingly, initially these measures had particular relevance to the prevention of war or the use of armed forces. In the recent past, the measures have become more important in the fight against other wrongs. Examples of these wrongs include terrorism, terrorist financing and money laundering.[32]

2.2 Fundamental human rights and anti-terrorism measures

2.2.1 Overview

The need to suppress terrorism has long been a province of international legal jurisprudence. Between 1934 and 1937, the League of Nations[33] already had devised measures to combat terrorism. The mechanisms were embodied in the League's Convention for the Prevention and Punishment of Terrorism.[34] The 1937 Convention had far-reaching consequences. It criminalised terrorism and enjoined countries to fight against the scourge of terrorism.[35] However, the impact of these measures was tarnished by the League's failure to publish the 1937 Convention. Following the League's demise in 1946, the UN took steps towards combating the plague of terrorism.

30 Howard (n 27 above) 83.

31 Preamble to the UN Charter.

32 The term 'money laundering' is associated with 'dirty money' (IL van Jaarsveld 'Mimicking sisyphus? – An evaluation of the Know Your Customer Policy' (2006) 27 *Obiter* 230-232). The dirtiness of money is often linked to the illicit manner in which the money was acquired or obtained (M Bond & G Thornton 'Money laundering' (1994) *Accountants Digest* 6-7). Therefore, money laundering can be said to mean a process of concealing illegal money or assets so that the money or assets appear to have been derived using genuine or legal means (J Madinger *Money laundering: A guide for criminal investigators* (1996) 6).

33 The League was an intergovernmental organisation founded or established immediately after World War I. One of the League's main aims was to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war.

34 The League 'Convention for the prevention and punishment of terrorism' (1937) http://www.cfr.org/terrorism-and-the-law/league-nations-convention-prevention-punishment-terrorism/p24778 (accessed 18 August 2014) (1937 Convention). Saul avers that the 1937 Convention marks the League's response to the assassination of King Alexander I of Yugoslavia (B Saul 'The legal response of the League of Nations to terrorism' (2006) 4 *Journal of International Criminal Justice* 79-80).

35 Arts 1 & 2 1937 Convention.

Consequently, the Convention on Offences and Certain other Acts Committed on Board Aircraft (Tokyo Convention) was adopted in 1963.[36] The Tokyo Convention criminalised the 'unlawful seizure of an aircraft,[37] in cases where such seizure resulted in the wrongful control of the aircraft in flight.[38] Both the 1937 and the Tokyo Conventions treated terrorism as an international crime.

The global nature of terrorism is also identified in the International Convention for the Suppression of the Financing of Terrorism.[39] Broadly speaking, the UN Anti-Terrorism Convention regards the fight against terrorism as a necessary phenomenon towards achieving international peace and security.[40] For this reason, countries are encouraged to, amongst others, criminalise terrorism[41] and to establish mechanisms within their domestic settings to identify, detect and freeze or seize funds used or allocated for use for purposes of terrorism.[42] In addition, the UN General Assembly issued its universal strategy to counter terrorism.[43] The Global Counter-Terrorism Strategy posits that terrorism is a global crime which requires a worldwide and integrated response.[44] Such a response, it is argued, should, however, promote the need to ensure respect for fundamental human rights.[45] The Global Counter-Terrorism Strategy was followed by the passing of a Resolution by the UN Security Council in August 2011.[46] This Resolution reiterates the UN stance regarding the importance of uplifting fundamental human rights in the fight against

36 UN 'Convention on offences and certain other acts committed on board aircraft' (1963) http://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf (accessed 12 February 2015) (Tokyo Convention).

37 Ch IV Tokyo Convention.

38 Art 11(1) Tokyo Convention. In terms of the Tokyo Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment the landing run ends (art 1(3) Tokyo Convention). For the meaning of the term 'in flight', see art 3(1) of the UN Convention for the Suppression of Unlawful Seizure of Aircrafts (1970) http://www.oas.org/juridico/MLA/en/Treaties/en_Conve_Suppre_Unlaw_Seiz_Aircr_Sig_The_Hague_1970.pdf (accessed 13 February 2015).

39 The UN 'International Convention for the Suppression of the Financing of Terrorism' (1999) http://www.un.org/law/cod/finterr.htm (accessed 13 February 2015) (UN Anti-Terrorism Convention).

40 Preamble to the UN Anti-Terrorism Convention; UN General Assembly 'Resolution on Measures to Eliminate International Terrorism' (1994) http://www.ref world.org/cgi-bin/texis/vtx/rwmain?page=topic&tocid=4565c22538&toid=459a87252&publisher=&type=RESOLUTION&coi=&docid=3b00f3171c&skip=0 (accessed 12 February 2015); UN Security Council 'Declaration on the global effort to combat terrorism' (2001) http://www.un.org/ga/search/view_doc.asp? symbol=S/RES/1377(2001) (accessed 13 February 2015).

41 Art 4 UN Anti-Terrorism Convention.

42 Art 8(1) UN Anti-Terrorism Convention.

43 UN General Assembly 'Global counter-terrorism strategy – Activities of the United Nations system in implementing the strategy' (2012) https://www.un.org/en/terrorism/ctitf/pdfs/A%2066%20762%20English.pdf (accessed 13 February 2015).

44 UN General Assembly (n 43 above).

45 As above.

46 A/RES/60/288.

terrorism.[47] More specifically, it encourages countries to recognise and accept that anti-terrorism measures and the maintenance of human rights are not contradictory objectives. Conversely, anti-terrorism measures and the maintenance of human rights are 'complimentary and mutually-reinforcing' goals.[48] Therefore, measures to deter terrorism can operate effectively only in environments that respect and safeguard human rights.[49]

Outside of these UN instruments is to be found, inter alia, an inter-governmental body that is referred to as the Financial Action Task Force (FATF). The FATF has played a meaningful role in providing content to the need to prevent terrorism. It adopted a number of recommendations on 16 February 2012 in order to assist member states to identify risks and to develop policies and domestic co-ordination; to pursue terrorist financing and the financing of proliferation; to apply preventive measures for the financial sector and other designated sectors; to establish powers and responsibilities for the competent authorities, for example investigative, law enforcement and supervisory authorities and other institutional measures; to enhance the transparency and availability of beneficial ownership information of legal persons and arrangements; and to facilitate international co-operation.[50] Accordingly, it enjoins member states not only to criminalise terrorism, but to prevent and suppress terrorism.[51]

2.2.2 Human rights and terrorism

The view that anti-terrorism measures and the maintenance of human rights are 'complimentary and mutually-reinforcing' goals is supported by the former UN Secretary-General, Kofi Annan. In particular, Annan comments as follows:[52]

> [Human rights law] makes ample provision for strong counter-terrorism action, even in the most exceptional circumstances … upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element in it.

47 As above.

48 As above. See also BJ Goold & L Lazaraus 'Security and human rights: The search for a language of reconciliation' in BJ Goold & L Lazarus *Security and human rights* (2007) 1; NT Katyal & LH Tribe 'Waging war, deciding guilt – Trying the military tribunals' (2002) 111 *Yale Law Journal* 1259-1260.

49 A/RES/60/288.

50 FATF 'International standards on combating money-laundering and the financing of terrorism and proliferation' (2012) http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (accessed 15 September 2015).

51 See Recommendations 5 and 6 of the FATF Recommendations.

52 K Annan Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, Spain, 10 March 2005.

It is argued that various rights may be encroached upon during the fight against terrorism. These include the inherent right to life;[53] the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;[54] the right to liberty and security of person;[55] and the right not to be subjected to arbitrary or unlawful interference with a person's privacy, home or correspondence, or to unlawful attacks on a person's honour and reputation.[56]

Because of this, it becomes necessary to establish human rights institutions that are designed to alleviate the scale of this potential encroachment. The most notable are the UN Human Rights Council;[57] the Economic and Social Council; the Sub-Commission on the Prevention of Discrimination and Protection of Minorities; the Commission on the Status of Women; the UN High Commissioner for Human Rights; and the Office of the High Commissioner for Human Rights (OHCHR). This article discusses the activities and functions of the OHCHR.

The OHCHR acts as the principal human rights office of the UN.[58] It was established following the recommendations by delegates of about 171 countries at the World Conference on Human Rights in Vienna in 1993. Subsequent to these recommendations, the UN General Assembly on 20 December 1993 passed Resolution 48/141 for its establishment. The OHCHR is responsible for promoting and protecting the successful enjoyment of civil, cultural, economic, political, social and developmental rights; providing consultative services, technical and monetary assistance on human rights; co-ordinating the UN's education and public information programmes on human rights; playing a significant role in removing the obstacles to the full realisation of human rights and preventing continuing human rights violations; engaging in a dialogue with governments in order to guarantee respect for human rights; enhancing international co-operation for the promotion and protection of human rights; co-ordinating human rights promotion and protection activities throughout the UN system; and rationalising, adapting, strengthening and streamlining the UN machineries that relate to human rights. Furthermore, its objectives are to promote and protect fundamental human rights; to lead global human rights efforts; to provide a forum for identifying, highlighting and developing responses to human rights challenges; and to act as the focal point of human rights

53 Art 3 Universal Declaration. See also art 6(1) of the International Covenant on Civil and Political Rights of 19 December 1966 (ICCPR).

54 Art 5 Universal Declaration and art 7 ICCPR.

55 Art 3 Universal Declaration and art 9(1) ICCPR.

56 Art 12 Universal Declaration and art 17(1) ICCPR.

57 The UN Human Rights Commission was established in 2006. It replaces the UN Commission on Human Rights.

58 OHCHR 'Who we are?' http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx (accessed 10 September 2014).

research, education, public information and advocacy activities in the UN system.[59]

The OHCHR relies on surveys in order to fulfil its responsibility as a supervisory body. These surveys are intended to assess a country's standing in relation to the promotion of a culture of fundamental human rights. Furthermore, surveys compel the establishment of a paradigm that alleviates terrorism, on the one hand, and mainstream a culture that promotes and protects fundamental human rights, on the other.[60]

In summary, human rights are the bedrock of the fight against terrorism. In particular, the relationship between human rights and anti-terrorism measures promotes the establishment of a framework which uplifts respect for the rule of law, good governance and human rights.[61] This framework does not repress human rights and the rule of law,[62] but encourages debate for or against existing measures against terrorism, including transaction reporting measures.[63] However, it is important to note that the UN accepts that there is no such a thing as limitless rights. This can be deduced from certain provisions of, inter alia, the International Covenant on Civil and Political Rights (ICCPR). For instance, article 17 of the the ICCPR provides protection to a victim of 'arbitrary or unlawful interference with his (or her) privacy, family, home or correspondence'. Accordingly, interference alone does not entitle a victim to protection under article 17. The protection arises in cases where it is alleged that the interference is arbitrary or unlawful.

This then brings us to the next issue regarding transaction reporting. The section below delves into the meaning and working of transaction reporting.

3 Transaction reporting

3.1 Overview

Transaction reporting is possible in environments where, inter alia, a suitable transaction recording procedure exists.[64] Transaction recording is an old phenomenon, developed as early as 3200 BC. This

59 OHCHR (n 58 above).

60 UN Human Rights Council 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' (2009) http://www2.ohchr.org/english/issues/trafficking/docs/HRC-10-16.pdf (accessed 10 February 2015).

61 OHCHR Fact Sheet 32 (n 6 above).

62 As above.

63 As above.

64 WH Muller et al *Anti-money laundering: International law and practice* (2007) 429; MC Bassiouni & DS Gualtieri 'International and national responses to the globalisation of money laundering' in EU Savona (ed) *Responding to money laundering: International perspectives* (1997) 137.

method was used to account for or calculate animals and other goods. With this method, a simplified representation of the animal or goods was drawn on the bulges of drenched terracotta. Afterwards, a resembling mark was made for the number counted and recorded. The terracotta would then be allowed to swelter in the sun and would thus become an enduring document.[65] Eventually, ancient Egypt and Rome developed their own methods of recording. In ancient Egypt, recording was carried out by a particular influential faction (the scribes). The scribes used raised edges of capsules or tablets for recording purposes. In Rome, a method of recording, referred to as shorthand, was used. Shorthand developed as a result of the necessity to keep up with the speed of spoken words. It relied on notes and symbols as equivalents for phrases or sentences. Swiftness and precision were the fundamental features of this system of recording.[66]

The success of record keeping in the periods mentioned above contributed to the adoption of this system in anti-terrorism schemes. The importance hereof specifically led to transaction recording being adopted to support anti-terrorism paradigms. In anti-terrorism schemes, transaction recording supports the undertaking of transaction reporting schemes. Specifically, they guarantee that 'a transaction, or a series of transactions, can be reconstructed during an investigation, clearly indicating not only what had transpired, but also who was 'involved' in it.[67] In addition, they are performed as part of the customer due diligence (CDD) or know-your-customer (KYC) process. The meaning of CDD becomes clearer when reference is made to the terms 'due' and 'diligence'. On the one hand, the notion of 'due' denotes something that is definite or expected.[68] On the other, the concept of 'diligence' connotes a vigilant and methodical work or exertion.[69] Within the context of anti-terrorism, 'due diligence' means a sensible and methodical process of appraising

65 History World 'History of writing' http://www.historyworld.net/wrldhis/PlainTextHistories.asp? historyid=ab33 (accessed 24 February 2015).

66 TG Parkin *Old age in Roman world: A cultural and social history* (2003) 182-183. This method was followed in Athens, Greece, in the year 330 BC. The Athenian method encompassed the preserving of information or records in the *Metroon,* that is, the holy mother of the Gods (see JP Sickinger *Public records and the archives in classical Athens* (1999) 1-2).

67 Financial Intelligence Centre (FIC) 'Joint statement – Clarification on the obligations of accountable institutions on verifying client identities and record keeping' (2009) https://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/JOINT%20STATEMENT%20Verifying%20and%20recording%20keep%20of%20client%20identities%20trkcm.pdf (accessed 7 February 2015).

68 AS Hornby et al *Oxford advanced learner's dictionary of current English* (2005) 474.

69 Hornby et al (n 68 above) 425.

personal information[70] or data[71] in order to classify divergent risks to an anticipated relationship or relationships.[72] In other words, it facilitates a process of identifying whether a transaction or transactions is or are in keeping with the required policies, procedures or methodologies or not.[73] The CDD or KYC process is performed by establishing and verifying the identity of a person.[74] Firstly, the establishment practice is satisfied by the furnishing or disclosing of sensitive or personal information to a financial institution.[75] The information to be furnished or disclosed to a financial institution includes a person's full names, date of birth, identity number, income tax registration number (if applicable) and residential address.[76] The furnishing or disclosing of information should enable such an institution to make an informed decision on whether to accept a person to its business or not.[77] The Financial Intelligence Centre Act (FICA) does not provide a definition of the term 'business' for anti-terrorism purposes. For that reason, its meaning has to be sought outside of FICA. In *Standard General Insurance Company v Hennop*, the court stated that 'anything which occupies the time and attention and labour of a man for the purpose of profit is [a] business'.[78] This 'anything' can be a commercial activity or any other institution.[79] In addition, the disclosure of information may be made by the person himself or herself or on his or her behalf by his or her agent or guardian.[80] Exceptions are made in respect of minors, the mentally

70 The term 'information' means a 'piece of news with a meaning for the recipient; its assimilation usually causes a change within the recipient' (U Sieber 'The emergence of information law – Object and characteristics of a new legal order' in E Lederman & R Shapira (eds) *Law, information and information technology* (2001) 10-11.

71 The word 'data' appears to have different meanings. Firstly, sec 1 of the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993 stipulates that data includes any data or information of a technical or other nature as well as blueprints, diagrams, plans, models, formulae, engineering designs, specifications, manuals and instructions, whether written or recorded by means of any electronic, magnetic or optical process. Secondly, sec 1 of the Electronic Communications and Transactions Act 25 of 2002 defines data as the electronic representation of information in any form. The word 'any form' is not defined in the ECT Act. For purposes of this study, the word 'any form' will mean automated or non-automated form.

72 *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) All SA 411 (A) 413-416.

73 LS Spedding *Due diligence and corporate governance* (2004) 3. See also sec 21 of the Financial Intelligence Centre Act 38 of 2001 (FICA).

74 Sec 21(1)(a) FICA. A reference to a 'person' means a person who or a business which wishes to or has established a business relationship or concluded a transaction or single transaction with a financial institution, eg a bank.

75 Regulation 3 of the FICA Regulations of GN R1595 in GG 24176 of 20 December 2002 (FICA Regulations).

76 Regulation 3(1)(a)-(e) of the FICA Regulations.

77 Proc R715 in GG 27803 of 18 July 2005 (FIC Guidance Note 3) 15.

78 1954 (4) 560 (A) 565.

79 Proc R301 in GG 30873 of 14 March 2008 (FIC Guidance Note 4).

80 Secs 21(1)(a), (b) & (c) FICA.

disabled, prodigals and insolvent persons.[81] Secondly, the verification process implies comparing the information disclosed during the establishment process to other documents serving the verification process.[82] For example, a person's income tax registration number may be compared to the number appearing in a document issued by the South African Reserve Bank.[83] Furthermore, a person's full names, date of birth and identity number may be compared to a person's official identification document (ID),[84] alternatively to a valid, current and unexpired document,[85] for example a valid driver's licence or an official passport.[86]

The discussion above indicates that transaction reporting follow transaction recording. Transaction recording is an old phenomenon used to compute certain information or particulars. It also illustrates that transaction recording facilitates a process of reporting transactions. Therefore, the achievements that it has enjoyed in computing information have led to it being adopted in order to assist in the fight against terrorism. As a consequence, countries around the globe have realised the need to establish measures related to transaction reporting. In this article, the South African approach to transaction reporting is examined. South Africa follows frameworks to transaction reporting developed internationally. Of particular interest is the model created by the FATF and some provisions of the United Kingdom's Terrorism Act[87] and UK Regulations.

3.2 South African approach

The measures that South Africa adopts in order to deter terrorism can be traced back to as far as 1950, embodied in legislation such as the Suppression of Communism Act,[88] the Unlawful Organisation Act,[89] the General Law Amendment Act,[90] the Terrorism Act[91] and the

81 Sec 21(1)(c) FICA. For an extensive reading on the capacity to conclude contracts by these persons, see J Heaton 'Status and capacity: The determining factors' in B van Heerden et al *Boberg's: law of persons and the family* (1999) 74-75. For further reading regarding the effect of insanity and prodigality on a person's capacity to act, see *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (K); *Ex Parter Klopper: In Re Klopper* 1961 (3) SA 803 (T); *Lange v Lange* 1945 AD 332; *Pienaar v Pienaar's Curator* 1930 OPD 171.

82 Regulation 4 FICA Regulations.

83 Regulation 4(2) FICA Regulations.

84 Regulation 4(1)(a)(i) FICA Regulations. An ID, for purposes of the establishment and verification process in South Africa, refers to a green bar-coded identity document (sec 1 of the Regulation of the Interception of Communication and Provision of Communication-Related Information Act 70 of 2002).

85 Regulation 4(1)(a)(ii)(aa)-(dd) FICA Regulations.

86 FIC Guidance Note 3 13.

87 The United Kingdom Terrorism Act of 2000.

88 Suppression of Communism Act 44 of 1950.

89 Unlawful Organisation Act 34 of 1960.

90 General Law Amendment Act 37 of 1963.

91 Terrorism Act 83 of 1967.

Internal Security Act.[92] They relied on the principle of *salus reipublicae suprema lex*. This principle was based on the premise that the safety and wellbeing of the state was the supreme or highest law.[93] For purposes of anti-terrorism, the *salus reipublicae suprema lex* principle afforded the state the power to, mainly, disregard the ordinary safeguards of human rights,[94] relying on the fact that the 'highest or supreme law' demands such curtailment.[95] However, this position changed when the first democratic South African Constitution was adopted in 1994, establishing the supremacy of the Constitution,[96] leading to the abandonment of the *salus reipublicae suprema lex* principle. The Constitution, 1996 restricts the powers of government, and promotes adherence to different sets of rules regarding the protection of human rights.[97] The Constitution further encourages meaningful obedience to particular democratic values, including human dignity, the achievement of equality and the advancement of human rights and freedoms.[98] The coming into effect of the Constitution compelled the legislature to model its laws, including laws that restrain terrorism,[99] to be in line with the Constitution.[100]

FICA was promulgated with a view to responding to the scourge of terrorism. Sections 28, 28A and 29 of FICA specifically regulate transaction reporting under the new constitutional order. It would appear that the approach to transaction reporting in terms of these sections differs in a number of respects. For example, section 28 deals with the reporting of cash transactions which are above a certain prescribed limit (R24 999,99).[101] For purposes of section 28, the term 'cash' has a specific meaning. Cash excludes negotiable instruments, the transfer of funds by means of a bank cheque or bank draft, an electronic funds transfer, wire transfer or any other non-physical transfer of cash.[102] Section 28A covers the reporting of property which is associated with terrorism or terrorism-related activities. This 'property' may be in the form of 'money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'.[103] However, section 29 provides a broad

92 Internal Security Act 74 of 1982.
93 DA Basson & HE Viljoen *South African constitutional law* (1988) 419; HI Flower *Roman republics* (2010) 147.
94 Flower (n 93 above) 147.
95 *Krohn v Minister of Defence* 1915 AD 191 197.
96 Sec 2 Constitution of the Republic of South Africa, 1996.
97 Ch 2 South African Constitution.
98 Sec 1(a) South African Constitution. For further reading on the other values, see secs 1(b)-(d) of the Constitution.
99 FICA, Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (PCDTRA) and the Prevention of Organised Crime Act 121 of 1998 (POCA).
100 Sec 2 South African Constitution. See also sec 36 of the Constitution.
101 Regulation 22B FICA Regulations.
102 FIC Guidance Note 5.
103 Sec 1(xvi) POCA. See also sec 1(xx) of the PCDTRA.

framework for transaction reporting. Essentially, it follows the same approach as article 18 of the UN Anti-Terrorism Convention. This Convention specifically encourages financial institutions to design special identification measures to unusual, suspicious, complex and unusually large transactions.[104] As soon as this identification process has been completed, a description of these transactions must be reported or furnished to the competent authorities.[105] Also, transaction reporting in terms of section 29 of FICA is required to be made to the Financial Intelligence Centre (FIC).[106] Various persons are enjoined to report transactions. These persons are individuals who carry on a business, individuals in charge of a business, individuals who manage a business or individuals employed by a business.[107] The persons mentioned must know or suspect the existence of certain facts.

The terms 'know' and 'suspect' for purposes of transaction reporting require additional elaboration. Firstly, the term 'know' means the presence of definite awareness. In particular, a person has knowledge of a fact if such a person has a genuine understanding of that fact, or if it is proved that such a person believes that there is a reasonable possibility of the existence of a fact, and that person fails to obtain information to confirm or refute the existence of such a fact.[108] The requisite knowledge is not only confined to the 'mental state of awareness [that is] produced by personal participation' of a person in a crime or terrorism,[109] neither is it only associated with any 'information derived' from such a person.[110] However, it encompasses an assurance or conviction that a particular circumstance, that is, a suspicious transaction, exists.[111] The latter may be gleaned from examining the mental state (*mens rea*) of a person at the time the crime (terrorism) was committed.[112] Secondly, a suspicion is formed or established without the existence of clearly-defined or definable grounds.[113] It particularly means 'a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove'.[114] It arises or ensues 'at or near the starting point of an investigation of which [the]

104 Art 18(b) UN Anti-terrorism Convention.

105 Art 18(b)(iii) UN Anti-terrorism Convention.

106 The FIC is an institution which is established in terms of sec 2 of FICA. The FIC is established to respond to recommendation 26 of the FATF Recommendations. The FIC is the South African intelligence unit that provides support in the fight against terrorism.

107 Sec 29(1) FICA.

108 Sec 1(2) FICA.

109 *R v Patz* 1946 AD 845 857.

110 *Patz* (n 109 above) 857.

111 As above.

112 *SVV Construction v Attorneys, Notaries & Conveyance Fidelity Guarantee Fund* 1993 (2) SA 577 (C) 585F-585H.

113 *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) 50H-50J.

114 *Shabaan Bin Hussein v Chong Fook Kam* 1970 AC 942 (PC) 948(B); *Powell NO v Van Der Merwe NO* 2005 (5) SA 62 (SCA).

obtaining of *prima facie* proof is the end'.[115] However, it is required that a degree of satisfaction, which extends beyond a mere speculation, should exist to justify or support the suspicion.[116] In cases where knowledge or a suspicion cannot readily be ascertained, some form of awareness of the facts is extrapolated. Accordingly, a three-stage analysis is generally undertaken to establish the existence of the requisite knowledge or suspicion. This analysis relates to whether or not a person is actually aware of something; where circumstances arise wherein a person can reasonably be expected to be aware of something; or where circumstances arise wherein a person can reasonably be expected to suspect the existences of something.[117]

The pertinent facts that must be reported include, inter alia, transactions that facilitate or are likely to facilitate the proceeds of unlawful activities[118] or are connected to terrorism or terrorist-related activities; transactions that have no apparent or noticeable business or lawful purpose; transactions that are conducted for the purpose of avoiding or evading reporting duties; transactions that may be relevant to the investigation of an evasion or attempted evasion of a duty to pay tax, duties or levies imposed by legislation; or transactions that relate to an offence which is connected to the financing of terrorism and/or terrorist-related activities.[119] Generally, a suspicious and unusual transaction report (STR) has to be compiled.[120] The STR sets out the information or facts that should be reported. In particular, it must include the particulars of a person or a business making the report;[121] detailed information related to the transactions that are being reported;[122] details of the account involved in concluding the transaction;[123] the particulars of a person (natural or legal) on whose behalf the transaction is concluded;[124] and the particulars of a person (natural or legal) who acts on behalf of another.[125] Furthermore, the STR must include detailed information relating to the date and time of the transaction; if a series of transactions, the period over which the

115 *Shabaan Bin Hussein* (n 114 above) 948(B).

116 *Commissioner for Corporate Affairs v Guardian Investments* [1984] VR 1019. See also *Walsh v Loughman* [1992] 2 VR 351.

117 FIC Guidance Note 4 10.

118 Sec 1 of POCA defines the term 'proceeds of unlawful activities' as any property or service, advantage, benefit or reward that was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.

119 Secs 29(1)(b)(i)-(v) FICA. See FIC Guidance Note 4 15, for the indicators of suspicious and unusual transactions.

120 GN R456 in GG 27580 of 20 May 2005 (2005 FICA Regulations).

121 Regulation 23(1) 2005 FICA Regulations

122 Regulation 23(2) 2005 FICA Regulations.

123 Regulation 23(3) 2005 FICA Regulations.

124 Regulation 23(4) 2005 FICA Regulations.

125 Regulation 23(5) 2005 FICA Regulations.

transactions were carried out; a description of the type of transaction; the manner in which the transactions were carried out; a description of the type of funds or cash involved in the transactions (if transactions involved funds or cash); a description of the type of property and all identifying characteristics of the property (if transactions involved property); the amount of funds or cash, or the estimated value of the property involved in the transactions; the currency in which the transactions were conducted; the manner in which the funds, cash or property were disposed of; the amount of the disposition of the funds or cash; the value for which the property was disposed of; the currency in which the funds or cash were disposed of and the currency used in the disposition of the property (if funds, cash or property involved in the transactions were disposed of); if another institution or person was involved in the transaction or series of transactions, the name of the other institution and the number of any account at the other institution involved in the transactions; the name and identifying particulars, for instance the address, the exclusive or unique number or code of the branch or office where the transactions were concluded; the purpose of the transactions; and the remarks, comments or explanation made or given by the person concluding the transactions.[126] Lastly, the STR must encapsulate details such as the account number; the name and identifying particulars of the branch where the account is held; the account type; the account holder's name; the date on which the account was opened; in cases where the account had been closed, the date of its closure and the name of the person who gave the instruction for its closure; the highest amount paid into and out of the account; the number of payments made into and out of the account; the balance in the account before concluding the transactions; the balance in the account on the date of drawing up the STR; the status of the account before the reported transactions were concluded; any activity (in the preceding 180 days) that had been considered for reporting; and the reference numbers allocated by the FIC.[127]

It is important to note that no duty of secrecy or confidentiality or any other restriction is required to be exercised during transaction reporting.[128] This means that a financial institution is absolved of its obligations pertaining to the observance of secrecy and confidentiality in these cases.[129] Such absolution also excludes the restrictions that are normally accorded to information which is protected by legal professional privilege.[130] This relates, amongst others, to the protection which is usually granted to information as between an attorney and client and which is disclosed by such a client for purposes of legal advice or litigation, or between an attorney and

126 Regulation 23(2)(a)(l) 2005 FICA Regulations.
127 Regulation 23(3)(a)-(o) 2005 FICA Regulations.
128 Sec 37(1) FICA.
129 As above.
130 Sec 37(2) FICA.

third party for purposes of pending, contemplated or already commenced litigation.[131]

Having considered the above-mentioned, it is submitted that South Africa has adopted an approach to the fight against terrorism which is receptive to the need to protect and promote human rights. The human rights guarantees that are enumerated in the Constitution inadvertently promote the reconciliation of the need to fight terrorism with the necessity to preserve fundamental rights and freedoms. For this reason, it is expected that measures to alleviate terrorism, including the processes relating to STR, will be in keeping with these guarantees. However, it would appear that South Africa sometimes departs from the established human rights culture when dealing with terrorism. For example, the constitutional guarantees of secrecy and confidentiality do not apply during the process of STR.[132] In other words, STR seems to disregard or outweighs the ordinary safeguards of human rights, for example, privacy and confidentiality.[133] The aforementioned also applies, to a limited extent, to information which is furnished and/or disclosed during the course of an attorney-client relationship.[134] Furthermore, there are cases which indicate a separation between what South Africa pronounces as its stance on human rights and that which is actually done in practice. In these cases, South Africa appears to suspend human rights until the act of terrorism has been dealt with. The case of *Jeebhai & Others v Minister of Home Affairs & Others*[135] illustrates the aforementioned. The facts of this case were briefly the following: A Pakistani national by the name of Khalid Rashid was arrested by members of the South African Police Service. The basis for the arrest was that Mr Rashid was suspected of having entered the Republic of South Africa without the necessary or legal documents authorising his stay.[136] Subsequent to his arrest, Mr Rashid was deported to Pakistan. The circumstances under which Mr Rashid was deported by South Africa were suspicious. Specifically, his deportation was done in secret and carried out without following the usual procedure of placing the deportee into an approved facility or port of entry designated as such by the Minister of Home Affairs (the Lindela Repatriation Centre) pending deportation. Instead, Mr Rashid was, without informing his friends or family, handed over to the Pakistani law enforcement.[137] It transpired later that Mr Rashid was wanted and sought by the Pakistani and British authorities for having links with certain 'international terrorist networks'.[138] Having

131 Secs 37(2)(a) & (b) FICA.
132 Sec 37(1) FICA.
133 As above.
134 Secs 37(2)(a) & (b) FICA.
135 2009 (5) SA 54 (SCA).
136 *Jeebhai* (n 135 above) 58.
137 *Jeebhai* 59.
138 See South African Government 'Government communications on deportation of Khalid Rashid' (2006) http://www.gov.za/government-communications-deportation-khalid-rashid (accessed 13 September 2015).

considered these facts, the court, *per* Cachalia JA, stated that 'an act of deportation does not necessarily involve the loss of a deportee's liberty'.[139] The loss of liberty would be justified, the court reasoned, if the act of deportation is made in a manner which safeguards the deportee's rights, that is, the right to be informed of the decision to deport, the right to appeal the decision, and the right to request that the detention be confirmed by a court warrant within 48 hours. Given the fact that there was no legal justification of the aforementioned operation by South Africa, the court stated that the whole scheme was simply a 'disguised extradition'.[140] Consequently, the court held that the detention and deportation of Mr Rashid were unlawful.[141]

3.3 Evaluating the STR approach

It is submitted that the approach to transaction reporting, generally, encroaches upon certain fundamental human rights. The most obvious of these rights is a person's right not to be subjected to arbitrary or unlawful interference with his privacy, home or correspondence, or to unlawful attacks on his honour and reputation.[142] Ordinarily, financial institutions owe their customers a duty to 'maintain confidentiality and secrecy'.[143] This responsibility generally is exercised in relation to information or data belonging to those customers or transactions that the customers conclude during the course of the business relationship.[144] Sometimes, this duty is described as the *naturale* of the contract between financial institutions and their customers.[145] Thus, an encroachment occurs in cases where disclosure of information or transactions belonging to customers is made to third parties, for example the FIC. However, whether such encroachment preserves human rights is determined by the Constitution, namely, section 36 of the Constitution.[146]

Section 36 of the Constitution states that rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[147] The requirement of 'reasonableness' and 'justifiability' does not extend to the impairment of a 'democratic functioning of society'.[148] In other words, it does not necessarily translate into the negation of the rule of law, good

139 *Jeebhai* (n 135 above) 63.
140 *Jeebhai* 72.
141 *Jeebhai* 74.
142 Art 17(1) ICCPR.
143 WG Schulze 'Big sister is watching you – Banking confidentiality and secrecy under siege' (2001) 13 *SA Mercantile Law Journal* 601-603.
144 As above.
145 *Abrahams v Burns* 1914 CPD 452 456, *Cambanis Buildings (Pty) Ltd v Gal* [1983] 1 All SA 383 (NC) 392-393; *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* [1991] 1 All SA 275 (A) 285-287.
146 *Bernstein v Bester* NO 1996 (2) SA 751 (CC) 67.
147 Sec 36(1) South African Constitution.
148 OHCHR Fact Sheet 32 (n 6 above).

governance and human rights. Conversely, it denotes the pursuit of pressing societal objectives and their impact on human rights and freedoms.[149] In addition, a reference to law of general application denotes, for purposes of transaction reporting, that the law that limits secrecy and confidentiality should be sufficiently accessible.[150] This accessibility must enable persons against whom transaction reporting is made to understand the extent and limits of their rights to secrecy and confidentiality.[151] It must also reflect the 'norms and values of the people which it seeks to bind'.[152] Furthermore, section 36 states that the limitation must take into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.[153]

Notwithstanding the aforementioned, it is argued that some of the information used for purposes of transaction reporting may be founded on unreliable data. In one case, the unreliability may stem from information that is a product of an illegal activity or operation. An example of the operation is illegal deportation, as was indicated in the case of *Jeebhai*.[154] Another example relates to information relating to the issuing of a valid television licence. Vendors issue television licences on the basis of information recorded and/or furnished by the applicant on a required form. The information is not verified and/or subjected to a CDD process. Furthermore, the information is not subjected to a rigorous risk-based approach which is necessary in identifying, assessing and evaluating the scale of the risks posed to a financial institution.[155] Therefore, the use of such a licence to establish business relationships or to conclude transactions with a customer may suppress or frustrate the entire scheme of reporting transactions. Specifically, this may result in a process of guess work whereby transactions that do not pose a threat or risk to a financial institution are regarded as suspicious and those that pose a grave risk are excluded from the list. In other instances, measures that are related to transaction reporting are open-ended and vague. For example, transaction reporting is done in cases where there is, inter alia, a suspicion that a transaction may be related to or used to finance terrorism. It is conceded that a suspicion is determined by means of subjective conjectures or surmises.[156] For this reason, the open-endedness and vagueness of the suspicion generate problems. It particularly distorts the limiting processes or measures and the making

149 As above.
150 As above.
151 As above.
152 FT Abioye 'Constitution making, legitimacy and the rule of law: A comparative analysis' (2011) XLIV *CILSA* 59 61.
153 Secs 36(1)(a)-(e) South African Constitution.
154 *Jeebhai* (n 135 above).
155 See FATF 'Guidance for a risk-based approach – The banking sector' October 2014.
156 *Shabaan Bin Hussein* (n 114 above) 948(B).

of suitable proportionalities between particular fundamental human rights (namely, the right privacy and the duty of confidentiality) and the need to carry out STR.[157]

4 Conclusion

Human rights are a measure and/or a benchmark for any anti-terrorism paradigm. In particular, the reconciliation of human rights with anti-terrorism promotes the establishment of a framework which uplifts respect for the rule of law, good governance and human rights.[158] This framework encourages a debate for or against existing measures against terrorism.[159] In this article, transaction reporting is identified as one of the essential anti-terrorism measures. Transaction reporting is part of the overall CDD process. The CDD process requires financial institutions to become 'amateur detectives'.[160] This entails, amongst others, the undertaking of investigations relating to the legal existence of a person,[161] the identification of suspicious and unusually large transactions, and the monitoring of the pattern of concluding transactions.[162] South Africa requires that STRs should be made to the FIC. In addition, the transaction reporting process must be made in respect of suspicious transactions.

It is argued that the latter approach to STR contains a number of shortcomings. These shortcomings not only relate to the fact that financial institutions are expected to become 'amateur detectives',[163] but also extend to the open-ended and vague nature of the limiting measures. For example, a suspicion is almost always the product of a subjective or individual inquiry.[164] Accordingly, the determination of a suspicion 'falls short of proof' which is based on established facts or evidence.[165] Therefore, the constant dependence on a suspicion as one of the bases for an STR is problematic. Specifically, such reliance hampers the process of establishing the reasonableness and justifiability of the general scheme of transaction reporting. Furthermore, the fact that a suspicion should be made by a 'reasonable person' does not render STRs unproblematic. This is so because the people who normally deal with and/or report transactions on behalf of financial institutions are employees of these institutions.

157 J Wadsley & GA Penn *The law relating to domestic banking* (2000) 164-165; I Currie & J de Waal *The Bill of Tights handbook* (2005) 167-168.
158 OHCHR Fact Sheet 32 (n 6 above).
159 As above.
160 Schulze (n 143 above) 606.
161 Sec 21 FICA.
162 Art 18 UN Anti-Terrorism Convention.
163 Schulze (n 143 above) 606.
164 MN Njotini 'The transaction or activity-monitoring process – An analysis of the customer due diligence systems of the United Kingdom and South Africa' (2010) 31 *Obiter* 570.
165 As above.

Although these employees are expected to be trained in, amongst others, transaction reporting,[166] there are currently no measures that provide for the testing of the level of their skills, and for the monitoring of their transaction reporting trends and the tools they use in STRs. Accordingly, there is a danger that these 'reasonable people' may carry out the statutory duty to report transactions by simply ticking the box (box ticking).[167] The case of *Jeebhai* may be used as an example. This case demonstrates how 'reasonable people' sometimes conduct themselves in a manner which is unreasonable during an honest attempt to act against or to prevent terrorism and the financing of terrorism.[168]

It is submitted that open-ended and vague limiting provisions should be avoided when conducting STR. This can be achieved by ensuring that illogical and subjective facts are excluded from the general scheme to report transactions. The basis for this should be to ensure that STR is a justifiable limitation of a person's (customer's) rights to privacy and confidentiality. In other words, it should be reasonable in the circumstances and should uphold the guarantee that it is to meant to respond to the need to protect fundamental human rights.[169] It is also submitted that the executive branch of government can play an active role in this regard. Particularly it should assist in establishing unambiguous provisions that espouse the need for transaction reporting. These provisions may be contained in guidance notes and/or other regulations. As a result, such provisions should logically and unambiguously inform the person who is affected by STR, in this case the holder of the right to secrecy and confidentiality, of the objective(s) and limits of transaction reporting, and the impact that STR has or may have on his or her rights.[170]

166 Regulation 27(a)-(b) FICA.
167 Regulation 27(d) of FICA for the punishments for failure to report by employees of financial institutions.
168 *Jeebhai* (n 135 above) 63.
169 Schulze (n 143 above) 614.
170 Currie & De Waal (n 157 above) 167-168.

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Recent developments

Human rights developments in the African Union during 2014

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Summary

The year 2014 saw the adoption by the AU Assembly of a protocol providing the African Court with jurisdiction over international crimes, and a revised protocol on the Pan-African Parliament providing it with power to adopt 'model legislation'. With regard to implementation, the Ebola epidemic in West Africa affected the effective functioning of, in particular, the African Commission. However, despite this and other challenges, the African Commission adopted important normative instruments, such as a resolution on the basis of sexual orientation or gender identity, responded to violations through urgent appeals and press releases, and engaged with states through missions and the state reporting procedure. The Commission also adopted some interesting jurisprudence in the period under review. The African Children's Rights Committee consolidated its position as the main regional body for the protection of children's rights in Africa. The African Court received an increasing number of cases and handed down two judgments on merits and an advisory opinion.

Key words: *African Union; African Commission on Human and Peoples' Rights; African Court on Human and Peoples' Rights; African Committee of Experts on the Rights and Welfare of the Child; African Peer Review Mechanism*

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1 Introduction

This article considers the work of the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court), the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the African Peer Review Mechanism (APRM) in 2014. The article also considers the new protocols and other instruments adopted by the African Union (AU) Assembly, in particular the Protocol providing the African Court with jurisdiction over international crimes. The aim is to identify the achievements and challenges of the main regional human rights institutions in promoting and protecting human rights on the African continent during 2014.

2 African Commission on Human and Peoples' Rights

2.1 Composition

No terms expired in 2014, therefore the composition of the African Commission remained unaltered, consisting of six women and five men, with Commissioner Kayitesi (Rwanda) as Chairperson and Commissioner Khalfallah (Tunisia) as Vice-Chairperson.

2.2 Sessions

The African Commission held three sessions, the 55th ordinary session and two extraordinary sessions, totalling 33 days, compared to 42 days in 2013.[1] The lower number of meeting days was a direct result of the Ebola epidemic in West Africa which caused the 56th ordinary session, scheduled to take place in October, to be postponed until 2015.

The Commission had urged[2]

> member states, especially those that have not yet done so, to consider hosting one of the future sessions of the Commission – not only to lessen the burden on the Commission's gracious host country, The Gambia, but also to benefit from partnering with the Commission in this most worthy exercise.

In 2014 the response by member states to such a call was positive. Two of the sessions were held outside the Commission's headquarters in Banjul, The Gambia. The April-May session was held in Angola and the extraordinary session in July in Rwanda. Niger was meant to have

1 15th extraordinary session, 7-14 March, Banjul, The Gambia; 55th ordinary session, 28 April to 12 May, Luanda, Angola; 16th extraordinary session, 20-29 July, Kigali, Rwanda. The third joint meeting of the Commission and the Court was held from 16-19 July in Kigali.

2 36th Activity Report (2014) para 17. The Executive Council reiterated this call.

hosted the ordinary session in October, but this session was cancelled due to the Ebola epidemic.

The African Commission's sessions provide a forum for both the Commission and non-governmental organisations (NGOs) to engage with states on their human rights practices. Representatives of 26 states attended the 55th ordinary session in Angola in April and May, including South Sudan, which is yet to ratify the African Charter on Human and Peoples' Rights (African Charter). Of these states, 21 made statements before the Commission.[3]

2.3 Resources

Resource constraints have been a key challenge to the African Commission. In seeking to address particularly the staff shortage, the AU Commission in 2014 recruited legal officers for the Commission's Secretariat in Banjul.[4] However, the staff complement of the Commission was still not at the level approved by the AU in 2009. The Commission has some legal officers on contracts sponsored by donor agencies. Some member states have long felt that this provides donor agencies with too much control over the Commission's agenda and findings. The Executive Council in 2014 decided to 'increase the budgetary allocation of the ACHPR to prevent the dependency of such a sensitive and important AU organ on partner funds for the performance of its functions'.[5] The extent to which this will in practice change the situation remains to be seen, as the Executive Council has for many years concluded that the Commission should be provided with sufficient resources in its decision on the Commission's Activity Report. The Commission continues to depend extensively on donor-funded staff. For example, the German financing of three legal experts to assist with reducing the Commission's backlog of individual communications continued in 2014.[6]

While the staff situation at the Secretariat improved somewhat in 2014, there are other serious shortcomings with regard to the functioning of the Secretariat, some of which are linked to its location in Banjul, The Gambia. The African Commission noted in its Activity Report covering the second half of 2014:[7]

> Communication with the Commission and its Secretariat remains a huge challenge, posing a major impediment to the Commission's effective discharge of its mandate. Telephone landlines do not work and the office

3 36th Activity Report paras 8-9.

4 36th Activity Report 15.

5 Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights, Doc.EX.CL/856(XXV) para 10.

6 'Strengthening the capacities of the African Commission on Human and Peoples' Rights, Gambia', http://www.gfa-group.de/Strengthening_the_capacities_ of_the_ African_Commission_on_Human_and_Peoples_Rights__3700505.html (accessed 6 November 2015).

7 37th Activity Report para 46. AUC refers to the African Union Commission in Addis Ababa.

> has to rely on a form of cordless phone system locally referred to as Jamano, which is not as efficient as fixed landlines and does not support office extensions; the fax is not working; internet connectivity continues to be a major problem for the Commission; even the Microsoft Outlook installed by the AUC Headquarters to link all AU organs and offices is erratic at best, despite the huge efforts deployed by the AUC in this regard; sending and receiving documents by e-mail is extremely difficult and sometimes impossible – indeed, both member states and other stakeholders have expressed frustration regarding the difficulties of transmitting documents to the Commission.

The logistical problems faced by the Commission's Secretariat in Banjul and the lack of easy access to Banjul from other parts of the African continent add to the reasons for relocating the Secretariat from Banjul. This is linked to the dismal human rights record of The Gambia under President Jammeh.[8]

2.4 State reporting

State parties to the African Charter should every two years submit a report to the African Commission, setting out the steps taken to give effect to the provisions in the African Charter and, if they have ratified it, the Protocol on the Rights of Women in Africa (African Women's Protocol). In practice, states report less frequently. This is not necessarily a problem, considering that the Commission has a backlog of state reports to consider. More problematic is the fact that a few states have never reported at all, despite having ratified the African Charter decades ago. Six states have never submitted a report,[9] while 13 states have not submitted a report for a decade or longer.[10]

Djibouti in 2014 submitted its initial and combined periodic reports for the period 1993 to 2013. Niger submitted its second and combined report for 2003 to 2014 and Ethiopia submitted its fifth and sixth periodic report covering 2008-2013. Closest to the prescribed two-year interval was Nigeria's fifth periodic report covering 2011 to 2014, submitted in July 2014.

The state report of Liberia, submitted in November 2012, was considered by the African Commission at its April-May session in 2014. The second reports of Mozambique, submitted in February 2013, and the Sahrawi Arab Democratic Republic, submitted in March 2013, were considered by the Commission at the same session. The delegations presenting the reports were generally of a high level; in the case of all the reports presented in 2014, led by the ministers of

8 See F Viljoen 'A call to shift the seat: The Gambia is not a suitable seat for the African Commission on Human and Peoples' Rights', 27 May 2013, africlaw.com; K Jeffang 'Calls for relocation of African Commission Secretariat away from Banjul amid Gambia's continued poor human rights record', *Foroyaa* newspaper, 24 April 2015, http://www.foroyaa.gm/archives/4889 (accessed 6 November 2015).

9 Comoros, Equatorial Guinea, Eritrea, Guinea-Bissau, São Tomé and Principe, Somalia.

10 Cape Verde, Chad, Egypt, The Gambia, Ghana, Guinea, Lesotho, Mali, Mauritania, Seychelles, South Africa, Swaziland and Zambia.

justice.[11] However, despite the high level of the delegations, the adoption of concluding observations was deferred 'to allow the member states to provide additional information requested by the Commission'.[12] In 2014, the Commission adopted concluding observations on the state reports of Cameroon[13] and Gabon,[14] both considered by the Commission in 2013.

By December 2014, ten state reports were pending before the Commission. These were the reports of Malawi, Nigeria, Senegal, Sierra Leone, Uganda, Niger, Ethiopia, Djibouti, Kenya and Zimbabwe. The cancellation of the second ordinary session due to the Ebola epidemic and the higher than usual submission of state reports caused the Commission to enter 2015 with a significant backlog of state reports to consider.

2.5 Resolutions, guidelines and General Comments

In 2014, the African Commission adopted a total of 29 resolutions, compared to 34 in 2013.[15] Resolutions included the renewal of mandates of special procedures. The Commission also mandated studies on the effect of climate change[16] and the impact of armed conflict on women and children,[17] the human rights situation of people living with HIV[18] and child marriage.[19]

The Commission adopted country-specific resolutions with regard to the Central African Republic, the Democratic Republic of Congo, Egypt, Nigeria, Sahrawi Arab Democratic Republic, Somalia, South Sudan and Swaziland. Thematic resolutions included:

- the Resolution on the Right to Peaceful Demonstration;
- the Resolution on the Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity;
- the Resolution on Climate Change in Africa;
- the Resolution on the Situation of Women and Children in Armed Conflict;
- the Resolution on Terrorist Acts in Africa;
- the Resolution on Elections in Africa in 2014;
- the Resolution on the Drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa; and

11 36th Activity Report para 18.
12 36th Activity Report para 19.
13 http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf.
14 http://www.achpr.org/files/sessions/54th/conc-obs/1-1986-2012/concluding_observations_gabon_eng.pdf.
15 See 36th and 37th Activity Reports of the African Commission; 34th and 35th Activity Reports of the African Commission.
16 Resolution on Climate Change in Africa, adopted at the 55th ordinary session, 28 April to 12 May 2014.
17 Resolution on the Situation of Women and Children in Armed Conflict.
18 Resolution on the Need to Conduct a Study on HIV, the Law and Human Rights.
19 Resolution on the Need to Conduct a Study on Child Marriage in Africa, adopted at the 16th extraordinary session, 20 to 29 July 2014.

- the Resolution on the UN World Conference on Indigenous Peoples.

The Commission adopted the Guidelines on Conditions of Police Custody and Pre-trial Detention in Africa and Principles and Guidelines on Human Rights and Countering Terrorism. The Commission also adopted two General Comments on article 14 of the African Women's Protocol (health and reproductive rights).

The Resolution on Violence on the Basis of Sexual Orientation or Gender Identity is particularly noteworthy as this is the first time that the Commission as a whole has taken a clear stance on the protection of this vulnerable group. The Preamble of the Resolution refers to the prohibition of discrimination in article 2 of the African Charter, the equal protection of the law in article 3 and the rights to life, physical integrity and prohibition of torture and ill-treatment in articles 4 and 5 of the Charter. While not explicitly calling for the decriminalisation of homosexual acts, a position that would be difficult to get a majority for in the Commission, the Resolution condemns 'murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity'. The Resolution is a bold step by the Commission in a context where many African leaders are at the forefront of discrimination based on sexual orientation and gender identity.

2.6 Missions and conferences

As part of their promotional or protective mandate, commissioners, accompanied by legal personnel from the Secretariat, undertake missions to some AU countries. Promotional visits provide the African Commission with the opportunity to interact with government officials of the target state (as well as civil society organisations) on the steps taken to give effect to the provisions of the African Charter. The Commission conducted promotional missions to Gabon and Zambia in January 2014.[20] In its 37th Activity Report, the Commission noted that it had not been able to undertake any further promotional missions due to a lack of response from member states and the Ebola epidemic.[21] However, individual Special Rapporteurs undertook missions.[22]

The Commission embarked on a fact-finding mission to the Central African Republic (CAR) from 10 to 14 September. During the fact-finding mission, the Commission's delegation gathered evidence on cases involving serious violations of human rights that have occurred in the country.[23]

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20 36th Activity Report para 32.

21 37th Activity Report para 10.

22 See eg Mission of the Special Rapporteur on Freedom of Expression and Access to Information in Africa to Mozambique, Ghana, Swaziland and SADC Secretariat, 37th Activity Report, para 33.

23 37th Activity Report paras 12-13.

In July 2014, the Commission organised a Continental Conference on the Abolition of the Death Penalty. The conference expressed 'deep concern about the continued application of the death penalty in a number of African states'.[24]

2.7 Urgent appeals and press releases

As part of its protective mandate, the Commission sent Letters of Urgent Appeal (LUA) to member states, including Ethiopia (arbitrary arrest and detention); Sudan (corporal punishment and the death penalty); Egypt (death penalty); Nigeria (death penalty); Burundi (extra-judicial executions, arbitrary detention); the Democratic Republic of Congo (DRC) (arbitrary detention); Mauritania (arbitrary detention); and The Gambia (arbitrary detention).[25]

Only two states, Egypt and The Gambia, responded to the Commission's appeals.[26] In its response, Egypt sought to justify the application of the death sentence in the state by setting out the legislative and procedural safeguards provided by law in such situations. However, it denied any knowledge of the case of 10 persons sentenced to death and requested the Commission to provide supplementary information. The urgent appeal sent to The Gambia related to the case of Mr Manneh, a journalist allegedly held in *in communicado* detention since 2006. As on many previous occasions, The Gambia denied any knowledge of the whereabouts of Mr Manneh.[27]

The Commission issued press releases on the human rights situation in the Kidal region in Mali,[28] in Central African Republic,[29] Nigeria,[30] and with regard to executions in Somalia.[31]

There is increasing collaboration between special procedures of the African Commission and those of the United Nations (UN) human rights system. This is in line with the Road Map of the dialogue between special procedures and mandate holders of the UN Human

24 Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa (Cotonou Declaration), http://www.achpr.org/news/2014/07/d150 (accessed 4 November 2015).

25 37th Activity Report para 14.

26 37th Activity Report para 15.

27 As above.

28 Press release on the human rights situation in the Kidal region in Mali, 22 May 2014, http://www.achpr.org/press/2014/05/d205/ (accessed 12 October 2015).

29 Press release on the human rights situation in the Central African Republic, 8 May 2014, http://www.achpr.org/press/2014/05/d203/ (accessed 12 October 2015).

30 Press release on the human rights situation in the Federal Republic of Nigeria, 10 May 2014, http://www.achpr.org/press/2014/05/d202/ (accessed 12 October 2015).

31 Press statement on the execution of three persons by firing squad in the Federal Republic of Somalia, 25 March 2014, http://www.achpr.org/press/2014/04/d199/ (accessed 12 October 2015).

Rights Council and the African Commission on Human and Peoples' Rights, adopted in Addis Ababa in January 2012.[32]

The Chairperson of the Working Group on the Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa, together with nine UN special procedures mandate holders, called 'on the Egyptian authorities to bring its legal system into compliance with international and regional standards so as to ensure long-term justice and contribute to reconciliation efforts in Egypt'.[33] The call followed the imposition of hundreds of death sentences after trials 'that seriously violated international standards'.

The Commission's Special Rapporteur on Human Rights Defenders and Special Rapporteur on Freedom of Expression and Access to Information issued a joint press release with the UN Special Rapporteur on Human Rights Defenders expressing concern over human rights defenders in Egypt being sentenced to imprisonment for participating in a peaceful demonstration.[34] The two African Special Rapporteurs had in March 2014 issued a joint press release on the arrest of an editor and a human rights lawyer in Swaziland.[35]

The Special Rapporteur on Human Rights Defenders also issued press releases expressing concern with regard to arbitrary detention in Niger;[36] abduction in the DRC;[37] the forced closure of a Sudanese NGO;[38] a proposed Bill regulating CSO funding in Nigeria;[39] and the

32 http://www.ohchr.org/Documents/HRBodies/SP/SP_UNHRC_ACHPRRoad%20Map.pdf (accessed 12 October 2015).

33 'Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences', 15 May 2014, http://www.achpr.org/press/2014/05/d204/ (accessed 12 October 2015).

34 Joint press release on the verdict against Sanaa Seif, Yara Sallam and 21 other co-accused in Egypt, http://www.achpr.org/press/2014/11/d233/ (accessed 12 October 2015). See also 'Press release by the Special Rapporteur on human rights defenders on the conviction of 25 Egyptian activists on 11 June 2014', 20 June 2014, http://www.achpr.org/press/2014/06/http://www.achpr.org/press/2014/06/d212/d213/ (accessed 12 October 2015); 'Press release on the arrest and detention of human rights defenders in Egypt', 24 June 2014.

35 Press release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Special Rapporteur on Human Rights Defenders in Africa on the arrest of Mr Thulani Rudolf Maseko and Mr Bheki Makhubu, 27 March 2014, http://www.achpr.org/press/2014/03/d197/ (accessed 12 October 2015).

36 Press release on the arrest and detention of Ali Idrissa and ten other human rights defenders in Niger, 11 August 2014, http://www.achpr.org/press/2014/08/d220/ (accessed 12 October 2015).

37 Press release on the abduction of Médiatrice Rizikiand and Angélique Navura, human rights defenders in the Democratic Republic of Congo, 11 August 2014, http://www.achpr.org/press/2014/08/d221/ (accessed 12 October 2015).

38 Press release on the closure of the Salmmah Women's Centre in Khartoum, Sudan, 30 June 2014, http://www.achpr.org/press/2014/07/d215/ (accessed 12 October 2015).

39 Press release on implications of the implications of the proposed Act Regulation of Foreign Aid to Civil Society Organisations on the work of human rights defenders in the Federal Republic of Nigeria, 30 June 2014, http://www.achpr.org/press/2014/07/d214/ (accessed 12 October 2015).

repression of human rights defenders in Djibouti[40] and Benin.[41]

The Special Rapporteurs' press releases on the implications of the Anti-Homosexuality Act of Uganda[42] and the Same-Sex Marriage (Prohibition) Act of Nigeria[43] go further than the Resolution adopted by the African Commission on violence against persons based on their sexual orientation or gender identity, by condemning not only violence, but also discrimination and violations of privacy.

The Special Rapporteur on Freedom of Expression and Access to Information issued a press release relating to the imprisonment of three Al-Jazeera journalists in Egypt.[44] The Chairperson of the Working Group on the rights of older persons and people with disabilities in Africa issued a statement on the murder of a woman with albinism in Tanzania.[45] The Chairperson of the Working Group on the death penalty and extra-judicial killings in Africa issued a press release calling on Kenya to conduct independent investigations into terrorist attacks in Kenya and possible extra-judicial executions of three named persons.[46] The Special Rapporteur on the Rights of Women in Africa in a press release welcomed the sentencing of three police officers for the rape of a young girl.[47]

40 Statement on the situation of human rights defenders in Djibouti, 22 January 2014, http://www.achpr.org/press/2014/01/d186/ (accessed 12 October 2015).

41 Press release on the situation of human rights defenders in Benin, 7 January 2014, http://www.achpr.org/press/2014/01/d184/ (accessed 12 October 2015).

42 Press release on the implications of the anti-homosexuality Act on the work of human rights defenders in the Republic of Uganda, 10 March 2014, http://www.achpr.org/press/2014/03/d196/ (accessed 12 October 2015).

43 Press release on the implication of the Same Sex Marriage [Prohibition] Act 2013 on human rights defenders in Africa, 5 February 2014, http://www.achpr.org/press/2014/02/d190/ (accessed 12 October 2015).

44 Press release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa on the arrest and imprisonment of Peter Greste, Mohamed Fahmy and Baher Mohamed, 25 June 2014, http://www.achpr.org/press/2014/06/d209/ (accessed 12 October 2015).

45 Statement by the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa on the murder of Munghu Lugata, a 40 year-old woman with albinism in North Western Tanzania on 12 May 2014, 26 May 2014, http://www.achpr.org/press/2014/05/d206/ (accessed 12 October 2015).

46 Press release on the killing of innocent Kenyan citizens by suspected Al Shabab militia and Sheikh Abubakr Shariff, Ibrahim 'Rogo' Omar and Aboud Rogo Mohammed, 10 April 2014, http://www.achpr.org/press/2014/04/d201/ (accessed 12 October 2015).

47 Press release by the Special Rapporteur on the Rights of Women in Africa on sentencing of three police officers for rape committed in September 2012 in Tunis, Tunisia, 7 April 2014, http://www.achpr.org/press/2014/04/d200/ (accessed 12 October 2015).

2.8 Communications

The African Commission was seized of 13 new communications in 2014[48] and decided not to be seized of two.[49] Despite its name, the complaint in Communication 464/14, *Kenyatta and Ruto (represented by Innocent Project Africa) v Kenya*, was submitted by Innocent Project Africa without the explicit consent of the persons it purported to represent, the President and Vice-President of Kenya. There is no victim requirement in the African Charter and the Commission has in its case law accepted the *actio popularis*.[50] However, in the *Kenyatta* case, the Commission held that 'for a complaint of this nature, consent of the victims should have been sought and signatures of the victims placed on the complaint prior to its submission to the Secretariat'.[51] It is unlikely that the President and Vice-President of Kenya would have wanted to litigate against their own country and, therefore, the Commission decided not to be seized of the communication rather than to take it to the admissibility stage, where the state would have been requested to make submissions.

The other cases where communications were not seized related to cases submitted against the one AU member state which has not yet ratified the African Charter, South Sudan. The Commission declined to be seized of one communication pending further information from the complainant.[52] A request to review the decision of non-seizure in a case against South Sudan was deferred at the 16th extraordinary session pending further information.[53]

The African Commission issued provisional measures in *Eskinder Nega and Reeyot Alemu v Ethiopia*.[54] The case concerned the arbitrary arrest and continued imprisonment of journalists since 2011 under the country's Anti-Terrorism Proclamation. The Commission also issued provisional measures in four communications submitted against Burundi.[55] As opposed to the practice of the Inter-American Commission on Human Rights, the African Commission does not make its decisions on provisional measures publicly available.

48 460/13, *Mboia Campira v Mozambique*; 461/13, *Nega and Alemu v Ethiopia*; 462/13, *Virassamy v Mauritius*; 463/14, *Atigan-Ameti v Togo*; 466/14, *Individuals killed and injured in the 2011 cabinet offices clashes v Egypt*; 467/14, *529 persons sentenced to death v Egypt*; 471/14 *Ibrahim & Others v Sudan*; 472/14, *Habonarugira v Burundi*; 473/14, *Ndikuriyo v Burundi*; 474/14, *Ndimumahoro v Burundi*; 475/14, *Ndayishimiye v Burundi*; 476/14 *El-Baghdad v Sudan*; 477/14, *Von Abo v Zimbabwe* The Commission also relisted Communications 391/10, *Gassim & Others v Sudan*; 394/11, EIPR, HRW and *Interights v Libya*.

49 464/14, *Kenyatta and Ruto v Kenya*; 465/14, *Sannoh v South Sudan*.

50 See eg *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 49.

51 Para 21.

52 468/14, *Miamingi v South Sudan and Uganda*.

53 465/14, *Sannoh v South Sudan*.

54 36th Activity Report para 22.

55 37th Activity Report para 20.

A request for review of an inadmissibility decision was denied.[56] One communication was struck off the roll for lack of diligent prosecution.[57]

Four communications were declared inadmissible.[58] A case against Swaziland was declared inadmissible since it was submitted to the Commission close to three years after the exhaustion of local remedies which the Commission, in line with its recent jurisprudence, found to be not 'within reasonable time' under article 56(6) of the African Charter.[59] The communication of *Asemie v Lesotho*, dealing with the deportation of a long-term Ethiopian resident in Lesotho, was declared inadmissible for failure to exhaust local remedies.[60]

The complainant in *Al-Asad v Djibouti*[61] was a Yemeni citizen who had lived in Tanzania since 1985 until he was apprehended by unknown men in December 2003 and taken in a small aircraft to an unknown destination several hours away, where he was subjected to ill-treatment. In its analysis on admissibility, the African Commission noted that '[a] complainant can establish the sufficient connection by proving that he or she was under the territorial jurisdiction or effective control or authority of the respondent state when the alleged violation occurred'.[62] Mr Al-Asad relied on *habeas corpus* proceedings before the High Court of Tanzania to establish that he had been held in Djibouti. The Commission noted that it would normally defer to facts determined by national courts, but that this was not possible in the case at hand since Djibouti did not participate in the Tanzanian proceedings and had disputed the facts alleged before the Commission by Mr Al-Asad.[63] The Commission, therefore, had to conduct its own investigation. Based on the record of the *habeas corpus* proceedings and other evidence presented by Mr Al-Asad, the Commission held that he had 'not conclusively established his presence in the respondent state's territory'[64] and that the communication, therefore, was inadmissible.

56 260/02, *Bakweri Land Claims Committee v Cameroon*.
57 390/10, *Aboubakar v Cameroon*.
58 Three of these decision are discussed here. The fourth inadmissibility decision, Communication 366/09, *Kamoun v Tunisia*, had not been published by the Commission at the time of writing.
59 414/12, *Lawyers for Human Rights (Swaziland) v Swaziland*.
60 435/12, *Asemie v Lesotho*.
61 383/10.
62 Para 136.
63 Para 150.
64 Para 176.

The African Commission declared 22 communications admissible in 2014.[65] Communication 377/09, *Monakali v South Africa*, was brought by the residents of an informal settlement facing eviction. The applicants won against the municipality in the High Court but lost in the Supreme Court of Appeal. The South African Constitutional Court decided not to hear the case. The Commission declared the case admissible as domestic remedies had been exhausted. The Commission decided not to refer the case to the African Court, as requested by the applicants. Instead, it invited the parties to consider an amicable settlement in light of the political will displayed by the respondent state in its many submissions.[66]

Communication 425/12, *Legal Defence and Assistance Project (on behalf of Subaru) v Nigeria*, dealt with an alleged robber who was detained without trial for three years. The Commission held that detention for three years without being brought to trial amounted to an undue delay and, as such, local remedies were non-existent and the communication was admissible.[67] In light of its general practice of only publishing an admissibility decision as part of the merits decision, it is not quite clear why the Commission published the admissibility decision in this case since it clearly stated that it intended to proceed to the merits. However, the Commission should consider publishing admissibility decisions as they are decided, as this would make it easier for those interested in a particular issue to submit *amicus* briefs on the merits of cases as allowed for under the Commission's Rules of Procedure.

The Commission decided five cases on the merits in 2014.[68] Two of these cases, both against Rwanda,[69] are not discussed here since they have not been published by the Commission, following a decision by the AU Executive Council in January 2015 that the reference to these cases in the 37th Activity Report of the Commission be removed and Rwanda be provided with the opportunity of an oral hearing on the two cases. The Commission amended its Activity Report.[70] This is part

65 318/06, *Open Society Justice Initiative v Côte d'Ivoire*; 314/2007, *Equality Now and Ethiopian Women Lawyers Association v Ethiopia*; 344/07, *Interights v Egypt*; 385/10, *ICJ (Kenya) v Kenya*; 388/10, *Nitroranya v Burundi*; 396/11, *El Sharkawi v Egypt*; 393/10, *Institute for Human Rights and Development in Africa and Accountability in Development v DRC*; 324 & 325/06, *OMCT and LIZADEEL v DRC*; 346/07, *Mouvement du 17 Mai v DRC*; 415/12, *Etonde Ekoto v Cameroon*; 416/12, *Atangana Mebara v Cameroon*; 431/12, *Kwayelo v Uganda*; 443/12, *Issa v Sudan*; 332/06, *CEMIRIDE v Kenya*; 406/11, *Law Society of Swaziland v Swaziland*; 430/12, *Shumba & Others v Zimbabwe*; 454/13, *Nde Ningo v Cameroon*; 428/12, *Isaak v Eritrea*; 423/12, *Mack-Kit and Moukoko v Cameroon*; 425/12, *Legal Defence and Assistance Project v Nigeria*; 377/09, *Monakali v South Africa*; 444/13, *Masuku v Swaziland*.

66 Para 102.

67 Para 45.

68 It should also be noted that a number of earlier merits decisions were only published by the Commission in 2014.

69 392/10, *Theogene Muhayeyezu v Rwanda* and 426/12, *Agnes Uwimana-Nkusi and Saidati Mukakibibi (represented by Medial Legal Defence Initiative) v Rwanda*.

70 Both the original and the revised versions of the Activity Report are available on the Commission's website, http://www.achpr.org.

of a disturbing trend going back some years, when the AU Executive Council, prompted by a dissatisfied member state, had intervened to address the concerns of member states against the supposedly autonomous African Commission.[71]

In Communication 379/09, *Elgak, Hummeida and Suliman v Sudan*, three journalists alleged arbitrary detention and torture by the Sudan's National Intelligence and Security Service (NISS) in November 2008. The complainants alleged that they had been accused of supporting investigations into mass atrocities conducted by the International Criminal Court (ICC). Sudan was found to have violated the African Charter by freezing assets and unlawfully closing the Khartoum Centre for Human Rights and Environmental Development (KCHRED).

Communication 287/04, *Titanju v Cameroon*, dealt with 18 persons in detention in Cameroon, members of the Southern Cameroons' National Council (SCNC). They were arrested in 1997 for alleged secessionist activities. The Commission held that Cameroon had violated the African Charter and called on Cameroon to immediately release those SCNC members remaining in detention, to provide compensation for torture, ill-treatment and arbitrary detention, to punish those responsible for torture and inhuman treatment, to assure a better understanding of relevant international and national law among law enforcement agencies and places of detention and to revise national legislation.

The African Commission held in Communication 322/06, *Tsikata v Ghana*, that Ghana had violated the duty to guarantee the independence of courts under article 26 of the African Charter. The Commission held:[72]

> The mere fact that appointments to the judiciary are done by the executive does not engage the breach of the duty to guarantee the independence of courts. However when an appointment is made in contemplation of a specific case which would be lodged by the appointing authority or its agent to the court to which such an appointment is made, the appearance of independence of such a court is seriously impaired. In such a case, the ordinary citizen, and the complainant in this communication, would reasonably view the appointment as a targeted measure to secure an anticipated outcome.

The African Commission convened the 15yh extraordinary session in March 2014 and the 16th extraordinary session in July 2014 to address the mounting number of communications. Yet, since the 56th session had been adjourned and, subsequently, further communications could not be examined, 87 communications were pending as of the end of 2014,[73] of which many awaited final determination on the merits. Clearly, the lack of meeting time due to

71 See for early examples of interference, M Killander 'Confidentiality v publicity – Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 572-581.

72 Para 158.

73 37th Activity Report para 19.

the cancellation of the second ordinary session negatively affected the Commission's attempt to effectively address the backlog in communications despite additional Secretariat staff having been made available to address the backlog.

In its January 2014 decision on the 35th Activity Report, the Executive Council called on 'member states to implement decisions and recommendations of the ACHPR, respond to urgent appeals from the ACHPR, and to comply with provisional measures issued by the ACHPR'.[74] This call was repeated *verbatim* in the decision on the 36th Activity Report in June 2014 to which the Council added a request to member states to provide the Commission 'with information regarding implementation of decisions and recommendations of the ACHPR'.[75]

3 African Court on Human and Peoples' Rights

3.1 Composition

The AU Assembly in June 2014 appointed three new judges for a six-year term. These were Mrs Solomy Balungui Bossa from Uganda; Mr Rafaa Ben Achour from Tunisia; and Mr Angelo Vasco Matusse from Mozambique. The new judges replaced the judges from Togo, Ghana and South Africa. Justice Ramadhani (Tanzania) became the new president of the Court, while Justice Thompson (Nigeria) was elected vice-president.

3.2 Cases

In March 2014 the Court delivered four judgments. In Application 001/2013, *Urban Mkandawire v Malawi: Application for Review of Judgment and Application for Interpretation of Judgment*, the Court held that the application could not be entertained since such interpretation could only be sought for the purpose of implementing a judgment. Two applications against Tanzania were also struck out. Application 001/2012, *Frank D Omary & Others v Tanzania*, and Application 003/2012, *Peter Joseph Chacha v Tanzania*, were declared inadmissible for non-exhaustion of domestic remedies. The first application concerned the failure of the Tanzanian government to pay the pension and benefits of a group of ex-employees of the East African Community (EAC) following the dissolution of the then EAC in 1984. The second case concerned the unlawful arrest, detention and imprisonment of the complainant.

74 Decision on the 35th Activity Report of the African Commission on Human and Peoples' Rights, Doc.EX.CL/824(XXIV), EX.CL/Dec.804(XXIV) para 4.

75 Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights, Doc.EX.CL/856(XXV), EX.CL/Dec.841(XXV) para 5.

The Court also handed down judgment in Application 013/2011, *Beneficiaries of late Norbert Zongo & Others v Burkina Faso*.[76] The case dealt with the killing of an investigating journalist and his companions in 1998. Their burnt corpses were found in a car. The applicants averred that since the murder of the victims, the state had failed to render justice to the victims and their families. The Court held that the state had failed to act with due diligence in arresting, detaining and trying the perpetrators in violation of article 7 of the African Charter. Arguably, the judgment could have been clearer in setting out what the due diligence standard would be in a case like this, since the state had investigated but discontinued the investigation due to a lack of evidence. The Court also held that the failure to conduct an effective investigation intimidated other journalists and, therefore, violated the right to freedom of expression in the African Charter and the ECOWAS Treaty. A minority opinion held that there was no violation of the right freedom of expression. Curiously, the official English translation of the judgment amended the reasoning of the majority to align with the minority opinion.[77]

The Court also delivered a reparations judgment in relation to *Mtikila v Tanzania*, where the Court had held in its 2013 merits judgment that Mr Mtikila's rights had been violated as he was not allowed to stand as an independent candidate in elections. The Court held that Mr Mtikila had not provided evidence linking the facts of the case to any damage suffered by him and, therefore, declined to award him damages.[78]

Judgment in Application 004/2013, *Lohé Issa Konaté v Burkina Faso*, was handed down in December 2014. The case concerned the imprisonment of a journalist for 12 months for publishing three articles about alleged corruption. The publication of the newspaper in which the articles were published was suspended for six months. The applicant averred that the jail term and the court costs he suffered were in breach of his right to freedom of expression. The Court concurred with the applicant and held that the sentences handed down by the domestic courts were disproportionate to the aim pursued by the domestic legislation.[79] The Court further decided that, since the state was responsible for the conduct of domestic courts, the

76 *In the matter of beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo & the Burkinabé Human and Peoples' Rights Movement v Burkina Faso*, Application 013/2011, judgment of 28 March 2014.

77 Compare paras 186 and 187 of the English and French versions of the judgment.

78 Application 011 of 2011, ruling on reparations, 30 June 2014.

79 African Court (15 December 2014) 'African Court on Human and Peoples' Rights rules in favour of Burkina Faso journalist in defamation application', http://www.african-court.org/en/index.php/news/latest-news/569-african-court-on-human-and-peoples-rights-rules-in-favour-of-burkina-faso-journalist-in-defamation-application (accessed 12 October 2015).

former was to be blamed for failing to comply with the provisions of the African Charter[80] and the ECOWAS Treaty.[81] The Court consequently ordered the state to amend its legislation.

On 27 and 28 November 2014, the African Commission for the first time appeared before the African Court to argue an application it had submitted concerning the eviction of indigenous people. The case earlier came before the Commission as Communication 381/09, *Centre for Minority Rights Development – Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya*.[82] On 12 July 2012, in light of the failure of the respondent state to comply with the provisional measures issued, the Commission referred the matter to the Court. In the hearing of Application 006/2012, *African Commission on Human and Peoples' Rights v Kenya*, the Commission averred that the state had committed numerous violations against the Ogiek, including forced eviction from the Mau forest, which had served as their ancestral home. The state argued that local remedies had not been exhausted by the Ogiek community. Judgment in the case is pending.

The African Court adopted an advisory opinion in a case brought by the African Committee of Experts on the Rights and Welfare of the Child.[83] The Court held that the African Children's Rights Committee did not have standing to submit contentious cases to the Court as it was not among the organs listed in the Court Protocol. The fact that the Committee did not exist at the time the Court Protocol was adopted did not sway the Court not to take a literalist approach to the interpretation of the 1998 Protocol establishing the Court. It is noteworthy that the three states that responded to the Court's request for comments on the issue under consideration, including Kenya and Senegal, that have had cases against them decided by the Committee, all thought that the Committee should have standing to bring cases to the Court.

In its decision on the Activity Report of the Court, in January 2014 the Council requested the Court to propose a reporting mechanism for consideration of situations of non-compliance.[84] In its July 2014 decision on the Activity Report of the Court, the Council noted that Libya had not responded to all the measures indicated in the Court's

80 See art 9.

81 Art 66(2).

82 Press release on the upcoming public hearing of application 006/2012 – African Commission on Human and Peoples' Rights v The Republic of Kenya, from 27 to 28 November 2014, in Addis Ababa, Ethiopia', http://www.achpr.org/press/2014/11/d235/ (accessed 12 October 2015).

83 In the matter of request for advisory opinion by the African Committee of Experts on the Rights and Welfare of the Child on the standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, Request 002/2013, advisory opinion, 5 December 2014.

84 Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights, Doc EX.CL/825(XXIV), EX.CL/Dec.806(XXIV) para 9.

order of provisional measures and urged Libya to inform the Court of the measures taken to comply with the order. The Council further urged states that had not acceded to the Protocol or made an article 34(6) declaration to do so before January 2016.[85]

4 African Committee of Experts on the Rights and Welfare of the Child

4.1 Composition

The composition of the 11-member Committee remained unchanged in 2014. In its original formulation, article 37 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) provided that members of the African Children's Committee may only serve a non-renewable term of five years. The AU Assembly in June 2014 decided to amend the Children's Charter to allow for the re-election of members of the Committee.[86] The amendment was done in anticipation of the terms of six members of the Committee coming to an end in July 2015. In December 2014, the Committee elected Sidikou Aissatou Alassane Moulaye as Chairperson for one year, with the former Chairperson, Benyam Dawit Mezmur, as first Vice-Chairperson.[87]

4.2 Sessions

The African Children's Committee held two ordinary sessions and one extraordinary session in 2014, totalling 19 days of meeting time.[88] As with the African Commission, a forum bringing together civil society organisations is held prior to the sessions of the Committee. Noticeably, the CSO Forum preceding the 23rd session was held in Dakar, Senegal, and not in Addis Ababa, Ethiopia, where the Secretariat of the Committee is based and where all the 2014 sessions were held.

The 23rd session included a panel discussion on ending child marriage in Africa. This discussion formed part of an AU campaign launched in 2014 to end child marriage. The Committee chose as the 2015 theme of the Day of the African Child 'Accelerating our collective efforts to end child marriage in Africa'.[89] At the

85 Decision on the mid-term activity report of the African Court on Human and Peoples' Rights, Doc. EX.CL/857(XXV), EX.CL/Dec,.842(XXV).

86 Decision on the report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Assembly/AU/Draft/Dec.528(XXIII).

87 24th session report para 9.

88 9-16 April (Addis Ababa); 7-11 October (Addis Ababa); 1-6 December (Addis Ababa).

89 Para 101.

extraordinary session, the Committee appointed Dr Fatima Sebaa as Special Rapporteur on Child Marriage.[90]

At the 23rd session, the Committee adopted revised Rules of Procedure and decided to send these to the AU legal counsel 'for clearance'.[91] It is unclear why the rules would need to be cleared by the legal counsel as the Committee is an autonomous institution.

4.3 State reporting

At the 23rd session, the African Children's Committee adopted Guidelines on the Form and Content of Periodic State Party Reports.[92]

The Committee at its 23rd session in April 2014 considered the initial state party report of Liberia.[93] The initial report of Ethiopia was considered at the 1st first extraordinary session in October 2014. The presentation of the report by the Minister of Women, Children and Youth Affairs was followed by a presentation by the 15 year-old President of the Addis Ababa Child Model Parliament.[94] The initial report of Guinea was presented by Guinea's permanent representative to the AU, who explained that the minister in charge of children's issues could not attend due to her involvement in the national response to the Ebola epidemic.[95] Kenya's first periodic report was presented by the Principal Secretary in the Ministry of Labour and Social Security Services.[96] Mozambique's report was presented by the permanent representative to the AU.[97] South Africa's initial report was presented by the Deputy Minister of Social Development.[98]

The Children's Committee allocated two days to a discussion of what is to be included in the concluding observations on the state reports.[99] The concluding observations on the reports of Ethiopia, Guinea, Kenya, Mozambique and South Africa were adopted at the 24th session in December.[100]

4.4 General Comments

At the 24th session, the African Children's Committee discussed the process for the adoption of General Comments and agreed that it was necessary to have a consistent approach (set out in detailed guidelines), to have a consistent budget for the development of each

90 Para 80.
91 Para 96.
92 Para 100.
93 23rd Session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 09-16 April 2014 Addis-Ababa, Ethiopia, ACERWC/RPT (XXIII), paras 56-60.
94 Paras 3-18.
95 Paras 19-32.
96 Paras 33-43.
97 Paras 44-58.
98 Paras 59-77.
99 Para 78.
100 Para 73.

General Comment and to consult member states to ensure ownership.[101] The Committee is in the process of developing a General Comment on article 31 of the African Children's Charter dealing with the responsibility of the child.[102]

4.5 Missions

At the 24th session, the African Children's Committee adopted the report of the Committee's advocacy mission to South Sudan. Committee member Julia Sloth-Nielsen highlighted some of the lessons of the mission, namely,[103]

> the significance to liaise with AU officers and organs on the field; the need to recognise the expensive cost of field works and to take action on it; the importance of having an advance preparation by the Secretariat on the ground before the actual mission takes place; the importance of asking the right question to UN agencies, and international NGOs working on the ground.

4.4 Communications and investigations

At the 1st extraordinary session, the African Children's Committee adopted the harmonised communication guidelines.[104]

The report of the Committee's 23rd session notes that '[t]he Committee considered the comliant [*sic*] and closely studied the submitted facts and heard oral arguments from both sides; based on this the Committee made a decision on the communication'.[105] The transparency with regard to other parts of its work is clearly absent with regard to communications. As is the case with the African Commission, delayed publication of the decision on communications by the African Children's Committee is a serious concern.

In the case against Senegal, the Committee found that the state of Senegal was responsible for the ill-treatment of children (*talibés*) attending religious schools, including forced begging.[106] The Committee provided extensive remedies aimed at rehabilitating children as well as at preventing future violations.

At the 23rd session, the Committee appointed one of its members as Rapporteur on the violations of the rights of children with albinism in Tanzania, following a request received by the Committee to investigate the situation.[107] An investigation mission was planned for 2015.[108]

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101 Para 54.
102 Para 87.
103 Para 64.
104 Para 79.
105 Para 90.
106 003/12 – *Centre for Human Rights and Rencontre Africaine pour la Défense des Droits de l'Homme v Senegal,* April 2014.
107 Para 91.
108 24th session para 60.

5 African Peer Review Mechanism

In June 2014, the AU Assembly decided that the APRM 'shall be an autonomous entity within the AU system'.[109] This means that the APRM will no longer be linked to the NEPAD structures.

By the end of 2014, 34 states had signed up for the APRM, but the review process continued at a very slow pace.[110] Only 17 country review reports have been published, the latest being the one on Tanzania dated January 2013, and so far no state has concluded the second review.

6 African Union organs and human rights

A significant development in 2014 was the adoption in June of five new legal instruments by the AU Assembly, including the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights.[111] When it finally enters into force after having received the necessary ratifications, the Protocol will expand the jurisdiction of the African Court to not only consider applications with respect to state responsibility for human rights violations and inter-state disputes, but to decide on individual criminal responsibility for the crimes set out in the Protocol.

The Protocol covers not only the traditional international crimes of genocide, crimes against humanity and war crimes, but also the unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression. A controversial aspect included at a late stage in the Protocol was the immunity of serving heads of state and senior government officials. [112]

Despite the limitation provided by the immunity provision, the Court will clearly have much to do when the Protocol enters into force. However, it is questionable whether this will happen soon as the interest of states to actually be bound by the Protocol is probably lower than their interest in adopting it.

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109 Decision on the integration of the APRM into the African Union, Assembly/AU/Draft/Dec.527(XXIII).

110 Equatorial Guinea was the 34th country to join the APRM in January 2014, 'Equatorial Guinea signs up for APRM', 29 January 2014, http://www.panapress.com/Ethiopia-AU--Equatorial-Guinea-signs-up-for-APRM--13-895418-18-lang1-index.html (accessed 12 October 2015).

111 Assembly/AU/8(XXIII)'Assembly/AU/Dec.529(XXIII).

112 Article 46A *bis.* African Union (10 July 2014) 'Media Advisory: Press Conference on the AU Summit Decision on the Protocol on African Court of Human and Peoples Rights', http://legal.au.int/en/sites/default/files/Media%20Advisory%20-%20AU%20Legal%20Counsel%20addresses%20Protocol%20on%20African%20court%20on%20Human%20and%20Peoples%20rights%20-%20July%2010%202014.pdf (accessed 11 March 2015).

The other treaties adopted by the AU Assembly in June 2014 are the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development; the African Union Convention on Cross-Border Co-operation; the Protocol on the Establishment of the African Monetary Fund; and the Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament. The revised Pan-African Parliament (PAP) Protocol provides for PAP to adopt model laws on topics suggested by the AU Assembly. The model law system is clearly less ambitious than the harmonisation of laws taking place under community acts of some regional economic communities, such as the East African Community (EAC) and the Economic Community of West African States (ECOWAS).[113]

In June 2014, AU Assembly adopted the Malabo Declaration on Accelerated Growth and Transformation for Shared Prosperity and Improved Livelihoods. The Declaration is a recommitment by the AU to the Comprehensive Africa Agriculture Development Programme (CAADP), as well as to the continent's agricultural transformation and food security agenda 2015-2025.[114] The NEPAD Heads of State and Governmental Orientation Committee adopted the NEPAD Programme on Agriculture Climate Change which was subsequently endorsed by the AU Assembly in 2014.[115] The programme aims at facilitating the establishment of an African Climate-Smart Agriculture Co-ordination Platform which seeks to boost the operations of smallholder farmers.

The AU Commission of Inquiry on South Sudan submitted an interim report to the AU in June 2014.

7 Conclusion

The fragile nature of any progress made towards the realisation of human rights was illustrated by the Ebola epidemic in West Africa, which also constituted a serious setback for the states most affected: Guinea, Liberia and Sierra Leone. The epidemic also had implications for the effective functioning of the regional African human rights bodies, in particular the African Commission, which cancelled its second ordinary session in 2014 due to the epidemic.

Despite the disruption caused by the Ebola epidemic, the Commission adopted a number of important resolutions, guidelines and general comments, made a dent in the backlog of individual

113 M Killander 'Legal harmonisation in Africa: Taking stock and moving forward' (2012) 47 *The International Spectator* 83-96.

114 NEPAD Newsletter (November 2014) 'Building infrastructure to spur intra-African trade and tourism' English edition, http://www.nepad.org/sites/default/files/newsletter/ 2014/12/newsletter_november_2014_pdf_11641.pdf (accessed 10 March 2014) 10-11.

115 Assembly/AU/9(XXIII).

communications and for the first time appeared before the African Court. The bold step, in the African context, of adopting a resolution on violence on the basis of sexual orientation and gender identity is particularly noteworthy.

The African Court handed down two significant judgments on accountability for extra-judicial executions and limits on criminal libel. While the lack of countries allowing for direct access constrains the number of cases before the Court, it still has a number of cases on the roll, and interesting jurisprudence may be expected to emerge from the Court in the coming years. The advisory jurisdiction of the Court also has potential, but the Court's literal approach to the issue of standing of the African Committee of Experts on the Rights and Welfare of the Child to bring cases to the Court was disappointing.

The lack of political will of state parties to comply with decisions of the human rights-monitoring bodies continues to be a cause for concern. In many instances, there is not even any engagement by the states. For instance, in cases where the Commission sent letters of appeal, most states failed to respond to such requests. The self-interest of the ruling elite is also evident in the immunity provision in the new Protocol providing criminal jurisdiction to the African Court. The Executive Council decision to remove the decisions against Rwanda from the African Commission's report is also disconcerting.

On a positive note, an increasing number of states are submitting state reports to the African Commission and the African Children's Committee. The high level of delegations at the African Commission implies a will by some member states to participate in a meaningful interactive dialogue. However, the lack of follow-up on concluding observations and the lack of engagement of states with the provisions of the African Women's Protocol remain a concern.

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Recent developments

The Al Bashir debacle

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Summary

This article deals with the failure of states to comply with their obligation to execute the warrant issued by the International Criminal Court for the arrest of President Omar Hassan Ahmed Al Bashir of Sudan. President Al Bashir is to stand trial on serious charges, including acts of genocide, based on action taken on instructions of President Al Bashir to eliminate nationals of Sudan who are not of Arab extraction. President Al Bashir may be depicted as the Adolph Hitler of Africa by virtue of his efforts to create a Sudanese Herrenvolk *and, in the process, causing the death of between 200 000 and 400 000 members of African tribes in the Sudanese province of Darfur and the displacement of approximately 2,5 million people. A special focus of the article is the hosting of President Al Bashir by the South African government in June 2015 at a summit of the African Union in Johannesburg, in blatant defiance of the rule of law, and escorting him out of the country in contempt of an order of the High Court, Gauteng Division. South Africa claimed that its obligations as a member state of the African Union prevented it from executing the warrant of arrest. However, South Africa was compelled to execute the warrant of arrest (a) as a state party to the ICC Statute; (b) because the Security Council had instructed all member states of the United Nations to do so, and (c) because South Africa's own Rome Statute Implementation Act, 2002 requires it of South African authorities. Claiming that President Al Bashir as a head of state enjoyed sovereign immunity is also based on a*

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false premise, since sovereign immunity does not apply to prosecutions in international tribunals. Maintaining that President Al Bashir is immune from prosecution in the ICC is criticised in the article.

Key words: *Al Bashir; African Union; genocide; International Criminal Court (co-operation with); rule of law; sovereign immunity; warrant of arrest (duty to execute)*

1 Introduction

The International Criminal Court (ICC) was founded for the purpose of bringing to justice perpetrators of 'the most serious crimes of concern to the international community as a whole'.[1] President Omar Hassan Ahmed Al Bashir of Sudan was indicted to stand trial in the ICC on charges of an impressive list of crimes against humanity and war crimes,[2] and of genocide.[3] The warrant for the arrest of President Al Bashir was based on 'reasonable grounds to believe' that he had committed the crimes with which he was charged, taking into account 'the evidence or other information submitted by the Prosecutor'.[4] The situation in Darfur was referred to the ICC by the Security Council of the United Nations (UN).[5] On 6 March 2009, Pre-Trial Chamber I of the ICC requested all state parties to the ICC Statute to arrest and surrender the Sudanese President for trial by the ICC.[6]

South Africa participated actively in the founding of the ICC. For example, the Working Group on Composition and Administration of the Court was chaired by Mr Medard R Rwelamira of South Africa; a resolution initiated by South Africa was adopted to include the crime of apartheid as a particular instance of crimes against humanity;[7] the principle of criminal justice that an accused shall 'not have imposed on him or her any reversal of the burden of proof or any onus of

1 Rome Statute of the International Criminal Court, Preamble para 4, UN Doc A/CONF183/9 (17 July 1998), reprinted in (1998) 37 *International Legal Materials* 1002 (ICC Statute).

2 *Prosecutor v Omar Hassan Ahmad Al Bashir* (*Warrant of Arrest for Omar Hassan Ahmad Al Bashir*) Case ICC-02/05-01/09-1 (4 March 2009).

3 *Prosecutor v Omar Hassan Ahmad Al Bashir* (*Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir*) Case ICC-02/05-01/09-95 (12 July 2010).

4 Art 58(1)(a) ICC Statute (n 1 above).

5 SC Res 1593 (2005) of 31 March 2005, SCOR (Res & Dec) 131, UN Doc S/RES/1593 (2005).

6 *Prosecutor v Omar Hassan Ahmed al Bashir* (*Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir*) Case ICC-02/05-01/09-7 (6 March 2009); see also *Prosecutor v Omar Hassan Ahmed al Bashir* (*Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*) Case ICC-02/05-01/09-96 (21 July 2010).

7 'Proposal for Article 5 Submitted by Lesotho, Malawi, Namibia, South Africa, Swaziland, and United Republic of Tanzania' UN Doc A/CONF183/C1/L13 (22 June 1998); also see arts 7(1)(j) and 7(2)(h) of the ICC Statute (n 1 above).

rebuttal'[8] was also introduced by the South African delegation;[9] at the Review Conference held in Kampala, Uganda, in 2010, Denmark and South Africa acted as focal points for stocktaking on complementarity; and Ms Yolanda Dwalia of South Africa occupied centre stage in the development and marketing of the important principle of positive complementarity.[10] Judge Navanethem Pillay of South Africa was elected in 2002 for a period of six years as one of the first body of judges in the ICC.[11] South Africa ratified the ICC Statute on 27 November 2000 and in 2002 enacted the Implementation of the Rome Statute of the International Criminal Court Act (Implementation Act) to bring the country's municipal law into conformity with its international obligations as a state party to the ICC Statute.[12]

2 Omar Hassan Ahmed Al Bashir

In 1989 Omar Hassan Ahmed Al Bashir (1944-), a brigadier in the Sudanese army, led a military *coup* that ousted the democratically-elected Prime Minister Sadiq al-Mahdi.[13] He became President of Sudan in 1993.

The charges against Al Bashir before the ICC included acts of genocide of which the selected victims were members of (black) African tribes in the province of Darfur. Al Bashir allegedly was the Adolf Hitler of Africa who wanted to establish *ein Herrenvolk* in Sudan and, in the process of doing this, he sought the extinction and expulsion from the country of all peoples in Darfur who were not of Arab extraction. According to the Sudanese government, the violence in Darfur resulted in the deaths of about 10 000 people, but other estimates set the death toll at between 200 000 and 400 000. It caused the displacement of approximately 2,5 million of the total population of Darfur of 6,2 million people.

President Al Bashir, probably for the same reason, not so long ago orchestrated the secession of Southern Sudan with its predominantly Christian population. Under the rules of international law, he could have granted the right to vote in the referendum that preceded the

8 Art 67(1)(i) ICC Statute (n 1 above).

9 H Friman 'Procedural law of the Criminal Court - An introduction' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (2004) 201 228.

10 As to the principle of positive complementarity, see JD van der Vyver 'The principle of complementarity' in M Novaković (ed) *Basic concepts of public international law: Monism and dualism* (2013) 373 376-383.

11 Justice Pillay resigned from the ICC shortly before her term of office came to an end in order to become the United Nations High Commissioner for Human Rights.

12 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

13 It is perhaps worth noting that the Constitutive Act of the African Union which entered into force on 26 May 2001 included amongst its basic principles 'condemnation and rejection of unconstitutional changes of government'. Art 4(p) Constitutive Act of the African Union, AU Doc CAB/LEG/23 15 (2000).

secession of Southern Sudan to all the citizens of Sudan, because Southern Sudan was also part of the national territory of the Sudanese population of the north.[14] However, the right to vote in the referendum was by law confined to the residents of Southern Sudan, probably to ensure a positive outcome.

3 Violation by the South African authorities of its obligation to arrest and surrender the Sudanese President

The government of the Republic of South Africa hosted the 25th Summit of the African Union (AU) in Johannesburg from 7 to15 June 2015. The government had to provide guarantees to the AU that President Al Bashir would not be arrested while attending the Summit as representative of Sudan as an AU member state.

On 13 June 2015, after it had become known that the South African government permitted the President of Sudan to attend the meeting of the AU, a pre-trial chamber of the ICC confirmed that South Africa was under a legal obligation to arrest President Al Bashir and to surrender him for prosecution in The Hague.[15] On the previous day, at the request of South Africa, a meeting was scheduled with the presiding judge of the pre-trial chamber, Justice Cuno Tarfusser of Italy. The meeting was attended by the South African ambassador to the Netherlands, a South African legal representative, and representatives of the office of the registrar and of the prosecutor of the ICC. The South African delegation alleged that there was an anomaly in the ICC Statute between article 27(2), proclaiming that '[i]mmunities … 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 person', and article 98(1), which prohibits the Court

> to proceed with a request for surrender or assistance which would require the requested state to act inconsistently with an obligation under international law with respect to the 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.

It was further noted that South Africa was under competing obligations towards the ICC and the AU. Referring to previous decisions of the ICC, the pre-trial chamber explained that there were no anomalies since the Security Council had impliedly waived the

14 See the Canadian case *Reference re Secession of Quebec* [1998] 2 SCR 217; see also JD van der Vyver 'Self-determination of the peoples of Quebec under international law' (2000) 10 *Journal of Transnational Law and Policy* 1-37.

15 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir*) Case ICC-02/05-01/09-242 (13 June 2015).

sovereign immunity of the Sudanese President when it referred the situation in Darfur to the ICC, and that South Africa was under a legal obligation to arrest President Al Bashir and to surrender him to the seat of the Court.[16]

In South Africa, the Southern Africa Litigation Centre brought suit against the Minister of Justice and Constitutional Development and nine other state officials in the High Court (Gauteng Division) in Pretoria, for an order compelling the respondents to prevent President Omar Al Bashir from leaving the country until an order was made by the Court relating to his arrest and surrender for trial by the ICC. On 14 June 2015, Fabricius J granted an interim order to that effect.[17] On the following day, three judges of the High Court unanimously confirmed this and made the following order:[18]

(1) that the conduct of the respondents, to the extent that they have failed to take steps to arrest and/or detain the President of Sudan Omar Hassan Ahmed Al Bashir … is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
(2) that the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant … and detain him, pending a formal request for his surrender from the International Criminal Court;
(3) that the applicant is entitled to the costs of the application on a *pro bono* basis.

In blatant defiance of this court order, South African authorities escorted President Al Bashir to the airport and secured his safe departure from the country.

The High Court of South Africa (Gauteng Division) subsequently gave reasons for its ruling.[19] It noted, among other things, a constitutional determination that South African law is to be interpreted to comply with international law;[20] that the ICC Statute 'expressly provides that heads of state do not enjoy immunity under its terms', and that similar provisions are included in the South African Implementation Act;[21] that decisions of the AU cannot trump South Africa's obligations under the ICC Statute;[22] and that the integrity of the rule of law must prevail.[23]

16 *Prosecutor v Omar Hassan Ahmed Al Bashir* (n 15 above) para 5-9, with reference to *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision on the Co-operation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*) Case ICC-02/05-01/09-195 para 28-31 (9 April 2014).

17 *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development & Others* Case 27740/2016 (14 June 2015).

18 *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development & Others* Case 27740/2015 (24 June 2015).

19 As above.

20 *The Southern Africa Litigation Centre* (n 18 above) para 24, with reference to *Glenister v The President of the Republic of South Africa & Others* 2011 (3) SA 347 para 97.

21 *The Southern Africa Litigation Centre* (n 18 above) para 28.8.

22 *The Southern Africa Litigation Centre* para 28.13.3.

23 *The Southern Africa Litigation Centre* para 33.

There are indeed three reasons why South Africa was under a legal obligation to execute the warrant of arrest.

(i) As a member state of the ICC South Africa was compelled to do so

The duty of member states to co-operate with the ICC falls into two categories. Some co-operation obligations are subject to prescribed conditions; others are unconditional and absolute. The duty to execute warrants of arrest belongs to the latter category. A member state of the ICC cannot under any circumstances whatsoever decline to execute this latter obligation.[24]

(ii) Acting under its chapter VII powers, the Security Council gave instructions to Sudan and all states involved in the situation in Darfur to fully co-operate in bringing Al Bashir to justice[25]

All member states of the UN are compelled to execute chapter VII decisions of the Security Council.[26] If a conflict were to exist between the obligations of a member state of the UN under the UN Charter and any other international agreement (for example, the Constitutive Act of the AU), the obligations under the UN Charter must prevail.[27]

(iii) South African law requires it of the South African authorities

The Implementation Act of 2002 was enacted by the South African Parliament 'to create a framework to ensure that the [ICC] Statute is effectively implemented in the Republic',[28] and 'to ensure that anything done in terms of this Act conforms to the obligations of the Republic in terms of the Statute'.[29] The formalities to be complied with in executing a warrant of arrest and the duty to surrender a suspect to the Court are specified in great detail in chapter 4 of the Implementation Act.

The High Court in its unqualified condemnation of the government's disregard of the rule of law and contempt of court sounded a compelling warning for the future:[30]

> A democratic state based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the state, an organ of state

24 Art 89(1) ICC Statute (n 1 above).
25 SC Res 1593 (2005) (n 5 above).
26 Charter of the United Nations art 25, TS No 993; 3 Bevans 1153; 59 Stat 1031; 1976 YBUN 1043 (UN Charter).
27 Art 103 UN Charter.
28 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 sec 3(a).
29 Implementation of the Rome Statute of the International Criminal Court (n 28 above) sec 3(b).
30 *The Southern Africa Litigation Centre* (n 18 above) para 37.2.

> or state official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.

Earlier, the Constitutional Court proclaimed that '[t]he principle of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of our constitutional democracy'.[31] Commenting on this passage, the High Court observed:[32]

> The emphasis must be on 'indispensable'. Where the rule of law is undermined by government, it is often done gradually and surreptitiously. Where this occurs in court proceedings, the court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice.

The Minister of Justice and Constitutional Development and his co-respondents applied for leave to appeal against the judgment of 23 June,[33] but leave to appeal was dismissed with costs by the High Court, because the appeal had no reasonable prospect of success.[34]

South Africa was severely criticised by members of the international community of states for its failure to comply with its international commitments and obligations in the Al Bashir debacle. This included – to mention but one example – the government of Botswana. On 14 August 2015, the office of the President of Botswana, Ian Khama, called on all member states of the ICC to co-operate with the Court and proclaimed: 'We therefore find it disappointing that President Al Bashir avoided arrest when he cut short his visit and fled, in fear of arrest, to his country.'[35]

4 Violation of the duty to execute a warrant of arrest by states other than South Africa

In 2010 the Republic of Chad became the first state party to the ICC Statute to host a fugitive from justice wanted by the Court without arresting him. President Al Bashir was permitted to attend a meeting of heads of state of the AU which was held on 22 July 2010 in that

31 *Justice Alliance of South Africa v The President of the Republic of South Africa*; *Freedom under the Law v The President of South Africa* 2011 (5) SA 388 (CC) para 40.

32 *The Southern Africa Litigation Centre* (n 18 above) para 38.

33 n 19 above.

34 *Minister of Justice and Constitutional Development & Others v The Southern Africa Litigation Centre*, Case 27740/2015 (16 September 2015).

35 Z Mogopodi 'Botswana critical of SA over Bashir' *IOL News* 17 June 2015, http://www.iol.co.za/news/africa/botswana-critical-of-sa-over-bashir-1.1872656 (accessed 31 October 2015).

country. For this, Chad was severely criticised by legal counsel of No Peace Without Justice[36] and, following subsequent visits by President Al Bashir to Chad, also by the European Union.[37] The pre-trial chamber of the ICC from the outset proceeded on the assumption 'that the current position of Omar Al Bashir as head of a state which is not a party to the [ICC] Statute, has no effect on the Court's jurisdiction over the present case'.[38] President Al Bashir was nevertheless hosted by Chad on several subsequent occasions: from 7 to 8 August 2011 to attend the inauguration of that country's President Indriss Deby Itno; during the weekend of 16 to 17 February 2013 to participate in a meeting of Sahel and Saharan African leaders; on 10 May 2013 to attend the Great Green Wall summit; and, most recently, on 29 March 2014 to attend the closing session of the second forum on peace and security in Darfur.

President Al Bashir was also hosted by the Republic of Kenya, another state party to the ICC Statute. On 27 August 2010 he was a guest of the Kenyan government at a function arranged for the signing of Kenya's new Constitution. President Al Bashir was thereafter again invited to participate in an Inter-Governmental Authority for Development summit, to be held in Nairobi on 30 October 2010, to discuss the forthcoming referendum for the secession from Sudan of the southern region of that country. Because of widespread criticism of his visiting Kenya, the summit was moved to Addis Ababa in Ethiopia. On 28 November 2011, a judge of the High Court of Kenya in Nairobi, the Honorable Nicholas RO Ombija, authorised the issuing of a provisional warrant for the arrest of President Al Bashir,[39] and on 25 January 2012 a provisional arrest warrant was actually issued by

36 No Peace Without Justice 'International Criminal Justice Programme, NPWJ calls on ICC and states parties to respond strongly to Chad's failure to arrest President Bashir of Sudan' http://www.npwj.org/ICC/NPWJ-calls-ICC-and-States-Parties-respond-strongly-Chad's-failure-arrest-President-Bashir-Sudan (accessed 31 October 2015).

37 See 'Statement by the spokesperson of European Union High Representative Catherine Ashton on the visit of Sudanese President Al Bashir to Chad' Doc 160513/3 (16 May 2015) (proclaiming that 'Chad, like all parties to the Rome Statute, is under the legal obligation to co-operate with the Court and indeed to arrest and surrender anyone sought by the Court').

38 *Prosecutor v Omar Al Bashir* (*Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir*) Case ICC-02/05-01/09-3 para 41 (4 March 2009).

39 *The Kenya Section of the International Commission of Jurists v Attorney-General & Minister of State for Provincial Administration and Internal Security*, Miscellaneous Criminal Application 685 of 2010, [2011] KeLR (28 November 2011) http://www.kanyalaw.org/CaseSearch/view_preview1.php?link=74146956184203788646854 (accessed 31 October 2015).

the same judge to be executed if President Al Bashir were to set foot in Kenya.[40]

On 14 October 2011, President Al Bashir attended a summit of the Common Market for Eastern and Southern Africa held in Lilongwe, the capital of Malawi. However, after Ms Joyce Banda became President of Malawi on 7 April 2012, that country was no longer prepared to host a meeting of the AU if President Al Bashir would not be arrested. The summit for the election of a new president of the AU that was to take place in Malawi (where Ms Nkosazana Dlamini-Zuma of South Africa was elected president of the AU on 15 July 2012 to become the very first female president of the organisation) consequently was moved to Addis Ababa in Ethiopia.

Several other African states party to the ICC Statute also permitted President Al Bashir to participate in events held in their countries without securing his arrest. On 8 May 2011, for example, he attended the inauguration of President Ismael Omar Guelleh of Djibouti, and in 2014 he was permitted, without threat of arrest, to attend the Common Market for Eastern and Southern Africa (COMESA) summit that took place on 26 and 27 February 2014 in Kinshasa in the Democratic Republic of the Congo. In August 2013, Al Bashir planned to travel to the Central African Republic to attend the 50th anniversary of the country's independence, but his travel to that country was aborted at the last minute, mainly due to pressure from France.[41]

The duty to co-operate with the ICC to bring perpetrators of 'the most serious crimes of concern to the international community as a whole' to justice[42] is not confined to state parties to the ICC Statute. It can also derive from an agreement of a non-party state to co-operate, or a decision of the Security Council, acting under its chapter

40 *The Kenya Section of the International Commission of Jurists v Attorney General, Minister of State for Provincial Administration and Internal Security & Kenyans for Justice and Development*, *Miscellaneous Criminal Application 685 of 2010, Provisional Warrant of Arrest under Section 32 of the International Criminal Act, 2008* 23 January 2012, http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_ article=41413.htp (accessed 31 October 2015).

41 In its report on non-co-operation of 7 November 2013, the Bureau of the ICC stated that President Al Bashir was 'reported to have visited … the Central African Republic' (*Report of the Bureau on Non-Co-operation*, Doc ICC-ASP/12/13 para 4 (7 November 2013)); see also *The Kenya Section of the International Commission of Jurists* (n 40 above) para 22 (referring to the 'purported visit of Al Bashir to the Central African Republic'). Pre-Trial Chamber II did subsequently take note of the failure of the authorities of the Central African Republic to arrest and surrender Abdel Raheem Muhammed Hussein, whose indictment also stemmed from the situation in Darfur, but declined to make a finding on non-co-operation due to the situation of unrest in the country that deprived the relevant authorities from taking action. *Prosecutor v Abdel Raheem Muhammad Hussein* (*Decision on the Co-operation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court*) Case ICC-02/05-01/12-21 para 13 (13 November 2013).

42 See ICC Statute (n 1 above) Preamble para 4.

VII powers, instructing states to co-operate in bringing certain perpetrators of such crimes to justice.

This latter basis of the obligation of a non-party state to execute a warrant of arrest and to surrender the suspect for prosecution in the ICC applies in the cases against Sudanese perpetrators,[43] including the indictment of President Al Bashir. When the Security Council referred the situation in Darfur to the ICC, it decided 'that the government of the Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor pursuant to the present resolution'.[44] The pre-trial chamber, when granting the application for a warrant of arrest against President Al Bashir, decided that Sudan, though not a state party to the ICC Statute, 'has the obligation to fully co-operate with the Court',[45] and in its final decision ordered that 'a request for co-operation seeking the arrest and surrender of Amar Al Bashir' be transmitted to all state parties to the ICC Statute and to all members of the Security Council.[46]

Sudan was, therefore, duty-bound to co-operate with the Court even though it was not a state party to the ICC Statute.[47] It has been emphatically decided 'that once there has been a UNSC referral of a situation of a non-state party, the entire legal framework of the Statute, particularly Part IX on co-operation, applies'.[48] Needless to say, Sudan has persistently refused to co-operate with the ICC in bringing President Al Bashir to justice.[49]

The obligation of Libya, also not a state party to the ICC Statute, to fully co-operate with the Court by virtue of the fact that the situation in that country was referred to the ICC by the Security Council of the

43 The first Sudanese case that was referred to the Security Council based on a lack of co-operation by the home state was *Prosecutor v Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al-Rahman* (*Decision Informing the United Nations Security Council about the Lack of Co-operation by the Republic of the Sudan*) Case ICC-02/05-10/07-57 (25 May 2010).

44 SC Res 1593 (n 5 above) para 2.

45 Case ICC-02/05-01/09-3 (n 38 above) para 241.

46 n 38 above, para 93.

47 *Prosecutor v Omar Hassan Ahmed al Bashir* (*Prosecution Request for a Finding of Non-Compliance Against the Republic of the Sudan in the Case of The Prosecutor v Omar Al Bashir Pursuant to Article 87(7) of the Rome Statute*) Case ICC-02/05-01/09-219 (19 December 2014); see also *Prosecutor v Omar Hassan Ahmed al Bashir* (*Decision on Prosecutor's Request for a Finding of Non-Compliance against the Republic of the Sudan*) Case ICC-02/05-01/09-227 paras 13-16 (9 March 2015).

48 Case ICC-02/05-01/09-219 (n 47 above) para 27.

49 n 47 above, paras 13-21; see also *Prosecutor v Omar Hassan Ahmed al Bashir* (*Registrar's Report on the Implementation of the Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan*) Case ICC-02/05-01/09-237 para 3 (23 April 2015) (noting that the Embassy of Sudan to the Kingdom of the Netherlands refused to transmit a letter of the Registrar of the ICC to Sudanese authorities and that non-co-operation of Sudan has been reported to the Security Council).

UN, has been confirmed similarly in a series of cases.[50] Other instances where non-party states have hosted the Sudanese President included those when President Al Bashir travelled to Kuwait on 18 and 19 November 2013,[51] and on 25 to 26 March 2014;[52] to Ethiopia on 30 January 2014,[53] on 17 February 2014,[54] on 26 and 27 April 2014,[55] and on 5 November 2014;[56] to Qatar on 8 July 2014;[57] to Saudi Arabia on 1 October 2014;[58] and to Egypt on 18 and 19 October 2014.[59]

5 Legal framework

Immediately after the indictment of President Al Bashir, the AU, at a meeting held in July 2009, endorsed a decision of the African State Parties to the Rome Statute of the International Criminal Court, proclaiming that[60]

50 See *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi* (*Decision on Libya's Submission Regarding the Arrest of Saif Al-Islam Gaddafi*) Case 01/11-01/11-72 paras 12-13 (7 March 2012); *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi* (*Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute*) Case 01/11-01/11-163 para 27-30 (1 June 2012); *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi* (*Decision Requesting Libya to Provide Submissions on the Status of Implementation of Its Outstanding Duties to Co-operate with the Court*) Case 01/11-01/11-545 para 2 (15 May 2014); and in the Appeals Chamber, *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi* (*Decision on the Request to File a Consolidated Reply*) Case 01/11-01/11-480 (AC) para 18 (22 November 2013).

51 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision Regarding Omar Al Bashir Potential Travel to the State of Kuwait*) Case ICC-02/05-01/09-169 (18 November 2013).

52 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision Regarding Omar Al Bashir Potential Travel to the State of Kuwait*) Case ICC-02/05-01/09-192 (24 March 2014).

53 *Prosecutor v. Omar Hassan Ahmed Al Bashir* (*Decision on the 'Prosecution's Urgent Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir''*) Case ICC-02/05-01/09-180 (30 January 2014).

54 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision on the 'Prosecution's Urgent Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir''*) Case ICC-02/05-01/09-184 (17 February 2014).

55 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision Regarding the Visit of Omar Hasan Ahmed Al Bashir to the Federal Republic of Ethiopia*) Case ICC-02/05-01/09-199 (29 April 2014).

56 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision on the 'Prosecution's Urgent Notification of Travel in the Case of "The Prosecutor v Omar Al Bashir"'*) Case ICC-02/05-01/09-215 (4 November 2014).

57 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Prosecution's Urgent Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir'*) Case ICC-02/05-01/09-203 (7 July 2014).

58 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Prosecution's Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir'*) Case ICC-02/05-01/09-208 (1 October 2014).

59 *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Prosecution's Notification of Travel of Suspect Omar Al Bashir the Case of 'The Prosecutor v Omar Al Bashir'*) Case No ICC-02/05-01/09-210 (14 October 2014).

60 *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court* (*ICC*) para 10, Doc Assembly/AU/13(XIII) (3 July 2009).

> [t]he AU member states shall not co-operate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.

The dispute between the ICC and the AU is centred upon a certain discrepancy between article 98(1) of the ICC Statute, which precludes the ICC from proceeding[61]

> 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 the state or diplomatic immunity of a person or property of a third state to the Court, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity,

and article 27(2), which provides:[62]

> 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.

A simple answer to the problem of reconciling articles 98(1) and 27(2) seems to be that the ICC can prosecute an official that enjoys sovereign immunity from prosecution in a national court if it can obtain custody of the official but cannot call on a state party to surrender that person to the seat of the Court while he or she is protected from prosecution under the rules of international law. However, this interpretation ignores the fact that state or diplomatic immunity is a component of state sovereignty and, therefore, only precludes the prosecution of (among others) heads of state in municipal courts. It does not apply to prosecutions before international tribunals.[63]

A decision of Pre-Trial Chamber I relating to the failure of the Republic of Malawi to comply with the co-operation request of the ICC to arrest and surrender President Al Bashir outlined in some detail decisions of international organisations and judgments of international tribunals, dating back to the aftermath of World War I, that clearly endorsed the basic rule of international law which excludes the protection afforded to heads of state from prosecution in international tribunals.[64] It cited the decision of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that recommended the establishment of a high tribunal to prosecute persons in authority responsible for war crimes committed in the context of World War I, and which rejected arguments founded on 'the alleged immunity, and in particular the alleged inviolability of

61 Art 98(1) ICC Statute (n 1 above).

62 Art 27(2) ICC Statute.

63 See *Prosecutor v Omar Hassan Ahmed al Bashir* (*Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*) Case ICC-02/05-01/09-139 para 18 (12 December 2011); Case ICC-02/05-01/11-195 (n 16 above) para 25.

64 Case ICC-02/05-01/09-139 (n 63 above) para 18.

a sovereign of a state', noting that 'this privilege … is one of practical experience in municipal law' and that 'even if … a sovereign is exempt from being prosecuted in a national court of his own country, the position from an international point of view is quite different'.[65]

The Charter of the International Military Tribunal under which the major war criminals of World War II were prosecuted provided in similar vein:[66]

> The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.

The principle was reaffirmed by the International Military Tribunal in Nuremberg in the Trial of the Major War Criminals:[67]

> The principle of international law, which under certain circumstances protects the representatives of states, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

The Charter of the International Military Tribunal for the Far East, under which Japanese war criminals were prosecuted in Tokyo, likewise provided:[68]

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to an order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the tribunal determines that justice so requires.

When Hiroshi Oshima, the Japanese ambassador to Berlin, was brought to trial, the tribunal rejected his reliance on diplomatic immunity. It decided:[69]

> Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the courts of the state to which an ambassador is accredited. In any event, this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The tribunal rejects this special defence.

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65 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 'Report Presented to the Preliminary Peace Conference, March 29, 1919' (1920) 14 *American Journal of International Law* 95 116.

66 Charter of the International Military Tribunal art 7, 82 UNTS 284 288 (1951).

67 *United States & Others v Göring & Others, Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 - 1 October 1946,* Judgment, 1: 171 223; see also Charter of the International Military Tribunal (n 66 above) 22: 466.

68 Charter of the International Military Tribunal for the Far East, art 6 http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml (accessed 31 October 2015).

69 *International Military Tribunal for the Far East Judgment of 4 November 1948* in J Pritchard & SM Zaide (eds) *The Tokyo war crimes trial* 49: 824, http//:www.crimeofaggression.info/documents/6/1948_Tokyo_Judgment.pdf (accessed 31 October 2015).

In 1950, the UN General Assembly included in the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal the following proposition:[70]

> The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible government official does not relieve him from responsibility under international law.

In essence, the same provision was included in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[71] and the International Criminal Tribunal for Rwanda (ICTR).[72] Judgments of the ICTY and the ICTR were *ad idem* that these provisions 'are indisputably declaratory of customary international law'.[73]

The principle was also clearly stated by the International Court of Justice (ICJ) in the *Arrest Warrant* case as a norm of customary international law: Immunity from prosecution does not mean impunity in respect of the crime committed:[74]

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

The ICJ went on to say that the official who, by virtue of the sovereign immunity doctrine, cannot be prosecuted in state courts, may be subject to criminal prosecution in certain international criminal courts, such as the ICC.[75] The rule stated tentatively in the *Arrest Warrant* case was subsequently confirmed without reservation by the Appeals Chamber of the Special Court for Sierra Leone in the case against Charles Taylor.[76] The Court noted that sovereign immunity applied to prosecutions of an official of state A in the courts of state B; that the

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70 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Principle III, GAOR, 5th Session, Supp (No 12), UN Doc A/1316 (1950).

71 Statute of the International Criminal Tribunal, art 7(2), contained in the annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, reprinted in (1993) 32 *International Legal Materials* 1192 (ICTY Statute).

72 *Statute of the International Tribunal for Rwanda*, art 6(2), contained in the annex of SC Res 955 (1994) 8 November 1994, UN SCOR (Res & Dec) 15, UN Doc S/INF/50, reprinted in (1994) 33 *International Legal Materials* 1602 (ICTR Statute).

73 *Prosecutor v Anton Furundžiya* (*Judgment*) para 140, Case IT-95-17/1-T (10 December 1998); see also *Prosecutor v Slobodan Miloševi*ć *& Others* (*Decision on Preliminary Motions*) para 28, Case IT-99-37-PT (8 November 2001).

74 *Democratic Republic of Congo v Belgium*, 2002 ICJ 3 para 60 (14 February 2002).

75 *Democratic Republic of Congo v Belgium* (n 74 above) para 61.

76 *Prosecutor v Taylor* 128 ILR 239 (31 May 2004).

Special Tribunal for Sierra Leone was not a national court of Sierra Leone but an international criminal court;[77] and that the principle of sovereign 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'.[78]

Article 27(2) of the ICC Statute is, therefore, a hundred per cent in compliance with a basic norm of customary international law and, if the official concerned does not enjoy sovereign immunity from prosecution before the ICC, then there is no rule of international law that would be violated if he or she is to be surrendered to the Court. If President Al Bashir does not enjoy sovereign immunity for purposes of prosecution before the ICC, there is no immunity that needs to be waived by Sudan.

This interpretation seemingly renders at least part of article 98(1) redundant, but a finding of redundancy would again bring into contention the presumption of statutory interpretation that no provisions in a legal document are to be considered tautological. It should be noted that '[s]tate or diplomatic immunity of … property of a third state' is not implicated by article 27(2), and as far as 'state or diplomatic immunity of a person' is concerned, if one ignores the fact that under the rules of customary international law such immunity does not bar prosecutions before an international tribunal, state parties must be taken to have waived such immunities by binding themselves to the provisions of article 27(2).

Akanda proposed that the tension between articles 27 and 98 can be resolved by confining article 27 to state party officials and making the provisions of article 98 applicable to state officials of non-party states.[79] Pre-Trial Chamber II, in an *obiter dictum*, seemed to support this proposition.[80] Having asserted that 'article 27(2) of the Statute, in principle, should be confined to those states parties who have accepted it',[81] the pre-trial chamber went on to say:[82]

> It follows that when the exercise of jurisdiction by the Court entails prosecutions of a head of state of a non-state party, the question of personal immunities might validly apply. The solution provided for in the Statute to resolve such a conflict is found in article 98(1).

However, since sovereign immunity applies only to prosecutions in domestic courts, this reasoning is without merit. Nor would the fact that a state, be it a state party or non-party state, has legislation in place that extends sovereign immunity to prosecutions in

77 *Prosecutor v Taylor* (n 76 above) para 42.
78 *Prosecutor v Taylor* para 51.
79 D Akanda 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Justice* 333 339.
80 Case ICC-02/05-01/11-195 (n 16 above).
81 Case ICC-02/05-01/11-195 para 26.
82 Case ICC-02/05-01/11-195 para 27.

international tribunals be of any consequence, since article 98(1) applies to 'obligations under international law' only.[83] It should, therefore, be evident[84]

> that the President of Sudan did not benefit from any immunity at international law under the circumstances, that therefore states parties would not find themselves confronted with conflicting obligations, and that consequently article 98(1) found no application.

As far as state parties are concerned, the Vienna Convention on the Law of Treaties furthermore provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[85]

The ICC has thus far avoided taking a clear stand on the conflict between articles 27(2) and 98(1) of the ICC Statute along these lines, by holding that the obligation of non-party states to execute the arrest warrant of President Al Bashir derives from the fact that the Security Council, acting under its chapter VII powers, have instructed all states, non-party-states included, to do so.

6 Remedies for non-co-operation

The ICC is entirely dependent on state parties, and in particular circumstances on non-party states, to execute a warrant of arrest and to surrender the accused for trial before the ICC. The ICC has on several occasions noted that 'unlike domestic courts, the ICC has no direct enforcement mechanisms in the sense that it lacks a police force' and, therefore, 'relies mainly on the state's co-operation, without which it cannot fulfil its mandate'.[86] This must for the greater part be taken care of by the law enforcement agencies of states.[87] State co-operation is, therefore, an important component of the

83 Art 98(1) ICC Statute (n 1 above); see also Case ICC-02/05-01/09-139 (n 63 above) para 20.

84 WA Schabas *The International Criminal Court*: *A commentary on the Rome Statute* (2010) 1042.

85 Vienna Convention on the Law of Treaties 1969, art 27, UN Doc A/Conf 39/27 (1969), 1155 UNTS 331, reprinted in (1969) 8 *International Legal Materials* 679 and in (1969) 63 *American Journal of International Law* 875.

86 Case ICC-02/05-01/09-242 (n 15 above) para 33; see also *Prosecutor v Omar Hassan Ahmed Al Bashir* (*Decision on the Non-Compliance of Chad with the Co-operation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*) Case ICC-02/05-01/09-151 para 22 (26 March 2013); Case ICC-02/05-01/09-219 (n 47 above) para 17.

87 A Ciampi 'The obligation to co-operate' in A Cassese et al (eds) *The Rome Statute of the International Criminal Court*: *A commentary* (2002) 1607-1608; Friman (n 9 above) 209; E Hunter 'Establishing the legal basis for capacity building by the ICC' in M Bergsmo (ed) *Active complementarity*: *Legal information transfer* (2011) 67 72.

successful functioning of the ICC.[88] Cassese captured the gist of the problem confronting international criminal tribunals, with reference to the ICTY, in compelling terms:[89]

> The ICTY remains very much like a giant without arms and legs - it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the co-operation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to co-operate with it.

This applies with equal force to the arrest and surrender for trial before the ICC of President Al Bashir.

This raises the critical question of how to respond to, and what to do about, the failure of states to comply with their obligation to execute an arrest warrant. The Pre-Trial Chamber II's initiative of notifying state parties in advance of President Al Bashir's possible travel arrangements for the foreseeable future[90] will not bring one closer to a satisfactory answer.

Some analysts have singled out problems attending state co-operation as the main weakness of the ICC regime,[91] while others have noted, perhaps more modestly, that the effective functioning of

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88 JN Maogoto *State sovereignty and international criminal law*: *Versailles to Rome* (2003) 253 277; B Broomhall *International justice and the International Criminal Court*: *Between sovereignty and the rule of law* (2003) 151 155 157; M Shaw 'The International Criminal Court – Some procedural and evidential issues' (1998) 3 *Journal of Armed Conflict Law* 56 79; B Swart & G Sluiter 'The International Criminal Court and international criminal co-operation' in HAM von Hebel et al (eds) *Reflections on the International Criminal Court*: *Essays in honour of Adriaan Bos* (1999) 91-92 94; D Rinoldi & N Parisi 'International co-operation and judicial assistance between the International Criminal Court and states parties' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 339-340 389; A Cassese 'The Statute of the International Criminal Court: Preliminary reflections' (1999) 10 *European Journal of International Law* 144 164; JK Cogan 'The problem of obtaining evidence for the International Criminal Court' (2000) 22 *Human Rights Quarterly* 404 425; JB Griffin 'A predictive framework for the effectiveness of international criminal tribunals' (2001) 34 *Vanderbilt Journal of Transnational Law* 405 439 449; M Frulli 'Jurisdiction *ratione personae*' in Cassese et al (n 87 above) 527 538-39; P Gaeta 'Official capacity and immunities' in Cassese et al (n 87 above) 975 982 993; F Terrier 'Powers of the trial chamber' in Cassese et al (n 87 above) 1259 1273; Board of Editors 'The Rome Statute: A tentative assessment' in Cassese et al (n 87 above) 1901 1911.

89 A Cassese 'On the current trends towards criminal prosecution of breaches of international humanitarian law' (1998) 9 *European Journal of International Law* 1 13; see also *Prosecutor v Tihomir Blaškić* (*Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*) Case IT-95-14-A para 26 (29 October 1997).

90 *Prosecutor v Omar Hassan Ahmed al Bashir* (*Prosecution Notification of Possible Travel in the Case of The Prosecutor v Omar Al Bashir Pursuant to Article 97 of the Rome Statute*) Case ICC-02/05-01/09-148 (15 March 2013).

91 LN Sadat *The International Criminal Court and the transformation of international law*: *Justice for the new millennium* (2002) 276; TJ Farer 'Restraining the barbarians: Can international criminal law help?' (2000) 22 *Human Rights Quarterly* 90 107; see also Broomhall (n 88 above) 154-55.

the ICC will depend on the attitude of state parties.[92] Others, again, have expressed the opinion that the ICC will be dependent on the Security Council for its effective functioning.[93] The bottom line, though, is that the ICC can only make a finding of non-compliance, leaving it up to the Assembly of States Parties or the Security Council (in cases of Security Council referrals) to take whatever action might be considered appropriate and feasible against the culprit state.[94]

If the Security Council were to find that the failure of a state to co-operate with the ICC in bringing the perpetrator of the crime of genocide, a crime against humanity or a war crime to justice, constitutes a threat to international peace or security, it can impose punitive sanctions against that state as provided for in chapter VII of the UN Charter.[95] In *Prosecutor v. Blaškić*, the ICTY decided that the Court could not make recommendations as to the course of action the Security Council may wish to take,[96] and it stands to reason that the ICC is subject to the same constraint.[97] It should further be noted that in the case of the ICTY and ICTR, the Security Council 'did not show a particular willingness' to adopt punitive measures against states that failed to co-operate with the *ad hoc* tribunals.[98] As far as non-co-operation with the ICC in cases emanating from a Security Council referral is concerned, the Council has thus far not imposed any punitive sanctions but has merely on one occasion, in a country-specific context, stressed 'the need for co-operation with the International Criminal Court (ICC)'.[99]

Although it may be legally feasible to expel state parties who violate their co-operation obligations from the ICC, this is not the solution,

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92 RS Lee 'An assessment of the ICC Statute' (2002) 26 *Fordham International Law Journal* 750 754; B Swart 'General problems' in Cassese et al (n 87 above) 1589-1590.

93 R Wedgwood 'The ICC: An American view' (1999) 10 *European Journal of Human Rights* 93 106; M Bergsmo 'Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court, and their possible implications for the relationship between the Court and the Security Council' (2000) 69 *Nordic Journal of International Law* 87 94 109-110; D Sarooshi 'The peace and justice paradox: The International Criminal Court and the UN Security Council international tribunals' in D McGoldrick et al (eds) *The permanent International Criminal Court: Legal and policy issues* (2004) 95 102-105 n 49.

94 Arts 87(5)(b), 87(7) & 112(2)(f) ICC Statute (n 1 above); see also Cogan (n 88 above) 424 425.

95 Sadat (n 91 above) 259; Ciampi (n 87 above) 1635.

96 *Prosecutor v Tihomir Blaški*ć (*Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*) para 36, Case IT-95-14-AR 108*bis* (29 October 1997).

97 Sadat (n 91 above) 259; Ciampi (n 87 above) 1635.

98 P Gargiulo 'The controversial relationship between the International Criminal Court and the Security Council' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 102.

99 SC Res 2147 (2014), UN Doc S/RES/2147 (28 March 2014), Preamble para 26; see also operative paragraph 23 (stressing the importance 'to arrest and hold accountable those responsible for war crimes and crimes against humanity' in the Democratic Republic of the Congo to engage in 'both regional co-operation and co-operation with the ICC').

for many reasons. It is perhaps fair to conclude that the procedures that are in place to deal with non-co-operation are not designed to be confrontational or punitive. In its 2014 report on non-co-operation, the Bureau accordingly emphasised the importance of improving 'the diplomatic measures to address instances of non-co-operation',[100] and recommended that 'consultations amongst states parties continue with a view to share best practices in preventing non-co-operation and dealing with instances of non-co-operation'.[101]

In December 2011, the Assembly of States Parties adopted procedures to be followed by the Assembly of States Parties (not the Court) in cases of non-co-operation by state parties or non-party states that have contracted an obligation to co-operate with the ICC.[102] These procedures distinguish between cases (a) where the Court has referred the matter of non-co-operation to the Assembly of States Parties,[103] and (b) where the matter has not yet been referred 'but there are reasons to believe that a specific and serious incident of non-co-operation in respect of a request for arrest and surrender of a person … is about to occur'.[104] In the case of (a), the emphasis is on 'an informal and urgent response as a precursor to a formal response',[105] which could involve an urgent Bureau meeting, an open letter from the President of the Assembly of States Parties, or a public meeting orchestrated at the Bureau's request by the New York Working Group,[106] and, in the case of (b), the proceedings are exclusively confined to 'an urgent, but entirely informal response at the diplomatic level',[107] which could 'build on and institutionalise the good offices of the President of the Assembly'.[108] Provision is also made for the appointment of four focal points 'of equitable geographic representation' to assist the President in the execution of his or her good offices[109] and, perhaps most importantly, that the role of the Assembly of States Parties in trying to resolve instances of non-co-operation should not 'prejudice … action taken by states at the bilateral or regional levels to promote co-operation'.[110]

100 *Report of the Bureau on Non-Co-operation* para 34, Doc ICC-ASP13/40 (5 December 2014).
101 *Report of the Bureau on Non-Co-operation* (n 100 above) para 50.
102 *Assembly Procedures Relating to Non-Co-operation*, Resolution ICC-ASP/10/Res5, Annex (21 December 2011).
103 *Assembly Procedures* (n 102 above) para 10, read with para 7(a).
104 *Assembly Procedures* para 11, read with para 7(b).
105 *Assembly Procedures* para 7(a).
106 *Assembly Procedures* para 14.
107 *Assembly Procedures* para 7(a).
108 *Assembly Procedures* para 15.
109 *Assembly Procedures* para 16.
110 *Assembly Procedures* para 12.

7 Final observations

Many successive administrations of the South African government have upheld a policy which has now come to be denounced internationally as a crime against humanity.[111] However, insofar as undermining the rule of law and the contemptuous disregard of judgments of courts of law are concerned, no government has throughout the history of South Africa stooped as low as the one currently in control.

Earlier, South Africa was committed to complying with its obligation as a state party to the ICC Statute to arrest the Sudanese President and to surrender him for trial in the ICC. For that reason, Al Bashir could not attend the inauguration of Jacob Zuma on 9 May 2009 as President of South Africa, or attend the soccer world championship that was held in the country in 2010. But now, the South African government, for profoundly obscure reasons, decided to change course and decided, in total disregard of the rule of law, not to arrest Al Bashir; and, in fact, in defiance of a court order – that is, in blatant contempt of court – to orchestrate and secure his safe departure from the country.

One is furthermore reminded that a pre-trial chamber of the ICC has established that there is reason to believe that President Al Bashir had orchestrated the killing of thousands, and the displacement of several millions, of inhabitants of Darfur selected by the powers that be because of their racial identity as members of black African tribes. For a predominantly black African government to, in a sense, condone the acts of racist barbarism orchestrated in Darfur through the enforced action of the President of Sudan is disturbing.

8 Postscript

At a recent meeting of the ANC's national executive committee, the party issued a statement proclaiming that '[t]he International Criminal Court is no longer useful for the purpose for which it was intended' and that South Africa will, therefore, withdraw from the ICC. The ANC's concerns were seemingly focused on the fact that only situations in African countries have led to prosecutions in the ICC. It failed to note that all those situations, except for two of them, were investigated by the ICC at the request of the countries concerned. The two exceptions (the situations in Darfur and in Libya) were referred to the ICC by the UN Security Council. It is also worth noting that the prosecuting office of the ICC is currently conducting a preliminary inquiry into the situations in Georgia, Afghanistan and Palestine. As noted in the text, the Assembly of States Parties does not impose punitive measures against states that decline to comply with their

111 See art 7(1)(j) of the ICC Statute (n 1 above).

commitment to co-operate with the Court, but addresses these matters by diplomatic means. The ANC's cause of grievance is, therefore, not the ICC but exposure by a South African court of the government's defiance of the rule of law and disrespect for judgments of a court of law. If South Africa withdraws from the ICC, its duty to arrest President Al Bashir will remain intact, because it has been ordered by the Security Council to execute the warrant of arrest. Is South Africa, therefore, also going to withdraw from the United Nations Organisation?

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Recent developments

Private prosecutions and discrimination against juristic persons in South Africa: A comment on *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another*

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Summary

Unlike countries such as the United Kingdom, Kenya, Zimbabwe and Australia, in South Africa companies and associations are not permitted to institute private prosecutions although natural persons have a right to institute private prosecutions. In National Society for the Prevention of

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Cruelty to Animals v Minister of Justice and Constitutional Development & Another, *the applicant argued that the law which permitted natural persons to institute private prosecutions and prevented companies and associations from doing so violated section 9 of the Constitution which protects the right to equality. The court held that the discrimination in question was not unfair. In this note, the author assesses the court's reasoning and recommends that there may be a need to empower companies to institute private prosecutions in South Africa.*

Key words: *Private prosecution; juristic person; companies; discrimination; South Africa*

1 Introduction

Textbooks on discrimination law and practice are littered with court cases dealing with companies which were alleged to have discriminated against their employees or which have been found by judicial or quasi-judicial bodies to have discriminated against their employees. It is on rare occasions that one finds a company alleging that a given piece of legislation is discriminatory against it. This could explain why some of the leading textbooks on discrimination law in the United Kingdom do not have any reference to a court case dealing with discrimination against companies.[1] Leading textbooks on company law in the United Kingdom are also silent on the issue of discrimination against companies.[2] Where the issue of discrimination is discussed, the authors of some of these books deal with issues such as the company's legal obligation not to discriminate against people with disabilities;[3] corporate criminal liability;[4] discriminatory articles of association;[5] discrimination against some members of the company;[6] and discrimination against shareholders.[7] In South Africa, as in the United Kingdom, there are cases in which companies have been found by judicial or quasi-judicial bodies to have discriminated against their employees.[8] In October 2014, the High Court of South Africa, in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another,*[9] dealt with the issue of whether a law which allowed natural persons to institute private

1 See eg M Connolly *Townshend-Smith on discrimination law: Text, cases and materials* (2004); M Sargeant (ed) *Discrimination law* (2004); C Palmer et al *Discrimination law handbook* (2007); and A McColgan *Discrimination: Text, cases and materials* (2005).

2 B Hannigan *Company law* (2012); D Kershaw *Company law in context: Text and materials* (2012).

3 C Wild & S Weinstein *Smith and Keenan's company law* (2013) 484.

4 A Dignam *Hicks and Goo's cases and materials on company law* (2011) 131.

5 Dignam (n 4 above) 234.

6 Dignam 432.

7 Dignam 446 482.

8 See, generally, I Currie & J de Waal *The Bill of Rights handbook* (2013) 209-243.

prosecutions but barred companies from doing so, was discriminatory. The Court held that the law did not unfairly discriminate against companies because, inter alia, the relevant legislative provision could not be interpreted to accommodate juristic persons (companies). The purpose of the article is to highlight the judgment and to argue that, in light of the practice in some countries in Europe, Africa, Asia, Australasia and North America, where companies are permitted to institute private prosecutions, there is a need for the law in South Africa to be amended to allow companies to institute private prosecutions. The author argues that the fear expressed by the South African High Court that allowing many people, including companies, to institute private prosecutions would be tantamount to creating an alternative prosecuting system, is not supported by evidence from countries where companies are empowered to institute private prosecutions. The author concludes the article by recommending that the law, as it stands in South Africa, needs to be amended to expressly empower companies to institute private prosecutions. The author highlights the law on private prosecutions in South Africa (including the provision that that was challenged by the applicant) before dealing with the facts of the case, the arguments by counsel and the court's finding.

2 Private prosecutions in South Africa

In South African law there are three categories of private prosecutions: private prosecutions by individuals on the basis of a certificate *nolle prosequi* (the focus of this article); private prosecutions by statutory bodies; and private prosecutions conferred on individuals by certain legislation. I briefly highlight these categories by starting with the last two.

2.1 Private prosecutions by statutory bodies

The first category of private prosecutions is governed by section 8 of the Criminal Procedure Act,[10] which states:

> (1) Anybody upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
>
> (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the [Director of Public Prosecutions] concerned and after the [Director of Public Prosecutions] has withdrawn his right of prosecution in respect of any specified offence or any specified class

9 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* (29677/2013) [2014] ZAGPPHC 763 (8 October 2014).

10 Criminal Procedure Act 51 of 1977.

or category of offences with reference to which such body or person may by law exercise such right of prosecution.

(3) [A Director of Public Prosecutions] may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the [Director of Public Prosecutions], and that the [Director of Public Prosecutions] may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.

It has been argued that private prosecutions under section 8 are not private prosecutions in the true sense of word.[11] This is because they remain under the control of the Director of Public Prosecutions (DPP) who may not authorise the person or body to prosecute or who may at any time withdraw the private prosecutor's right to prosecute. The DPP also imposes the conditions that have to be followed if the private prosecutor under section 8 is to retain his right to prosecute. Section 8 has been invoked mainly by municipalities to prosecute individuals and companies that break municipal laws.[12]

2.2 Private prosecutions under pieces of legislation other than the Criminal Procedure Act

The second category of private prosecutions is found in different pieces of legislation that authorise individuals to institute private prosecutions against people who are alleged to have committed offences under these laws. For example, section 33 of the National Environmental Management Act (NEMA)[13] provides:

(1) Any person may

(a) in the public interest; or
(b) in the interest of the protection of the environment,

institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.

(2) The provisions of sections 9 to 17 of the Criminal Procedure Act, 1977 (Act 51 of 1977) applicable to a prosecution instituted and conducted under section 8 of that Act must apply to a prosecution instituted and conducted under subsection (1): Provided that if –

11 JJ Joubert *Criminal procedure handbook* (2013) 81.

12 See eg *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of the City of Durban* 1994 (3) SA 170 (AD); [1994] 2 All SA 222 (A); *Claymore Court (Pty) Ltd & Another v Durban City Council* 1986 (4) SA 180 (N).

13 National Environmental Management Act 107 of 1998. This section is referred to in *Le Sueur & Another v Ethekwini Municipality & Others* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) para 36.

(a) the person prosecuting privately does so through a person entitled to practise as an advocate or an attorney in the Republic;
(b) the person prosecuting privately has given written notice to the appropriate public prosecutor that he or she intends to do so; and
(c) the public prosecutor has not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence,
(i) the person prosecuting privately shall not be required to produce a certificate issued by the Attorney-General stating that he or she has refused to prosecute the accused; and
(ii) the person prosecuting privately shall not be required to provide security for such action.

(3) The court may order a person convicted upon a private prosecution brought under subsection (1) to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence.

(4) The accused may be granted an order for costs against the person prosecuting privately, if the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal and the court finds either:

(a) that the person instituting and conducting the private prosecution did not act out of a concern for the public interest or the protection of the environment; or
(b) that such prosecution was unfounded, trivial or vexatious.

(5) When a private prosecution is instituted in accordance with the provisions of this Act, the Attorney-General is barred from prosecuting except with the leave of the court concerned.

Other pieces of legislation, such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[14] and the Extension of Security of Tenure Act 1997,[15] similarly empower individuals to institute private prosecutions against persons who have allegedly committed offences under those Acts. One of the major differences between private prosecutions, for example, under section 33 of the National Environmental Management Act, and those under section 7 of the Criminal Procedure Act (discussed below), is that, should the public prosecutor refuse to prosecute, the private prosecutor would not need a certificate *nolle prosequi* from the DPP to institute such a prosecution. Also, unlike under section 7 of the Criminal Procedure Act, in terms of which a private prosecution has to be brought by a victim or a victim's close relative or legal representative, a private prosecution under section 33 of NEMA may be brought in the public interest. Finally, unlike private prosecutions under section 7 of the Criminal Procedure Act which, as this article illustrates, can only be instituted by natural persons, private prosecutions under section 33 of

14 Sec 8 Act 9 of 1998.

15 Sec 23 Extension of Security of Tenure Act 1997. See *Crookes v Sibisi & Others* 2011 (1) SACR 23 (KZP); 2011 (1) SA 491 (KZP), in which the High Court dealt with this section in detail.

NEMA may be instituted by juristic persons such as corporations. This is because section 1(1)(xiii) defines a 'person' as including 'a juristic person'. Although section 33(2) of NEMA provides that the provisions of the Criminal Procedure Act, which apply to private prosecutions under section 8, must be applicable to the private prosecutions under section 33(1), the private prosecutions under section 33(1) have some of the features of private prosecutions under section 7 of the Criminal Procedure Act. These features include the fact that, in the event of a successful private prosecution, the court may order the offender to reimburse the private prosecutor the costs incurred in the prosecution and, in the event of an unsuccessful private prosecution, the court may order the private prosecutor to reimburse the accused the costs incurred in defending himself. In other words, private prosecutions under section 33 of NEMA are a hybrid form of those under sections 7 and 8 of the Criminal Procedure Act.

2.3 Private prosecutions on the basis of a certificate *nolle prosequi*

A private prosecution on the basis of a certificate *nolle prosequi*, the focus of this article, is provided for in section 7 of the Criminal Procedure Act. This section provides:

> (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence –
>
> (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
> (b) a husband, if the said offence was committed in respect of his wife;
> (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
> (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward,
>
> may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
>
> (2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the [Director of Public Prosecutions] that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the state.
>
> (b) The [Director of Public Prosecutions] shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).
> (c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted

> by the issue of the process referred to in paragraph (a) within three months of the date of the certificate.

Many private prosecutions have been instituted on the basis of section 7.[16] The question of whether section 7 may be invoked by a company to institute a private prosecution first arose in the case of *Barclays Zimbabwe Nominees (Pvt) Ltd v Black*.[17] The question for the Supreme Court of Appeal to decide was whether a company was 'entitled to bring a private prosecution'.[18] The Director of Public Prosecutions (then known as the Attorney-General) declined to prosecute the defendant for perjury and fraud and invoked section 7 to grant a certificate to the appellant, a company incorporated in Zimbabwe, to prosecute the defendant. The respondent argued that the company had no title to prosecute because it was not a person within the meaning of section 7 of the Criminal Procedure Act. The appellant argued that the Interpretation Act defines a 'person' to include a company unless the context otherwise requires. The Court observed that the appellant's argument was 'attractive' but that it could not 'succeed'.[19] The appellant also argued that the word 'private' under section 7 of the Criminal Procedure Act was of no significance 'other than to contrast such a person with a person holding public office or an official person'.[20] The Court referred to the dictionary meaning of the word 'person' and to the words 'substantial and peculiar interest' and to the phrase 'he individually suffered' in section 7 to observe that the person referred to in this section is a natural person as opposed to a company.[21] The Court added that the word 'he' in the section could not be applied to companies. The Court further held that[22]

> [s]ection 7(1) provides that any person referred to in (a), (b), (c) or (d) may institute and conduct a prosecution 'either in person or by a legal representative' and it would … be straining [the] language to speak of a company instituting and conducting a prosecution 'in person'.

The Court added that if the word 'private' also applied to companies, that would mean that section 7 'would apply only to private companies. This would create an anomaly since there would seem to be no reason in principle why a private company should be able to

16 See eg *Nundalal v Director of Public Prosecutions KZN & Others* (AR723/2014) [2015] ZAKZPHC 28 (8 May 2015); *Tsholo v Kgafela & Others* (1244/2004) [2004] ZANWHC 36 (9 December 2004); *Phillips v Botha* 1999 (2) SA 555 (SCA); [1999] 1 All SA 524 (A) (26 November 1998); and *Bothma v Els & Others* 2010 (2) SA 622 (CC); 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC).

17 [1990] ZASCA 92; 1990 (4) SA 720 (A).

18 *Barclays Zimbabwe* (n 17 above) 721.

19 *Barclays Zimbabwe* 722.

20 As above.

21 As above.

22 *Barclays Zimbabwe* (n 17 above) 724.

prosecute and a public company should not.'[23] The Court concluded:[24]

> The general policy of the legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the state … The exceptions are firstly where a law expressly confers a right of private prosecution upon a particular body or person (these bodies and persons being referred to in section 8(2)) and secondly, those persons referred to in section 7. There may well be sound reasons of policy for confining the right of private prosecution to natural persons as opposed to companies, close corporations and voluntary associations such as, for example, political parties or clubs.

It should be noted that this case was decided before the 1996 Constitution of South Africa which, as the discussion below shows, provides, inter alia, for the right to equality. It is the above interpretation of section 7 of the Criminal Procedure Act that the applicant in *National Society for the Prevention of Cruelty to Animals*[25] challenged. Our attention now turns to that judgment.

3 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another*

The applicant, the National Council of Societies for the Prevention of Cruelty to Animals, a statutory body[26] with the objectives, inter alia, 'to prevent the ill-treatment of animals, to take cognisance of laws that affect animals and to make representations in connection therewith to the appropriate authority',[27] petitioned the High Court for 'an order declaring section 7(1)(a) of the Criminal Procedure Act … unconstitutional insofar as it does not permit juristic persons to also institute private prosecutions'.[28] Section 6(2)(e) of the legislation establishing the applicant states that in order to perform its functions, it may

> institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it.

23 As above.
24 *Barclays Zimbabwe* (n 17 above) 726. This principle was also emphasised in *Reynolds v Beinash* 1998 JDR 0510 (W).
25 *National Society for the Prevention of Cruelty to Animals* (n 9 above).
26 Established under sec 2 of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993.
27 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 2.
28 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 1.

The applicant argued that its inability to institute private prosecutions made it difficult for it to undertake some of its statutory duties, in that:[29]

> [O]ver the past few years it has attempted on several occasions to privately prosecute individuals in circumstances where the state has declined to do so. In each instance it has been met with the same response, namely that the prosecutor cannot issue it with a certificate *nolle prosequi* because, according to section 7(1)(a) of the Act, only a private person can institute a private prosecution.

The applicant submitted that section 7 of the Criminal Procedure Act was contrary to section 9(1) of the Constitution which guarantees the right to equality. Section 9(1) of the Constitution provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. They added that section 7 lacked[30]

> any apparent rational basis for treating juristic persons differently to natural persons with the consequent result that juristic persons do not, for all intents and purposes, enjoy the equal protection of the law, nor do juristic persons get the equal benefit of the law.

It submitted further that the 'differentiation … fails to serve a legitimate governmental purpose and is therefore irrational and unconstitutional'.[31]

The Court referred to the legislation establishing the National Prosecuting Authority and its functions,[32] and held:[33]

> It flows from the state's power to institute criminal proceedings that the prosecution of crime is a matter of importance to the state. It enables the state to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens … This indicates that the general point of departure in terms of our Constitution is that all prosecutions are to be public prosecutions in the name and on behalf of the state.

The Court further held that private prosecutions were an exception to the general rule that it is the prerogative of the state to prosecute crime.[34] The Court referred to the case of *Barclays Zimbabwe Nominees*[35] and held as follows:[36]

> As far as both sections 7 and 8 of the [Criminal Procedure] Act are concerned, it appears that only natural persons and public bodies may prosecute privately. Companies and other legal persons, also voluntary associations, do not have this right.

Thereafter the Court discussed the requirements that a person or body has to meet before a private prosecution is instituted under

29 *National Society for the Prevention of Cruelty to Animals* para 3.
30 *National Society for the Prevention of Cruelty to Animals* para 4.
31 As above.
32 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 12.
33 *National Society for the Prevention of Cruelty to Animals* para 13.
34 *National Society for the Prevention of Cruelty to Animals* para 14.
35 *Barclays Zimbabwe* (n 17 above).
36 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 15.

sections 7 and 8 of the Criminal Procedure Act and other pieces of legislation.[37] The Court observed:[38]

> [N]ot all rights in the Bill of Rights are for the benefit of juristic persons. Section 8(4) of the Constitution provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. For example, rights to life and to human dignity cannot sensibly be applied to juristic persons.

The Court added that '[i]n order to decide whether a particular right is available to a juristic person, two factors should be taken into account: the nature of the right in question and the nature of the juristic person'.[39] The Court referred to the legislation establishing the applicant and observed that 'the nature of the applicant as a juristic person is not that of a private company, but a public body'.[40] The Court assumed 'without deciding' that section 9(1) of the Constitution applied to juristic persons. It then referred to the criteria developed by the Constitutional Court that must be followed to determine whether a legislative provision is discriminatory:[41]

> It should first be determined whether the impugned provision contains a differentiation. If it does, the next question is whether the differentiation constitutes … discrimination. If the differentiation amounts to … discrimination, then it should be determined whether that is an unfair discrimination or not.

The Court held that the fact that natural persons are allowed to institute private prosecutions but companies are not allowed to amounts to both differentiation and discrimination.[42] It further held that what the Constitution prohibits is unfair discrimination and, in order to determine whether the discrimination in question is unfair, the following factors should be considered:[43]

> (a) the position of the complainants in society and whether they have been victims of past patterns of discrimination; (b) the nature of the provision and the purpose sought to be achieved by it; and (c) the extent to which the discrimination has affected the interests or rights of the complainant.

Assessing the applicant's position in light of the above factors, the Court held:[44]

> Taking into account these guidelines, it appears that (a) above more appropriately applies to natural persons. However, insofar as it may be applicable to the applicant I have already indicated above that the applicant should be regarded as a public body. I am not aware whether the applicant is a victim of past patterns of discrimination. As far as (b) above is

37 *National Society for the Prevention of Cruelty to Animals* paras 16-18.
38 *National Society for the Prevention of Cruelty to Animals* para 19.
39 *National Society for the Prevention of Cruelty to Animals* para 20.
40 *National Society for the Prevention of Cruelty to Animals* para 21.
41 *National Society for the Prevention of Cruelty to Animals* para 22.
42 *National Society for the Prevention of Cruelty to Animals* para 23.
43 *National Society for the Prevention of Cruelty to Animals* para 24.
44 *National Society for the Prevention of Cruelty to Animals* paras 25-26.

> concerned, the nature of section 7 and the purpose thereof have already been considered above. It constitutes an exception to the constitutional imperative stipulated in section 179 of the Constitution. The purpose is, inter alia, to afford a way of vindicating 'imponderable interests' and to curb the propensity to resort to self-help if there is a refusal by the Director of Public Prosecutions to institute a prosecution. To put it differently, the purpose of section 7 is to allow a private prosecution only where private or personal interests are at stake, but to prevent other natural persons, as well as juristic persons, not having such interests from doing so. To allow all persons to undertake a private prosecution would be contrary to the constitutional imperative and would effectively create an alternative prosecuting system. As far as (c) above is concerned, the following should be pointed out. First, in considering the effect or extend [*sic*] of section 7(1)(a) one must take into account that not only juristic persons are excluded, but also other natural persons not referred to in the section. The right to institute a private prosecution is determined by a limitation clause which does not only differentiate between juristic and natural persons, but also between natural persons. Second, the criteria applied to achieve this differentiation are not arbitrary, but to serve a particular purpose, ie to exclude persons not having a personal interest linked to some injury individually suffered.

The Court added that, in order to ensure that there was a single prosecuting authority in the country, it was necessary 'to strictly control the right of private prosecution'.[45] The Court suggested that, maybe, parliament should consider amending section 6 of the Societies for the Prevention of Cruelty to Animals Act to expressly empower the applicant to institute private prosecutions.

4 Analysis

It has been illustrated above that section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act provides that in order to carry out its functions, the applicant may 'institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law'. By holding that the applicant does not have a right to institute a private prosecution, it means that it is rendered incapable of performing one of the duties it was established to perform - to 'institute legal proceedings connected with its functions'. The drafting history of the Societies for the Prevention of Cruelty to Animals Act is silent on whether the applicant is empowered to institute private prosecutions.[46]

As mentioned above, the Court held that '[t]o allow all persons to undertake a private prosecution would be contrary to the constitutional imperative and would effectively create an alternative prosecuting system'. Although private prosecutions, as provided for in section 7 of the Criminal Procedure Act, are allowed in many parts of the world, not all persons are permitted to institute private prosecutions. For any person to institute a private prosecution, he or

45 *National Society for the Prevention of Cruelty to Animals* para 27.
46 Debates of the National Assembly (Hansard) 25 November 1993 14064-14089.

she must be a victim or must be representing the victim. This is the case in countries such as Tonga,[47] the Republic of Ireland,[48] the Cook Islands,[49] Vanuatu,[50] Canada[51] and China.[52] It is, therefore, not possible for everyone, including the victims, to institute private prosecutions. This principle is applicable to natural persons and juristic persons where such prosecutions are allowed. Private prosecutions by companies are allowed in different parts of the world. For example, the Supreme Court of the United Kingdom (*per* Lord Wilson) in *Gujra, R (on the application of) v Crown Prosecution Service*[53] observed that private prosecutions by individuals 'are still frequently instituted' in the United Kingdom and that private prosecutions are also conducted by public bodies, such as the Office of Fair Trading, the Transport for London, and the Royal Society for the Prevention of Cruelty to Animals.[54] Lord Wilson observed that '[r]etail companies often prosecute shop-lifters' and the Crown Prosecuting Service 'seems not to intervene and, indeed, to be more than content thus to be spared entry into that sphere of prosecution'.[55] In *Virgin Media Ltd, R (on the application of) v Zinga*[56] the United Kingdom Court of Appeal observed:[57] '

> It is now also evident that commercial organisations regularly undertake private prosecutions. This type of private prosecution is undertaken not only by trade organisations … but also ordinary commercial companies.

There is also evidence from countries in Africa, Asia, Australia/Oceania and North America that companies or corporations institute private prosecutions. This is the case, for example, in Singapore,[58] New

47 *Pohiva v Tu'ivakano* [2014] TOSC 1; AM20.2013 (17 January 2014) para 31.

48 *Kelly & Another v District Judge Ann Ryan* [2013] IEHC 321 (9 July 2013) paras 11 & 16.

49 *Pera v Tangiiti* [2010] CKHC 5; CRC 115-116 of 2010 (10 September 2010) para 5.

50 See *Jessop v Public Prosecutor* [2010] VUSC 134; Civil Case 114 of 2009 (2 July 2010) para 16.

51 *Bowman & Others v Zibotics* 2010 ONSC 4422 (CanLII) para 22. See also *Johnson v Saskatchewan* (Attorney-General) 1997 CanLII 11117 (SK QB); *Hall v Jakobek* 2003 CanLII 45521 (ON SC) para 24.

52 Art 88 of the Criminal Procedure Law of the People's Republic of China [1996].

53 [2012] UKSC 52 (14 November 2012); [2013] 1 Cr App R 12, [2012] 3 WLR 1227, [2013] 1 All ER 612, [2013] 1 AC 484, [2012] WLR(D) 330, [2012] UKSC 52.

54 *Gujra* (n 53 above) para 33.

55 As above.

56 [2014] 1 WLR 2228, 178 JP 105, [2014] EWCA Crim 52, [2014] 3 All ER 90, [2014] 1 Cr App R 27, (2014) 178 JP 105, [2014] 2 Cr App R (S) 30, [2014] WLR 2228, [2014] WLR(D) 29.

57 *Virgin Media* (n 56 above) para 16.

58 *Odex Pte Ltd v Pacific Internet Ltd* [2008] SGHC 35 (7 March 2008) para 52; *Vicplas Holdings Pte Ltd v Allfit International Market Pte Ltd & Others* [2010] SGHC 370 para 9. See sec 133(1) of the Criminal Procedure Code (Cap 68, 1985 Ed); and secs 11(10), 12 & 13 of the Criminal Procedure Code 2010 (15 of 2010).

Zealand,[59] Canada,[60] Kenya,[61] Zimbabwe[62] and Vanuatu.[63] In Singapore, Kenya, Vanuatu and Zimbabwe, as in South Africa, the law does not provide expressly that juristic persons have the right to institute private prosecutions. However, courts in these countries, unlike in South Africa, have held that they may institute private prosecutions, or the accused have not contested the juristic person's right to institute private prosecutions. In Canada, the right of a corporation to institute a private prosecution is not expressly provided for in national or provincial legislation, but it is derived from English common law.[64] In New Zealand, the Criminal Procedure Act provides specifically that a private prosecution may be brought by an individual or an organisation.[65] The above examples reveal that South Africa is not the only country where legislation does not specifically provide for the right of juristic persons to institute private prosecutions.

In the author's opinion, allowing companies to institute private prosecutions does not mean that there will be no control mechanism to ensure that they do not abuse their right. There is evidence that private prosecutions under section 7 have been abused by some

59 See *Banks v District Court at Auckland* [2013] NZHC 3221 (3 December 2013) para 14; and *Haines v Waikato District Law Society* Hc Ham Civ-2006-419-426 [2006] NZHC 963 (23 August 2006) para 8.

60 *United Brotherhood of Carpenters and Joiners of America, Local 1072 v Universal Showcase/idX Company* 2006 CanLII 1614 (ON LRB) para 15; and *Letourneau v Clearbrook Iron Works Ltd* 2005 FC 333 (CanLII) para 7.

61 *Lois Holdings Limited v Ndiwa Tamboi & 184 Others* [2014] eKLR 1 para 7.

62 In *Telecel Zimbabwe (Pvt) Ltd v AG of Zimbabwe NO* Civil Appeal SC 254/11 [2014] ZWSC 1 (28 January 2014), the Supreme Court of Zimbabwe held that, like natural persons, juristic persons also have a right to institute a private prosecution. In arriving at this conclusion, the Court distinguished the relevant South African case law and legislation on this issue, in particular the case of *Barclays Zimbabwe Nominees* (n 17 above) and sec 7 of the Criminal Procedure Act. However, in October 2015, notwithstanding serious opposition from especially the opposition members of parliament, the Zimbabwean National Assembly passed the Criminal Procedure and Evidence [HB 2, 2015] which, inter alia, provides that juristic persons shall not have a right to institute private prosecutions. The Zimbabwean Minister of Justice argued that there was a need to expressly prohibit juristic persons from instituting private prosecutions as they could abuse that right and prosecute especially poor people. See National Assembly Hansard 14 October 2015 Vol 42 No 13, http://www.parlzim.gov.zw/national-assembly-hansard/national-assembly-hansard-14-october-2015-vol-42-no-13 (accessed 29 October 2015).

63 *Lauto v Public Prosecutor* [2003] VUSC 75; Criminal Case 010 of 2003 (21 April 2003). (The appellant, as employee of BP, was convicted in a private prosecution filed by BP after misappropriating some of its money. The private prosecution was instituted on the basis of a certificate issued by the public prosecutor.) *Etmat Bay Estate Ltd v Magna Ltd* [2014] VUSC 79; Civil Case 101 of 2010 (4 July 2014). See secs 1, 35(2), 98, 99 & 103 of the Criminal Procedure Code, ch 136.

64 See, generally, P Burns 'Private prosecutions in Canada: The law and a proposal for change' (1975) 21 *McGill Law Journal* 269-297.

65 Sec 16(2)(e) of the Criminal Procedure Act 2011. See also sec 6(c) of the Criminal Disclosure Act 2008, which recognised the right to private prosecution in New Zealand.

individuals and courts have stepped in to put an end to such abuse.[66] Companies would not be prosecuting the accused in private courts. These prosecutions would be conducted in public courts and the accused would be entitled to all the rights of an accused under section 35(3) of the Constitution.[67] Judicial officers would be able to prevent or stop any abuse. It should also be noted that there is nothing in the Constitution or the Criminal Procedure Act which would prevent the Director of Public Prosecutions from intervening and discontinuing a private prosecution by a company should the company abuse the process. Private companies that institute frivolous or vexatious prosecutions against individuals or other companies should also be prepared to compensate the accused for the trouble he has been put through and the costs incurred should the accused be acquitted.[68] Such mechanisms would ensure that a company only institutes a private prosecution when it has a strong case against the accused. Another mechanism would be to allow private companies to

66 Eg, *Phillips v Botha* (591/96) [1998] ZASCA 105; 1999 (2) SA 555 (SCA); [1999] 1 All SA 524 (A) (26 November 1998) (using a private prosecution to enforce the payment of an illegal gambling debt); *Nundalal v Director of Public Prosecutions KZN & Others* (AR723/2014) [2015] ZAKZPHC 28 (8 May 2015) (summons in a private prosecution not signed by the private prosecutor, instituting a private prosecution without lodging a certificate *nolle prosequi* with the clerk of the magistrate's court, and without paying the required security deposit).

67 This section provides that '[e]very accused person has a right to a fair trial, which includes the right (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried; (f) to choose, and be represented by, a legal practitioner and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court'.

68 Sec 16 of the Criminal Procedure Act provides: '(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal. (2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred in connection with the prosecution, as it may deem fit.' In *Solomon v Magistrate, Pretoria, & Another* 1950 (3) SA 603 (T), the court held that '[t]he legislature … must have contemplated that private prosecutors might in

prosecute minor offences and to leave the prosecution of serious offences to the state.

There are also some advantages in allowing private companies to institute private prosecutions. One, the government will be saving some of its resources as companies may be able to instruct their own investigators to collect the evidence needed to prosecute the accused. One should not lose sight of the fact that, if an offence is committed against a company, it is the company that has an interest in ensuring that the accused is prosecuted and punished. This is because the company is the victim. Case law from South African courts shows that the fact that companies cannot institute private prosecutions could explain why some of them are now making funds available to the National Prosecuting Authority to engage private lawyers to prosecute those who are alleged to have committed offences against them.[69] This should be understood against the background that crimes against businesses, including companies, have been on the rise in South Africa

many cases have weak grounds for prosecution – a decision by the Attorney-General not to prosecute would indicate this – but the policy of parliament, no doubt, was to allow prosecution even in weak cases, in order to avoid the taking of the law by the complainant into his own hands. The Act contains no provision requiring that the private prosecutor shall satisfy anyone that he has a *prima facie* case. The penalty for vexatious and unfounded prosecution is liability for costs.' See 613.

69 This is done on the basis of sec 38 of the National Prosecuting Authority Act 38 of 1998, which provides: '(1) The National Director may in consultation with the Minister, and a Deputy National Director or a Director may, in consultation with the Minister and the National Director, on behalf of the state, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases. (2) The terms and conditions of service of a person engaged by the National Director, a Deputy National Director or a Director under subsection (1) shall be as determined from time to time by the Minister in concurrence with the Minister of Finance. (3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the state (a) the National Director; or (b) a Deputy National Director or a Director, in consultation with the National Director, may, on behalf of the state, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the Minister as contemplated in that subsection. (4) For purposes of this section, "services" include the conducting of a prosecution under the control and direction of the National Director, a Deputy National Director or a Director, as the case may be.' In *Bonugli & Another v Deputy National Director of Public Prosecutions & Others* 2010 (2) SACR 134 (T), the charges of fraud against the applicants in respect of company UZ had been withdrawn by the Director of Public Prosecutions. Later, the Deputy National Director of Public Prosecutions allowed an application by UZ's attorney that the applicants should be prosecuted for defrauding the company. In that application, UZ indicated that it would pay for the costs involved in the prosecution of the applicants by engaging its own advocates. UZ transferred the money that was meant to pay for the advocates' services into a bank account controlled by the DPP. In theory, the advocates' bills were being paid by the office of the DPP. The applicants argued that their trial was not fair because the circumstances surrounding their prosecution made it impossible for the private prosecutors to prosecute without fear, favour or prejudice. The court held that '[s] 38(3) of the

for some years now.[70] Allowing companies to launch their investigations and to use the evidence obtained through these investigations in prosecutions enables the police to concentrate on other cases the outcome of which is not the concern, at least directly, of companies. Two, companies will instruct their own lawyers to prosecute the accused. The advantage here is that state prosecutors will concentrate on prosecuting those cases they need to prosecute. Allowing companies to instruct their lawyers to prosecute those who have committed offences against them will not violate the accused's right to a fair trial. This fact was emphasised by the South African Supreme Court of Appeal when it held that[71]

> the right to a fair and public hearing by an independent and impartial tribunal did not include a right to an independent and impartial prosecutor, inter alia, because such a right would be incompatible with prosecutions by statutory and private prosecutors.

In conclusion, allowing companies to institute private prosecutions in South Africa would not threaten the accused's right to a fair trial and would allow some state institutions, such as the police and the National Prosecuting Authority, to concentrate on those offences that do not serve the interests of companies.

NPA Act envisages that the fees of prosecutors appointed under s 38 may be paid by someone other than the state. Accordingly, the mere fact that someone else funds the prosecution cannot be objectionable. In this case, however, the advocates are paid by the complainant who urged the prosecution after it had been withdrawn ... In my view, a reasonable and informed person would on the basis of these facts already reasonably apprehend that the advocates would not throughout, albeit subconsciously, act without fear, favour or prejudice. In the course of a criminal prosecution the prosecutor must, virtually on a daily basis, take decisions that might seriously impact on the rights and interests of the accused. The potential for a prosecutor paid by the complainant who had urged the prosecution, subconsciously to have undue regard to the interests of the complainant who foots the bill, is self-evident.' See 145. In *S v Tshotshoza & Others* 2010 (2) SACR 274 (GNP) para 14, the court held that '[i]t follows that the argument that the appointment is not in accordance with s 38 of the Act cannot be sustained. As to what the right-minded objective person would make of the mode of payment, it is evident that this matter differs totally from the *Bonugli* matter. That was a matter where the prosecution was based on fraudulent conduct of the accused. The complainant tried to minimise its losses, as caused by the fraud ...The complainant was conducting what in fact was a private prosecution as if it were a public prosecution. In this matter the individual banks do not have much hope of getting redress for their losses in the case of a successful prosecution. They are not directly involved in the prosecutions, and cannot and do not prescribe to the prosecutor to prosecute, and, if a prosecution commences, how to conduct the prosecution. Their contributions are more of a self-imposed tax and the payment of the prosecutor is much more akin to the payment of public prosecutors who get paid from public funds. A right-minded objective person will not have a perception of possible prejudice.' See also *Porritt & Another v National Director of Public Prosecutions & Others* [2015] 1 All SA 169 (SCA); 2015 (1) SACR 533 (SCA).

70 See South African Police Service Crime Statistics Report (2014/2015) http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2015/crime_stats.php (accessed 29 October 2015).

71 *Porritt* (n 69 above) para16.

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JP Bohoslavsky & JL Černič (eds) *Making sovereign financing and human rights work*

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Sovereign financing can empower governments to respect, protect and fulfil their human rights obligations, but at the same time it can fuel serious human rights violations. Debts contracted by countries enable them to implement their social and economic policy. However, these debts can also help deteriorate the human rights situation in a country, be it civil and political rights or economic and social rights. This is so because they can be in the form of the following: funding undemocratic governments; funding projects which are against human rights; funding corporations and financial institutions which violate human rights; sanctions which have a negative impact on human rights; and funding armed conflicts. The book *Making sovereign financing and human rights work* attempts to answer the question about how to ensure better protection of human rights in the case of sovereign financing. It aims at filling the gap that exists in terms of reconciling sovereign financing with human rights. International organisations such as the United Nations (UN), the World Bank and the International Monetary Fund (IMF), which are concerned with human rights and sovereign financing, have adopted different instruments (for example, the UN Guiding Principles on Foreign Debt and Human Rights (2011); the UN Guiding Principles on Business and Human Rights (2011); and the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing (2012)) to reconcile sovereign debts and human rights. Despite these instruments and the international attention given to sovereign debts after the crisis in Greece, Ireland, Portugal, Slovenia and Spain, little has been written on the impact of sovereign debt on human rights, and this book seeks to provide literature on the subject.

The book consists of a foreword by Philip Alston and 21 chapters, including an introductory chapter, with the rest of the chapters divided into four parts. The focus is putting human rights at the centre of sovereign financing. To address the negative impact that sovereign debts have on civil and political rights, and economic and social rights, parts one and two of the book deal with debt and gross violations of civil and political rights, and debt crises and social and economic rights respectively. Part three examines the specific financial actors and instruments, while also studying novel approaches. Finally, part four expands on different case studies to demonstrate the negative impact of sovereign financing on human rights.

The contributors to the book adopt both a micro- and a macro-perspective while studying sovereign debts and human rights. The strength of the book is that it adopts an inter-disciplinary and pluralistic approach. It intends to create a legal theory that presents human rights as central to any discussion on sovereign financing. The book presents a bottom-up strategy to have human rights-based sovereign financing so that the needs of ordinary people are taken into account in instances of sovereign financing.

States are primarily responsible for the realisation of human rights within its territory. However, the current publication presents financial institutions and corporations as having additional human rights responsibilities. In addition to expanding upon states' obligations to ensure that human rights are respected while incurring a loan, it makes reference to the responsibility of corporations, the liability of mother states of corporations, and inter-state responsibility. It also examines the IMF's compliance with human rights and suggests that there is a need for greater accountability within the system.

Moreover, it provides for the right to a remedy for human rights violations against corporations and financial institutions. Chapter 10 provides different avenues available to victims of violations of economic and social rights against financial corporations, and these include prosecution under the Alien Torts Act, international human rights law, and national jurisdictions. Furthermore, in chapter 12, the notions of corporate complicity for human rights violations and corporate human rights responsibility for unsustainable sovereign debts are expanded upon. The book also singles out civil society organisations as entities which ensure that ordinary people do not suffer in instances of sovereign financing.

As this review is written for the *African Human Rights Law Journal*, it might be relevant to point out the extent to which the book covers sovereign financing and human rights in Africa. The different chapters of the book give examples of African countries while making their argument. For instance, Sharp, while making reference to the trade-off between debt servicing and human rights in chapter four, gives the examples of Tanzania (which spent nine times more on debt service than on health in 2000); Mauritania (which spent more on debt service than on health and education combined in 1998); and

Malawi (which spent more on debt servicing than on health, education and its police and judicial system combined). The author then gives the examples of Zambia and Mozambique which used the money from debt cancellation to further human rights. Another example is chapter 13, written by Leader, which deals with project finance and human rights and gives details about the Chad-Cameroon oil pipeline and the health of local populations.

Part four of the book, which contains case studies, has two chapters relating to Africa. Chapter 17 concerns foreign finance and armed conflicts in Africa. Kuwali, the author of this chapter, highlights the high cost of armed conflicts in Africa and its adverse impact on the resources that could be used for social and economic development. He makes reference to the importance of the availability of external and internal finance for the duration and the outcome of armed conflicts. He also explains the role of natural resources, sovereign debts, extortion by insurgents, remittances from diasporas, and financial support from hostile governments to finance armed conflicts in Africa. This chapter also expands upon war profiteers and recommends the curbing of war profiteers in Africa.

Chapter 21, titled 'Towards making blood money visible: Lessons drawn from the apartheid litigation', presents a case for litigation of sovereign financing which violates human rights. This chapter makes reference to two cases brought before United States courts under the Alien Torts Act against banks and financial institutions for their financial support to the apartheid regime in South Africa. The chapter aims at demonstrating the judicial avenues available for corporate complicity in human rights violations.

One criticism of the book is that, despite the fact that it contains a comprehensive introduction which clearly states the aims of the different chapters, it does not provide for a general conclusion at the end of the different chapters. Readers have to draw their own general conclusions and assess whether the book has achieved its aim. The book further contains mistakes in consistence of style. For instance, on page 33, chapter 3, the abbreviation UN was used, whereas on page 34, the UN was written in full before abbreviating it. Another example is in the footnotes, where both footnote 26 of chapter 1 and footnote 6 of chapter 4 make reference to General Comment 3 adopted by the Committee on Economic, Social and Cultural Rights, but the reference styles of the footnotes are different.

In a nutshell, in this reviewer's view, this book is exceptional in bringing a multi-dimensional perspective on the link between sovereign financing and human rights. The book can be used as a tool by different stakeholders to ensure that the relationship between human rights and sovereign financing is a positive one. It contains several recommendations which international organisations, governments, corporations, financial institutions and civil society organisations can make use of to ensure that human rights do not suffer in cases of sovereign financing.

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Damian Oakes
Project Officer: Business and Human Rights Unit

Onuora-Oguno Azubike C
Tutor; LLD Candidate

Adebayo Okeowo
Alumni Co-ordinator

Sarita Pienaar-Erasmus
Assistant Financial Manager

Ahmed Yusuf Sayaad
Project Co-ordinator: African Human Rights Moot Court Competition

Ololade Shyllon
Programme Manager: Freedom of Expression and Access to Information

Olufemi Soyeju
Project Co-ordinator: LLM (International Trade and Investment Law in Africa)

Norman Taku
Assistant Director
Project Manager: African Human Rights Moot Court Competition

Carole Viljoen
Office Manager

Frans Viljoen
Director, Centre for Human Rights
Professor of International Human Rights Law

Extraordinary/Honorary professors

Jean Allain
Professor of Public International Law, Queen's University of Belfast, Northern Ireland

Cecile Aptel
Office of the High Commissioner for Human Rights, Geneva, Switzerland

Jakkie Cilliers
Director, Institute for Security Studies

Mustaqeem de Gama
Acting Director of International Trade and Economic Development, Department of Trade and Industry

Fernand de Varennes
Université de Moncton, Canada

John Dugard
Member, International Law Commission

Johann Kriegler
Retired Justice of the Constitutional Court of South Africa

Dan Kuwali
Law in private practice, Malawi

Edward Kwakwa
Legal Counsel, World Intellectual Property Organisation, Geneva, Switzerland

Cephas Lumina
Independent Expert of the United Nations Human Rights Council

Richard Maiman
University of Southern Maine, USA

Stuart Maslen-Casey
Strategic Consultant and Senior Research Fellow, Geneva Academy of International Humanitarian Law and Human Rights

Thandabantu Nhlapo
University of Cape Town

David Padilla
Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Mary Robinson
President, Mary Robinson Foundation – Climate Justice, Northern Ireland

Michael Stein
Harvard Law School, United States of America

Academic Programmes

- LLM/MPhil (Human Rights & Democratisation in Africa)
- LLM (International Trade & Investment Law in Africa)
- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual & Reproductive Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- Programmes at the Faculty of Law
- Gill Jacot Guillarmod Scholarship
- Disability Rights Scholarship Programme
- Alumni Association: LLM (HRDA)

Projects

- Advanced Human Rights Courses (AHRC)
- African Moot Court
- Nelson Mandela World Human Rights Moot Court
- Extractive Industries (African Commission Working Group)
- Human Rights Clinics
- Human Rights Conferences
- Annual African Trade Moot

Research

- AIDS & Human Rights Research Unit
- Business and Human Rights Unit
- Disability Rights Unit
- Ending Mass Atrocities in Africa Conference
- FRAME
- Freedom of Expression & Access to Information
- Gender Unit
- Impact of the Charter/Protocol
- Implementation and Compliance Project
- International Development Unit (IDLU)
- International Law in Domestic Courts (ILDC)
- Unlawful Killings Unit

Regular publications

- *African Human Rights Law Journal*
- *African Human Rights Law Reports* (English and French)
- *African Disability Rights Yearbook*

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2015
Compiled by: I de Meyer
Source: http//www.africa-union.org (accessed 30 November 2015)

	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		13/09/12	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
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	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
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	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
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			27/11/13		27/11/13
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
South Sudan						
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
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	21/10/05	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	**54**	**45**	**47**	**27**	**36**	**23**

* Additional declaration under article 34(6)
Ratifications after 31 December 2014 are indicated in bold