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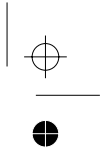
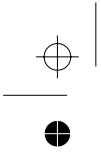
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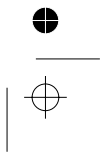
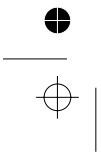
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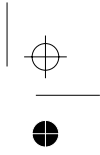
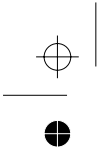
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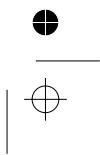
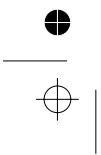
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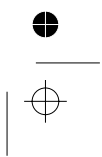
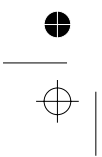
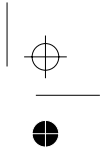
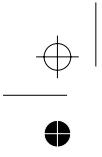
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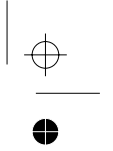
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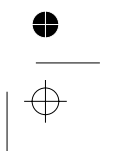
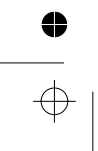
Editorial

Following the African Commission's 35th ordinary session, which took place in Banjul, The Gambia, during May and June 2004, Pretoria played host to two important events relating to the African regional human rights system. The first was a seminar on the socio-economic rights provided for under the African Charter. This seminar culminated in the adoption of a statement elucidating the content of these rights, and is analysed by Sibonile Khoza in this issue. The second event, also discussed here, was the third extraordinary session of the Commission, called to discuss and adopt the report of a fact-finding mission that four commissioners had undertaken to the Darfur region of Sudan.

Both these developments are welcomed: The African Charter has long been commended for containing socio-economic rights, but with the exception of the Commission's finding in *SERAC and Another v Nigeria*, little discussion about the African content of these rights has taken place. One of the persisting weaknesses of the Commission has been its inability to respond to massive human rights violations. Its efforts in respect of Darfur are directed at improving its record in this regard.

In July, the African Union adopted a decision in which it called for the 'integration' of the African Court on Human and Peoples' Rights and the AU's Court of Justice. The editors add their voice to those who are insisting that any process towards fusing the two courts should not suspend the establishment of the African Court on Human and Peoples' Rights. The fact that the Protocol on the Court of Justice has not yet entered into force should not be allowed to become an obstacle towards the establishment of the African Court on Human and Peoples' Rights.

Two contributions deal with HIV/AIDS, which has had a devastating effect in Africa. Sabelo Gumedze investigates the potential role of the African Commission in addressing the pandemic. Australian High Court Judge Michael Kirby poses some challenging questions about reliance on an individualistic human rights discourse, emphasising privacy in an age of accessible but underutilised anti-retroviral (ARV) medication. One of the possibilities that may lead to greater use of ARV treatment is routine testing. Routine HIV testing is usually understood as an HIV test



that forms a routine part of a medical examination when the patient shows any symptoms that may be linked to AIDS. A utilitarian approach, in terms of which the perceived benefit to the common good of treatment justifies inroads into human rights, should be avoided. It should be taken into account that routine testing will take place in a context where stigma is still rife, and where the test result may have serious consequences. As treatment is not universally available, and only HIV-positive persons with a CD4 count of less than 200 qualify for ARV treatment, the consequence of routine testing may easily be to expose individuals to stigma and discrimination, without any concomitant advantage.

Other contributions in this issue deal with contemporary issues of a complex and controversial nature, such as the rights of gays, privatisation and indigenous knowledge. These topics have not yet been addressed sufficiently in an African context, and from an African perspective.

The editors thank the following people who acted as referees over the period since the previous issue of the *Journal* appeared: Jean Allain, Gina Bekker, Mary Crewe, Anton Kok, Pius Langa, Justice Nwobike and Dire Tladi.

The never-ending paradoxes of HIV/AIDS and human rights

Michael Kirby AC CMG*

Justice of the High Court of Australia

Summary

From the outset, HIV/AIDS posed challenges that made traditional public health approaches, such as quarantine, inappropriate. The author realised early on in the epidemic that law had a role to play in curbing the spread of HIV, but that the temptation to adopt 'highly inefficient laws' had to be resisted. The first AIDS paradox arose when it became clear that the disease could best be curbed by respecting the rights of those infected with HIV, rather than by imposing restrictions on such persons, as traditional public health approaches or popular outcries for punishment demanded. This was so because only behaviour change could curb the spread of HIV, and a human rights-based approach was regarded as the most feasible way to ensure the knowledge of and means to effect behaviour change. The author identifies a second AIDS paradox, which accompanies the greater availability of antiretroviral treatment (ARV). Seeing the solution in greater access to ARV, he argues that consideration must be given to whether past strategies of testing and counselling should be amended to 'scale up' testing and, consequently, access to ARVs. Advocating a more flexible approach, the author poses the question whether a human rights-based approach should not be replaced by a serostatus-based approach.

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1 Introduction

From the start, HIV/AIDS has not been like any other epidemic. The numbers of people infected were immediately far too numerous to warrant the traditional approach of quarantine. Furthermore, the long period of latency of the virus and the limited modes of transmission made such an approach disproportionate. The absence of a rapid cure and the failure to develop speedily a safe and effective vaccine has meant that HIV/AIDS is not susceptible to the usual medical or public health responses, used in the past in challenges of this kind. Moreover, the principal modes of transmission — penetrative sexual activity and injecting drug use (commonly involving stigmatised groups in the community: sex workers, men who have sex with men, and drug users), together with high initial levels of mortality and widespread community fear have made HIV/AIDS a most troublesome problem.

Faced with challenges of this kind, the natural human reaction is flight or fight. Unfortunately, flight, in the form of denial and neglect, has all too often been the response to HIV/AIDS. Particularly is this so in the developing world, and especially in South Africa where a state of denial appears to have paralysed many of those who should have been giving leadership.¹ In other parts of the developing world, denial took different forms. Often it has involved immobilisation of thinking and action on the part of leaders and officials, with a consequent unchecked rise in sero-conversions as more and more people became infected with HIV.

In sub-Saharan Africa, as in most parts of the developing world, HIV/AIDS has, from the start, followed the dominant pattern of typical transmission. Whereas in most developed countries the primary burden of HIV initially fell upon that cohort of the population involving men who have sex with men (primarily homosexuals), together with some injecting drug users, in Africa the pattern has been principally one of transmission through sexual contact between persons of the opposite sex, together with subsequent mother to child transmission to neonates and, in some cases, through breastfeeding. The result has been that in countries following this primary pattern (including South Africa), HIV/AIDS has leapt beyond small minority groups in the community. It has entered the cohort of the population comprising the overwhelming majority of the community. It has reached a level in terms of numbers and distribution² that, without radical interventions, will mean increased

¹ R Riddick 'State of denial: Finding meaning in South Africa's AIDS crisis' (2003–4) 24 *Conscience* 35; M Modise *et al* 'Stopping AIDS in Africa' (2004) *Melbourne University Magazine* 21.

² It is estimated that at least 4,5–5 million South Africans are infected with HIV. See University of Pretoria, Centre for the Study of AIDS *HIV/AIDS and human rights in South Africa* (2004) 6.

and ongoing dangers to the entire population — or at least a large proportion of those in the ages most vital to the economy, being the ages of work, sexual activity and child bearing.

I have been a witness to the epidemic of HIV/AIDS, virtually from the beginning. In Australia, the heaviest toll fell (and still falls) on the homosexual community. Because of my own sexuality, by the early 1980s, in Sydney, I became aware of the report of a strange new condition that, in large numbers, was striking gay men in Australia, the United States and elsewhere. In 1981, reports circulated in the gay media suggesting that a new condition resulting in swollen lymph nodes was caused by the use of 'poppers', pharmaceutical amyl nitrate originally intended for emergency relief of angina pectoris. This drug had come into recreational use in the 1960s in gay venues, often in conjunction with sex on premises. The initial reports led to publicity urging the curtailment of 'poppers' as hazardous to health. The sudden appearance of an increase in a previously rare condition of Kaposi's sarcoma amongst gay men who had used 'poppers' led to the understandable but erroneous belief that coincidence was explained by causation.³ HIV/AIDS was not to prove so simple.

In the early days, theories abounded as to the cause and origin of the curious debilitating condition that was striking large numbers of otherwise healthy gay men. However, eventually it became clear that a new and dangerous epidemic was underway. Dr Peter Piot and his colleagues described the disease in Central and East Africa,⁴ just three years after its first description in the United States.⁵ These reports proved a grim herald for what was to follow.

Working in Congo (Zaire) as an epidemiologist, at the time of the early detection of the new 'slim' disease, was a young Jewish American medical scientist, Jonathan Mann. He later described how, during a visit to that country of the Director-General of the World Health Organisation (WHO), Dr Hafden Mahler, in the midst of an African thunderstorm, he explained to the world's top health bureaucrat the new medical condition and the challenges that it presented. Soon afterwards, Jonathan Mann was summoned to the WHO headquarters in Geneva. He was given a desk and a secretary but little else. Thus began the global response to AIDS.

Not long after his appointment, Jonathan Mann came to Australia. I met him at one of the first national conferences in my country concerned with the impact of the epidemic in Australia and its region. I was

³ HW Haverkos & JA Dougherty (eds) *Health hazards of nitrate inhalants* (1988). See also J Lauritsen & H Wilson *Death rush: Poppers and AIDS* (1986).

⁴ P Piot *et al* 'Acquired Immunodeficiency Syndrome in a heterosexual population in Zaire' (1984) 2 *The Lancet* 65–69.

⁵ N Clumeck *et al* 'Acquired Immune Deficiency Syndrome in black Africans' (1983) 1 *The Lancet* 642.

immediately struck by the high sense of dedication and commitment of Dr Mann. Most surprising of all was that he was speaking in a language that I understood: a language of human rights and individual protection. His was not the traditional language of the public health official. After I had published an essay on the subject of the legal responses to HIV,⁶ some of my judicial colleagues at the time, in the Court of Appeal, expressed dismay that a judge was venturing into the forbidden territory of an epidemic connected with prostitutes, homosexuals, injecting drug users, sex venues, anal intercourse and other previously unmentionable topics. However, sitting by the bed of friends who had become infected with HIV, watching their struggle and believing that the law could play an affirmative role, I continued my involvement. For me, it was an ethical issue. People were dying. There were no drugs. There was no vaccine. Unusually, therefore, as Dr Mann taught, law had a positive role to play.

2 The first AIDS paradox

It must have seemed unusual to Jonathan Mann that a lawyer, and a judge, would be interested in the issues of HIV as I was. Soon after his visit to Australia, I was invited to become a member of the first Global Commission on AIDS. This was a supervisory body established by WHO to work in relation to the Global Programme on AIDS of which Jonathan Mann was the Director.

The Commission was chaired by the distinguished Swedish scientist, Professor Lars Kallings. It gathered participants from many parts of the world, with different expertise but a common commitment. Two of the scientific members of the Commission were Dr Luc Montagnier and Dr Robert Gallo, subsequently credited with the co-discovery of the virus (HIV) responsible for the breakdown in the body's immune system, resulting in AIDS. One of the most influential members of the Commission was Dr June Osborn, then professor of Public Health of the University of Michigan. From the start, Professor Osborn insisted that WHO, in all of its interventions on HIV/AIDS, should rest its strategies on the best available empirical data. AIDS was such an emotional, frightening and stigma-laden condition that nothing else would suffice. In the place of ignorance, superstition, moralising and fear would be substituted good science, empirical data and a sound knowledge of the epidemic and its modes of transmission.

This was the first real blow for respect for human dignity in the global struggle against HIV/AIDS. WHO would insist, from the outset, upon an empirical approach. It would oppose the extreme and disproportionate

⁶ MD Kirby 'AIDS legislation — Turning up the heat?' (1986) 60 *Australian Law Journal* 324.

reactions of those who demanded quarantine or other protections excessive to the condition and irrelevant to the modes by which HIV was transmitted from one person to another.

Of course, from the earliest stages — and especially once the virus was described and tests were developed to the antibodies produced by the virus — demands were made for mandatory testing and for the introduction of laws that would strike down hard on the people who were thought to be responsible for spreading the virus. It was at this stage that I described two phenomena that were quickly to become features of the early global struggle against AIDS.

The first was the danger of a virus of a different kind, namely the virus of highly inefficient laws (HIL).⁷ This was not a novel or unexpected response to an epidemic of such proportions. It had happened before in history.⁸ But in the early days of AIDS, the pressure on legislators and governments to produce a legal response — any response — was enormous. That pressure presented the risk of making victims of everyone.⁹ Effective and efficient laws, well targeted and proportionate, would be required. But the over-reach of law was a danger in epidemics. Together with many others, I lifted my voice in warning.

The second proposition that was expressed at this time was that AIDS was riddled with paradoxes.¹⁰ The first and central paradox of HIV/AIDS, in the first decade after it manifested itself, was the one that became best known and best understood. According to this AIDS paradox, the most effective means of preventing the spread of the virus, at that stage, was protection of the human rights of the people most at risk of acquiring the virus. This was a paradox because it was contrary to intuitive responses to the spread of a dangerous virus in society. Instinctively, in such a case, citizen and public health experts thought in terms of the public health paradigm. Citizens, moreover, thought of punishment. Their minds were in tune with the moralising and stigmatising response that those who had and spread the virus were unclean, immoral and dangerous to the community — people who needed to be controlled, checked and sanctioned. The instinctive reaction of many people was to punish, to impose mandatory testing on large segments of the population and to denounce those considered responsible.

⁷ MD Kirby 'The new AIDS virus — Ineffective and unjust laws' unpublished paper for the International Symposium on AIDS, Paris, 23 October 1987, reprinted in *Washington Post* 2 February 1988 12.

⁸ WM McNeill *Plagues and peoples* (1976); PH Curson *Times of crisis: Epidemics in Sydney, 1788–1900* (1985).

⁹ T Mangold 'The plague mentality makes victims of us all' *The Listener* 2 July 1987 546.

¹⁰ MD Kirby 'The ten paradoxes of AIDS — Summing up the First International Conference on the Global Impact of AIDS', London, 8–10 March 1988 in AF Fleming *et al* (eds) *The global impact of AIDS* (1988) 397.

The difficulty with this approach was that HIV was unlike other conditions. During the long period of latency, people who had acquired the virus could continue performing their social and employment functions fully and without risk to others in most aspects of life. Because there was no specific treatment or vaccine, the only effective means of ensuring against infection by HIV was behaviour modification. Therapies could provide support and palliative assistance. But they could not rid the body of HIV as it could be relieved of tuberculosis and other infectious conditions.

Even if everyone in the community could be tested, at great expense, there were no desert islands and insufficient barbed wire to isolate those who came up positive. Behaviour modification thus, possibly for the first time, became the major focus of the strategy of the Global Programme on AIDS and the WHO Global Commission on AIDS. Instead of urging moralising, stigmatisation, punishment and quarantine, the approach of WHO embraced the 'AIDS paradox'. The best way to promote behaviour modification, essential to prevent the spread of HIV, was to ensure that knowledge about the existence, modes of transmission and means of prevention of infection was given to all those at risk of acquiring it in circumstances that they would trust, believe and follow up.

Thus was established the rights-based approach in the struggle against HIV/AIDS. In an article,¹¹ Dr Mann declared that '[h]ealth and human rights are complementary approaches to the central problem of advancing human well-being'.

In Australia, as a result of a rare co-operation between political leaders in government and opposition and in consequence of well-informed and enlightened leadership in politics and administration, the rights-based approach was observed, virtually from the start.¹² In Australia, radical measures were taken in pursuance of the initial AIDS paradox:

- A massive public information campaign on television and in other media was undertaken to alert the entire Australian community of the existence, dangers, modes of transmission and methods of protection in respect of HIV.
- A specific national structure, NACAIDS (the National Committee on HIV and AIDS) was quickly put in place to mobilise an ongoing national strategy and to devise particular policies, to support relevant

¹¹ J Mann 'Health and human rights: If not now, when?' (1997) 2 *Health and Human Rights* 118.

¹² W Bowtell 'HIV/AIDS: Present at the creation' unpublished paper to the HIV/AIDS, Hepatitis C and Related Diseases Social Research Conference, Sydney, 18 May 2004. See also P Sendziuk *Learning to trust: Australian responses to AIDS* (2004) and N Blewett 'AIDS in Australia: The primitive years' Commissioned Paper Series, Australian Health Policy Institute (2003/07).

interest groups and to promote research, science and information campaigns.

- All Australian health ministers, in an astonishing and courageous decision, agreed to a national needle and syringe exchange programme. This was the first formal, national recognition of the reality of illicit drug use in Australia. Implicitly, it involved a departure from the 'zero tolerance' approaches of the 'war on drugs'. It embraced harm minimisation. It did so on the footing that this was the most sensible policy to follow to arrest in the spread of HIV/AIDS. It became possible for injecting drug users to deliver used syringes to many pharmacies and other publicised outlets, with no questions asked, in exchange for sterile equipment so as to reduce the risk of infection by this route.
- Even in prisons, where multiple use of injecting drug equipment was one possible risk factor, enlightened prison administrators, whilst not supplying sterile injecting equipment in breach of prison regulations and safety, ensured that bleaching solutions were left available for use for sterilisation purposes by those in the prison who had gained access to such equipment.
- School education courses were introduced to inform students in most schools of the dangers of HIV and the modes of avoiding transmission, including the use of condoms.
- Dispensers for anonymous condom sales were introduced in many public places to permit acquisition of protectives, and to overcome the embarrassment or fear involved in purchasing them from pharmacies and stores.
- The remaining laws that were still in force in Australia for the criminalisation of adult, consensual homosexual conduct in private were repealed. The last such repeal followed federal legislation,¹³ enacted by the Australian parliament following a ruling by the United Nations (UN) Human Rights Committee that the Tasmanian laws criminalising adult homosexual conduct¹⁴ were contrary to Australia's obligations under the International Covenant on Civil and Political Rights (CCPR).¹⁵
- In many parts of Australia, the laws on prostitution have been reformed in order to reduce the risk of an underground culture out of contact with health messages and the empowerment necessary for self-protection amongst sex-workers.¹⁶

¹³ Human Rights (Sexual Conduct) Act 1994.

¹⁴ Sec 124 Criminal Code 1924 (Tas).

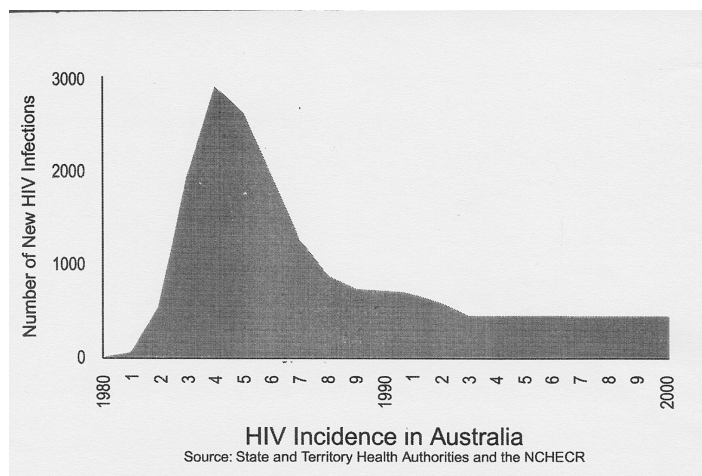
¹⁵ Communication 488/92, *Toonen v Australia*, CCPR/C/50/D/488/92, 31 March 1994, reproduced in HJ Steiner & P Alston *International human rights in context* (1996) 545–548.

¹⁶ J Godwin *et al Australian HIV/AIDS legal guide* (1993) ch 8 'Sex Industry' 242.

- To the anti-discrimination laws that were already enacted, provision was made in a number of states permitting remedies to persons who suffered discrimination on the ground of a relevant health status, including that of being HIV positive.¹⁷

In consequence of these radical measures, largely supported at the time by both major political groupings in Australia, the incidence of HIV infections throughout the nation dropped quite rapidly. The following graph illustrates the reported incidence of HIV in Australia from the beginning of the epidemic, taken at 1980, until the year 2000.¹⁸

FIGURE 1
HIV incidence in Australia



Appropriate credit must be given to the political leaders, their advisers and health officials who played a part in reducing the toll of HIV in Australia. Credit must also be given to NACAIDS and to organisations within the gay community who, at the start, were in the front line. In the past two years, for the first time, there has been an increase in the number of HIV sero-conversions in Australia as in other developed countries. This is a serious development. It appears to be related to fatigue in the gay community and the diminished power of the messages of self-protection after 20 years of relative success.

The availability of anti-retroviral treatment (ARVs) under the Australian Pharmaceutical Benefits Scheme for people in Australia living

¹⁷ n 16 above, ch 4 'Anti-discrimination and equal opportunity', 87. See also *IW v City of Perth* (1997) 191 CLR 1 and *X v The Commonwealth* (1999) 200 CLR 177.

¹⁸ Reproduced in MD Kirby 'Foreword to LO Gostin' *The AIDS pandemic: Complacency, injustice and unfulfilled expectations* (2004) xi xv.

with HIV and AIDS has also had a consequence that individuals are less willing to treat HIV, as it still is, as a most serious risk to individual health, well-being and life. We still do not know how to rid the body of a person infected with HIV/AIDS of all traces of the virus. In this respect, HIV remains incurable. Those who are infected remain capable of infecting others. However, in developed countries, such as Australia (and particularly where they have effective national health systems), HIV is no longer the automatic death sentence that it was at the beginning of the epidemic. People living with HIV can ordinarily continue to live an economically productive life marked by human dignity.

By virtue of the early interventions, political leadership and sound policies in accordance with the first AIDS paradox, the rate of Australian infections never reached a plateau where it could take off and penetrate the entire community. In short, HIV was contained. Sadly, in Africa, there have been few cases of similar leadership. The lessons of the first AIDS paradox were not fully accepted in Africa. And even where they were, all too often they were corrupted by notions of moralising and stigmatising this human illness. Moreover, the funds were not available to provide access to ARVs. Even where they were, rapid steps have not been taken to make these life-enhancing and life-saving drugs available to the general population. This, therefore, brings me to the second AIDS paradox as it affects the situation in Africa at this time.

3 The second AIDS paradox

Come forward 20 years from the first rumours of the condition that turned into AIDS. Sadly, the fears of a major assault upon the health of people in all parts of the world have been fulfilled. HIV/AIDS, despite the enormous efforts of WHO and UNAIDS, which was established to co-ordinate UN's strategies in this area, has continued to expand. Indeed, at the XV International Conference on HIV/AIDS held in Bangkok in July 2004, the view was widely expressed that the pandemic of AIDS is now 'out of control'.¹⁹ As if to symbolise the seriousness of the global predicament, the Secretary-General of the UN, Mr Kofi Annan, attended the biennial conference for the first time. He urged, not just for Africa, but for the world:²⁰

We need leaders everywhere to demonstrate that speaking up about AIDS is a point of pride, not a source of shame. There must be no more sticking heads in the sand, no more embarrassment, no more hiding behind a veil of apathy.

The Bangkok conference demonstrated the impact of the 'culture wars' upon the controversies over HIV/AIDS, as on so much else in the world

¹⁹ 'AIDS out of control' *Sydney Star Observer* 15 July 2004 1.

²⁰ As above.

today. One of the liveliest debates in Bangkok concerned a shift towards abstinence as a prevention campaign, both in the United States and in some countries of the developing world. The President of Uganda, Mr Yoweri Museveni, told the Bangkok conference that the first line of defence against HIV/AIDS infection in Uganda was 'abstinence and faithfulness'. He declared that the use of condoms was 'an improvisation — not a solution'.²¹ In this respect, his statement reflected the current policy of the United States government which has stepped away from the 'rights-based approach' (CNN — condoms, negotiations and [sterile] needles) anchored in virology instead of morality.

The so-called 'ABC' approach (A for Abstinence, B for Being Faithful and C for Condoms) has resulted in a substantial part of the large and generous funding offered and promised by the United States government being devoted to strategies of abstinence and faithfulness (strict monogamy and no sex before marriage). The cost effectiveness of such abstinence strategies has been questioned, although no one doubts that reduction in the number of sexual partners significantly reduces the risks of HIV infection. Total abstinence from sexual activity would self-evidently remove one of the main risk factors of infection, so long as it lasted. The question presented by the ABC strategy involves one of emphasis and ideology. To some extent, at least, the strategy responds to the moralising attitudes of religious and other groups who have been concerned from the first that the 'rights-based' strategy in respect of HIV/AIDS has undermined true morality, promoted promiscuity, condoned drug use and contributed to individual and community moral decay.²²

For present purposes, these controversies can be placed on one side. They are important, but they are not the most important of the challenges to the 'rights-based approach'. This approach includes an insistence upon the right of individuals, who are adults acting with consent, to decide for themselves about their sexual behaviour in private, so long as it does not involve risk of harm to others. The real challenge to the 'rights-based approach' comes from a different quarter. It is the result of a realisation that not enough is being done to ensure the provision to millions of HIV infected people in the developing world of the ARVs that, in developed countries, are largely taken for granted in the medical management of the condition of HIV/AIDS.

Upon his election as Director-General of WHO, Dr Lee Yong-wook (Republic of Korea) declared that the current mortality from AIDS of approximately three million persons each year (mostly in the developing world and substantially in Africa) was totally unacceptable. If the

²¹ As above.

²² H Burkhalter 'The politics of AIDS: Engaging conservative activists' (2004) 83 *Foreign Affairs* 8.

enormity of this level of death and suffering is considered even for a moment, the conclusion of Dr Lee is plainly correct. Among the most fundamental of the human rights guaranteed by international human rights law is the right to life²³ and the right to access to health care.²⁴

These fundamental rights are recognised in the International Guidelines produced by the Second International Consultation on HIV/AIDS and Human Rights, jointly organised by the UN Office of the High Commissioner for Human Rights and UNAIDS.²⁵ I chaired the consultation that produced those guidelines. They grew, in turn, out of an earlier (1989) consultation. They called on the member states of the UN to adopt a number of strategies, including legal strategies, to ensure a co-ordinated, participatory, transparent and accountable approach to HIV/AIDS, compatible with human rights and fundamental freedoms, in order to respond effectively to the epidemic.

Guideline 6 of the International Guidelines, as adopted in 1996, concerned the right of access to health care. As first drafted, the Guideline was qualified and cautious:²⁶

Guideline 6: Regulation of goods, services and information

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

The original text of Guideline 6, as so accepted, reflected a number of considerations. These were the state of the pharmaceutical developments of therapies and vaccines in 1996; the state of the intellectual property regimes' national, regional and international, then in place; and the feasibility of securing access to such therapies as were entering

²³ Art 6 CCPR. In its General Comment, the UN Human Rights Committee describes the right to life as a 'supreme right' and a right 'basic to all human rights'. See General Comment No 14 reproduced in (1994) 1 *International Human Rights Reports* 15–16, confirming the earlier General Comment No 6 reproduced in (1994) 1 *International Human Rights Reports* 4–5. Municipal courts have frequently ranked the right of an individual to life as 'the most fundamental of all human rights'. See *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at 531 *per* Lord Bridge of Harwich cited with approval in *R v Lord Saville of Newdigate & Others; Ex parte A* [2000] 1 WLR 1855.

²⁴ Art 12 International Covenant on Economic, Social and Cultural Rights. The UN Human Rights Committee has recognised a connection between the right to life and a state's obligation to provide medical care. In its General Comment on the right to life, the Committee urged state parties to take all possible measures to reduce infant mortality and to increase life expectancy. See UN Human Rights Committee, General Comment No 6 (n 23 above) para 5. See also *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC); 1998 1 SA 765 (CC).

²⁵ Office of the High Commissioner for Human Rights and UNAIDS *HIV/AIDS and human rights — International guidelines* (1998) (HR/pub/98/1) (reprinted 2001).

²⁶ Office of the High Commissioner for Human Rights and UNAIDS, *HIV/AIDS and human rights — International guidelines — Revised Guideline 6 — Access to prevention, treatment, care and support* (Geneva, July 2002) (UNAIDS/02 49E) 21–22.

the market in developing countries that had extremely limited resources for expenditure on healthcare.

In the years following the adoption of the original Guidelines, a number of important developments occurred. They demanded reconsideration of the foregoing language of Guideline 6. These developments included the arrival of ARVs; the realisation of their significant impact on the well-being and life expectancy of the patients who receive them; the effect of ARVs (especially Nevarapine) in the significant reduction of mother to child transmission at relatively little cost; the widespread availability of ARVs in developed countries but the virtual unavailability of these therapies in countries of the developing world; and the steps taken at Doha in November 2001, at the Ministerial Conference of the World Trade Organisation, to declare that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) should be interpreted to support public health and to allow for patents to be qualified if required to respond to public health emergencies such as the AIDS epidemic.²⁷

In consequence of these developments, a new consultation took place in Geneva to revise Guideline 6. I also chaired the new consultation which occurred in July 2002. At the forefront of the consideration by the Expert Group were a number of key documents of the UN. These included the Declaration of Commitment on HIV/AIDS of the General Assembly of the UN,²⁸ the Millennium Development Goals declared by world leaders at the UN in September 2000,²⁹ the resolutions of the UN Commission on Human Rights on the Right to the Highest Attainable Health Standard,³⁰ on Access to Medication³¹ and General Comment 14 of the UN Committee on Economic, Social and Cultural Rights.³²

In consequence of the fresh deliberations of the Expert Group, a revised Guideline 6 was adopted in 2001, in the following terms:

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

States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV/AIDS prevention, treatment, care and

²⁷ Statement by Dr Peter Piot, Executive Director, UNAIDS and Mary Robinson, High Commissioner for Human Rights in *Revised guideline 6* (2002) 6.

²⁸ UN General Assembly *Declaration of Commitment on HIV/AIDS* ('Global crisis — Global action') Resolution A/RES/S-26/2 (27 June 2001).

²⁹ UN General Assembly *United Nations Millennium Declaration* Resolution 55/2 A/RES/55/2 (8 September 2000).

³⁰ E/CN.4/RES/2002/31.

³¹ E/CN.4/RES/2001/33, E/CN.4/RES/2002/32.

³² General Comment No 14: The right to the highest attainable standard of health, adopted 11 May 2000; E/C.12/2000/4.

support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for prevention, curative and palliative care of HIV/AIDS and related opportunistic infections and conditions.

States should take such measures at both the domestic and international levels, with particular attention to vulnerable individuals and populations.

Coinciding with this development of principle, WHO and UNAIDS adopted a global initiative to provide antiretroviral therapy to three million people with HIV/AIDS in developing countries by the end of 2005. This strategy has become known as the 3 x 5 Strategy.³³

Dr Lee, the Director-General of WHO, declared:³⁴

Lack of access to antiretroviral treatment is a global health emergency . . . To deliver antiretroviral treatment to the millions who need it, we must change the way we think and change the way we act.

It is at this point that the second AIDS paradox enters for consideration. In advance of the 3 x 5 Strategy, scientific commentators on the 'rights-based approach' began to question the effectiveness of this approach, at least in the circumstances of developing countries and specifically the countries of Africa. One of the key proponents of the need for rethinking has been Dr Kevin M de Cock of the United States Centers for Disease Control and Prevention based in Nairobi, Kenya. Writing in *The Lancet*,³⁵ Dr De Cock and his colleagues suggested that it was time to return to what was, in effect, a more conventional public health strategy to combat HIV/AIDS, with much less emphasis on consent and information for the individual. In effect, the message of Dr De Cock and his co-writers has been that communitarian rather than individual approaches should dominate the response to HIV/AIDS. Thus it was put:³⁶

Prevention and care in Africa need a serostatus-based approach . . . aimed at universal voluntary knowledge of serostatus, simplified clinical testing, and prevention of discrimination. Defining different categories of testing, consent, and counselling is necessary. International agencies should re-assess their HIV testing policies on the basis of public health needs and targets, and the declared global emergency relating to treatment. Of three possible positions, staying silent will abdicate leadership, and endorsing traditional practice will reinforce barriers to prevention and care; only strong guidance to promote and facilitate HIV testing will allow urgently-needed expansion of treatment and prevention services.

Was this an attempt to return to the siren calls for widespread mandatory testing, initially common in the United States, that was knocked on the head as futile and ineffective in the early days of the HIV/AIDS pandemic?

³³ World Health Organisation and UNAIDS *Treating 3 million by 2005 — Making it happen — The WHO strategy* (2003).

³⁴ n 33 above, 1.

³⁵ KM de Cock *et al* 'A serostatus-based approach to HIV/AIDS prevention and care in Africa' (2003) 362 *The Lancet* 1847; KM de Cock *et al* 'Shadow on the continent: Public health and HIV/AIDS in the 21st century' (2002) 360 *The Lancet* 67.

³⁶ *The Lancet* (2003) (n 35 above) 1848.

Was it a Trojan horse for the current moralistic views promoted, most especially in the United States, designed to restore traditional public health control and to identify those morally responsible for spreading a dangerous virus? Would widespread mandatory testing actually be followed up by the provision of ARVs to poor people in Kenya and other countries of Africa and the wider developing world? If not, was such widespread testing simply a diversion of scarce resources to combat this epidemic without the sure promise of any benefit for those tested? Or was Dr De Cock's intervention a serious scientific one based upon the changing features of the epidemic, the availability of affordable ARVs in the form of generic drugs and the manifest need to conduct more HIV tests in order to identify those who could benefit from the ARVs if they could be made available in mass quantity?

For the past two years I have been serving with a distinguished group of scientists, ethicists, lawyers and public health experts on a Reference Panel established by UNAIDS to examine questions of HIV/AIDS and human rights. The questions presented by the views of Dr De Cock have been considered by the Reference Panel. The consideration has been undertaken in the light of the Guidelines on HIV/AIDS and Human Rights, including the revised Guideline 6, the UN Resolutions, and the new WHO/UNAIDS 3 x 5 Strategy.

Clearly, the Panel has appreciated that we are in a new international situation that demands new thinking and a willingness, if necessary, to reconsider past approaches. We now have the ARVs. A new inexpensive and generally accurate saliva test for the presence of HIV has been developed that facilitates HIV testing on a mass scale. The development of generic drugs, available under licence to countries in the developing world to reduce significantly the cost of ARVs and other treatments, together with national contributions and the establishment of the Global Fund³⁷ to support the provision of therapies in developing countries, make possible what was hitherto thought completely unaffordable. Shame and stigma abound as an impediment to people living with HIV coming forward to undergo tests and to receive therapies. At least, in South Africa, many do not come forward until they are seriously unwell and therefore less amenable to treatment by the available therapies. It is in these circumstances that consideration must be given to whether the past strategies of pre-test voluntary counselling and testing need to be modified or qualified in various ways in order effectively to 'scale up' the testing so as to bridge the reticence and impediments and to get the ARVs quickly to those who need them. Would such a change result in scaling up and effective treatment?

³⁷ The Global Fund to Fight AIDS, Tuberculosis and Malaria (Executive Director, Dr Richard Feachem). There are also bilateral programmes such as the US Presidential Emergency Plan for AIDS Relief (USA) and private programmes, such as those initiated by the Gates Foundation (USA).

There can be no doubt that the inequalities in the availability of ARVs throughout the world are serious, continuing and a grave affront to human rights and fundamental freedoms. A figure sets out the coverage of adults in developing countries with antiretroviral therapy by reference to the WHO regions in 2003:

FIGURE 2
ACCESS TO ARVs

Region	Number of People on Treatment	Estimated Need	Coverage %
Africa	100 000	4 400 000	2
Americas	210 000	250 000	84
Europe (Eastern Europe, Central Asia)	15 000	80 000	19
Eastern Mediterranean	5 000	100 000	5
South-East Asia	60 000	900 000	7
Western Pacific	10 000	170 000	6
WHO ALL REGIONS	400 000	5 900 000	7

What is the lesson from these statistics? Is it that we should redouble efforts to secure coverage of those who would benefit from ARVs in proper compliance with human right protecting principles of pre-test voluntary and informed consent, as is generally observed in the developed world? Or is it that the special needs of the developing countries, notably in Africa, are so large, so urgent, so intractable and so bedevilled by stigma and discrimination, that systems of routine testing must be introduced with less emphasis upon notions of individual patient prior consent? Is this the only practical way to overcome stigma, fear and apathy? Would it do so in practice? Is it undesirable because it involves a misuse of the human rights of highly vulnerable and poor people who do not need to have such affronts piled upon their serious health status?³⁸

³⁸ For a recent South African case involving unconsensual testing of a domestic worker for HIV and Hepatitis B and a claim under the Labour Relations Act 1995 (South Africa) of unfair dismissal under s 187(1)(f), see AIDS Law Project 'Domestic workers and HIV/AIDS' http://www.alp.org.za/view/php?file=/kyr/20040608_DomWork.xml (accessed 31 July 2004).

The UNAIDS Panel on HIV/AIDS and Human Rights has emphasised that, in the context of the AIDS epidemic, the content of human rights principles is not inflexible. There is an equation that reflects the necessary adjustment of the content of human rights to the circumstances of the epidemic and its proper management.³⁹ The Panel supports the 3 x 5 initiative. It supports necessary 'scaling up' of HIV testing that is the prerequisite to providing ARVs to those who are infected. However, to be effective, the 'scaling up' must occur in circumstances that are sensitive to the fundamental considerations that are at stake. These include the way the tests are conducted; the access to sustainable treatment and care to which they must lead; the sufficiency of the existing healthcare infrastructure to respond; the provision of laws and policies to protect people against related stigma and discrimination; and the legal and policy context in which the 'scaling up' occurs.

The ethical dilemmas presented by the reality on the ground in Africa, as this epidemic enters its third decade, demand flexibility of approach and a greatly heightened sense of urgency. Clearly, the current predicament is intolerable. Urgent measures are essential. This is one of the largest and most urgent problems for human rights in Africa, indeed the world. As with most human rights questions, there are no easy solutions. But the beginning of wisdom is an appreciation that this epidemic presents acute human rights dilemmas. They derive from the huge challenge to the right to live and the equal challenge, faced by millions, because of the lack of access to basic healthcare essential to human dignity and life.

4 A turning point?

In his address as President of South Africa to the first Joint Sitting of the Third Democratic Parliament in Cape Town on 21 May 2004, President Thabo Mbeki detailed the enormous range of challenges that South Africa faces and the programmes of his government designed to address them. In the midst of so many challenges of the post-apartheid society, HIV/AIDS attracts a paragraph in a speech of 13 pages. But it was one with a clear commitment:⁴⁰

We have already started with the implementation of our Comprehensive Plan on HIV and AIDS. 113 health facilities will be fully operational by March 2005 and 53 000 will be on treatment by that time. At the same time, more impetus will be given to the Khomanani Social Mobilisation Campaign as we intensify home-based care.

³⁹ S Gruskin & B Loff 'Do human rights have a role in public health work?' (2002) 360 *The Lancet* 1880.

⁴⁰ T Mbeki 'Address of the President of South Africa to the First Joint Sitting of the Third Democratic Parliament' 21 May 2004 8.

It must be hoped that the failure to specify that the 'treatments' promised will include ARVs is inconsequential and that a full range of modern therapies will be provided to South Africans, including ARVs. If South Africa, with its developed medical and hospital infrastructure and high professional standards, can give a lead to Africa in this respect, a great blow will be struck for basic human rights in an area where they have been neglected and are greatly at risk.

The political leaders of the African continent, indeed of the world, must be rendered accountable. So must the UN and its agencies. We have passed the point of cautious plodding. Clearly, the time has come for brave and strong action. But what does strong action require?

If I was in any doubt of the need, the doubt was dispelled when I visited the Chris Hani Baragwanath/Kalafong Hospital on the edge of Soweto during my visit to South Africa. The waiting rooms were full with anxious mothers and sickly children. Very few men were to be seen waiting on the benches. African men, it seems, do not easily acknowledge their vulnerability to HIV, until the end. The lists for admission to the Wellness Clinic at the hospital are overfull and now closed. No new patients can be added to those lists. Pamphlets tell the patients how they can inform others that they are HIV positive. They tell them of the therapies that are available. But are they available to all? Or are they only available to the most 'innocent' of the 'victims'? Is this why men do not come forward because they are seen as 'guilty' and excluded from the treatment regimes? In a continent of so many health care and other problems, is HIV/AIDS just the latest grave health problem that must be borne with fortitude in lives that are rarely far from suffering?

In an earlier address at the National Judicial Symposium, President Mbeki,⁴¹ an economist, drew an analogy between the transformation of South African society and the change of a business. He quoted Francis Goillart and James Kelly⁴² as saying:

Transformation . . . is the time when [you] leave the secure walls of the castle and step into unexplored territory. Though the dynamics of success may eventually lead to elation, it is not much fun in the initial stages. There are walls of reluctance and denial to break through, old values to discard, and new ones to assimilate. And that is usually painful, because the ramparts are thick, and they are made of human emotions and prejudices.

President Mbeki told the assembled judges of South Africa of the need, in the law, to break down the walls of reluctance, to discard old values, to assimilate new values and to establish mastery over human emotions and prejudices. He urged them to take the road that Chief Justice John

⁴¹ T Mbeki 'Address to the Judicial Symposium' (2003) 120 *South African Law Journal* 652.

⁴² n 41 above, 657, citing F Goillart & J Kelly *Transforming the organisation* (1995).

Marshall of revolutionary America had chosen 200 years earlier so that the 'better angels of our nature' would prevail.

That is what is needed in South Africa, in Africa and the world as we face the third decade of HIV/AIDS. We are still in the initial stages. There is no fun whatever in the struggle. The walls of reluctance and denial so often seem impenetrable. The old values that impede the struggle (some of them lately reinforced) remain. The new values are yet to be accepted. And meanwhile, in the hospital wards, in the villages, in the fields, indeed everywhere, people are sick, gravely ill and dying. We must help them.

That is what human rights is about: human dignity and justice. Nothing less will do. How we go about attaining human rights is also important. We must maintain the struggle to prevent the infection of new generations. We must not write off the millions who are already infected with HIV and can now be helped by therapies and by behaviour modification. And in responding to the dilemmas of AIDS we must be fresh of mind, constantly alert to the paradoxes of AIDS and the cries of the vulnerable. Neglect is contemptible. Moralising is counter-productive. Men, women and children are in need. They have human rights. They have rights to justice. We all have human duties to respond.

HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights

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Summary

There is a relationship between HIV/AIDS and human rights. HIV/AIDS is the most severe epidemic to hit the globe and the African continent in particular. It is now well known that HIV/AIDS infects and affects human beings in various ways. This article contends that, at best, the HIV/AIDS pandemic in Africa can be addressed within a comprehensive human rights framework. As part of the global response to HIV/AIDS, the article explores, in depth, the role of the African Commission on Human and Peoples' Rights in addressing the HIV/AIDS scourge within its structural mandate of promoting and protecting human and peoples' rights in Africa.

1 Introduction

The HIV/AIDS pandemic poses the greatest threat to Africa's efforts to achieve its full potential in the social, economic and political spheres. As it was rightly stated by former South African President, Nelson Mandela, the pandemic is 'a threat that puts in the balance the future of nations'.¹ HIV/AIDS is the first worldwide epidemic to occur in the modern era of human rights.² The African continent has been the worst hit. In 2003, an

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¹ In his address at the World Economic Forum session on AIDS on 3 February 1997; <http://www.polity.org.za/html/govdocs/speeches/1997/sp0203.html> (accessed 12 July 2003).

² J Oyegun 'AIDS and human rights' in LA Sadiwa (ed) *Human rights theories and practices* (1997) 108.

estimate of between 25 and 28,2 million people in sub-Saharan Africa were living with HIV.³ HIV/AIDS has indeed become the plague of our time,⁴ and the already unending human rights problems and challenges facing the continent aggravate its sting.

On the African continent, the African Charter on Human and Peoples' Rights (African Charter or Charter)⁵ is the principal instrument for the promotion and protection of human and peoples' rights. Van Boven rightly described the Charter as a human rights instrument specifically designed to respond to 'African concerns, African traditions and African conditions'.⁶ The human and peoples' rights provided for in the Charter include, at least in implied terms, those associated with people infected with and affected by HIV/AIDS. The HIV/AIDS pandemic has become one of the contemporary African concerns. Article 30 of the Charter establishes the African Commission on Human and Peoples' Rights (African Commission or Commission) as a promoter and protector of human and peoples' rights within the continent. The promotion and protection of those human rights associated with the HIV/AIDS pandemic fall within the mandate of the Commission.

The promotion and protection of human rights are legitimate concerns of the international community.⁷ It is therefore not surprising that the United Nations (UN), in particular, has placed HIV/AIDS at the top of its agenda. This initiative is under the auspices of the Joint United Nations Programme on HIV/AIDS (UNAIDS).⁸ The African Commission considers the HIV/AIDS pandemic a serious threat to the human rights of Africans and underscores the difficulties that HIV/AIDS patients face in accessing treatment as a major obstacle to exercise their right to health as provided for by the African Charter.⁹ Accepting that the issue of HIV/AIDS is a human rights issue, which is a threat to humanity, as

³ See UNAIDS/03.39E *AIDS epidemic update* (December 2003) http://www.who.int/hiv/pub/epidemiology/en/epiupdate2003_1_en.pdf (accessed 29 February 2004).

⁴ C Ngwenya 'HIV testing in Swaziland in the wake of AIDS: A human rights framework' in C Okpaluba *et al Human rights in Swaziland: The legal response* (1997) 210.

⁵ OAU Doc CAB/LEG/67/3 rev 5, adopted 27 June 1981 and entered into force 21 October 1986.

⁶ T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 183 186.

⁷ Vienna Declaration and Programme of Action 1993, UN Doc A/CONF 157/24, Part I para 5 <http://www1.umn.edu/humanrts/instreet/l1viadec.html> (accessed 13 July 2003).

⁸ UNAIDS is the main advocate for global action on HIV/AIDS. Its mission is to lead, strengthen and support an expanded response aimed at preventing the transmission of HIV, providing care and support, reducing the vulnerability of individuals and communities to HIV/AIDS, and alleviating the impact of the epidemic.

⁹ See para 7 of the Final Communiqué of the 29th ordinary session of the African Commission on Human and Peoples' Rights. See UNAIDS website at <http://www.unaids.org>.

declared by the Commission,¹⁰ this paper seeks to explore the various ways for the Commission to best address the issue of HIV/AIDS in Africa as part of its mandate of promoting and protecting human and peoples' rights. This discussion, therefore, is premised on the fact that HIV/AIDS is the greatest threat to Africa, and that taking it on board the mandate of the Commission should be a matter of priority.

2 Declaration of Commitment on HIV/AIDS

From 25 to 27 June 2001 the Heads of State and Government and Representatives of States and Governments assembled at the UN for the 26th special session of the General Assembly in accordance with Resolution 55/13. This special session was convened as a matter of urgency, to review and address the problem of HIV/AIDS in all its aspects, as well as to secure a global commitment to enhancing co-ordination and intensification of national, regional and international efforts to combat HIV/AIDS in a comprehensive manner.¹¹ During this special session, the Heads of State and Government adopted the Declaration of Commitment on HIV/AIDS, wherein they noted with grave concern that:¹²

Africa, in particular sub-Saharan Africa, is currently the worst hit affected region where HIV/AIDS is considered a state of emergency and imposes a devastating economic burden and that the dramatic situation on the continent needs urgent and exceptional national, regional and international actions.

The fact that HIV/AIDS is considered a state of emergency in Africa calls for drastic steps to be taken by African states in addressing the pandemic within their respective territories. African states need to understand the enormity of HIV/AIDS in Africa and its devastating implications to the continent as a whole. This will in turn enable them to commensurately harness all resources and all sectors to fully respond to the global crisis. This should certainly involve multi-sectoral strategies, which could be guided by international organisations, such as the UN, and regional organisations such as the African Union (AU), under which the African Commission falls. It would be foolhardy for African states to respond to

¹⁰ See Resolution on HIV/AIDS Pandemic-Threat against Human Rights and Humanity, done in Tripoli, 7 May 2001. This resolution was premised on the Commission's mandate in terms of the Charter to 'promote human and peoples' rights and ensure their protection in Africa' and especially in regard to the right of every individual to 'enjoy the best attainable state of physical and mental health' provided for in art 16 of the Charter.

¹¹ Para 1 of the Declaration of Commitment on HIV/AIDS 'Global Crisis — Global Action' <http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html> (accessed 13 July 2003).

¹² As above.

the epidemic without the involvement of the international community to which they belong. After all, HIV/AIDS is a global concern. In order to adequately address HIV/AIDS in Africa, one cannot agree more that the need for 'urgent and exceptional national, regional and international actions' is non-negotiable. Hence, the importance of the Commission in playing a role is crucial in this regard.

3 HIV/AIDS as a health concern

HIV/AIDS is a health concern because it affects people's health. It is now well known that HIV attacks and slowly damages the human body's immune system. Because of this, the body can no longer fight off infections and other infectious diseases. When this occurs, the body develops AIDS as a result of the so-called AIDS-defining conditions or illnesses.¹³ The fact that AIDS is a scandalous disease cannot be over-emphasised. Tracing the experience of poorer countries in so far as HIV/AIDS is concerned, Jones notes that:¹⁴

For those in poorer countries of the world [such as in Africa], HIV/AIDS was and was not a new experience. The body's vulnerability to illness had not been curtailed by the plethora of scientific and technological support mechanisms available to richer countries, so the spectacle of early and multiple deaths through illness was, initially perhaps, not as surprising nor as threatening to people's senses of self as was the resurgence of early deaths in the richer world . . . HIV/AIDS introduces deaths in poorer countries on a scale that was in itself scandalous.

Initially, the issue of HIV/AIDS was solely perceived a health issue, which could only be addressed through viable health policies. Standing on its own, this approach could not effectively address the issue of HIV/AIDS. Tomasevski argues that health is subject to vast legal regulations, much of which are not necessarily guided by human rights standards.¹⁵ Today, the issue of HIV/AIDS has widely been accepted to be a human rights issue, which affects a plethora of human rights in a number of ways. Chief among these is the right to health, which does not necessarily mean the right to be healthy.¹⁶

¹³ AIDS Law Project *HIV/AIDS and the law: A resource manual* (2003) 10.

¹⁴ TT Jones *Who cares? AIDS review* (2001) 5.

¹⁵ K Tomasevski 'Health rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 126.

¹⁶ B Toebes 'The right to health' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 169.

4 HIV/AIDS as a human rights concern

Wojcik argues that, in reviewing the relative short history of responses to the HIV/AIDS pandemic, a common denomination of effective programs is the respect for human rights and dignity of persons.¹⁷ HIV/AIDS is therefore a human rights issue, which has to be approached by applying human rights principles. Today every African is either affected by or infected with HIV/AIDS. Through its presence, HIV/AIDS generates poverty, thus affecting the population at large and in particular their right to development. Ngwena asserts that it is difficult to imagine a part of the world that has remained pristine and insulated from HIV/AIDS.¹⁸ On the African continent, the situation is worse.

Anttila argues that HIV/AIDS-related discrimination is a problem not only to HIV-positive persons and AIDS victims, but also to those persons belonging to the so-called risk groups.¹⁹ In the African context, the so-called risk groups include sex workers who are perceived as more likely to be infected with HIV/AIDS. Painting a very grim picture on the African continent, Dr Peter Piot, the Executive Director of UNAIDS, speaking during the Global Forum on Health and Development at the AU Summit, said the following:²⁰

Sixty million Africans have been touched by AIDS in the most immediate way. They are either living with HIV, have died of AIDS or they have lost their parents to AIDS. But the toll of those directly affected is even higher.

Generally, those who are infected with HIV/AIDS consider their right to life²¹ to be in jeopardy.²² As a result, we have HIV/AIDS awareness messages such as 'AIDS Kills'.²³ In order to uphold the right to life, there is an urgent need to uphold the right to enjoy the best attainable state of physical and mental health which is provided for under article 16(1) of the African Charter.²⁴ More importantly, article 16(2) obliges state

¹⁷ ME Wojcik 'Global aspects of AIDS' in DW Webber (ed) *AIDS and the law* (1997) 454.

¹⁸ Ngwena (n 4 above) 210.

¹⁹ M Anttila 'AIDS does not discriminate but people do' in L Hannikainen & E Nykänen (eds) *New trends in discrimination law — International perspectives* (1999) 223.

²⁰ UNAIDS Press Release, Maputo, 10 July 2003; <http://www.unaids.org/EN/media/press+releases> (accessed 31 August 2004).

²¹ Art 4 African Charter.

²² The South African example of Gugu Dlamini illustrates the worst kind of treatment that an HIV-positive person can be subjected to. Dlamini, an AIDS activist, was killed in December 1998 by people in her community because she publicly disclosed that she was HIV-positive.

²³ This message is sometimes misleading, because not every infected person is killed by HIV/AIDS. The message tends to dehumanise those infected by the pandemic, thus affecting them psychologically.

²⁴ The right to health is closely related to, and dependent upon, the realisation of other human rights, such as the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to

parties to the Charter to take measures to protect the health of their people and to ensure that they receive medical attention when they are sick. This is very crucial for people living with HIV/AIDS. The right to health involves the provision of anti-retroviral drugs which is necessary for the prevention of parent-to-child transmission of HIV.²⁵

In *Treatment Action Campaign and Others v Minister of Health and Others*,²⁶ the Constitutional Court of South Africa held that the government's policy of confining the provision of Nevirapine to research sites was unreasonable and in contravention of the state's obligation in terms of the Constitution, and in particular section 27(1) of the Constitution, which provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to health care services.²⁷ In *Free Legal Assistance Group and Others v Zaire*,²⁸ the Commission held that a shortage of medicine constituted a violation of article 16 of the African Charter.

The recognition of the right to health is related to the right to dignity.²⁹ The right to dignity cannot be achieved without the right to equality³⁰ and the right against discrimination.³¹ In the South African case of *Hoffman v South African Airways*,³² a job applicant living with HIV/AIDS was refused employment as a South African Airways cabin attendant as a result his HIV-positive status. The Constitutional Court held that people living with HIV/AIDS 'must not be condemned to

information, and the freedom of association, assembly and movement. These and other rights and freedoms address integral components of the right to health. See para 3 of UN General Comment No 14, 22nd session (2000), HRI/GEN/1/Rev 5.

²⁵ See WHO 'Prevention of mother-to-child transmission of HIV: Selection and use of Nevirapine' WHO/HIV_AIDS/2001.03 WHO/RHR/01.21 http://www.who.int/docstore/hiv/PMTCT/who_hiv_aids_2001.03.pdf (accessed 17 March 2004).

²⁶ 2002 (5) SA 721 (CC). The decision in this case captures a fundamental transformation in the conception of judicial enforcement of socio-economic rights under the South African jurisprudence, in particular the question of remedies, and also illustrates the value of socio-economic rights and their ability to influence the policy of a government. See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

²⁷ See E Baimu 'The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human rights context: The South African *Nevirapine* case' (2002) 2 *African Human Rights Law Journal* 160.

²⁸ (2000) AHRLR 74 (ACHPR 1995).

²⁹ Art 5 African Charter.

³⁰ Art 3 African Charter.

³¹ Art 2 African Charter.

³² 2001 (1) SA 1 (CC). Sec 9(1) of the South African Constitution provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.

“economic death” by the denial of equal opportunity in employment³³ and ordered South African Airways to employ the appellant. In another South African case, *A v SAA*,³⁴ South African Airways refused to hire the applicant an account of his HIV status. South African Airways admitted that the testing of A without his informed consent and refusing to employ him thereafter because of his HIV-positive status was ‘unjustifiable’. A settlement, including payment of R100 000 (approximately US \$16 100) to A, was eventually drawn up. The Court in this case never considered the merits of the case.

Those infected with HIV/AIDS need to exercise their right to receive information³⁵ on how to live with HIV/AIDS. Most importantly, HIV/AIDS, being a disability, presupposes that people with HIV/AIDS have the right to special measures of protection in providing for their physical or moral needs.³⁶ In the case of *Bragon v Abbott*,³⁷ the United States Supreme Court decided that people living with HIV are protected by the non-discrimination section of the Americans with Disabilities Act No 42 of 1990.

Those affected have a need to recognise and uphold their right to receive information,³⁸ in order to be well informed on how to prevent HIV/AIDS. In the same vein, they need to exercise their right to education³⁹ on specific issues related to HIV/AIDS as a preventive measure. They also need to be informed on how to respect the rights of those infected, who are also entitled to the enjoyment of all the rights and freedoms recognised and guaranteed in international human rights

³³ Para 38. Since HIV is not a listed ground for discrimination in sec 9(3) of the South African Constitution, it was argued that the SAA policy of not employing HIV-positive persons as cabin attendants amounted to unfair discrimination on the listed ground of disability. However, the Constitutional Court avoided this argument and opted to deal with HIV-status discrimination as an analogous ground.

³⁴ J 1916/99 (unreported); see AIDS Law Project ‘HIV/AIDS: Current law and policy — Your rights in the workplace’ <http://www.alp.org.za/kyr/misc/20000717kyry.doc>.

³⁵ Art 9 African Charter.

³⁶ Art 18(4) African Charter. This article has an implication for the right to social security as it may be interpreted as requiring member states to provide disability grants for people living with HIV/AIDS.

³⁷ 524 US 624.

³⁸ n 24 above. See the South African case of *Karen Perreira v Sr Helga’s Nursery School & Another*, Case No 02/4377, judgment October 2003. In this case, a foster mother of a three-year-old child elected to disclose her child’s HIV status to a nursery school, believing that it was in the child’s best interest for the school to be aware of her medical condition. The school expressed fears of admitting the child and indicated that it did not consider itself equipped to admit a child with HIV as none of its teachers had received any training on how to deal with children with HIV. The school opted to defer the application until such time as it considered itself ready to admit children with HIV and until a child was ‘past the biting stage’. The High Court found that since the school had not made a final decision to exclude the child, its conduct did not amount to unfair discrimination. Currently the decision is being appealed.

³⁹ Art 17 African Charter.

instruments. This is the only way they can give due respect to the infected persons' right to dignity⁴⁰ and equality.⁴¹ They need to be protected from discrimination on the basis that their family members or relatives are infected. HIV/AIDS also affects the right to development⁴² because it has social, economic and cultural implications for both the infected and the affected. Whether infected or affected, every individual is entitled to the equal protection of the law.⁴³

From the above it is clear that all the human rights associated with HIV/AIDS are somehow interrelated and interconnected. After all, human rights are universal, indivisible, interdependent and inter-related.⁴⁴ There seems to be no way in which one human right can be sustained without the due recognition of other human rights. It is also important to note that the enjoyment of human rights is not absolute. Coupled with the right to enjoy human rights is a responsibility and duty towards fellow human beings. The African Charter clearly provides that every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.⁴⁵ According to Mutua, the use of duties alongside rights emphasises the non-individualistic, communal nature of African societies.⁴⁶ Further, the Charter states that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.⁴⁷ The same is true for all the human rights associated with HIV/AIDS.

The African Charter's provisions do not differentiate between people infected with or affected by HIV/AIDS. While special emphasis should undoubtedly be placed on the rights of infected individuals, otherwise known as people living with HIV/AIDS, individuals should enjoy their human rights regardless of whether or not they are living with HIV/AIDS. Caution should be taken, however, not to concentrate on a particular group of persons and neglect another, as human beings are all equal, and should enjoy their right to equality and protection of the law. Wojcik calls this a 'false dichotomy of protecting individual human rights and

⁴⁰ n 29 above. In the *Hoffman* case, the Court held that people who are living with HIV must be treated with compassion and understanding and called upon people to show *ubuntu* towards them. *Ubuntu* is the recognition of human worth and respect for the dignity of every person; para 38.

⁴¹ n 30 above. The Court in the *Hoffman* case made reference to art 2 of the Charter and held that the need to eliminate unfair discrimination does not only arise from the South African Constitution, but also from its international obligations in terms of sec 231(2) of the Constitution.

⁴² Art 22 African Charter.

⁴³ Art 3(2) African Charter.

⁴⁴ Vienna Declaration and Programme of Action, A/CONF 157/23 para 5.

⁴⁵ Art 27(1) African Charter.

⁴⁶ M Mutua *Human rights: A political and cultural critique* (2002) 339.

⁴⁷ Art 27(2) African Charter.

neglecting the rights of society'.⁴⁸ He argues that both the individual and society can be protected. In fact, both the individual and society must be protected and human rights law must play an important role in restoring human dignity to both.

Article 2 of the African Charter provides that:

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.

While the Charter does not specifically provide for HIV/AIDS as a prohibited ground for discrimination, it may be argued that HIV/AIDS status falls under 'other status' within the meaning of article 2 of the Charter. The question, therefore, is how best the African Commission can take the HIV/AIDS aboard its mandate?

The Commission can best address the issue of HIV/AIDS by making use of its mandate to promote and protect human and peoples' rights associated with the epidemic. It is now convenient to consider what a human rights approach to HIV/AIDS contains in order to reconcile it with the role of the Commission in addressing HIV/AIDS.

5 A human rights approach to HIV/AIDS

According to the Vienna Declaration and Plan of Action, human rights and fundamental freedoms are the *birthright* of all human beings.⁴⁹ A human rights-based approach rests upon the premise that all human rights are universal, indivisible and interrelated. Because of the universality, indivisibility and interrelationship of human rights:⁵⁰

[T]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis . . . [thus] it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

It is in this vein that, in so far as human rights are affected by HIV/AIDS, the African Commission is also mandated to promote and protect them.

A human rights-based approach to HIV/AIDS can be said to entail three distinct dimensions. Firstly, it refers to the processes of using human rights as a framework for addressing the HIV/AIDS pandemic. Secondly, it entails the assessment of human rights implications of any HIV/AIDS policy, strategic plan, programme, legislation or constitution.

⁴⁸ n 17 above.

⁴⁹ Para 1 Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, Vienna, 14–25 June 1993, UN General Assembly document A/CONF 137/23 (my emphasis).

⁵⁰ n 49 above, para 5.

Thirdly, it involves the making of human rights an integral dimension of the design, implementation, monitoring and evaluation of these HIV/AIDS related policies, strategic plans, programmes, legislations and constitutions. Applying these dimensions to the work of the Commission, the human rights-based approach ensures that every person's human right to dignity is promoted and protected. More importantly, a human rights-based approach guides the development of programmes and policies which seek to address the questions around HIV/AIDS.

A human rights-based approach is in line with the focus adopted by the UN Commission on Human Rights.⁵¹ In Resolution 1999/49 on the global efforts to combat HIV/AIDS, the UN Commission put emphasis on⁵²

[t]he increasing challenges by HIV/AIDS, the need for intensified efforts to ensure universal respect for and observance of human rights and fundamental freedoms for all, to reduce vulnerability to HIV/AIDS and to prevent HIV/AIDS related discrimination and stigma.

Within the African human rights system, the African Commission is one mechanism that can take the issue of HIV/AIDS aboard its mandate. After all, it is through the human rights-based approach that a legal and ethical framework for addressing the social and development impact of HIV/AIDS in Africa can be sustained through the application of international human rights norms and standards.

6 The African Charter and HIV/AIDS

While the drafters of the African Charter never anticipated the existence of the HIV/AIDS pandemic, the substantive provisions of the Charter are to some extent flexible enough to address the denial of human rights as a result of HIV/AIDS.⁵³ This gives the African Commission an opportunity to make the provisions work towards addressing the pandemic in so far as it affects human rights and freedoms among the African people. As expressed in the Latin maxim, *ubi jus ibi remedium*, that is, where there is a right there is a remedy, the Commission is entrusted with the responsibility of providing remedies to those rights and freedoms that

⁵¹ See the Office of the High Commissioner for Human Rights' Programme on HIV/AIDS and Human Rights at http://www.unaids.org/EN/Intfocus/hiv_aids_human_rights.asp (accessed 31 August 2004).

⁵² Resolution 1999/49 E/CN 4/RES/1999/49.

⁵³ One criticism levelled against the substantive provisions of the Charter is by Ouguerouz, who argues that none of the human rights guaranteed in the African Charter carries an absolute guarantee because the exercise of most of these rights is circumscribed *ab initio* by limitation clauses or the so-called 'claw-back clauses'. See F Ouguerouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2002) 429.

have been tampered with by state parties to the Charter. This is also directly applicable to those human rights associated with HIV/AIDS, which are violated by state parties to the Charter.

Article 1 of the African Charter specifically provides that state parties to the Charter shall recognise the rights, duties and freedoms enshrined therein and shall undertake to adopt legislative or other measures to give effect to them. On the issue of HIV/AIDS, the African Commission should play a pivotal role by developing guidelines which are Africa-specific to assist state parties in the adoption of legislative or other measures such as policy making, aimed at giving effect to the rights, duties and freedoms associated with HIV/AIDS. The Charter provides a check and balance mechanism through article 62, which requires state parties to undertake to submit every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed therein. This covers the rights and freedoms associated with HIV/AIDS.

The African Charter further underscores the responsibility entrusted to state parties by spelling out in article 2 that every individual shall be entitled to the enjoyment of the Charter provided rights and freedoms without any distinction whatsoever. As already stated, this distinction automatically accommodates the HIV/AIDS status. It must be noted that this proposition is yet to be certified by the Commission, should a question arise in its consideration of inter-state or individual communications. The right to equality and the entitlement to equal protection of the law provided under article 3 of the Charter is one of the most important rights to be accorded to those infected with and affected by HIV/AIDS. With regard to the above articles, in Communication 241/2001, *Purohit and Moore v The Gambia*,⁵⁴ the Commission held that:⁵⁵

Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the rights provided under the African Charter.

By upholding the right to equality, the African Commission would invariably be instilling the right to dignity of the African people, guaranteed under article 5 of the African Charter. Suffice it to say that the right to dignity is at the core of human rights and fundamental freedoms. As reflected in the Vienna Declaration, '[h]uman rights and

⁵⁴ Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002–2003. Assembly/AU/7(II); http://www.achpr.org/english/_doc_target/documentation.html (accessed 14 July 2003).

⁵⁵ Para 69.

fundamental freedoms are the *birthright* of all human beings' and '[t]he universal nature of these rights and freedoms is beyond question'.⁵⁶

Other rights which complement the above include the right to liberty and to the security of person, provided under article 6; the right to freedom of movement, provided under article 12; the right to have equal access to the public service of his or her country, provided under article 13; the right to work under equitable and satisfactory conditions, provided under article 15; the right to health, provided under article 16; the right to a family, provided under 18; the right to economic, social and cultural development, provided under article 22; and the right to a general satisfactory environment, provided under article 24. The above articles are not conclusive. All these rights are interlinked to the HIV/AIDS pandemic and one cannot address the issue of HIV/AIDS without making reference to them. The duty to enforce these rights rests upon the African Commission.

7 The Grand Bay Declaration and HIV/AIDS

The Grand Bay Declaration and Plan of Action of 1999⁵⁷ is an important document of the African Commission as it provides a good basis for addressing the root causes of human rights violations in Africa. The Grand Bay Declaration constitutes a collective vision for human rights promotion and protection on the continent and far-reaching/forward-looking strategies for its implementation by the AU member states. The Grand Bay Declaration provides that African governments must work towards ensuring the full respect of rights of people with disability and people living with HIV/AIDS, in particular women and children.⁵⁸

The abovementioned provision is in line with the UN recommendation that programmes to combat AIDS should give special attention to the rights and needs of women and children, and to factors relating to the reproductive role of women and their subordinate position in some societies, which make them especially vulnerable to HIV infection.⁵⁹ While the statement in the Grand Bay Declaration is a good statement, the Commission must itself take the initiative in addressing the issue of HIV/AIDS within its mandate and to assist African states in the fight against the scourge.

⁵⁶ n 49 above, para 1 (my emphasis).

⁵⁷ Adopted at Grand Bay, Mauritius on 16 April 1999; <http://www.africanreview.org/docs/rights/grandBay.pdf> (accessed 10 July 2004).

⁵⁸ n 57 above, para 7.

⁵⁹ See UN General Recommendation No 15 *Avoidance of discrimination against women in national strategies for the prevention and control of Acquired Immunodeficiency Syndrome (AIDS)*.

8 The African Commission's mandate in respect of HIV/AIDS

The African Commission is an intergovernmental institution responsible for the implementation of the provisions of the African Charter within the member states of the AU at an international level. The Commission does not have a programmatic strategy of addressing the HIV/AIDS pandemic in Africa. This is very unfortunate, as the Commission remains the only operational enforcement mechanism within the African human rights system. What is needed is for the Commission to give an impetus to the use of the Charter provisions in order to fight the HIV/AIDS pandemic on the continent. Baimu argues that the potential of socio-economic rights has not been explored sufficiently to improve the standard of living of the African people, particularly in the context of HIV/AIDS, and that this is a source of grave concern in Africa.⁶⁰

Of great importance is the fact that article 60 of the African Charter provides that the African Commission shall draw inspiration from international law on human and peoples' rights. Particular emphasis is put on the provisions of various African instruments on human and peoples' rights, the Charter of the UN, the Constitutive Act of the AU,⁶¹ the Universal Declaration of Human Rights, other instruments adopted by the UN and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the UN of which parties to the African Charter are members. In fulfilling its mandate, therefore, the Commission has vast sources from which to draw inspiration in its task of addressing the issue of HIV/AIDS in Africa.

The Commission is tasked with three main functions, namely, ensuring the promotion of human and peoples' rights,⁶² protection of human and peoples' rights⁶³ and interpreting the provisions of the Charter.⁶⁴ Often these functions overlap. For example, when the Commission embarks on promoting these rights, it automatically ensures their protection. When interpreting any provision of the Charter, it automatically promotes them, thus protecting them at the same time. When it embarks on its protective function, it achieves its goal by interpreting the Charter, automatically promoting the rights contained in the Charter. I will now consider how the issue of HIV/AIDS can fit within these three main functions of the Commission.

⁶⁰ Baimu (n 28 above) 164.

⁶¹ The Constitutive Act of the AU succeeded the Charter of the OAU in 2002.

⁶² Art 45(1) African Charter.

⁶³ Art 45(2) African Charter.

⁶⁴ Art 45(3) African Charter.

8.1 The promotional function of the Commission and HIV/AIDS

Ankumah correctly describes the promotional mandate as a fundamental requirement for the respect and recognition of the rights provided for in the Charter.⁶⁵ Therefore it logically follows that those human rights associated with the HIV/AIDS pandemic can be recognised and respected through the promotional function of the Commission. The promotional function of the Commission can be divided into three main activities.

Firstly, it involves the collection of documents, undertaking studies and researches on African problems in the field of human and peoples' rights, organising seminars, symposia and conferences, disseminating information, encouraging national and local institutions concerned with human and peoples' rights and giving recommendations to governments.⁶⁶ One of Africa's problems is the issue of HIV/AIDS. Obviously, when addressing this issue, the collection of documents, the undertaking of studies and researches on HIV/AIDS, should be undertaken. So far the Commission has not undertaken activities which specifically address HIV/AIDS as a human rights issue. Capacity building on HIV/AIDS and human rights through seminars, symposia and conferences as well as advice to member states on their HIV/AIDS policies and legislations are also crucial in this regard.

Secondly, it involves the formulation and laying down of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.⁶⁷ In so far as HIV/AIDS is concerned, the African Commission has not yet considered this path. Such principles and rules can be formulated in line with the UN Guidelines and the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases.⁶⁸ Under this activity, the Commission can formulate a database of policies and legislation specifically dealing with HIV/AIDS in respect of member states.

After all, African leaders affirmed their plans and commitments to win the battle against HIV/AIDS, including ensuring the full respect of the rights of people living with HIV/AIDS, particularly women and children, as stated in the Grand Bay Declaration. The challenge, which remains to

⁶⁵ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 21.

⁶⁶ Art 45(1)(a) African Charter.

⁶⁷ Art 45(1)(b) African Charter.

⁶⁸ The Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases; adopted by the African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases held in Abuja, Nigeria, 24–27 April 2001; OAU/SPS/ABUJA/3; <http://www.un.org/ga/aids/pdf/Abuja.declaration.pdf> (accessed 31 August 2004).

be addressed, is to translate these commitments and declarations of intention into concrete actions. The possibility of drafting the AU Guidelines on HIV/AIDS sponsored by the Commission's expertise should thus be considered.

Thirdly, it involves the co-operation of the Commission with other African and international institutions concerned with the promotion and protection of human and peoples' rights in Africa.⁶⁹

Also falling under this mandate is the exercise of the Commission of promotional activities through education and publicity in designated countries. For promotional purposes, commissioners are assigned to countries belonging to the geographic region of which the commissioner is a national or in which the commissioner resides.

In an endeavour to ensure the implementation of the African Charter, the African Commission adopted a method of appointing Special Rapporteurs in relation to different thematic areas. So far there are three Special Rapporteurs. The first, the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions,⁷⁰ was appointed in 1994. The second, the Special Rapporteur on Prisons and Conditions of Detention in Africa,⁷¹ was appointed in 1996. The third, the Special Rapporteur on the Conditions of Women on Africa,⁷² was appointed in 1999. It would be necessary for the African Commission to consider the possibility of appointing a Special Rapporteur on HIV/AIDS in order to strengthen the work of the Commission in so far as addressing HIV/AIDS on the continent is concerned.

8.2 The protective function of the African Commission and HIV/AIDS

The Commission's protective function involves consideration of individual communications or complaints against member states to the Charter under article 55 of the Charter, and making recommendations to the Assembly of Heads of State and Government under article 59 of the Charter and to the member state concerned. This function is best undertaken with the assistance of civil society, especially non-governmental organisations (NGOs).

So far, no communication alleging violations of human rights associated with HIV/AIDS has been brought before the Commission. This does not, however, mean that human rights associated with HIV/AIDS have never been violated by African states. The Commission is the appropriate regional forum for individuals to bring their cases

⁶⁹ Art 45(1)(c) African Charter.

⁷⁰ Eighth Annual Activity Report of the African Commission, Annex VII.

⁷¹ Tenth Annual Activity Report of the African Commission, Annex VII.

⁷² Eleventh Annual Activity Report of the African Commission.

relating to human rights associated with HIV/AIDS in accordance with the Charter.⁷³ It is also through the protective mandate that the Commission can interpret *in extenso* the provisions of the Charter, especially those relating to the issue of HIV/AIDS.

8.3 The interpretative function of the African Commission and HIV/AIDS

The interpretation mandate of the Commission is one avenue for the effective implementation of the human rights provisions of the Charter. In interpreting the Charter, the Commission enriches the African human rights jurisprudence. The Commission may be called upon by any member state party to the Charter or an NGO to interpret a certain provision in terms of article 45(3) of the African Charter. On the interpretative function of the Commission, Odinkalu argues that '... the Commission has been mostly positive and sometimes even innovative ... In cases where it has proceeded on merits, it has interpreted the rights of the Charter effectively ...'.⁷⁴ For example, in Communication 241/2001, *Purohit and Moore v The Gambia*,⁷⁵ the Commission interpreted the right to health, which is relevant to the fight against HIV/AIDS, in the following way:⁷⁶

[The] enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.

On the right to health, the Commission further stated that, while it recognised the fact that most African countries were faced with the problem of poverty, which rendered them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right, state parties to the Charter are obliged 'to take concrete and targeted steps, while taking full advantage of [their] available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind'.⁷⁷

With respect to the HIV/AIDS pandemic, the African Commission adopted a resolution on the same at its 29th ordinary session held in Tripoli, Libya in April/May 2001. In this resolution, the Commission declared that the HIV/AIDS pandemic is a human rights issue, which is a

⁷³ SB Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

⁷⁴ C Odinkalu as cited in HJ Steiner & P Alston *International human rights in context — Law, politics, morals* (2000) 929.

⁷⁵ n 54 above.

⁷⁶ Para 80.

⁷⁷ Para 84.

threat to humanity. Secondly, the Commission called upon African governments, state parties to the Charter, to allocate national resources that reflect a determination to fight the spread of HIV/AIDS, to ensure human protection of those living with HIV/AIDS against discrimination, to provide support to families for the care of those dying of AIDS, to devise public health care programmes of education and to carry out public awareness, especially in view of free and voluntary HIV testing, as well as appropriate medical interventions.

Third, the Commission declared HIV/AIDS as a human rights issue and called for comprehensive action on the part of African governments, state parties to the African Charter, international pharmaceutical industries and aid agencies.

9 Recommendations

The UN Declaration of Commitment on HIV/AIDS provides persuasive recommendations to be adopted at the regional level. These recommendations are discussed below. These recommendations may be applied and adopted by the Commission as they may easily be accommodated within its mandate. It must be noted that these recommendations would be ineffective without the support of the AU, the parent organisation of the Commission. The support of the AU would set the benchmark for determining the real commitment on the part of the African leaders needed in the fight against the pandemic, beyond the usual political rhetoric.

Firstly, there must be an inclusion of HIV/AIDS and related public health concerns as appropriate on the agenda of regional meetings at the ministerial and Heads of State and Government level.⁷⁸ With regard to the Commission, this can be addressed by including an agenda item on HIV/AIDS during its biannual ordinary sessions. This will enable NGOs with observer status with the Commission, as well as Intergovernmental organisations, to effectively contribute to the HIV/AIDS and human rights in Africa discourse, while challenging the role of the Commission in its efforts of addressing the pandemic.

Secondly, there is a need to support data collection and processing to facilitate periodic reviews by regional commissions and/or regional organisations of progress in implementing regional strategies and addressing regional priorities and to ensure wide dissemination of the results of these reviews.⁷⁹ This fits perfectly into the Commission's promotional mandate as provided by article 45 of the Charter.

⁷⁸ Para 97 Declaration of Commitment.

⁷⁹ Para 98 Declaration of Commitment.

Thirdly, there is a need to encourage the exchange of information and experience between countries in implementing the measures and commitments contained in the Declaration, and in particular to facilitate an intensified North-South and triangular co-operation.⁸⁰ Different countries have responded differently to HIV/AIDS. Some countries have succeeded in containing the pandemic while others have not. The Commission may therefore co-ordinate the exchange of such information and experiences between member states in order to address the human rights concerns relating to HIV/AIDS.

Fourthly, numerous international organisations are involved in the fight against HIV/AIDS. Chief amongst these is the UN, whose programme, UNAIDS, offers a comprehensive approach in the fight against the pandemic. UNAIDS is guided by the UN System Strategic Plan for HIV/AIDS-2001-2005,⁸¹ which establishes the critical links between the work of individual UN organisations, the achievement of UN system objectives, and agreed goals and targets — most notably those of the UN General Assembly, and ultimate impact on the epidemic. As the African continent remains in the red in so far as the pandemic is concerned, the African Commission should establish a specialised programme, in order to complement the global efforts undertaken by the UN through UNAIDS. It might also prove worthwhile for the Commission to enter into a memorandum of understanding with UNAIDS in order to join hands in the fight against the pandemic on the continent.

Fifthly, subscribing to a human rights-based approach to HIV/AIDS calls for the overall respect and recognition of human rights in general. If member states of the AU continue to violate human rights, it would be difficult to see the Commission carrying out its mandate of protecting and promoting human rights on the continent. The co-operation of member states is therefore crucial in the fight against HIV/AIDS.

Lastly, the implementation of the above-mentioned recommendations requires resources. In its Sixteenth Annual Activity Report,⁸² the African Commission stated that in order for it to successfully discharge its mandate, it would be necessary that a significant amount of human, material and financial resources be made available to it. The fact that the Commission is starved for funds is well known, and neglecting the Commission in this way will be to the detriment of the average African. This will seriously hamper the already expressed commitment by the Commission in addressing HIV/AIDS and its human rights challenges in Africa.

⁸⁰ Para 99 Declaration of Commitment.

⁸¹ <http://www.unaids.org/about/files/UNSSP20012005.html#globalstrat> (accessed 14 July 2003).

⁸² n 54 above.

10 Conclusion

Oyegun⁸³ raises a rather obvious, yet thought provoking, question as to whether or not Africans, in general, and people living with HIV/AIDS, perceive themselves as bearers of rights, as citizens with entitlements such that they are 'active subjects and full members of society, rather than objects of a government's abuse or neglect'. The response to this question is that Africans are human beings and that this entitles them to be bearers of fundamental human rights. It is very unfortunate that, in practice, most of them do not enjoy these fundamental human rights to the maximum. Africa is now well known as a continent of perpetual suffering and this suffering is made worse by the prevalence of HIV/AIDS. The African Commission, therefore, has a daunting task in addressing HIV/AIDS within its Charter-based mandate of promoting and protecting human and peoples' rights in Africa. As an intergovernmental institution, it possesses a potential of making Africans realise their fundamental human rights and freedoms in accordance with the African Charter and other international human rights instruments.

This is the time for Africans to appreciate the importance of the Charter and the role of the Commission in addressing the issue of HIV/AIDS in Africa, as inspired by international law on human and peoples' rights in line with article 60 of the Charter. Without the Commission adopting a human rights approach to HIV/AIDS within its mandate, as guided by the International Guidelines on HIV/AIDS and Human Rights⁸⁴ and other international instruments, Africa will continue to be ravaged by violations of human rights associated with HIV/AIDS, and the statistics of those suffering from the pandemic will never cease to increase.

In the words of Mandela, 'the challenge of [HIV/] AIDS can be overcome if we work together as a global community. Let us join hands in a caring partnership for health and prosperity . . .'.⁸⁵ This will be essential in reversing the declaration by the British Prime Minister, Tony Blair, that the state of Africa is a 'scar to the conscience of the world'.⁸⁶ While the international community focuses on Africa in order to heal it from the scandalous disease of HIV/AIDS, the continent must also take steps to heal itself through its own available means. As long as the African

⁸³ n 2 above.

⁸⁴ The International Guidelines on HIV/AIDS provide an important means of supporting both human rights and public health, emphasising the synergy between these two areas.

⁸⁵ Mandela (n 1 above).

⁸⁶ Tony Blair as quoted by G Monbiot in *Guardian Unlimited* (2003-06-03) <http://www.guardian.co.uk/comment/story/0,3604,969210,00.html> (accessed 20 March 2004).

Commission does not tackle the issue of HIV/AIDS in a more robust manner, joining hands with other organisations in caring partnership, not only for health and prosperity, but for instilling a culture of human rights among our African states, which is seriously lacking, the full enjoyment of human rights in Africa will remain a pipe dream.

Same-sex relationships in Botswana: Current perspectives and future prospects

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Summary

In this article, the author examines constitutional challenges to statutes criminalising same-sex behaviour in three Southern African countries. On the one hand, in Botswana and Zimbabwe, the highest courts found (in the Kanane and Banana cases, respectively) that such statutes are not unconstitutional. On the other hand, the South African Constitutional Court invalidated statutes criminalising consensual sexual conduct between men in private. The main explanation for the difference is the fact that the South African Constitution outlaws unfair discrimination on the basis of sexual orientation, while the constitutions of the other two countries do not. However, the author argues that the courts in Botswana and Zimbabwe could have reached a different conclusion, had they creatively applied a broad and generous interpretative approach. Changes to the status quo depends more on the actions of those affected by these laws than on judicial interpretation.

1 Introduction

Sexual behaviour in society is generally predicated on heterosexuality and as a result, any exhibition of homosexual tendencies is regarded as deviant behaviour and an affront to morals and decency.¹ In regulating

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¹ See AB Tafa 'Right to sexual orientation: The line of the Botswana government' in Ditshwanelo Conference on Human Rights and Democracy, 17–19 November 1998, Gaborone, Ditshwanelo, (2000) 127.

sexual behaviour between consenting adult males and females, the law performs the function of prohibition through the criminalisation of homosexual activity and attempts to organise relationships in the public and private sphere through legal engineering.² This is manifested in the regulation of heterosexuality and its concomitant demands for conformity and its relegation of homosexuals into the criminal realm. In recent years there has been a wave of agitation for reform in many countries for the decriminalisation of homosexual activity, with some measure of success.³ The agitation has taken the form of attack on the criminalisation of homosexual activity as a denial of the civil rights of those who exhibit that tendency.

In Botswana there has not been any noticeable agitation for such reform, but the recent decision of the Court of Appeal in *Utjiwa Kanane v The State*⁴ has brought into the public domain same-sex relationships which had hitherto been discussed, if at all, by whispers and innuendos in private. This decision comes in the wake of a number of similar decisions in neighbouring countries such as South Africa and Zimbabwe. This paper examines the issues raised in the case, comparing them with those raised in South African and Zimbabwean cases and ascertaining whether same-sex relationships have a future in the law of Botswana.

2 The *Utjiwa Kanane* case

In March 1995, the appellant was brought before the Magistrate's Court and charged with the commission of two offences, namely committing an 'unnatural offence, contrary to section 164(c) of the Penal Code', and committing 'indecent practices between males, contrary to section 167 as read with section 33 of the Penal Code'.⁵ Section 164(c) provides as follows:⁶

Any person who . . . permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

² See D Cooper & D Herman 'Getting 'the family right': Legislating heterosexuality in Britain, 1986–1991' (1991) 10 *Canadian Journal of Family Law* 41, cited by SSM Edwards *Sex and gender in the legal process* (1996) 52.

³ See (2003) 116 *Harvard Law Review* 2007–2012 and E Steyn 'On the international recognition of gay love' (2003) 2 *Journal of South African Law* 340.

⁴ Criminal Appeal No 9 of 2003 (30 July 2003) unreported.

⁵ The section provides that where the Code does not specifically provide for punishment for an offence, a punishment of a maximum term of two years' imprisonment or a fine or both shall be imposed.

⁶ The section was amended by sec 21 of the Penal Code (Amendment) Act 1998, by substituting the words 'any other' for the word 'male' contained in the section. One of the objectives of the Bill, which eventually became the 1998 Act, was to enable sexual offences to be applicable to both sexes. See Bill No 1 of 1998, *Government Gazette* of 23 January 1998.

Section 167 provides as follows:⁷

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit an act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of an offence.

In relation to the first offence, it was alleged that on 26 December 1994, at Maun Village, the appellant 'permitted Graham Norrie, being male, to have carnal knowledge of him (Utjiwa Kanane) against the order of nature'. The particulars of the second offence were that the appellant, a male person, on 26 December 1994, at Maun Village, 'committed an act of gross indecency with Graham Norrie, a male person'. The appellant pleaded not guilty to both charges and averred that the sections of the Penal Code under which he was charged were *ultra vires* section 3 of the Botswana Constitution. It was common cause that this averment raised a constitutional issue, which ought to be determined by the High Court before the trial could proceed. Accordingly, in terms of section 18(3) of the Constitution, the case was referred to the High Court for determination. Section 18(3) provides:

If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

The essence of the appellant's contentions in the High Court was that the stated sections of the Penal Code, (a) discriminate against male persons on the ground of gender and offend against their right of freedom of conscience, of expression and of privacy, assembly and association entrenched in section 3 of the Constitution,⁸ and thus contravened that section; and, (b) hinder male persons as contained in sections 13⁹ and 15¹⁰ of the Constitution by discriminating against males on the basis of their gender and thus contravened those sections.

⁷ The section was amended by sec 22 of the Penal Code (Amendment) Act 1998 by deleting the word 'male' wherever it appears and inserting the words 'or her' immediately after the word 'him' and 'or herself' immediately after the word 'himself'. For a discussion of the amendments, see Tafa (n 1 above) 128 and DG Boko 'The case for the decriminalisation of voluntary homosexual conduct in Botswana' in Ditshwanelo (n 1 above) 129.

⁸ The section grants every person in Botswana, irrespective of his or her race, place of origin, political opinions, colour, creed or sex, fundamental rights and freedoms of the individual, namely life, liberty, security of the person, protection of the law; freedom of conscience, of expression, assembly, association and protection for privacy of his or her home and other property and from deprivation of property without compensation.

⁹ The section provides for the protection of freedom of assembly and association.

¹⁰ The section provides for, *inter alia*, protection from discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed.

Furthermore, the alleged offences, it was contended, were committed in private between two consenting male adults. It was submitted on behalf of the defendant that the traditional legal attitudes to sex were founded on a procreation fetish, and therefore under such an approach, all non-procreative sex was deemed aberrational, deviant and unnatural, thus making the ambit of the so-called 'unnatural offences' being far from clear, so that it was impossible for any charge under section 164(c) of the Penal Code to satisfy the requirements of section 10(2)(b) of the Botswana Constitution.¹¹

Mwaikasu J, in a lengthy and detailed judgment,¹² held that the sections of the Penal Code complained of did not violate any of the provisions of the Constitution and were in accordance with them. The learned judge was of the view that the application essentially concerns the place and extent of public morality or moral values in the criminal law of a given society. In his view, the criminal law has as its basis the public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society. Such moral values regulate the conduct of individual members of society for the good of society and provide a conducive environment for the exercise and enjoyment of the individual rights and freedoms of members of such society. He added that the conduct of any person that is seen to threaten the fabric of a given society is what falls to be proscribed under the criminal law of the society concerned. In this regard, the identification of any such moral values or norms as being of importance to the welfare of society as a whole and for the promotion of the dignity, rights and freedoms of its members is the preserve of the society concerned.

It follows, therefore, that with offences of the type the appellant was charged with, great care must be taken by the courts in interpreting the relevant provisions of the Penal Code, lest they be trapped in unconsciously importing alien notions of moral values or norms into Botswana. Great reliance was placed on the Wolfenden Report¹³ and the

¹¹ The said section provides that '[e]very person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail of the nature of the offence charged'.

¹² See Crim Trial No F94/1995 (22 March 2002) unreported.

¹³ A report by a committee set up in England, Committee on Homosexual Offences and Prostitution, in 1957, chaired by Sir John Wolfenden. The report asserted that '[i]t is not the duty of the law to concern itself with morality as such . . . [I]t should confine itself to those activities which offend against the public order and decency or expose the ordinary citizen to what is offensive or injurious.'

response to it by Lord Devlin in a series of lectures.¹⁴ Mwaikasu J approved the latter's view:¹⁵

The true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.

Mwaikasu J expressed the view that offences like 'unnatural offence', 'sodomy' and 'bestiality', though found in the Penal Codes of many African countries, are generally uncommon among indigenous African societies.¹⁶ They are the type of offences that have had their origin and predominant practices among white societies, particularly in the West and migratory white communities from there. Consequently, he asserted that these offences are more pronounced in countries like South Africa and Zimbabwe, where white settlers have imparted their influence in planting such practices, than in Botswana.

Tebbutt JP, who gave the lead judgment of the Court of Appeal, with which the other four Justices of Appeal consented, disassociated himself from the view that the offences in issue are uncommon among indigenous African societies as no evidence or authority was cited in support of it.¹⁷ On the question whether sections 164 and 167 violated the Constitution, Tebbutt JP opined that Mwaikasu J failed to appreciate that the appellant had been charged with contravening the sections as they existed prior to their amendment in 1998, and dealt with the appellant as if he had been charged with those sections in their amended form. Furthermore, it was his view that the Court should adopt a broad and generous approach to the construction of the Constitution, an approach which had earlier been adopted by a majority of the Court in

¹⁴ See *The enforcement of morals* (1965), a reprint of lectures delivered by him between 1959 and 1964. Lord Devlin was a leading figure in Britain during the years 1948–1964 and a proponent of the legalistic view of enforcement of morals. It was his view that 'the whole basis of criminal law is that there are certain standards of behaviour or moral principles which society requires to be observed and a breach of them is an offence against society as a whole'. He added that conduct that arouses 'intolerance, indignation and disgust' in society needs to be suppressed by legal order. Devlin's view was criticised by Prof Hart (*Law, liberty and morality* (1963)), who asserted, *inter alia*, that Devlin's proposition that homosexuality is a threat to society is as meaningless as Justinian's view that homosexuality causes earthquakes and that his assumption that there is a shared solidarity of morality is naïve.

¹⁵ See 21 of the transcript.

¹⁶ See AJGM Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41 *Journal of African Law* 101, where a view is expressed to the effect that whereas, culturally, a gay (homosexual) lifestyle is un-African, situational same-sex activity, at least among males, is not. See also K Botha 'A regional perspective of the right to sexual orientation' in Ditshwanelo (n 1 above) 124.

¹⁷ See 20–21 of the transcript.

Attorney General v Dow.¹⁸ Relying on *dicta* from this case,¹⁹ he held that discriminatory legislation on the basis of gender, though not expressly mentioned in section 15(3) of the Constitution, would violate section 3 of the Constitution.

Consequently, section 167 of the Penal Code, with which the appellant was charged, was clearly discriminatory on the basis of gender, either in itself or in its effect. The section was aimed entirely at male persons who committed acts of gross indecency with one another, be it in public or in private. However, he could not strike down the section in light of the 1998 amendment. With regard to section 164(c) as it stood before the 1998 amendment, it was his view that it did not discriminate on the basis of gender. As the person who commits the stipulated offence may be either male or female, the allegation that it is discriminative in nature failed. The appellant's appeal therefore succeeded in part, as the Court held that section 167, as it stood at the time when the appellant was charged, violated the Constitution but that section 164 did not.

The possible impact of the case on the law on same-sex relationships in Botswana may be seen from some of the reasons advanced by the court for not decriminalising homosexual behaviour. The pertinent questions which the court thought arose from the case were whether, at the present time and circumstances, homosexual practices between consenting adult males should be decriminalised in Botswana. Was there a class or group of gay men who require protection under section 3 of the Constitution? Should the word 'sex' in section 3 of the Constitution be broadened by interpretation to include 'sexual orientation'? These questions will be looked at below.

3 Should homosexual practices between consenting adults be decriminalised?

In trying to answer this question, Tebbutt JP noted the conclusion reached in the High Court by Mwaikasu J that Botswana society did not at the present time require the decriminalisation of homosexual practices between consenting adults because such practices were generally uncommon among indigenous African societies. As indicated above, Tebbutt JP disassociated himself and the Court from this and other reasons advanced by the learned judge for this conclusion. He nevertheless affirmed that the time had not yet arrived to decriminalise

¹⁸ [1992] BLR 119 at 129–132 *per* Amissah JP. For a commentary on the case, see EK Quansah 'Unity Dow v Attorney General of Botswana — One more relic of a woman's servitude removed?' (1992) 4 *African Journal of International and Comparative Law* 195; (1993) 5 *African Journal of International and Comparative Law* 189.

¹⁹ [1992] BLR 119 122.

homosexual practices even between consenting adults in private.²⁰ Gay men and women, in his view, did not presently represent a group or class which had been shown to require protection under the Constitution. Although no evidence was before the Court as to the extent of public opinion in favour of the decriminalisation of homosexual practices, he was supported by the legislature's passing of the Penal Code (Amendment) Act of 1998, which amended sections 164 and 167 and broadened other aspects of the Code.²¹ Tebbutt JP also took judicial notice of the incidence of HIV/AIDS,²² both worldwide and in Botswana,²³ and concluded that the amendments made by the legislature showed public concern for the spread of HIV/AIDS, and far from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of a contrary attitude. He cited with approval a *dictum* from the majority judgment in the Zimbabwean case of *Banana v The State*²⁴ to the following effect:

From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete.

However, he added that, although the courts may not be dictated to by public opinion, the courts would be loathe to fly in the face of public opinion,²⁵ especially if expressed through legislation passed by those elected by the public to represent them in the legislature.²⁶ As Lord Bingham put it in *Reyes v R*:²⁷

[I]n a liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences.

²⁰ See 26 of the transcript. See Boko (n 7 above) for arguments in favour of decriminalisation of voluntary homosexual conduct.

²¹ See eg secs 2 & 3 of the 1998 Act, which broadened the definition of rape and increased the punishment for the offence by imposing a minimum term of 10 years' imprisonment and a maximum term of life imprisonment. The latter section introduced compulsory HIV tests for convicted rapists and, depending on the outcome of the test, the minimum sentence may be either 15 or 20 years.

²² UNAIDS estimates that the global HIV/AIDS epidemic killed about 3 million people in 2003 and that an estimated 5 million people acquired HIV, bringing to 40 million the number of people living with the virus around the world. See AIDS Epidemic Update 2003 at <http://www.unaids.org> (accessed 30 September 2004).

²³ In 2003 an estimated 39% of the Botswana's population was infected with HIV. See source cited in n 22 above.

²⁴ (2000) 4 LRC 621 (ZSC) 670–671 *per* McNally JA.

²⁵ On the effect of public opinion on constitutional interpretation, see the English case of *Reyes v R* [2002] 2 LRC 606 607, approving a *dictum* from the South African case of *S v Makwanyane* [1995] 1 LRC 269 311; 1995 3 SA 391 (CC) *per* Chaskalson P.

²⁶ See 23 of the transcript.

²⁷ *Reyes v R* (n 25 above) 620. The *dictum* was approved by the Court of Appeal in *Badisa Moatshe & Others v The State* Cr App No 26/2001, unreported and reiterated in the present case.

Whilst the court will jealously guard the rights of citizens against violations of those rights by the legislature, Tebbutt JA was of the view that the protection of such rights was subject to the limitation that enjoyment of such rights does not prejudice the rights and freedoms of others, or the public interest, as provided for in section 3 of the Constitution. Consequently, public interest must always be a factor in the court's consideration of legislation, particularly where such legislation reflects a public concern.

4 Is there a class of gay men requiring constitutional protection?

In answering this question, the Court of Appeal was of the view that 'gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution'.²⁸ The Court reasoned that, whilst there must be a need for the courts to be alive to the fact that the constitutional rights of citizens of Botswana must, where circumstances demand, keep abreast of similar rights in other kindred democracies,²⁹ the time had not yet arrived for the adoption of progressive trends taking place elsewhere. This conclusion was borne out by the fact that legislative enactments in recent years have tended to take a sterner view of sexual offences. Particular reliance was placed on the Penal Code (Amendment) Act 1998, which in a number of sections broadened the scope and ambit of offences relating to sexual acts. The Court acknowledged that it was for the legislature to decide, subject to the confines of the Constitution, what conduct should be regarded as criminal and in doing so, the legislature must inevitably take a moral position in tune with what it perceives to be the public mood.

5 Should the word 'sex' used in the discriminatory provisions of the Constitution be broadened to include 'sexual orientation'?

'Sexual orientation' is said to be:³⁰

defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of

²⁸ See 25 of the transcript.

²⁹ The court surveyed changing trends in attitudes to sexual orientation in South Africa, England, USA and in Europe. See 12–16 of the transcript.

³⁰ See E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450–452. The definition was adopted by Ackermann J in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 1 SA 6 (CC) 21. See also 'Sexual orientation and the law' by the editors of the *Harvard Law Review* in 1989 *Harvard Law Review* 1511 n 1.

the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.

The Botswana Constitution does not make any reference to a right to or protection from discrimination on the ground of sexual orientation. A possible way to accommodate sexual orientation within the Constitution would be to extend the definition of 'discriminatory' in section 15(3) to cover it. There is precedent for the extension of the provisions of the said subsection. In *Attorney General v Dow*, the Court held that the classes of discrimination contained in section 15(3) of the Constitution were not meant to be closed. The classes mentioned therein were mere highlights of some vulnerable groups or classes that might be affected by discriminatory treatment. Consequently, the Court extended the ambit of the subsection to include 'sex' in the sense of male or female or gender. In the present case, while acknowledging this precedent, the Court did not think it appropriate to further extend the ambit of the subsection to include sexual orientation.

Why, one may ask, are gays and lesbians not classified as a new category of persons needing protection? If 'sex' in the sense of male or female or 'gender' was found worthy of inclusion in section 15(3), why not 'sexual orientation'? The answer, it would seem, is that the legislature is not ready for such an extension. It needs to be pointed out that the fact that the legislature was not ready to accept 'sex' as a basis for discrimination, however, did not deter the Court in *Dow's* case from including 'sex' in the subsection, albeit by a majority of three to two.³¹

In light of these views, expressed by the highest court in Botswana, the current perspective seems therefore to be that same-sex relationships will remain relationships prohibited by law. This is due to the fact that public opinion shaped through a democratically elected legislature is not supportive of legalising them. Present trends, judged from legislative enactments, point to a hardening of attitudes towards such relationships. It will be instructive to compare the emerging trends in South Africa and Zimbabwe, countries with which Botswana shares a legal tradition.

³¹ It took the legislature some three years to enact the Citizenship (Amendment) Act 1995 (now consolidated and re-enacted as the Citizenship Act 1998) to reflect the decision of the court that the then sec 4(1) of the Citizenship Act was unconstitutional.

6 Judicial attitudes to same-sex relationships in South Africa

The constitutional provisions relevant to the issue at hand are found in sections 9 and 10 of the South African Constitution Act 108 of 1996. Section 9 provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 10 provides: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

A number of cases have been brought before the Constitutional Court to determine various aspects of the concept of sexual orientation as envisaged under subsection (3) and its relationship with other subsections of section 9. A brief look will be taken at some of these cases.

In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*³² the South African Constitutional Court was faced with the question whether the following laws were unconstitutional and invalid: the common-law offence of sodomy, the inclusion of sodomy in schedules to the Criminal Procedure Act 51 of 1977, the Security Officers Act 92 of 1987, and section 20A of the Sexual Offences Act 23 of 1957, which prohibits sexual conduct between men in certain circumstances. The Court unanimously held³³ that the offences, all of which were aimed at prohibiting sexual intimacy between gay men, violated the right to equality in that they unfairly discriminated against gay men on the basis of sexual orientation. Such discrimination is presumed to be unfair since the Constitution expressly includes sexual orientation as a prohibited ground of discrimination. The Court expressed the view that gay people were a vulnerable minority

³² n 30 above.

³³ Ackermann J delivered the judgment with which the other judges concurred (Sachs J wrote a separate concurring judgment).

group in society. Sodomy laws criminalised their most intimate relationships and the Court felt that this devalued and degraded them and therefore constituted a violation of their fundamental right to dignity. Furthermore, the offences criminalised private conduct between consenting adults, which caused no harm to anyone else. This intrusion on the innermost sphere of human life violated the constitutional right to privacy. The fact that these offences, which lie at the heart of the discrimination, also violated the rights to privacy and dignity, strengthened the conclusion that discrimination against gay men was unfair.

Finally, the Court found no legitimate reason why the rights of gay men should be limited in the way set out in the schedules to the statutes referred to above. The Court added that open and democratic societies around the world were increasingly turning their backs on discrimination on the basis of sexual orientation, even though South Africa was the first to do so in its Constitution.³⁴ The Court therefore concluded that the common-law offence of sodomy, its inclusion in certain statutory schedules, and the relevant section of the Sexual Offences Act, were not reasonable or justifiable limitations on the rights of gay men to equality, dignity and privacy, and accordingly were unconstitutional and invalid.

In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*³⁵ the Constitutional Court was again asked to determine the constitutionality of a statute, namely section 25(5) of the Aliens Control Act 96 of 1991, and if it was found to be unconstitutional, whether the Court may insert words into the statute to remedy the unconstitutionality. This subsection was alleged to fail to give persons, who are partners in permanent same-sex life partnerships, the benefits it extends to 'spouses' under that subsection. The Court therefore found it necessary to determine the constitutional validity of the subsection. The constitutional rights of equality and dignity were found to be germane in determining the constitutionality of the subsection. It was felt that this subsection reinforced harmful stereotypes of gays and lesbians. This conveyed the message that such people lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected and constituted an invasion of their dignity. The section was held to discriminate unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limited their equality rights and their right to dignity. It did so in a way that was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

³⁴ See Cameron (n 30 above) 450.

³⁵ 2000 2 SA 1 (CC).

The Court accordingly held that the omission from the section of partners in permanent same-sex life partnerships was inconsistent with the Constitution. The Court therefore concluded that there were only two ways to remedy the defects in the provision before it, that is, by declaring the whole subsection invalid, or by reading words into it to cure the defects. The Court adopted the latter option and decided that the words 'or partner in a permanent same-sex life partnership' should be added to the section. Permanent life partners were said to be those who had an established intention to cohabit with one another permanently.

In *Satchwell v President of South Africa*,³⁶ the Constitutional Court expressed the view that, depending on the circumstances of a particular case, a duty of support may be inferred as a matter of fact in cases of persons involved in permanent same-sex life partnerships.³⁷ This was so as a result of the range of family formations having widened in South African society. In *Du Plessis v Road Accident Fund*,³⁸ the Supreme Court of Appeal extended the common-law dependant's action to cover a partner in a same-sex permanent life relationship, similar in other respects to marriage, where the deceased owed that partner a contractual duty of support.

In *J & B v Director General, Department of Home Affairs and Others*,³⁹ the Constitutional Court held that section 5 of the Children Status Act 82 of 1987 was unconstitutional in that it unfairly discriminated on the basis of sexual orientation, in violation of the equality provisions in the Constitution; and ordered that it should be read to provide the same status to children born from artificial insemination to same-sex permanent life partners as it currently provides for children born to heterosexual married couples.⁴⁰

In all these cases, the constitutional argument that the rights of gays and lesbians to equality, dignity and privacy have been violated, has prevailed. This outcome is based on the fact that the South African Constitution expressly prohibits discrimination on the basis of one's sexual orientation. This prohibition is further strengthened by section 9(4), which provides that no person may unfairly discriminate against anyone on one or more of the grounds stated in subsection (3), and section 9(5), which presumes that such discrimination is unfair unless it is established that the discrimination is fair. The immediate political past of the country

³⁶ 2002 6 SA 1 (CC).

³⁷ Para 25.

³⁸ 2004 1 SA 359 (SCA) 362 para 1.

³⁹ 2003 5 BCLR 463 (CC).

⁴⁰ See also *Satchwell v President of the Republic of South Africa & Another* 2003 4 SA 266 (CC), where the court ruled that sec 9 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 discriminated against same-sex partners on the ground of sexual orientation.

may inform the rationale behind these prohibitions. As Ackermann J observed in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*:⁴¹

In a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.

With this background, gays and lesbians were recognised as a vulnerable minority group who had no chance of influencing legislation to better their lot, except by relying on the Bill of Rights provisions in the Constitution. Consequently, the courts have taken a vigorous stand in protecting their rights.

7 Judicial attitudes to same-sex relationships in Zimbabwe

One of the most notable judicial decisions on same-sex relationships in Zimbabwe is the case of *Banana v The State*.⁴² The appellant was a former non-executive president of Zimbabwe. In 1997, his aide-de-camp, D, was convicted by the High Court of having murdered a police constable. The Court held that it could not reject as false the uncontradicted claim that D had been traumatised as a result of being the victim of repeated homosexual abuse by the appellant. Subsequently, after police investigation into the allegations of the common-law crime of sodomy, unlawful intentional sexual relations *per anum* between two human males, the appellant was indicted for trial by the High Court. He was convicted, *inter alia*, on two counts of sodomy. He appealed against the conviction to the Supreme Court. The Court had to decide whether, amongst others, the common-law crime of sodomy was in conformity with section 23 of the Zimbabwean Constitution, which guaranteed protection against discrimination on the ground of gender.

By a majority of three to two, the Court held that section 23 of the Constitution did not include an express prohibition against discrimination on the ground of sexual orientation. That provision prohibited discrimination between men and women, not between heterosexual men and homosexual men. The latter discrimination was

⁴¹ 1999 1 SA 6 (CC) para 60.

⁴² (2000) 4 LRC 621 (ZSC).

prohibited only by a constitution which proscribed discrimination on the grounds of sexual orientation. The real complaint by homosexual men, in the majority's view, was that they were not allowed to give expression to their sexual desires, whereas heterosexual men were. In so far as that was discrimination, the majority thought it was not the sort of discrimination which was prohibited by section 23 of the Constitution. The majority further expressed the opinion that the argument that the discrimination arose from the fact that men who performed that act with women were not penalised, although technically correct, lacked common sense and real substance. It added that the law had properly decided that it was unrealistic to try to penalise such conduct between a man and a woman. This did not lead to a conclusion that the law was discriminating when such conduct took place between men. The real discrimination was against homosexual men in favour of heterosexual men, which was not discrimination on grounds of gender. Consequently, the majority concluded that the criminalisation of consensual sodomy was not discrimination under the Constitution and even if that was the case, the law in question would stand the constitutional test of whether it was 'not shown to be reasonably justifiable in a democratic society'. The appellant's conviction was therefore upheld. The following *dictum* from McNally JA succinctly expressed the reasoning behind the majority's decision:⁴³

In the particular circumstances of this case, I do not believe that the 'social norms and values' of Zimbabwe are pushing us to decriminalise consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matters of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal. I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual freedom. Put differently, I do not believe that this Court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the constitution of a country whose social norms and values in such matters tend to be conservative.

Of the three jurisdictions, it is not surprising that the vigour with which the South African Constitutional Court has tackled the issue of gay and lesbian protection under its Constitution, is not evident in the other two jurisdictions. This is attributable to the fact that it is only in the South African Constitution that there is an expressed prohibition against discrimination on the grounds of sexual orientation. This notwithstanding, the Botswana Court of Appeal and Zimbabwean Supreme Court both have a history of adopting a broad and generous approach to constitutional interpretation, and one would have thought that such an approach should have been adopted in the same-sex cases that have come before them.

⁴³ 671.

In the Botswana case of *Utjiwa Kanane v The State*, Tebbutt JP reiterated the generous approach to constitutional interpretation when he restated the position adopted by the Court in the landmark case of *Attorney General v Dow*.⁴⁴ He reiterated that, in construing the Constitution, a broad and generous approach should be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together in order to effect the objective of the Constitution, and where such rights and freedoms were conferred on persons by the Constitution, derogation from such rights and freedoms should be narrowly or strictly construed.⁴⁵

Similar sentiments were expressed by the Zimbabwean Supreme Court in *Banana v The State*. McNally JA⁴⁶ approved the generous and purposive approach to constitutional interpretation put forward by Gubbay CJ in *Smyth v Ushewokunze*.⁴⁷ Despite the adherence to this approach to constitutional interpretation, the two courts took a seemingly conservative stand in interpreting their respective constitutions with regard to same-sex relationships. *Kanane's* case presented the Botswana Court of Appeal with an opportunity for some creative interpretation of the discriminatory provisions of the Constitution, an opportunity which was unfortunately missed.

8 Future prospects of law reform on same-sex relationships

As set out above, the attitude of the Botswana Court of Appeal to same-sex relationships is conservative in nature when compared to the South African Constitutional Court. This admittedly is due to the fact that, whilst the South African Constitution expressly prohibits such discrimination, the Botswana Constitution does not. Although there is a precedent in the Botswana Court of Appeal for extending the ambit of the definition of 'discriminatory' in section 15(3) of the Constitution, the Court did not think the time was ripe for the extension of that subsection to include sexual orientation. Judging from the views expressed in *Kanane's* case, the future prospects for law reform concerning same-sex relationships in Botswana look bleak. The judiciary does not have an enviable record of activism,⁴⁸ and as such no prospect of help will be

⁴⁴ [1992] BLR 119 (CA) 130–132 *per* Amisshah P.

⁴⁵ 8–9 of the transcript.

⁴⁶ 671.

⁴⁷ (1997) 4 BHRC 262 269. A similar approach is also adopted by the South African Constitutional Court. See *S v Makwanyane* (n 25 above) 282–283 *per* Chaskalson P.

⁴⁸ See AJGM Sanders 'Constitutionalism in Botswana: A valiant attempt at judicial activism' (1984) XVI *Comparative and International Law Journal of Southern Africa* 350 and (1984) XVII *Comparative and International Law Journal of Southern Africa* 49.

forthcoming from there. The executive's attitude to same-sex relationship is, at best, one waiting to be shaped by majority sentiments of the people of Botswana and, at worst, one of denial — such relationships do not exist in Botswana.⁴⁹

The executive position was articulated as follows by a Deputy Attorney General:⁵⁰

Constitutional orders and/or legal regimes (including their amendment) have, particularly in this Republic, by and large been grounded in the changing and/or evolving mores and attitudes of our people. It is for this reason that, throughout our history as a nation, the Parliamentary Law Reform Committee⁵¹ has touched base with our people with respect to major and/or far-reaching proposed constitutional or other legal amendments. I have no doubt that even with regard to the question of the recognition of rights to sexual orientations (other than the conventional), the same consultative machinery and processes shall be invoked and the government be guided by majority sentiment on the issue. What government would, however, want to guard against — as indeed has been the case with other matters — is the substitution of the views of a small (but vocal) minority for those of the majority.

Furthermore, there is no known pressure group currently championing the cause of gay and lesbian rights in order to keep the issue constantly in the public domain.⁵²

The sum total of the prevailing circumstances, therefore, can be said to be that parties to same-sex relationships will have to conform either to established norms of heterosexuality, or become 'unapprehended felons'⁵³ by persisting in their homosexual practices. Whether there are a significant number of persons within Botswana's society practising homosexuality or exhibiting homosexual tendencies is a moot point because no empirical evidence exists on this. *Kanane's* case demonstrates that until the numbers significantly increase, and the yardstick for this is unclear, gays and lesbians will remain beyond the pale of constitutional protection.

⁴⁹ See M Olivier 'The reality of being gay in Botswana' in Ditshwanelo (n 1 above) 135.

⁵⁰ See Tafa (n 1 above) 128.

⁵¹ The track record of this Committee is dismal. See AJGM Sanders 'Ten years of the Botswana Matrimonial Causes Act — Future proposals for divorce reform' (1982) 26 *Journal of African Law* 163 167.

⁵² A representative of an organisation called Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo) presented a paper at a Human Rights Conference in 1998. See Ditshwanelo (n 1 above) 135. Hitherto and subsequent to the said conference nothing much has been heard of the organisation.

⁵³ See Cameron (n 30 above) 455.

9 Conclusion

The wind of change blowing through kindred liberal democracies for the decriminalisation of homosexual practices will take some time to reach Botswana. The country is doggedly holding on to established heterosexual norms and is not in any hurry to effect changes. One may ask for how long the country can stem the tide of change and who will determine the time for change, if that time comes. On the present evidence, it would seem that the Court of Appeal has deferred to the legislature to determine the time frame within which a change, if any, should take place. Judging from the track record of the legislature on matters of gender equality in particular,⁵⁴ and law reform in general,⁵⁵ gays and lesbians have a long walk from the closet to the living room, not to talk about coming out onto the front porch.

The future recognition of same-sex relationships, one may conclude, lies mainly in the hands of those who wish to engage in this type of relationship. Despite the many obstacles faced by and prejudices shown against them by society, they must stand up and be counted in order to influence a shift in public opinion, leading to legislative and constitutional changes in the *status quo*. Their heterosexual compatriots are not likely to do it for them.

⁵⁴ n 31 above.

⁵⁵ Machinery for law reform is woefully inadequate and this has severely hampered systematic reforms of many of the archaic laws still scattered around in the statute books. The Law Reform Committee of parliament is presently the only body charged with law reform and its activities, if any, have failed to make the desired effect on law reform; n 50 above.

Privatisation of water in Southern Africa: A human rights perspective

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Summary

As is the case elsewhere, privatisation in Southern Africa has since the 1990s extended to the provision of basic services. Controversy surrounds the issue whether the involvement of the private sector in the provision of basic services could enhance the enjoyment of the socio-economic rights relating to those services. This article argues that, while privatisation as a policy per se may not be objectionable, human rights law prescribes standards to which privatisation measures must conform. Southern African countries have certain socio-economic rights obligations emanating from CESC, the African Charter and their domestic constitutions. It is argued that privatisation does not mean a delegation of state obligations in relation to human rights, although the question of privatisation has reinforced the call for the recognition of human rights obligations of private actors as well. Some of the obligations that states have in the context of the privatisation of water are explored.

1 Introduction

The policy of privatising state enterprises did not gain prominence until the 1980s.¹ While the momentum for privatisation in Europe might have

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¹ P Cook & Y Uchida 'Privatisation and economic growth in developing countries' Centre on Regulation and Competition, Working Paper Series No 7, October 2001, available at <http://idpm.man.ac.uk> (accessed 30 May 2003); K Ascher *The politics of privatisation: Contracting out public services* (1987) 3.

been driven by the liberalisation of markets and budgetary constraints experienced by governments,² Southern African countries embarked on privatisation initiatives as a key part of the policy, conditionality on which the approval of aid or loans depended.³

Unlike the early 1980s, privatisation has since extended to the provision of basic services in Southern Africa. A 15-year contract for Maputo and five-year management contracts for four other cities in Mozambique were concluded and are now in operation. In Namibia, bulk water commercialisation commenced on 1 April 1998. In Malawi, Mauritius and Zambia, plans to privatise the provision of water were approved in June 1995, February 1998, and May 1995 and June 2000 respectively.⁴ In South Africa, the provision of water and sanitation was privatised in Nelspruit between 1996 and 1999. Similar services in Dolphin Coast and Durban were in 1999 contracted to multinational enterprises, SAUR International and Bi-Water respectively, while in 2001, those in Johannesburg were contracted out to Water and Sanitation Services of South Africa. In Zimbabwe, the water privatisation concession was stalled after the corporation involved, Bi-Water, a UK firm, cancelled it owing to the inability of the people to pay for services.⁵

The pressure to privatise the delivery of water is no longer solely exerted by the World Bank and the International Monetary Fund (IMF) (by imposing it as condition of debt relief or aid funds).⁶ Multinational corporations, multilateral institutions such as the European Union and the World Trade Organisation, and donor agencies such as Britain's DFID, Germany's GTZ and the United States' USAID have become key supporters of this policy.⁷ Recent international and regional forums, such as the African Ministerial Conference on Water held in Nigeria in 2002, and the International Fresh-Water Conference held in Bonn in 2001, also endorsed the idea of privatising water.⁸ The newly adopted New Partnership for Africa's Development (NEPAD) has also given privatisation a fresh impetus.⁹

² Cook & Uchida (n 1 above) 2.

³ O Letwin *Privatising the world: A study of international privatisation in theory and practice* (1988) 23.

⁴ Rural Development Services Network 'Against the water current: Water and privatisation in the Southern African region' Briefing paper for the EU/SADC Civil Society Conference held in Denmark on 3–5 November 2002, available at <http://www.rdsn.org.za/news/documents.htm> (accessed 30 June 2003).

⁵ As above.

⁶ See generally P Bond *et al* 'Water privatisation in SADC: The state of the debate' (on file with author).

⁷ As above.

⁸ Rural Development Services Network (n 4 above).

⁹ See AIDC 'Privatisation in South Africa — The facts' *Alternatives* October/November 2002.

This article argues that, unless privatisation policies are structured by human rights principles, they may not result in more or progressive access to relevant basic services, especially by poor people. It further provides a theoretical human rights framework within which privatisation of water should be analysed. The article starts by defining the concept of privatisation and its links to the notions of corporatisation, liberalisation and deregulation, and human rights. Following this, it investigates and critiques arguments in favour of the assertion that privatisation can enhance the enjoyment of human rights. It is argued that evidence supporting an affirmative contribution of privatisation in this regard is scanty and at best speculative. The article proceeds to argue that, although private sector participation in the delivery of basic services *per se* is not objectionable from a human rights perspective, human rights establish a normative framework with which privatisation measures, like other public measures, must comply in order for them to be acceptable. The precise human rights obligations of the state in the context of privatisation are investigated in the last part.

2 Conceptual framework

2.1 The meaning of privatisation and related concepts

Privatisation is an ambiguous term, but its multiple meanings have attracted little controversy. As a process and broadly defined, it entails the reduction of the role of the government in asset ownership and service delivery and an increase in the role of the private sector in these areas.¹⁰ While privatisation is commonly associated with full divestiture (complete transfer of a public enterprise to a private actor),¹¹ it may take other forms than an outright sale of assets. Examples of its other forms include partnerships between public and private institutions, leasing of business rights by the public sector to private enterprises, outsourcing or contracting out specific activities to private actors, management or employee buyout, and discontinuation of a service previously provided by the public sector on the assumption that, if it is necessary, a private actor might engage in its delivery.¹²

¹⁰ DJ Gayle & JN Goodrich 'Exploring the implications of privatisation and deregulation' in DJ Gayle & JN Goodrich (eds) *Privatisation and deregulation in global perspective* (1990) 1 3.

¹¹ See DA McDonald 'Up against the (crumbling) wall: The privatisation of urban services and environmental justice' in DA McDonald (ed) *Environmental justice in South Africa* (2002) 292 296–297.

¹² See C Vuylsteke 'Techniques of privatisation of state-owned enterprises: Methods and implementation' World Bank Technical Papers (1988) 8; FM Andic 'The case for privatisation: Some methodological issues' in Gayle & Goodrich (n 10 above) 37–39.

Privatisation is intricately linked to other market principles, such as liberalisation and deregulation.¹³ Indeed, it has been argued that this policy has a greater chance of success in a market-friendly environment.¹⁴ Deregulation entails the reduction or elimination of specific governmental rules and regulations that apply to private business, including removal of regulations that prevented the private sector from competing with a nationalised monopoly.¹⁵ Generally, corporate interest groups support at least some socio-economic regulations, especially where they provide competitive advantage for specific firms (for example through certification, permit and licensing systems that restrict entry into business).¹⁶ However, deregulation is mostly preferred in the arena of social responsibility. For example, corporations prefer corporate self-regulation through corporate codes, social audits and industry codes to binding human rights obligations or legislative procedures.¹⁷

Closely related to and often used in conjunction with deregulation is the principle of liberalisation, which involves measures aimed at opening up the market for competition. Such measures include tariff removals or reduction, removal of subsidies, and introduction of cost-recovery measures. The implications of human rights for the privatisation of basic services cannot be discussed in isolation from these principles.

The link between privatisation and the concept of corporatisation is significant. This link is increasingly being employed in the delivery of basic services in Southern Africa, parallel to or simultaneously with privatisation.¹⁸ Corporatisation is a method of institutional reform that incorporates many principles inherent in privatisation, such as performance-based management and full cost recovery.¹⁹ The principal objective of corporatising a public service is to let it function as a business.²⁰ What distinguishes it from privatisation is that ownership, control and management of the assets and other utilities remain firmly in

¹³ According to Vuylsteke, 'privatisation is often only an element of a broader economic policy (or reform) that may include deregulation and liberalisation as well'. See Vuylsteke (n 12 above) 1.

¹⁴ S Kikeri *et al* *Privatisation: The lessons of experience* (1992) 4–5.

¹⁵ Gayle & Goodrich (n 10 above) 82.

¹⁶ n 15 above, 5.

¹⁷ See eg Institute of Directors *King Report on Corporate Governance for South Africa 2001*, available at <http://www.iodsa.co.za/loD%20Draft%20King%20Report.pdf> (accessed 30 June 2003).

¹⁸ In South Africa, eg, the draft Electricity Distribution Restructuring Bill establishes six regional electricity distributors that will operate as commercial entities. In Namibia, the Namibian Water Corporation is a publicly owned corporation.

¹⁹ DA McDonald 'Privatisation and the new ideologies of service delivery' in DA McDonald & L Smith (eds) *Privatising Cape Town: Service delivery and policy reforms since 1996* (2002) 3 11.

²⁰ Bond (n 6 above).

the public sector.²¹ Thus, human rights obligations of a corporatised entity are easier to pinpoint than in the case of privatisation. However, since a corporatised entity is also bound by similar market principles applicable to privatisation, this article has implications for corporatisation as well.

2.2 The link between water privatisation and human rights

Policies on water provision are directly linked to the enjoyment of such rights as the rights to water, housing, life and health. These rights are conventionally referred to as economic, social and cultural rights. They aim to ensure access by all human beings to those resources, opportunities and services necessary for an adequate standard of living.²² What motivates their recognition as human rights is the realisation that the capacity to enjoy other rights, such as the rights of association, equality, political participation and expression, is intricately linked to access to a basic set of social goods.²³ Economic, social and cultural rights are particularly relevant to vulnerable and disadvantaged groups of people,²⁴ because of the important role they can play in the eradication of poverty and in bridging socio-economic inequalities in society.²⁵

Most Southern African countries (including Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe) are parties to the African Charter on Human and Peoples' Rights (African Charter or Charter). The African Charter departs radically from traditional international and regional human rights instruments by giving express recognition to a range of economic, social and cultural rights, along with civil and political rights, as justiciable rights.²⁶ Although the right to water is absent in the Charter, the rights to health, life, family protection, and economic, social and cultural development are expressly recognised. The right to water can be implied in these rights. This construction is consistent with the

²¹ L Smith 'The corporatisation of water' in McDonald & Smith (n 19 above) 35 43; McDonald (n 19 above) 11.

²² S Liebenberg & K Pillay (eds) *Socio-economic rights in South Africa* (2000) 16.

²³ J de Waal *et al* *The Bill of Rights handbook* (2000) 398.

²⁴ See also Liebenberg & Pillay (n 22 above) 16.

²⁵ International Council on Human Rights Policy *Duties sans frontières: Human rights and global social justice* (2003) 17–19.

²⁶ See generally J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for economic, social and cultural rights in Africa' (1995) 26 *California Western International Law Journal* 10; C Odinkalu 'Analysis of paralysis or paralysis of analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327; SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177.

approach of interpretation adopted by the African Commission on Human and Peoples' Rights (African Commission), which monitors the implementation of the African Charter, in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (SERAC case).²⁷ In this case, the African Commission found violations of the rights to housing and food, which are not expressly recognised by the African Charter, by holding that they were implicitly entrenched in the rights to property, family protection and health, and the rights to life, health and economic, social and cultural development respectively.

With the exception of Botswana, South Africa, Swaziland and Mozambique, most Southern African countries are also parties to the International Covenant on Economic, Social and Cultural Rights (CESCR). Like the African Charter, CESCR does not recognise the right to water. However, the Committee on Economic, Social and Cultural Rights (Committee on ESCR), which monitors the implementation of CESCR, has stated that this right is implicitly recognised in the rights to an adequate standard of living, food, housing, health, life and human dignity.²⁸ Furthermore, the Committee on ESCR has construed the right to adequate housing broadly to imply 'sustainable access' to, among other things, 'safe drinking water'.²⁹

It is noteworthy that Southern African constitutions adopted after 1990 are increasingly recognising economic, social and cultural rights as justiciable rights.³⁰ South Africa has been internationally acclaimed for not only guaranteeing these rights in its 1996 Constitution, but also leading the way in developing constitutional jurisprudence on these rights.³¹ Although not as detailed as the South African Constitution, the 1990 Constitution of Mozambique also contains a range of socio-economic rights, including the rights to property, work, inheritance, education and health. The 1994 and 1992 Constitutions of Malawi and Namibia, respectively, have a combination of a few enforceable socio-economic rights in their respective Bills of Rights and unenforceable directive principles of state policy which, with the presence of a range of civil and political rights, provide a good framework for the protection of socio-economic rights.³² These Constitutions represent a remarkable

²⁷ Communication 155/96, Fifteenth Annual Activity Report (2001–2002).

²⁸ General Comment No 15 'The right to water (arts 11 and 12 of the Covenant)' adopted by the Committee on ESCR at its 29th session, 11–29 November 2002 para 3.

²⁹ General Comment No 4 'The right to adequate housing (art 11(1) of the Covenant)' adopted by the Committee on ESCR at its 6th session, 13 December 1991 para 8(b).

³⁰ See generally C Heyns (ed) *Human Rights Law in Africa* (2004).

³¹ See S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 59.

³² See DM Chirwa '*Minister of Health & Others v Treatment Action Campaign & Others: Its implications for the combat against HIV/AIDS and the protection of economic, social*

shift away from the traditional view that economic, social and cultural rights are different from civil and political rights in nature, requiring different enforcement mechanisms.³³

Policies adopted by African countries, including privatisation measures, must conform to these human rights standards for them to be accepted.

3 Implications of privatisation for the enjoyment of human rights

3.1 The case for the position that privatisation can enhance the enjoyment of socio-economic rights

The objectives that drive privatisation are diverse and often not easily reconcilable. A decision on whether a privatisation initiative is successful or not will therefore depend on the specific objectives it was set to achieve. Invariably, such a decision will turn on the power plays amongst different interest groups advocating particular objectives.³⁴

Despite the multiplicity of objectives and their apparent contradictions, proponents of privatisation maintain that privatisation of basic services can have a positive impact on access to or the enjoyment of human rights. Firstly, they argue that a well-formulated and implemented policy of privatisation has the potential to enhance operational efficiency, economic growth and development.³⁵ The public sector, the argument goes, has limited capital. Its investment options and lending policies are also undermined by short-term political

and cultural rights in Africa' (2003) 9(1) *East African Journal of Peace and Human Rights* 174-178.

³³ The alleged differences between these sets of rights have been examined and critiqued in a number of works, including S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1999) ch 41; S Liebenberg 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 55; C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 44; D Beetham *Democracy and human rights* (1999) 115-135; P de Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67; M Craven 'The International Covenant on Economic, Social and Cultural Rights' in R Hanski & M Suksi (eds) *An introduction to international protection of human rights* (1999) 101-102; E de Wet *The constitutional enforcement of economic and social rights: The meaning of the German constitutional model for South Africa* (1996) 40-41; DM Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475.

³⁴ Y Aharoni 'On measuring the success of privatisation' in R Ramamurti & R Vernon (eds) *Privatisation and control of state-owned enterprises* (1991) 73.

³⁵ Letwin (n 3 above) 32; D Leach & F Vorhies 'Privatisation and natural monopoly' in F Vorhies (ed) *Privatisation and economic justice* (1990) 23; Kikeri *et al* (n 14 above) 24.

expediency. By contrast, the private sector boasts of a huge capital base, which can support expansion of service delivery. This advantage, coupled with the urge to provide attractive returns on capital that will appeal to investors over a long period of time and the need to gratify customers, can result in increased efficiency in the private sector, higher production, improved output quality and reduced prices.³⁶ Proponents of this line of argument proceed to argue that the private sector has more efficient staff than the public sector.³⁷ Managers in the private sector can be motivated to cultivate a risk-taking culture by offering lucrative rewards for the production of greater marginal returns. With the detachment from political control, managers in the private sectors are better placed to implement cost effective and the most efficient means of providing services tailored to suit the demands and needs of customers.³⁸ It is also often argued that privatisation increases competition in the delivery of basic services.³⁹ Competition is conducive to lower costs of the services rendered. In short, the increased efficiency, enhanced competition and larger investment that privatisation promises can lead to a higher production of the privatised service of a competitive quality at a lower cost. The result, so the argument goes, would be increased access to and the better enjoyment of the relevant socio-economic rights.

Secondly, proponents of privatisation argue that privatisation is conducive to a better and healthier environment. The latter is critical for the enjoyment of human rights. One limb of this argument posits that private sector participation in the delivery of basic services can promote innovation. The discipline of the financial market place generates interest in new technologies and products that are healthier or environmentally friendlier, in order to secure a competitive advantage over other participants in the industry. Such motivation is absent in the case of state-owned enterprises.⁴⁰

The other limb of the argument posits that service delivery by the public sector often hides subsidies and other latent distortions. Proponents of privatisation see privatisation as a means of exposing and removing such distortions.⁴¹ Subsidisation, it is argued, 'promotes wasteful consumption of environmentally sensitive services such as water, electricity and refuse collection'.⁴² It is therefore argued that their

³⁶ As above.

³⁷ Aharoni (n 34 above) 75.

³⁸ Gayle & Goodrich (n 10 above) 7; Letwin (n 3 above) 31.

³⁹ Letwin (n 3 above) 45.

⁴⁰ McDonald *et al* 'Water privatisation in SADC: The status of the debate' (unpublished paper on file with author).

⁴¹ Letwin (n 3 above) 43.

⁴² D McDonald 'The theory and practice of cost recovery in South Africa' in DA McDonald & J Pape (eds) *Cost recovery and the crisis of service delivery in South Africa* (2002) 17 25.

removal and the introduction of cost recovery measures provide an incentive to use such services responsibly and in a manner that is not deleterious to the environment.⁴³

Thirdly, proponents of privatisation contend that it has a redistributive thrust that is consistent with the *raison d'être* of socio-economic rights. This potential can be realised in two ways. The first is by inviting and encouraging employees of the enterprise and/or previously disadvantaged individuals or groups to buy shares in the privatised enterprise.⁴⁴ The second is by involving previously disadvantaged people in the provision of basic services. In South Africa, for example, the government regards privatisation as an important resource for black empowerment.⁴⁵ These opportunities promote 'popular capitalism', which can help to alleviate poverty and bridge societal inequalities.

Fourthly, proponents of privatisation also argue that it can result in reduced fiscal deficits and national debt. Through privatisation, time and resources spent on monitoring and subsidising state-owned enterprises could be saved. The saved resources, plus the proceeds from sale, can be used for settling foreign debt, balancing the national budget or investing in other priority areas such as education and child care.⁴⁶

Lastly, privatisation is favoured by some on the ground as it has the potential to contract the public sector to a much more manageable entity.⁴⁷ As a result, improved efficiency is possible in the public sector, including organs dealing with law and enforcement such as the judiciary, parliament, the police, prisons and public human rights institutions. Efficiency in these organs might lead to an efficient and effective human rights protection regime.

These arguments compel proponents of privatisation to conclude that the latter can enhance the enjoyment of human rights.

3.2 A rebuttal

Whether privatisation does in practice result in enhanced enjoyment of human rights generally, and increased access to socio-economic rights particularly, is debatable. Evidence of the positive impact of privatisation on economic growth and efficiency is inadequate and at most

⁴³ As above.

⁴⁴ Letwin (n 3 above) 47; Gayle & Goodrich (n 10 above) 7.

⁴⁵ See Ministry of Public Enterprises Republic of South Africa 'An accelerated agenda towards the restructuring of state-owned enterprises policy framework' August 2000.

⁴⁶ K Bayliss 'Privatisation and poverty: The distributional impact of utility privatisation' Centre on Regulation and Competition, Working Paper Series No 16, January 2002, available at <http://idpm.man.ac.uk> (accessed 30 June 2003); Aharoni (n 34 above) 80.

⁴⁷ Aharoni (n 34 above) 78.

conflicting.⁴⁸ Indeed, opponents of privatisation contend that there is little practical evidence establishing that privatisation does in fact result in increased efficiency, economic growth, development and competition. Gayle and Goodrich, for example, have argued that privatisation in Britain, the former West Germany, Chile and Honduras in the 1980s did not result in better economic performance by private firms.⁴⁹ Likewise, Cook and Uchida's study on the impact of privatisation on economic growth in developing countries concludes in the negative.⁵⁰

Where it can be established that enhanced economic performance occurred after privatisation, the difficulty in pinpointing privatisation as the cause of such performance remains. Many other factors, such as the introduction of competition and the liberalisation of the market without privatisation, might lead to economic growth.⁵¹ Significantly, economic growth in itself does not mean greater access by poor communities to basic needs. For example, structural adjustment programmes introduced by the IMF and the World Bank policies that were implemented by most of the Southern African countries were reported to have improved economic growth. However, these policies worsened the levels of poverty of the majority of people in these countries.⁵²

The potential for privatisation to increase competition is undermined by the availability of investors.⁵³ Then, too, water is a most basic good and there is in each of the countries mentioned earlier only one provider at a given time. As a result, people do not have a choice other than to purchase water from the available provider. The privatisation of water in Southern Africa has seen the demise of public monopolies, but has led to the emergence of private sector monopolies in water provision.

Opponents of privatisation also contend that although managers in the private sector are accountable to their shareholders, such accountability is largely in terms of profits. The search for profits motivates private actors to invest in areas that can bring huge turnovers.

⁴⁸ Some studies by the IMF indicate a positive impact of privatisation on economic, growth, efficiency, competition and quality of the services. See Cook & Uchida (n 1 above). See generally also Kikeri *et al* (n 14 above). Positive impacts of privatisation on access, quality and efficiency have also been noted in Peru. See M Torero & A Pasco-Font 'The social impact of privatisation and the regulation of utilities in Peru', United Nations University, World Institute for Development Economic Research, Discussion Paper No 2001/17, June 2001.

⁴⁹ Gayle & Goodrich (n 10 above) 8.

⁵⁰ Cook & Uchida (n 1 above).

⁵¹ Letwin (n 3 above) 35–37.

⁵² See K Cheru 'Economic, social and cultural rights: The Highly Indebted Poor Countries (HIPC) Initiative: A human rights assessment of the Poverty Reduction Strategy Papers (PRSP)' Report submitted by the independent expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights particularly economic, social and cultural rights, E/CN 4/2001/56.

⁵³ Bayliss (n 46 above).

Investors are therefore less prepared to buy enterprises that make losses. In Zimbabwe, for example, Bi-Water withdrew from a privatisation project of water supply because the users were too poor to afford the services.⁵⁴ Furthermore, in the quest to maximise profits, private actors tend to be selective about beneficiaries and the investment they make. Private service providers prefer to invest in water services that will service industrial users than poor people.⁵⁵ They also exercise more leniency to corporations with respect to disconnections than poor people.⁵⁶ These observations call into question the potential for privatisation to extend service delivery to disadvantaged communities and to provide quality services in sufficient amounts as required by socio-economic rights.⁵⁷

That privatisation is beneficial to health and the environment is equally questionable. Evidence establishing that the activities of private actors are often harmful to the environment and that many private actors have violated environmental and health regulations with impunity through the improper exercise of their economic power, for example, through corruption of the responsible government officials is in abundance.⁵⁸ As regards the potential of private actors to invest in new technologies that are environmentally friendly, this possibility is undermined by short-term contracts of service delivery and competitive bidding, which result in losses in institutional memory necessary for innovations.⁵⁹ Contrary to the assertion that private actors are bastions of innovation, available evidence suggests that public institutions have historically invested invaluablely in new technologies and innovation without the promise of profits.⁶⁰

Some of the arguments in favour of privatisation are potentially in conflict with human rights. For example, the implementation of cost recovery measures and the removal of subsidies, which go with privatisation, may constitute a denial of human rights, especially those of the poor. State intervention in the form of subsidies and kindred measures are critical to increasing or sustaining access by poor communities to socio-economic rights and to the enjoyment of other human rights. Even in the United States, where socio-economic rights are not

⁵⁴ As above.

⁵⁵ As above (making reference to electricity).

⁵⁶ As above.

⁵⁷ Socio-economic rights entail the principles of availability, accessibility, quality and acceptability. See below.

⁵⁸ See AX Fellmeth 'Wiwa v Royal Dutch Petroleum Co: A new standard for the enforcement of international law in US Courts' (2002) 5 *Yale Human Rights and Development Law Journal* 241; C Scott 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights' in Eide *et al* (n 33 above) 563.

⁵⁹ Bond *et al* (n 6 above).

⁶⁰ As above.

constitutionally protected, welfare provision has been considered by federal courts to form an essential element of a democratic society. In *Goldberg v Kelly*,⁶¹ for example, it was conceded: 'For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.' By meeting these basic means, the judgment proceeded, welfare 'can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community'. The relevance of welfare policies and other measures aimed at assisting the poor to access basic services in Southern Africa is particularly obvious, given the high levels of poverty in these countries.

With regard to the potential to redistribute resources, the contribution of privatisation in this regard is sharply limited by the drive to attract foreign investment. And in most cases, privatisation results in massive job losses.⁶² Key participants in the provision of basic services and those that reap a disproportionate share of the benefits of privatisation are multinational companies, not local businesses or people. This is the case in Southern Africa where such multinational corporations as Bi-Water, Saur International, IPE-Aguas de Portugal, and Suez-Lyonnaise have won the contracts to provide water.⁶³ There is therefore a negligible redistributive potential that privatisation of water can offer.

In addition, while proceeds from the sale of public enterprises can be of use in balancing the national budget, such benefit can be a short-term one. In some instances a long-term contribution of an enterprise to the national budget can outweigh the contribution of the proceeds realised from its sale.

The United Nations (UN) High Commissioner for Human Rights has summarised some of the ways in which privatisation can undermine the enjoyment of socio-economic rights as follows:⁶⁴

- the establishment of a two-tiered service supply in a corporate segment focused on the healthy and wealthy and an under-financed public sector focusing on the poor and sick;
- brain drain, with better trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures;

⁶¹ 397 US 254 (1970).

⁶² Aharoni (n 34 above) 80; VV Ramanadham 'Privatisation: Constraints and impacts' in VV Ramanadham (ed) *Constraints and impacts of privatisation* (1993) 1 54.

⁶³ Bond *et al* (n 6 above).

⁶⁴ UN High Commissioner for Human Rights 'Economic, social and cultural rights: Liberalisation of trade in services and human rights' Report of the High Commissioner E/CN.4/Sub.2/2002/9, 25 June 2002.

- an overemphasis on commercial objectives at the expense of social objectives which might be more focused on the provision of quality health, water and education services for those that cannot afford them at commercial rates; and
- an increasingly large and powerful private sector that can threaten the role of the government as the primary duty bearer for human rights by subverting regulatory systems through political pressure or the co-opting of regulators.

The upshot of the preceding discussion is that arguments that privatisation has a positive impact on the enjoyment of human rights are, at best, speculative. For the most part, the little practical evidence in support of the affirmative focuses on micro-economic objectives. Apart from noting that such evidence is inconsistent, I have argued that the achievement of these objectives does not automatically guarantee availability, accessibility, quality and acceptability of basic services to all people, especially vulnerable groups. In fact, the fear that privatisation of basic services can result in limited access to economic, social and cultural rights by poor communities in the Southern African context appears to be well founded.

4 The position of human rights regarding privatisation

Given the diversity of objectives privatisation seeks to achieve, it is important to answer the question whether privatisation itself can be resisted on the ground that it can negatively affect the enjoyment of human rights generally or socio-economic rights particularly.

As noted earlier, the central feature of privatisation is private sector participation in service delivery. It is noteworthy that human rights do not recognise the obligation of the state to be the sole provider of basic services.⁶⁵ On the contrary, it is permissible within the human rights regime for private actors to play a role in the realisation of human rights.⁶⁶ In the South African case of *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*, the Constitutional Court conceded that:⁶⁷

⁶⁵ As above.

⁶⁶ Liebenberg argues: 'The state should be entitled to rely on private mechanisms of delivery in appropriate circumstances.' She cites the provision of education by private institutions and adult education by NGOs as examples of private sector contribution to service delivery. See Liebenberg (1999) (n 33 above) 41-1 41-35.

⁶⁷ 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) para 35.

It is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.

Similarly, in the Indian case of *Krishnan v State of Andhra Pradesh*, Jeevan Reddy J commented on the position of private actors in relation to the directive principle in the Indian Constitution on free and compulsory primary education for children until they reach the age of 14 years as follows:⁶⁸

This does not, however, mean that this obligation can be performed only through state schools. It can also be done by permitting, recognising and aiding voluntary non-governmental organisations, who are prepared to impart free education to children. This does not also mean that unaided private schools cannot continue. They can, indeed, as they too have a role to play. They meet the demand of that segment of the population who may not wish to have their children educated in state-run schools.

It is clear, therefore, that private sector involvement *per se* in the provision of basic goods and services is not unacceptable from a human rights perspective.

What is more, human rights law does not require a particular political or economic system within which human rights can best be realised.⁶⁹ The Committee on ESCR has flagged this standpoint in the following words:⁷⁰

[T]he undertaking 'to take steps . . . by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot be accurately described as being predicated exclusively upon the need for, or the desirability for a socialist or capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognised in the Covenant are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

⁶⁸ (1993) 4 LRC 231 301. See also *Jain v State of Karnataka* (1992) 3 SCC 666 para 17.

⁶⁹ See P Hunt 'The international human rights treaty obligations of states parties in the context of service provision' Submission to the UN Committee on the Rights of the Child on the private sector as service provider and its role in implementing child rights, 20 September 2002, Office of the High Commissioner for Human Rights, Geneva.

⁷⁰ General Comment No 3 'The nature of state parties' obligations (art 2(1) of the Covenant)' adopted by the Committee on ESCR at its 5th session, 14 December 1990, para 8.

This position finds similar expression in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. According to paragraph 6:⁷¹

The achievement of economic, social and cultural rights may be realised in a variety of political settings. There is no single road to their full realisation. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures.

Not requiring a particular political economic system for the realisation of human rights is a significant affirmation of the principle that all human rights are interrelated, interdependent and mutually supporting. It serves to underscore that human rights are not by-products of any political or economic system, but that they are 'trumps' over collective goals.⁷² Any such system is bound by human rights.

In short, human rights law does not prescribe exhaustive measures to be taken to implement or give effect to human rights. Private actors have played and will continue to play an important role in the realisation of human rights.

5 The obligations of states in the context of privatisation

While, as a policy, privatisation cannot be rejected outright, human rights law establishes a normative framework with which privatisation measures, like other public measures, must comply to be acceptable. Significantly, since states are contracting parties to international and regional human rights treaties, they are principally responsible for their implementation. The often-cited Vienna Declaration and Programme of Action (1993) in respect of the principle of the interdependence of all human rights states: 'Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments.'⁷³ More recently, the preamble to the Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms has stressed that 'the prime responsibility and duty to promote and protect human rights lie with the state'.⁷⁴ It is therefore clear that the duty to respect, protect, promote and fulfil human rights remains on the state, including when water

⁷¹ The Limburg Principles were adopted by a group of distinguished experts in international law on 2–6 June 1986 in Maastricht, The Netherlands. Although not binding, they have been very influential to the understanding of the content and nature of obligations generated by socio-economic rights.

⁷² R Dworkin 'Rights as trumps' in J Waldron (ed) *Theories of rights* (1992) 153–167.

⁷³ See Part 1, art 1.

⁷⁴ UN General Assembly Resolution 53/144 of 9 December 1998 para 7.

provision is privatised. Thus, the UN High Commissioner for Human Rights has stated that states 'have responsibilities to ensure that the loss of autonomy does not disproportionately reduce the capacity to set and implement national development policy' and human rights.⁷⁵ This part explores some of the precise obligations that states are required to discharge in the context of privatisation.

5.1 The duty not to limit access

States have the primary duty to respect human rights, including the right to water. This duty binds the state to refrain from interfering in the enjoyment of all fundamental rights.⁷⁶ The state is enjoined 'to respect right-holders, their freedoms, autonomy, resources, and liberty of their action'.⁷⁷ Liebenberg argues that the duty to refrain from 'preventing and impairing' access to a relevant socio-economic right is broad enough to include policies that result in denial of access by poor communities to the right, rather than simply an interference with their existing access to the right.⁷⁸

The Committee on ESCR has stated that failure by the state to take into account its legal obligations when entering into bilateral or multilateral agreements with other states, international organisations and other entities such as multinational corporations, may constitute a violation of the duty to respect human rights.⁷⁹ This implies that, by privatising the provision of basic services and goods, the state remains responsible for ensuring the enjoyment by all people the rights relevant to the privatised service. Agreements with private service providers must therefore be structured by the relevant human rights norms. Consistent with the Committee on ESCR's statement, the UN High Commissioner for Human Rights has stated:⁸⁰

In setting comprehensive objectives for trade liberalisation that go beyond commercial objectives, a human rights approach examines the effect of trade liberalisation on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals.

In other words, the state is enjoined to ensure that the advancement of human rights is a paramount objective that the privatisation of water must achieve. This viewpoint is premised on the principle that the

⁷⁵ See UN High Commissioner for Human Rights (n 54 above) para 9.

⁷⁶ *SERAC* case (n 27 above) para 45.

⁷⁷ n 76 above, para 45.

⁷⁸ S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (forthcoming).

⁷⁹ General Comment No 14 'The right to the highest attainable standard of health (art 12 of the Covenant)' adopted by the Committee on ESCR at its 22nd session, 2000, para 50.

⁸⁰ n 79 above, para 8.

human person is the ultimate subject of human development.⁸¹ It is therefore imperative that development measures or policies aimed at alleviating poverty must place human rights at the fore. This principle is also consistent with the notion that economic, social and cultural rights must be realised progressively. Any retrogressive measures taken by the state would constitute a violation of these rights.⁸²

A human rights approach to privatisation would therefore require the state to consider four key principles when embarking on and implementing privatisation:

- Equality and non-discrimination. This is a central principle on which international human rights law is founded. Apart from taking measures to eliminate discrimination, it enjoins states to formulate and implement legislative and other measures aimed at the effective protection of the most vulnerable, the poor and socially excluded groups against discrimination by state actors and private actors. Affirmative measures are consistent with this principle.⁸³
- Indivisibility and interdependence of all rights. This principle requires recognition of both civil and political rights, and economic, social and cultural rights. It is not enough for policies to comply with civil and political rights. They must also lead to more access to or the better enjoyment of socio-economic rights.
- Accountability of policy makers and private service providers.⁸⁴ Development policies must entrench legal and administrative measures to guarantee democratic accountability.
- Public participation.⁸⁵ International human rights law requires that policies must be devised, implemented and monitored in a manner that allows for popular participation. To this end, regular presidential, parliamentary and local government elections are part of that accountability. However, they are not enough. All people, including

⁸¹ See art 2(1) of the Declaration on the Right to Development, adopted by the UN General Assembly Resolution 41/128, 4 December 1986.

⁸² See General Comment No 3 (n 70 above).

⁸³ According to the Human Rights Committee (HRC), 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the [CCPR] . . . Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.' See General Comment No 18/37 [non-discrimination], adopted by the HRC on 9 November 1998.

⁸⁴ According to the Committee on ESCR: 'Rights and obligations demand accountability: Unless supported by a system of accountability, they become no more than window dressing.' See the Committee on ESCR's Statement on Poverty, UN Doc E/C 12/2001 para 14.

⁸⁵ S Tsemo 'Privatisation of basic services, democracy and human rights' (2003) 4 *ESR Review* 2.

the poor, must be allowed to participate in key decisions affecting their lives.

It is imperative that privatisation, being a developmental policy and/or one designed to alleviate poverty, complies with the above principles. Not only must processes of its formulation be governed by these principles, the content of the policy, and its monitoring and accountability measures must be consistent with human rights.⁸⁶

In order to ensure that a water privatisation initiative will result in more access to (rather than denials of) human rights, Paul Hunt and Amnesty International have rightly argued that states should carry out a human rights impact assessment before embarking on privatisation.⁸⁷ If the assessment reveals that denials or restrictions of the access to the right to water is likely to occur, then privatisation should not be undertaken.

5.2 The duty to regulate and monitor private service providers

The state's duty to protect is very important in the context of privatisation. This duty summons the state to take positive action to protect its citizens from damaging acts that may be perpetrated by private actors. The Committee on ESCR has interpreted this obligation to include the duty not only to prevent violations of these rights by private actors, but also to control and regulate them. In respect of the right to water, for example, the Committee on ESCR has stated that the state has an obligation to prevent third parties from 'compromising equal, affordable, and physical access to sufficient, safe and acceptable water'.⁸⁸ The Committee has also stated with reference to the right to food that states have the duty to 'ensure that activities of the private business sector and civil society are in conformity with' this right.⁸⁹ According to the Committee, 'failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others' amounts to a violation by states of the right to food.⁹⁰ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) contain a similar interpretation of the obligations of states in relation to economic, social and cultural rights:⁹¹

⁸⁶ See Hunt (n 69 above).

⁸⁷ Amnesty International *Human rights principles regarding the delivery of essential services* (2003) (forthcoming).

⁸⁸ General Comment No 15 (n 28 above) para 24.

⁸⁹ General Comment No 12 'The right to adequate food (art 11 of the Covenant)' adopted by the Committee on ESCR at its 20th session, 12 May 1999 para 27.

⁹⁰ n 89 above, para 19.

⁹¹ See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by international experts in economic, social and cultural rights in Maastricht on 22–26 January 1997.

The obligation to protect includes the state's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.

In the context of the right to health, the Committee on ESCR has provided an insight into the possible areas of regulation and control of private service providers. The state is enjoined, among other things,⁹²

to adopt legislation or to take other measures ensuring equal access to health care and health related services provided by third parties; . . . to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.

The duty to protect requires that vulnerable groups be given special protection. In relation to people with disabilities, for example, the Committee on ESCR has stated:⁹³

In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities.

The state discharges the duty to protect through 'the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations' to enable individuals to freely realise their rights and freedoms.⁹⁴ It has to establish 'an effective regulatory system' providing for 'independent monitoring, genuine public participation and imposition of penalties for non-compliance'.⁹⁵ Adoption of legislation is not exhaustive of the state's duty to protect citizens from violations by third parties. In accordance with the principle of economic accessibility, the Committee on ESCR has stated, for example, that 'tenants should be protected by appropriate means against unreasonable rent levels or rent increases'.⁹⁶

The duty to protect citizens from violations of human rights, including a range of socio-economic rights by private actors, was enforced in the *SERAC* case.⁹⁷ The plaintiffs complained, among other

⁹² General Comment No 14 (n 79 above) para 35.

⁹³ General Comment No 5 'Persons with disabilities' adopted by the Committee on ESCR at its 11th session, 9 December 1994 para 11.

⁹⁴ *SERAC* case (n 27 above) para 46.

⁹⁵ General Comment No 15 (note 28 above) para 24. With respect to the right to education, the state has an obligation to ensure that 'private educational institutions conform to the "minimum educational standards" required by article 13'. See General Comment No 13 'Right to education (art 13 of the Covenant)' adopted by the Committee on ESCR at its 21st session, 15 November to 3 December 1999 para 59.

⁹⁶ General Comment No 4 (n 29 above) para 8(c).

⁹⁷ n 27 above. For a review of the case, see DM Chirwa 'Toward revitalising economic, social and cultural rights in Africa: *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*' (2002) 10 *Human Rights Legal Brief* 14;

things, that the state-owned Nigerian National Company and Shell Petroleum Development Corporation had been depositing toxic wastes into the local environment and waterways in Ogoniland in Nigeria without putting in place necessary facilities to prevent the wastes from spilling into villages. As a result, water, soil and oil contamination brought about serious short-term and long-term health problems, such as skin infections, gastrointestinal and reproductive complications. Further allegations were made relating to repressive measures such as the destruction of food sources, homes and villages by the military aimed at quelling opposition to the oil companies' activities. The Ogoni communities were neither consulted in the decisions that affected the development of their land, nor did they benefit materially from the oil exploration. The African Commission found the Nigerian government in violation of the rights to health, a satisfactory environment, free disposal of wealth and natural resources, shelter and housing, food and life, for its own acts and omissions and for those of the oil companies. It found that the government had breached the duty to protect the people from damaging acts of the oil companies by failing to control and regulate the activities of these companies and allowing them to deny or violate these rights with impunity.⁹⁸

An important area requiring the state's protection relates to disconnections. Not only must the state ensure that the procedure for disconnections is fair and reasonable, it must also protect those people who cannot afford water on their own from arbitrary disconnections. The Water Services Act 108 of 1997 of South Africa represents a commendable legislative measure of discharging this duty by the state. According to section 4(1) of the Act, a service provider⁹⁹ must set conditions under which water services are to be provided. These terms include the circumstances under which water services may be limited or discontinued, and procedures for limiting or discontinuing water services. Section 4(3) stipulates that procedures for the limitation or discontinuance of water service must:

DM Chirwa 'A fresh commitment to implementing economic, social and cultural rights in Africa: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*' (2002) 3 *ESR Review* 19.

⁹⁸ Other cases in which this duty was enforced include *Yanomani v Brazil* Resolution No 12/85, reported in *Annual Report of the Inter-American Commission on Human Rights* 1985; *Guerra & Another v Italy*, judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and Decisions 1998-1 No 64; Communication 549/1993, *Hopu & Bessert v France*, CCPR/C/60/D/549/1993, 29 December 1997.

⁹⁹ In terms of sec 1(xxiii), 'water services provider' means 'any person who provides water services to consumers or to another water services institution but does not include a water services intermediary'. The latter means 'any person who is obliged to provide water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of that contract'. See sec 1(xxii).

- (a) be fair and equitable;
- (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless —
 - (i) other consumers would be prejudiced;
 - (ii) there is an emergency situation; or
 - (iii) the consumer has interfered with a limited or discontinued service; and
- (c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water service authority, that he or she is unable to pay for basic services.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,¹⁰⁰ Budlender AJ held that the effect of these provisions, when read in the light of sections 27(1) (on the right of access to sufficient food and water) and 7 (mentioned above) of the Constitution, is that disconnection of an existing water supply to consumers by a local authority is a *prima facie* breach of its constitutional duty to respect the right of existing access to water.¹⁰¹ Accordingly, where a disconnection might result in denial of access to basic water services for non-payment, the service might not be disconnected where the consumer satisfies the court that he or she was unable to pay for basic services.

In the United Kingdom, the Water Services Act of 1999 abolished disconnections or limitation of basic water services on grounds of non-payment of water bills, after many years of attempts to implement fair procedures that would protect the poor from disconnections. In terms of this Act, the premises for which water may not be disconnected for non-payment include private dwelling houses, children's and residential care homes, prisons and other detention centres, educational institutions such as schools, hospitals and nursing homes, and premises occupied by the emergency services. Such pieces of legislation are particularly important in the Southern African context where many people cannot afford commercial charges for water.

Other areas requiring the state's protection include pricing and quality of water being provided. Not all consumers should be charged at the same rate for water. To do so might result in perpetuation of inequalities or the poor being overburdened by the costs of providing water. The Committee on ESCR has stated that:¹⁰²

Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

¹⁰⁰ 2002 6 BCLR 625 (W).

¹⁰¹ n 100 above, para 27.

¹⁰² General Comment No 15 (n 28 above) para 27.

In respect of water, Elizabeth Drent has argued that lack of effective monitoring mechanisms of a privatisation initiative in Canada of water testing resulted in the death and sickness of many consumers due to water contamination.¹⁰³

5.3 The duty to provide

The state has a further duty to fulfil human rights. This duty encompasses the duty to promote,¹⁰⁴ which enjoins the state to ensure that individuals are able to exercise their rights and freedoms through promoting tolerance and raising awareness.¹⁰⁵ The duty to promote is therefore essential to ensuring effective public participation and access by the public to information. The duty to fulfil entails an obligation to facilitate the actual realisation of the right.¹⁰⁶ This obligation requires the adoption of positive measures that enable and assist individuals and communities to enjoy the right in question.¹⁰⁷ Additionally, the duty to fulfil includes an obligation to provide the right when individuals or groups are unable to realise the right by their own means. This obligation includes the duty to ensure that water is affordable. To achieve this objective, the state is required to adopt such measures as the use of a range of appropriate low-cost techniques and technologies; appropriate pricing policies such as free or low-cost water; income supplements.¹⁰⁸ The state is enjoined to adopt comprehensive and integrated strategies and programmes to ensure that there is 'sufficient and safe water for present and future generations'.¹⁰⁹

The right to water requires that everyone must have access to 'sufficient and continuous for personal and domestic use'.¹¹⁰ Although the state may plead resource constraints for its failure to guarantee sufficient and continuous access to basic water, the state still has the obligation to 'ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent

¹⁰³ E Drent 'Privatisation of basic services in Canada: Some recent experiences' (2003) 4 *ESR Review*, 16.

¹⁰⁴ The duty to fulfil entails the obligations to 'facilitate, promote and provide'. General Comment No 15 (n 28 above) para 25.

¹⁰⁵ *SERAC* case (n 27 above) para 46.

¹⁰⁶ General Comment No 13 (n 95 above) para 47.

¹⁰⁷ As above; General Comment No 14 (n 79 above) para 37; General Comment No 12 (n 89 above) para 15.

¹⁰⁸ General Comment No 15 (n 28 above) para 27. A similar obligation in relation to the right to health enjoins the state to 'ensure provision of health care, including immunisation and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions'. General Comment No 12 (n 89 above) para 36.

¹⁰⁹ General Comment No 15 (n 93 above) para 28.

¹¹⁰ n 109 above, para 12(a).

disease'.¹¹¹ The exact amount of this minimum core is impossible to pinpoint, since sanitary conditions and water demands vary from one place to another. However, the World Health Organisation's guidelines state that at least 50 litres per person per day (lcd) is needed to reach a 'low' level of concern over health impacts. 100 lcd is the minimum needed to provide a sufficient quantity for 'all basic personal and food hygiene' as well as 'laundry and bathing' assuming efficient patterns of use.¹¹² Recent research by the South African Municipal Workers Union has concluded that the amount of water needed to meet environmental health concerns is between 63 and 120 lcd, an estimate that does 'not include water used for subsistence gardening or the operation of small businesses — practices which are often essential for the survival of the poor'.¹¹³

The state must therefore put measures in place to ensure that poor people have access to minimum levels of water for personal and domestic use. Such measures could include free basic water policies such as the South African one, subsidies and similar measures.

It is clear, therefore, that, as the ultimate bearer of socio-economic rights obligations, the state has the duty to ensure that privatisation does not compromise accessibility, availability, quality and acceptability of basic services. Most importantly, it must not result in the denial of access by vulnerable and poor people to socio-economic rights. Regulatory mechanisms and assistance measures must be put in place for the state to discharge its obligations.

6 Conclusion

In conclusion, privatisation of basic services is a policy that, from a human rights perspective, cannot be rejected outright. Human rights law allows the state a margin of appreciation regarding measures to give effect to human rights. Some have argued that privatisation could be a measure that can enhance access to socio-economic rights. Practical evidence establishing this contribution is inconsistent and contradictory. In fact, there is some evidence suggesting that privatisation of basic services in the Southern African context where many people are poor and cannot afford water charges using their own means, has the potential to limit or has circumscribed access by people to

¹¹¹ n 109 above, para 37(a).

¹¹² J Bartram & G Howard 'Domestic water quantity, service level and health' 2002 WHO/SDE/WSH/03 02.

¹¹³ See joint submission by Congress of South African Trade Unions and the South African Municipal Workers' Union on the Draft White Paper on Water Services, presented to the Department of Water Affairs and Forestry in 2003.

socio-economic rights. A human rights approach to privatisation of water, however, requires that privatisation should have the advancement of human rights as its primary objective. It further demands that the privatisation initiative should be structured by the principles of indivisibility of all human rights, non-discrimination, participation and accountability.

This paper has shown that human rights law holds the state as the principal bearer of duties implicit in socio-economic rights, even in the event of privatisation. Among other things, the state has the duty not to interfere with existing access to water. Thus, the state must not embark on privatisation if it is clear that it will result in the denial of access to water. It must also ensure that all its obligations arising from economic, social and cultural rights are fully taken into account when entering into contracts with private service deliverers. The state also has the obligation to protect citizens from acts of private actors. In the context of privatisation, this entails adopting measures to regulate and control the conduct of private service deliverers. The duty to fulfil requires that the state should take measures aimed at ensuring access by everyone to socio-economic rights. This duty includes the obligation to take special measures in favour of disadvantaged groups such as subsidies, cross-subsidies and other intervention measures.

Unless guided by human rights principles, privatisation of water in Southern Africa might not result in greater access to water by the people, especially the poor. Conversely, a privatisation policy that undermines human rights principles can be challenged using a human rights framework.

Protecting traditional knowledge in Africa: Considering African approaches

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Summary

This article reflects on various legal mechanisms that are available to protect traditional knowledge. Its departing point is that legal protection of traditional knowledge requires a response that is pragmatic, yet innovative. It assesses the usefulness of conventional legal machinery such as intellectual property rights and contract law and comments on the failure of these tools to accommodate the more amorphous traditional knowledge systems. The article investigates other responses, such as the conception of sui generis rights and protection by way of human rights law. In doing so, it specifically explores the African normative legal framework that could be utilised in the protection of traditional knowledge.

1 Introduction

Over the last few decades we have witnessed the spectacular growth of globalisation; a phenomenon that includes the ability of individuals and corporate entities to gain virtually unfettered access to information. Consequently, knowledge related to the customs and practices derived from bioresources held by indigenous groups in Africa have fallen prey to unregulated appropriation. In an era where knowledge has become increasingly accessible, very little has been done in Africa to restrict the flow of knowledge from the continent. Notwithstanding the mandate contained in the Cultural Charter for Africa that calls for the legal and

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practical protection of African cultural heritage,¹ the information flow in respect of traditional knowledge continues.

This outward flow of knowledge is related to the dominance of the western world in the sphere of technological innovation and the ability to usurp intellectual capacity. In the realm of traditional knowledge, most African societies view this type of knowledge as a communal value, to be placed in the public domain and not necessarily as a profit-bearing commodity. Research institutions, biotechnological companies, pharmaceutical companies and the like do not, however, share this generous view and have focused on ways to obtain biodiversity-related knowledge and profit from it to the exclusion of others, including the original holders of the knowledge. Thus, the regulatory vacuum that exists in most African countries has left traditional knowledge largely unprotected and vulnerable to annexation.

There are, however, a variety of ways to protect biodiversity-related knowledge. The existing intellectual property rights system as well as the law of contract can be utilised to some extent. More recently, the idea of a *sui generis* right has been developed. This approach has been captured in a regional initiative by the Organization of African Unity (OAU): the Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (Model Law).² Another potential tool that could be instructive in the protection of traditional knowledge is the African Charter on Human and Peoples' Rights (African Charter or Charter). A human rights-based approach to traditional knowledge has been largely neglected, yet the African Charter provides for a number of rights that provide protection to holders of traditional knowledge.

The first part of this paper will provide the context of exploitation as well as the nature of biodiversity-associated knowledge systems. The second part will briefly refer to existing defensive and offensive mechanisms, focusing on the limitations of these tools in protecting traditional knowledge (TK). The third part of the paper will explore African mechanisms and will address both the option of developing a *sui generis* right in line with the OAU Model Law and possibilities for human rights protection in line with the rights and obligations flowing from the African Charter.

¹ Art 26 Cultural Charter for Africa, available at <http://www.dfa.gov> (accessed 31 July 2004). This Charter was adopted on 5 July 1976 and came into force on 19 September 1999. See C Heyns (ed) *Human rights law in Africa* (2004) 125.

² In April 1998, the then Organization for African Unity (OAU) (now known as the African Union (AU)), through its Scientific, Technical and Research Commission initiated a Draft Model Legislation on Community Rights and Access to Biological Resources. The Draft Model Legislation was sponsored by the government of Ethiopia at the 34th Summit of Heads of State and Government in June/July 1998, at which it was decided that governments of member states should formally adopt the Model Law. This initiative represents an attempt to provide an ideal legal framework for member states to develop their own policies, laws and regulations on access to bioresources.

2 The context of exploitation

Africa is a continent rich in biodiversity. According to a study by the United Nations Environmental Programme (UNEP), the region is home to more than 50 000 known plant species, 1 000 mammal species and 1 500 bird species.³ The people of Africa depend on the flora and fauna for basic survival needs. Moreover, Africans have long used the knowledge of their environment and resources to provide food, medicines and cosmetics, to breed better crops and livestock and in general to shape their ecosystems.

Over the last few decades, biodiversity has become a potential income generator in innovative and pioneering ways. The use of genetic plant and animal sources as the basis for biotechnology is a multi-billion dollar industry. Biodiversity in the age of biotechnology has given rise to the 'Green Rush' in ways that the discovery of gold led to the Gold Rush. Biodiversity is of particular interest to prospectors who search for genetic resources that have commercial value for the research-based pharmaceutical, biotechnological and agricultural industries. Whilst about a quarter of all modern medicines that are sold in the United States are derived from natural products, it cannot be said, however, that the profits of this so-called 'Green Rush' have always benefited the suppliers of the genetic material, which are for the most part the developing world.

Even more hotly contested are the claims of biopiracy. These are claims that indigenous and community knowledge, innovations and practices about the medicinal, cultural, cosmetic, domestic or other value and use of bioresources have been widely appropriated. Not being recognised as either 'scientific' or valuable within traditional Western frameworks of knowledge and ideas, it has been freely utilised by others and patented to the exclusion of its originators and original owners.

Consider the case of the katempfe and serendipity berries, which have long been used by African peoples for their sweetening properties. The University of California and Lucky Biotech, a Japanese corporation, were granted a patent for the sweetening proteins naturally derived from these African plants. It is said that thaumatin, the substance that makes katempfe sweet, is 2 000 times sweeter than sugar, yet calorie-free. The patent is extensive and covers any transgenic plant containing the derived sweetening proteins; however, no attempts have been made to share benefits with local communities.⁴

³ UNEP *Global environmental outlook 2000, ch 2, The state of the environment — Africa*; <http://www1.unep.org/geo-text/0055.html> (accessed 1 April 2003).

⁴ See N Roht-Arriaza 'Of seeds and shamans: The appropriation of the scientific and technical knowledge of indigenous and local communities' (1996) 17 *Michigan Journal of International Law* 919, citing 'Intellectual property rights for whom?' *GRAIN Biobriefing* (June 1994) Part 2 5.

This example represents the tip of the iceberg. Dozens of patents have been established outside of Africa, based on knowledge derived from local communities.⁵ To understand why incidents like this have become widespread, not only in Africa but also throughout the developing world, requires a full understanding of the nature of TK.

As a matter of course, regulating any subject matter requires the identification of a tangible and defined entity. Conceptually, however, it is difficult to delineate TK as no universal definition exists.⁶ According to the World Intellectual Property Organisation (WIPO), a lack of definitional clarity is a result of three factors: (1) the inability to translate the linguistic context of a word; (2) the lack of appropriate translations for terms; and (3) the presence of non-standard usage of certain terminology.⁷ A fourth reason may be the amorphous nature of TK. As a knowledge construct it is fluid, dynamic and its authorship is often (albeit not always) collective and oral in nature. One commentator advises that given the difficulty in defining and distinguishing TK from other knowledge, it is best to define it in general terms.⁸

The dearth of legal protection can also be ascribed to the diminutive value attached to TK. Unlike Western sources of information, TK is held and passed along not in a written, but mostly oral form. Many legal systems provide less (if any) consideration to ideas that are not contained in a written format. The limitations of Western styled intellectual property systems are instructive in this regard. In Western society, ideas are protected (and rewarded) through intellectual property law. Rights derived from such protection — intellectual property rights (IPRs or IP rights) — are deemed to protect against exploitation, whilst at the same time encouraging original, creative and innovative activity.⁹ It is, therefore, safe to say that the underlying philosophy of IPRs is to reward creativity. Under patent law, for example, in order to acquire a patent, the invention must not only be non-obvious and useful, but also novel.¹⁰ In other words, the invention should be new and not have been in existence or anticipated in the prior art. TK products and processes, however, often become the subject of patents

⁵ For a list of some of these patents, see *Patents in Africa, Genetic Resources International GRAIN* (April 2001) available at <http://www.grain.org/docs/patentsafrica.pdf> (accessed 1 April 2003).

⁶ See WIPO *Traditional knowledge — Operational terms and definitions*, WIPO/GTRKF/IC/3/9 (20 May 2002) paras 3–4.

⁷ See WIPO *Intellectual property needs and expectations of traditional knowledge holders* WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999) 21.

⁸ See G Dutfield 'TRIPS-related aspects of traditional knowledge' (2001) 33 *Case Western Journal of International Law* 233–240.

⁹ See J Watal *Intellectual property rights in the WTO and developing countries* (2001) 1.

¹⁰ Art 27 WTO Agreement on Trade Related Intellectual Property Rights (TRIPS).

in Western countries, even though they may not pass the 'novelty' test as a whole. This is mainly as a result of the fact that patent offices in countries such as the US and Japan allows the *written* prior art to be searched anywhere in the world, but restricts the search of *oral* prior art within its borders.¹¹ Yet, it is the *oral* art that provides the basis for most patent applications.

In recent years, the developing world and indigenous communities have stepped forward to claim recognition of their sovereign rights over biological resources and protection of their traditional knowledge, respectively. In this regard, they have turned to international law and comparative regional and domestic models for possible solutions. Considerable efforts are under way to curb access to bioresources and governments are beginning to act proactively by translating international norms on access to bioresources into domestic regulation.¹² Some challenges in the protection of TK do, however, remain.

3 The limits of existing models for protecting traditional knowledge

3.1 The limits of defensive mechanisms

Defensive protection of TK consists of 'measures that ensure that other parties do not successfully obtain IP rights over pre-existing TK', while positive protection of TK is achieved through 'existing legal mechanisms', such as 'contracts, access restrictions and IPRs'.¹³ However, these concepts are not mutually exclusive. An effective protective scheme may contain elements of both these concepts.

Defensive protection of TK involves 'taking measures to ensure that unauthorised parties do not unfairly acquire intellectual property rights over other people's TK'.¹⁴ Three types of defensive protection can be noted: (1) the use of databases to identify the prior art;¹⁵ (2) secrecy; and (3) the imposition of a disclosure requirement as a condition for acquiring IP rights.

¹¹ Watal (n 9 above) 90.

¹² The South African National Environmental Management Act: Biodiversity Act 10 of 2004, eg, attempts to regulate access to bioresources and provide for equitable benefit sharing.

¹³ WIPO 'Intellectual property and genetic resources, traditional knowledge and folklore — Traditional knowledge at <http://www.wipo.int/globalissues/tk/background/index.html> (accessed 3 March 2003).

¹⁴ As above.

¹⁵ A number of databases exist in Africa, such as the World Bank's 'Database of indigenous knowledge and practices in sub-Saharan Africa' <http://www.worldbank.org/afr/ik/now.htm> (accessed 3 March 2003); the Traditional Medicines Research Group's database in South Africa, <http://www.mrc.ac.za/Tramed/> (accessed 30 April 2003); and the Department of Botany's database at Makerere University in Uganda.

Defensive regimes are not, however, without their own particular set of difficulties. Whilst databases, for example, serve to improve the information of the prior art available to patent examiners, such documentation will not necessarily prevent the patenting of commercial products or processes based on TK disclosed in the library.¹⁶ Second, documentation alone will not assure any return for holders of TK. Lastly, as the information contained in the database is in the public domain, it also prevents the holders of TK to apply for IP protection should they wish to do so.¹⁷ Secrecy as defensive device brings about a number of practical considerations. If the knowledge is known amongst several members of a community, it may be hard to enforce a secrecy code. This becomes more of a challenge should the knowledge be shared amongst several communities, which is often the case. In the case of a single knowledge holder, the drawback is that the TK practised by the holder runs the risk of being irretrievably lost, unless that knowledge is documented or disseminated in some form.¹⁸

Finally, source disclosure and prior consent requirements are not presently mandated under the World Trade Organisation (WTO) Trade-Related Intellectual Property Rights (TRIPS) Agreement.¹⁹ TRIPS does not require source disclosure of the invention or the prior consent of the holder for patentability, and does not provide for the absence of these conditions as a basis for invalidation/revocation.²⁰ As a result, governments are not required to amend their domestic regulations to require patent applicants to provide patent offices with information concerning the origin of the genetic resources in the invention or some proof of prior informed consent from TK holders.

¹⁶ 'Legislative options for protection' *The Hindu* (29 April 2002), available at <http://www.iprlawindia.org> (accessed 3 March 2003).

¹⁷ WIPO (n 7 above) 89.

¹⁸ n 16 above.

¹⁹ WTO *Agreement on Trade-Related Intellectual Property Rights* (1994).

²⁰ Some developing nations have taken the position, however, that the relationship between the CBD and TRIPS should be clarified, primarily by amending the TRIPS Agreement on this aspect. At a recent TRIPS Council meeting, a group of African and Caribbean countries stressed the need for a multilateral solution to this issue in the TRIPS Council. In a submission to the Council, the group called for an amendment of the TRIPS provision to 'require for a patent to disclose the country and area of origin of any biological resources and traditional knowledge used, or involved in the invention, and to provide confirmation of compliance with all access regulation in the country of origin'. See 'Taking forward the review of article 27.3B of the TRIPs Agreement' Communication of the Africa Group (IP/C/W/404) available at <http://docsonline.wto.org> (accessed 12 June 2003).

3.2 The limits of positive/offensive mechanisms

3.2.1 Intellectual property protection

IP rights are often regarded as the most effective legal mechanism to safeguard the products of human creativity. Western notions of individual ownership of IP are, however, philosophically at odds with the collective nature of TK rights. Whilst sharing of knowledge is for some communities entrenched in their cultural values and customary laws and systems, IP law counters these traditions and beliefs and dictates that the sharing of knowledge should carry monetary value. Using IP to protect traditional knowledge thus necessitates a profound shift in how people construct their own practices and cultural values. In addition to these theoretical divergences, the amorphous nature of TK also limits the scope for using IP rights to protect biodiversity-related TK.

Trade secret protection,²¹ for example, requires that the privileged information is not in the public domain, that it is subject to reasonable steps to keep it undisclosed and that it has commercial value as a result of its secrecy.²² Certain types of TK may actually qualify for trade secret protection, in particular information that is not known outside of a particular community or group. However, protecting TK by means of trade secrets requires positive action by the holder(s) of the information. Thus, unless a local community or indigenous group designates information as a trade secret and takes positive steps to protect it, any unauthorised acquisition or use by a third party would not be protected.²³

Another form of IP protection, namely geographical indication,²⁴ provides only limited scope for positive protection. Often used in the challenging of trademarks, geographical indication can be utilised to prevent the misleading use of any means in the designation or presentation of a good that indicates or suggests that the good in question originated in a geographical area other than the true place of origin.²⁵ Domestic protection of bioresources that act as the basis for TK may, for instance, include a registration system such as the one used in Europe for wines and spirits.²⁶ However, products derived from natural

²¹ Trade secrets allow individual or legal persons to prevent information lawfully in their control from being disclosed to, acquired by, or used by others without their consent.

²² Art 39(2) TRIPS.

²³ See JR Axt *et al* *Biotechnology, indigenous peoples and intellectual property rights* Congressional Research Service (1993) 63 66. Such positive action would include providing restricted access only to an outside third party who is contracting with the group to access the knowledge for research and commercial purposes.

²⁴ Geographical indications are 'indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin' (art 22 (1) TRIPS).

²⁵ As above.

²⁶ Watal (n 9 above) 274.

resources indigenous to a specific geographical territory may qualify for protection only if the concerned name has not yet become generic or semi-generic, either locally or internationally. Holders of TK would thus only benefit if they act pro-actively in the protection of bioresources.

The most effective form of positive protection of TK arguably lies in the area of patent law.²⁷ In order for TK to benefit from patent protection, the three criteria for patentability, namely novelty, non-obviousness and usefulness, must, however, be satisfied. Of these three requirements, utility is arguably the easiest to satisfy. The utility criterion ensures that those products or processes that, although novel and non-obvious, but without current practical application, are prevented from being patented. TK would, for the most part, fulfil this requirement as it has been utilised for generations within the community.

The requirements of novelty and non-obviousness, on the other hand, prove more challenging. The novelty requirement constrains the use of patents as a form of protection for TK, since no individual applicant from an indigenous group or local community can realistically claim to have *invented* the matter at issue. The nature of TK is that it has been passed from one generation to another and may furthermore be known to other members of the community or group as well. The requirement of non-obviousness or 'an inventive step' is similarly difficult to fulfil, as it is tricky to track down the original 'inventor' of specific TK. The inventive step may have occurred generations ago and would be difficult to trace.²⁸ Thus, while patent law can be useful in the protection of TK, it can also be unwieldy and awkward to use and apply.

3.2.2 Protection via contract law

Given the difficulties in applying the classic IPR regime to TK, many countries and communities have taken the more pragmatic route of turning to contract law for a possible solution. Research institutions and pharmaceutical companies have established co-operation agreements with developing country governments and indigenous people/communities, whereby they receive prior informed consent to obtain biotechnological samples and utilise associated TK. In turn, they agree to share the profits from any commercial product derived from the biotechnological material with the indigenous people/communities.²⁹

²⁷ A patent is an exclusive right granted for an invention, being a product or process that offers a new technical solution to a problem. See WIPO (n 7 above) 35.

²⁸ It has been noted, however, that TK is not necessarily inert; rather, it is intrinsically innovative and as such intellectual effort continues to be improved upon and applied in modern times. See I Mgbeoji 'Patents and traditional knowledge of the uses of plants: Is a communal patent regime part of the solution to the scourge of biopiracy?' (Fall 2001) 9 *Indiana Journal of Global Legal Studies* 163 180.

²⁹ See EJ Asebey 'Biodiversity prospecting: Fulfilling the mandate of the Biodiversity Convention' (1995) 28 *Vanderbilt Journal of Transnational Law* 720 730; see also

The most recent example of a co-operation agreement in Africa is the one between the Khomani San people of Southern Africa and South Africa's Council for Scientific and Industrial Research (CSIR). In 2002, the CSIR and the San Council reached a 'memorandum of understanding' acknowledging the rights of the San as 'custodians of the ancient body of traditional knowledge' and the CSIR's role in developing the technology involved in extracting anti-obesity properties out of a plant known and used by the San to sustain them in times when they do not have access to water and food.³⁰ Contractual arrangements of this type can be beneficial for holders of TK. It does, however, have its limits. In most developing countries, including most of Africa, access to bioresources and associated knowledge and benefit sharing is not regulated. Contractual arrangements thus take place in the context of the standard contract law. Numerous problems arise in the context of contract law, such as enforcement, and specifically with regard to the fact that only parties to a contract can enforce it. This raises questions as to the successors of the community members who are the original contractees.

Furthermore, the law of contract assumes relative equality in bargaining strength. The truth of the matter is that most holders of TK do not have the capacity to negotiate fair terms. Even worse is that, in the presence of a legal regulatory vacuum, an agreement depends in part on whether the research institution or other users of TK possess the moral (and financial) authority and will to engage the local community.

Whilst there is no prescribed formula for contractual agreements, they can only really protect the interests of TK holders if they are created within a legal framework designed to regulate access to bioresources and associated TK.

ACA Muller 'Protecting biotechnological inventions in Brazil and abroad: Draft, scope and interpretation of claims' (2002) 13 *Albany Law Journal of Science and Technology* 145 153.

³⁰ See 'Extinct San reaps rewards' *Mail & Guardian* 8 January 2003; <http://www.mg.co.za> (accessed 18 April 2003). See also 'Bushmen to win royalties from slimming drug' *Mail & Guardian* 27 March 2003; <http://www.mg.co.za> (accessed 18 April 2003). The CSIR agreed to pay the San 8% of milestone payments made by its licensee, Phytopharm, during the drug's clinical development over the next three to four years. The San could also earn 6% of all royalties if and when the drug is marketed, possibly in 2008.

4 Alternative mechanisms for the protection of traditional knowledge

4.1 A *sui generis* system within the context of the African Model Law

A somewhat unique form of positive protection is the development of a *sui generis* system specifically designed to protect TK. A *sui generis* approach modifies some of the features of existing IP rights so as to accommodate the requirements of the specific subject matter at hand. A number of legislative models exist around the world that have incorporated a *sui generis* model in the form of 'collective/communal intellectual rights'.³¹

The OAU Model Law attempts to provide a model for Africa.³² The Model Law is instructive in many ways. First, it recognises that in many African countries some form of formal or informal communal control over biological resources does exist. Second, it also recognises that states may not always be, and in fact have not always been, protective of the rights of communities over their local bioresources, or ensured that communities benefit from their knowledge and practices. Third, it acknowledges that traditional ecological knowledge and practices often differ significantly from Western concepts of intellectual property and, as such, warrants dissimilar protection. It recognises 'community intellectual rights' as rights that are enshrined and protected under community norms and practices and customary law.³³ Article 16 specifically acknowledges the rights of communities over their biological resources and knowledge, and the right to *collectively* benefit from the use of their biological resources and the utilisation of their knowledge, innovations, practices and technologies.³⁴

Two central provisions are articles 17 and 23. Article 17 provides for the recognition and protection of community rights under the norms

³¹ These countries include Bangladesh, Brazil, Costa Rica, India, Peru, Philippines and Thailand. See GRAIN 'Community rights' available at <http://www.grain.org/brl/comm-brl-en.cfm> (accessed 7 May 2003).

³² See n 2 above.

³³ Art 1 defines a 'local community' as a 'human population in a distinct geographical area, with ownership over its biological resources, innovations, practices, knowledge and technologies, governed partially or completely by its own customs, traditions or laws'.

³⁴ It states: 'The state recognises the rights of communities over the following: their biological resources; the right to collectively benefit from the use of their biological resources; the right to collectively benefit from the utilisation of their innovations, practices, knowledge and technologies; their rights to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity; the exercise of collective rights as legitimate custodians and users of their biological resources.'

and practices of customary law. Article 23 reinforces the idea of placing the responsibility of determining what constitutes those rights upon the communities themselves.³⁵ It also deals with the notion of community rights as intellectual property rights that are inalienable and as such protected from appropriation.³⁶ Protection of ideas and practices exists without the requirement of a positive act such as registration, and prior publication of TK does not preclude the local community from exercising the intellectual right.³⁷

An issue to consider is whether these collectively owned and exercised rights are compatible with the TRIPS Agreement. The preamble of TRIPS specifically provides that 'intellectual property rights are private rights'. However, IP rights have already become more collective in nature. As a result of corporate or institutional research and development activities, IP rights such as patents are increasingly being treated as collective endeavours.³⁸ Furthermore, the notion of establishing a *sui generis* right is derived from the vacuum that exists within the realm of IP to cover those areas that do not fit under traditional conceptions of intellectual property. A *sui generis* right, therefore, would not have to be tailored as a *traditional* IP right. As such, the 'private right' provision of TRIPS would not apply to a *sui generis* right.

The Model Law provides a solution to some of the more philosophical and practical difficulties encountered in the protection of TK. It also provides a mechanism through which African governments can fulfil their mandate to protect TK under regional treaties, such as the Cultural Charter for Africa³⁹ and the African Charter.⁴⁰ Domestic regulation based on the Model Law, will, however, have to be tailored to the specific conditions, practices and legal systems of each state. In this respect, aspects such as the nature of the right, acquisition of the right and enforcement of the right will to a large extent depend on customary norms and practices of different communities. Countries like Egypt, Namibia, Zimbabwe and South Africa already have legislation with some

³⁵ Art 23(2) states that '[a]n item of community innovation, practice, knowledge or technology, or a particular use of a biological or any other natural resource shall be identified, interpreted and ascertained by the local communities concerned themselves under their customary practice and law, whether such law is written or not'.

³⁶ Art 23(1).

³⁷ Arts 23(3) & (4).

³⁸ See G Dutfield 'TRIPS-related aspects of traditional knowledge' (2001) 33 *Case Western Reserve Journal of International Law* 233 240.

³⁹ Art 26 states that 'African cultural heritage must be protected on the legal and practical planes in the manner laid down in the international instruments in force and in conformity with the best standards applicable in this field'.

⁴⁰ See the discussion in para 2 below. In the interpretation of the Charter, the African Commission is required to draw inspiration from the provisions contained in 'various African instruments on human and peoples' rights . . .' (art 60 of the Charter).

components of the Model Law, whilst others, such as Nigeria, Uganda and Zambia have developed draft legislation.

4.2 Utilising the African human rights system

The African Charter contains a number of provisions that can be used as both defensive and offensive mechanisms in the protection of TK. Article 1 mandates state parties to 'recognise the rights, duties and freedoms enshrined in the Charter' and to 'adopt legislative or other measures to give effect to them'. Thus, in terms of the Charter, contracting parties have a duty to respect, protect and fulfil the rights contained in the Charter.⁴¹

In the *SERAC* case,⁴² the African Commission on Human and Peoples' Rights (African Commission) indicated that 'respect' entails refraining from interference with the 'enjoyment of all fundamental rights'. The 'recognition of rights, duties and freedoms' would thus include an obligation on states to refrain from interfering in those rights and freedoms.⁴³ The mandate to 'adopt legislative or other measures to give effect to them', on the other hand, places a duty on African states to adopt positive measures in the protection of these rights and freedoms. It has also been suggested that states have to fulfil the rights through the obligation to 'move its machinery towards the actual realisation of the right'.⁴⁴ It can therefore be argued that member states have an obligation to respect, protect and fulfil the rights of traditional knowledge holders. These include rights such as the right to property, environmental rights and the right to development.

Article 14 of the African Charter provides:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

TK, as a form of intellectual property, undoubtedly falls within the realm of property. Unlike Western notions of IP, the nature of TK is such that it is either individually or communally held. It is submitted that the right to property contained in the African Charter is not restricted to private property, and therefore communally held TK is also protected. This implies that the holders of TK 'have the right to undisturbed possession, use and control of their property however they deem fit'.⁴⁵

Article 24 is an environmental right and stipulates that '[a]ll people shall have the right to a generally satisfactory environment favourable to their development'. In the *SERAC* case,⁴⁶ the scope and content of this

⁴¹ Heyns (n 1 above) 408.

⁴² Communication 155/96, *SERAC & Another v Nigeria* para 44.

⁴³ As above.

⁴⁴ n 42 above, para 47.

⁴⁵ *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 52.

⁴⁶ *SERAC* case (n 42 above).

right were considered. In enumerating this right, the African Commission referred to the principles contained in articles 60 and 61 of the African Charter, which allow the Commission to consider other relevant international and African instruments in the interpretation of the African Charter.⁴⁷ The African Commission regards the environmental right as an *essential right*⁴⁸ which requires a government, amongst others, to:

- (i) promote conservation and ensure ecological sustainable development and the use of natural resources;⁴⁹
- (ii) provide access to information to communities involved;⁵⁰ and
- (iii) grant those affected an opportunity to be heard and participate in the development process.⁵¹

The obligation to 'promote conservation and ensure ecological sustainable development and the use of natural resources' entails that states should protect natural resources and regulate access to bio-resources, as these provide the basis for TK. In addition, it also implies the protection of TK itself. The protection of TK under the environmental right is in line with the notion of an expanded understanding of the concept 'environment'. It has been argued that, in line with an anthropocentric approach to the environment, the term 'environment' should not be limited to the non-human natural environment, but should be defined broadly to specifically include the interrelationships between humans and the natural environment.⁵² As a result, an environmental right could then provide for traditional rights, needs and values of indigenous cultures and communities.

The second and third obligations contain procedural aspects, which are fundamental to the exercise of the substantive rights.⁵³ Access to information, for example, is essential for TK holders in gaining insight into the scope of government decisions regarding natural resources, particularly access to biological resources. Similarly, the third obligation provides an opportunity for TK holders to participate in, and comment on, those decisions that may detrimentally affect the protection that

⁴⁷ n 42 above, para 44.

⁴⁸ n 42 above, para 68.

⁴⁹ n 42 above, para 52.

⁵⁰ As above.

⁵¹ Para 53.

⁵² See L Feris & D Tladi 'Environmental rights' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa: International and constitutional law* (2004) (forthcoming).

⁵³ Principle 10 of the Rio Declaration on Environment and Development recognises the need to have access to information in order to protect the environment, and notes: 'At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.' Available on <http://www.unep.org> (accessed 10 August 2004).

they enjoy in terms of article 24. As mentioned by one commentator, 'procedural rights will play an integral role in ascertaining whether the right to a generally satisfactory environment has been violated'.⁵⁴

Finally, the right to development contained in article 22(1) provides that '[all] peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the heritage of mankind'. TK provides a vehicle, not only for social and cultural development, but given the growth in biotechnology, also for economic development of communities. It is in this regard that states should ensure that they provide mechanisms for the protection of TK in line with their duty contained in article 22(2).⁵⁵

5 Conclusion

Various options for the protection of TK exist. Some mechanisms are more appropriate than others, and certainly a 'one size fits all' solution for protecting traditional knowledge is not feasible. It is thus important that African countries make an assessment of possible best practices for protection. This would require expanding research on the nature of TK, which should involve indigenous communities and other holders of TK. It is only through extensive research that the extent to which TK can be protected through different forms of IPRs, contract, *sui generis* rights or human rights can be evaluated.

African legal instruments, such as the Model Law and the African Charter, should be considered when making these assessments, as these instruments present home-grown solutions for the African continent and are to a large extent designed to address the challenges presented to the continent. African states now have the tools to act pro-actively to adopt domestic policies and legislation to ensure the protection of TK.

⁵⁴ M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 167 175.

⁵⁵ It provides that 'states shall have the duty individually or collectively, to ensure the exercise of the right to development'.

Triggering the jurisdiction of the International Criminal Court

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Summary

African countries have been subjected to various ideologies, often coinciding with wars and armed conflicts that in turn result in flagrant human rights abuses. Countries such as the DRC, Liberia, Rwanda, Sierra Leone, Sudan and Uganda are testimony to such abuses. Against the backdrop of these conflicts in Africa, this article explores numerous operational aspects relating to the jurisdiction of the International Criminal Court. It considers issues such as the basis of jurisdiction, jurisdiction over foreigners and bilateral immunity agreements. The article further explores mechanisms that can trigger the jurisdiction of the ICC. These mechanisms include state referrals, Security Council referrals and initiatives taken by the prosecutor.

1 Introduction

The twentieth century is generally acknowledged as one of the bloodiest centuries in the history of mankind. Pernicious ideologies such as apartheid, communism, fascism and Nazism were developed and perfected during its course. These ideologies, in turn, inspired the emergence of some of the worst tyrannies known to man, and produced two world wars and countless lesser wars and armed conflicts. These wars and conflicts were used as the justification for or context within which the most flagrant abuses of human rights and heinous deeds were committed. They wrought untold sorrow, woe and suffering to millions of people all over the world. Africa had its share of this sorrow, woe and

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suffering. Events that engulfed such countries as Burundi, the Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone, Sudan and Uganda left thousands of Africans killed, maimed, destitute and homeless. Millions of others were forced to flee their countries as refugees.¹

Notwithstanding, the twentieth century also recorded countless significant achievements in most areas of human endeavour. In the spheres of the rule of law and human rights, one such achievement is the establishment of the International Criminal Court (ICC or Court). The Rome Diplomatic Conference adopted its Statute, the Rome Statute, in 1998.²

At a regional level, African states demonstrated strong support for the establishment of the ICC. The Southern African Development Community (SADC) adopted 'Principles of Consensus on the Court' in 1997. Another decision on the Court was adopted during the following year by the SADC Ministers of Justice/Attorneys-General. In 1999, 14 Southern African states reaffirmed their commitment to the ICC process through the adoption of the Pretoria Statement of Common Understanding on the ICC.³ The Pretoria Statement affirmed a continued commitment to support the ICC process and to accelerate the ratification of the Rome Statute; to adopt implementing legislation; to share information on the implementation of the Rome Statute; and committed parties to further participation in the processes of the ICC.⁴

As of May 2004, there were 139 signatories and 94 state parties to the Rome Statute. African support consisted of 20 signatories and 24 state parties.⁵ Egypt is, however, the only African state that made declarations regarding the Rome Treaty.⁶

¹ Generally see DDN Nsereko 'Victims of abuse of power, with special reference to Africa' (1994) 28 *University of British Columbia Law Review* 171.

² Rome Statute of the International Criminal Court, UN Doc A/conf 183/9 (1998), (1998) 37 *International Legal Materials* 999. The Statute came into force on 1 July 2002, 60 days after 60 states ratified it. As of 10 June, 94 states had ratified the Statute. Twenty-four of these states were from Africa. They are Benin, Botswana, Burkina Faso, Central African Republic, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, The Gambia, Ghana, Guinea, Lesotho, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

³ Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁴ NGO Coalition for an ICC 'Southern African governments adopt a common approach to ICC ratification' (1999) 12 *International Criminal Court Monitor* 3.

⁵ African signatories: Algeria, Angola, Burundi, Cameroon, Cape Verde, Chad, Comoros, Côte d'Ivoire, Egypt, Eritrea, Guinea-Bissau, Kenya, Liberia, Madagascar, Morocco, Mozambique, Sao Tomé et Príncipe, Seychelles, Sudan and Zimbabwe.

African state parties: Benin, Botswana, Burkina Faso, Central African Republic, Congo (Brazzaville), DRC, Djibouti, Gabon, The Gambia, Ghana, Guinea, Lesotho, Malawi, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia. For a detailed list on the status of ratification, see <http://www.isc-icc.org/signedlist.html> (accessed 31 July 2004).

⁶ Egypt's declarations are available at <http://www.un.org/law/icc/statute/status.htm> (accessed 31 July 2004).

Unlike the *ad hoc* tribunals for the former Yugoslavia and Rwanda or the Special Court for Sierra Leone, the ICC is a permanent international court. It serves as a reminder to tyrants all over the world, and especially those in Africa, that they can no longer oppress their fellow human beings with impunity. Even though tyrants may appear to be above the law, with the Court in place, they can be held accountable for their criminal conduct.

The Court was launched during June 2003 with the election of the 18 judges and a prosecutor in February and April respectively.⁷ The registrar was appointed during June of the same year. Of the 18 judges (seven women and 11 men), three represent Africa.⁸ Africa's commitment to the process is further exemplified by that fact that the first matters that the ICC was tasked with were referrals from Africa: the Democratic Republic of the Congo (DRC) and Uganda.⁹

This article discusses the Court's jurisdiction and focuses on how that jurisdiction may be set in motion.¹⁰

2 Jurisdiction

2.1 Bases of jurisdiction

The Court has jurisdiction over natural persons who commit international crimes such as aggression, genocide, crimes against humanity and war crimes.¹¹ While the Statute defines genocide, crimes against humanity and war crimes, it does not define aggression. The task of defining aggression was assigned to the Assembly of States Parties.¹²

As an international court created by treaty, the ICC derives its jurisdiction from the Rome Statute. However, the Statute does not vest the Court with universal jurisdiction such as that given by customary international law to municipal courts over crimes against the law of

⁷ Ms Fatou Bensouda (The Gambia) was appointed as the Deputy Prosecutor for Prosecutions.

⁸ Judge Ms Fatoumata Dembele Diarra (Mali), Judge Ms Navanethem Pillay (South Africa) and Judge Mrs Akua Kuenyehia (Ghana).

⁹ Democratic Republic of Congo: The referral by the Congo relates to atrocities committed in recent years by the Congolese rebel leader Jean-Pierre Bemba. Uganda: Uganda's referral deals with the terror campaigns of the Lord Resistance Army (LRA) in the Northern parts of Uganda.

¹⁰ Generally see DDN Nsereko 'The International Criminal Court: Jurisdictional and related issues' (1999) 10 *Criminal Law Forum* 87–120.

¹¹ Art 5 Rome Statute.

¹² See DDN Nsereko 'Genocide under the Rome Statute of the International Criminal Court' (2002) 71 *Nordic Journal of International Law* 497–521. Also by the same author see 'Defining aggression: An important agenda item for the Assembly of States Parties to the Rome Statute of the International Criminal Court' (2003) *Acta Juridica* 256.

nations, *delicta juris gentium*. A proposal by the Korean delegation to the Rome Diplomatic Conference would have vested a variant of universal jurisdiction in the Court.

Jurisdiction would have vested in the Court where:

- (a) the perpetrator of a crime within its mandate was a national of a state party;
- (b) he or she committed the alleged crime in the territory of a state party;
- (c) he or she was arrested in the territory of a state party — the custodial state; or
- (d) the victim of the crime was a national of a state party.

While the majority of the delegations at the Rome Conference supported this proposal, they did not adopt it because of stiff opposition by the permanent members of the Security Council, notably the United States.¹³ Instead, they adopted article 12(2), according to which the Court has jurisdiction over an alleged perpetrator only when the perpetrator is a national of a state party *or* he or she committed the offence in the territory of a state party — (a) and (b) above. The only way that the Court can exercise jurisdiction over an individual who commits the crimes in the territory of a country that is not a state party, or is a national of a country that is not a state party, is by either of the two countries making a declaration under article 12(3), accepting that the Court would exercise jurisdiction ‘with respect to the crime in question’.¹⁴ However, the Statute does not make it clear when a state that is not party to the Statute can make such a declaration. It appears that it may make such a declaration on a case-by-case basis after a crime has been committed. The crime in question must, however, have been committed after the Statute came into force.¹⁵ This interpretation is consistent with the need to give notice to prospective offenders that the ICC is already in place to try them. Article 12(3) is further commendable in that it makes the ICC accessible to states that were not able to become party to the

¹³ Ambassador David Scheffer, head of the United States delegation, threatened that the United States ‘would have to actively oppose this court if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the court. As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the world. . . .’ United States Delegation, Intervention on the Bureau’s Discussion Paper (A/CONF 183/C 1/L.53) 9 July 1998.

¹⁴ Art 12(3) Rome Statute. The declaration must be lodged with the Registrar of the Court.

¹⁵ Art 11(1) of the Rome Statute provides that ‘[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’. Para 2 provides that ‘[I]f a state becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that state, unless that state has made a declaration under article 12, paragraph 3’.

Statute at the time that the crimes were committed. For example, states that have recently been liberated from dictatorship and are not party to the Statute will be able to vest the ICC with jurisdiction over erstwhile dictators and their cohorts simply by making the required declaration. In that case, however, those states must be prepared to co-operate fully with the Court without delay or exception in accordance with part 9 of the Statute.

2.2 Foreigners

It is important to note that for the Court to exercise jurisdiction over an accused person, it is not necessary that both the state of the perpetrator's nationality and the one in whose territory the crime was committed be parties to the Statute. It is enough if at least one of them is. This point frustrated the United States during the negotiation process. Reacting to this position, Ambassador David Scheffer, the Chief US negotiator, asked the question:¹⁶

The fundamental question is, will the Court be able to prosecute even the officials and personnel of a government without that government having joined the treaty or otherwise submitted to the jurisdiction of the Court? This is a form of extraterritorial jurisdiction which would be quite unorthodox in treaty practice — to apply a treaty regime to a country without its consent . . . We have grave difficulties with a court of this character being established that presumes to have jurisdiction over the citizens of a country that has not ratified the treaty creating the Court, except in those situations where the Security Council has taken enforcement action under chapter VII of the UN Charter which binds member states.

The plenipotentiaries at the Rome Conference rejected these arguments on the solid ground that when a foreigner comes into the territory of a country, that foreigner must submit to its jurisdiction. The foreigner is duty bound to observe all the laws of that country, and in case of non-observance, is amenable to the legal processes of the country.¹⁷ The foreigner must also accept the institutions of that country as he or she finds them. A state that becomes a party to the ICC Statute adopts the Statute as part of its *juris corpus*.¹⁸ Foreigners in a country are deemed to have accepted in advance that should they, whilst in its territory, commit offences within the mandate of the ICC, that country may elect to hand them over to the ICC for trial. Criminal responsibility is an *individual* responsibility and not that of a person's state of nationality. The question of that state submitting to the jurisdiction of the Court does not arise.

¹⁶ See United States Delegation Intervention on the Bureau's Discussion Paper (A/CONF 18 3/C 1/L.53) 9 July 1998.

¹⁷ See JL Brierly *The law of nations* (1963) 278; R Jennings & A Watts *Oppenheim's international law* (1992) 904–910.

¹⁸ In some states, treaties automatically become part of the national laws on ratification. In others there may be a need to enact special statutes incorporating the treaties into the national legal system.

The question is asked as to whether it should make a difference that the individuals concerned are officials and personnel of a government. This answer is negative. As the Nuremberg International Tribunal so poignantly declared, in matters of international criminal law, 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state'.¹⁹

2.3 Bilateral immunity agreements

It is against this backdrop that the United States has pressured a number of countries, including many state parties, to enter into impunity or bilateral immunity agreements.²⁰ By these agreements, states undertake not to surrender any United States citizens in their territory to the Court to answer charges for the crimes they might have committed. The US government concludes these agreements under its American Service Members' Protection Act of 2 August 2002. That Act authorises the US President to use all means necessary, including force, to free any American service member that might be held by the Court. It also authorises the President to terminate American military and other assistance from any state that is not a member of NATO that refuses to enter into the agreements with the US.²¹ States thus enter into these agreements generally out of fear of losing American aid.²² These

¹⁹ *France et al v Goering et al* [1946] Ann Dig 202 221.

²⁰ As of 31 December 2003, 73 countries had concluded agreements with the United States. They include Afghanistan, Albania, Azerbaijan, Bahrain, Bhutan, Bolivia, Bosnia-Herzegovina, Botswana, Cambodia, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Dominican Republic, East Timor, Egypt, El Salvador, Gabon, The Gambia, Georgia, Ghana, India, Honduras, Israel, Macedonia, Madagascar, Maldives, Marshall Islands, Mauritania, Mauritius, Micronesia, Mongolia, Mozambique, Nauru, Nepal, Nicaragua, Palau, Panama, Philippines, Romania, Rwanda, Senegal, Seychelles, Sierra Leone, Sri Lanka, Tajikistan, Thailand, Togo, Tonga, Tunisia, Tuvalu, Uganda, Uzbekistan and Zambia.

²¹ The Nethercutt Amendment of 15 July 2004 further withheld funds from the Economic Support Fund from 50 states that refused to enter into impunity agreements with the United States. These included Benin, Republic of Congo, Lesotho, Mali, Namibia, Niger, South Africa and Tanzania.

²² Eg, on agreeing to sign the agreement, President Jagdeo of Guyana is reported to have said: 'I need the military co-operation with the US to continue, it is as clear as that.' Similarly, in justifying his country's action in entering into the agreement with the US, Prime Minister Lester Bird of Antigua and Barbuda said: 'This agreement is important to Antigua and Barbuda because the US Congress passed a law which prohibited the US government from providing military assistance to countries which did not sign article 98 agreements. Consequently, since July, we lost all US support to our coast guard which is crucial, both to search and rescue operations and to the interdiction of drug trafficking. The loss of this support has seen a significant increase in the amount of cocaine entering our territory and, in turn, this has spawned criminal activity.' 'A & B signs war crimes treaty with US' *Antigua Sun Daily News* 3 October 2003.

agreements purport to be made under article 98(2) of the ICC Statute.²³ However, agreements envisaged under that article are only those that (i) were in force between states that are parties to the ICC Statute (ii) before the Rome Treaty came in force and (iii) related to armed forces personnel only. They were meant to cover such agreements as Status of Forces Agreements (SOFs) and Status of Mission Agreements (SOMs), and were designed to resolve any conflicts that might arise between the obligations to states imposed by such agreements and those arising from the ICC Statute.²⁴ The United States is not a party to the Rome Statute and has no commitment to the attainment of its goals. The agreements entered into with states extend not only to military personnel but also to civilian officials, former officials, tourists and mercenaries. David Scheffer, formerly the US Chief Negotiator at the Rome Conference, explained thus:²⁵

We successfully negotiated article 98 in the treaty, preserving the core principle of the nearly 100 military status-of-forces agreements the United States has with other countries. The principle is that the nation that sent military forces deployed on foreign soil — the 'sending state' — retains primary criminal jurisdiction over its soldiers unless it consents to local prosecution. We purposely negotiated the words 'sending state' to ensure that Americans sent on official mission overseas — military, diplomatic, humanitarian — would retain this important protection. But article 98 was never intended to protect unofficial actions, such as those taken by mercenaries or others acting without US authority. Other countries agreed and gave us this well-defined protection.

It is submitted that these agreements not only undermine the integrity of the ICC, but also violate the principle of equality before the law and contravene the obligations undertaken by state parties to the Rome Statute.²⁶ They are also an affront to those states' national dignity.

²³ The provision reads as follows: 'The court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of the sending state is required to surrender a person of that state to the court, unless the court can first obtain the co-operation of the sending state for the giving of consent for the surrender.'

²⁴ Generally see D Fleck (ed) *The handbook of the law of visiting forces* (2001).

²⁵ DH Schaffer 'Unwilling hands: US sabotages International Court at its own peril' *The Seattle Post-Intelligencer* 1 February 2004.

²⁶ By entering into those agreements, state parties incapacitate themselves from co-operating fully with the Court as required under art 86 of the Rome Statute. Yet, art 18 of the Vienna Convention of the Law of Treaties also obliges parties to a treaty to refrain from acts which 'would defeat the object and purpose of a treaty'.

3 Trigger mechanisms

3.1 The International Law Commission proposals

The issue of who should have the authority to set in motion or trigger the jurisdiction of the Court was one of the most contentious before the Preparatory Commission and the Rome Diplomatic Conference. According to the International Law Commission (ILC) draft, only state parties to the Statute could lodge complaints with the prosecutor, alleging that crimes within the Court's jurisdiction appear to have been committed. However, they could only complain in respect of genocide if they were party to the Genocide Convention. To complain about other crimes, they had to accept the Court's jurisdiction over those crimes.²⁷ Even then, not all state parties could complain in a given case. Only state parties in whose territory a suspect was found (the custodial state) or in whose territory the offence was committed (the territorial state) would be able to do so.²⁸ The Security Council would also have had power to refer to the Court matters that it might be dealing with under chapter VII of the UN Charter, which vests in the Council power to decide on measures to seize situations that it considers to be a threat to the peace, breach of the peace or an act of aggression. The trial and punishment of individuals responsible for such situations may be regarded as such measures. Nevertheless, during the Nuremberg, Yugoslav or Rwanda Tribunals, the ICC prosecutor would have had no power *proprio motu* to initiate investigations or to commence prosecutions without a prior complaint by a state or a referral by the Security Council.

Opposition to a prosecutor with such powers centred on the issue of state sovereignty. It was argued that criminal investigations tended to be intrusive into the internal affairs of a state and that for the prosecutor to commence investigations in the territory of a state *proprio motu*, without a request and against the wishes of that state, would amount to a diminution of that state's sovereignty.²⁹ It was also argued that states would most likely not co-operate with the prosecutor or with the Court, and any proceedings commenced without the political goodwill of states, particularly those directly concerned with the case, would be doomed to failure.

It was further argued that an independent prosecutor, who is not accountable to a superior political authority, would be a 'loose-cannon' prosecutor, likely to abuse his powers and to commence proceedings

²⁷ See draft art 25.

²⁸ See draft art 21.

²⁹ See, eg, the editorial comment of the *Detroit News* 28 July 1998 A6, asserting that 'the international tribunal is an extremely bad idea that would work only to the extent that it is able to breach national sovereignty'.

that were wholly unfounded.³⁰ Developing states also expressed fears that such a prosecutor might fall under the sway of powerful states bent on harassing the weaker ones. Lastly, it was argued that the prosecutor might also create a workload that cannot be sustained by the available resources.

Advocates of an independent prosecutor with *proprio motu* powers pointed out that past experience with human rights instruments demonstrates that states are very reluctant to file complaints against each other. This is probably so because of fear of straining relations with each other. It may also be due to fear of terrorist reprisals. It may also be due to a lack of moral authority, realising that they, too, have skeletons in their closets that they would not want to be exposed. To date, no state has made use of the state complaint procedures under the International Covenant on Civil and Political Rights,³¹ the Inter-American Convention on Human Rights,³² the Organization of African Unity's African Charter on Human and Peoples' Rights,³³ or the United Nations (UN) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.³⁴ Only 12 state complaints have been filed under the European Convention for the Protection of Human Rights and Fundamental Freedoms since it came in force in 1953.³⁵ With the exception of the European Convention, virtually all the complaints under the instruments just mentioned have been filed by non-governmental organisations (NGOs) acting on behalf of individuals. Since most defendants before the ICC are likely to be key government or military officials, their states are not likely to complain against them.

As has been noted, the Security Council cannot always be relied upon to refer situations to the prosecutor for action, even when the facts of the situation indicate that such referral is called for. In 1998 a UN team, mandated to investigate allegations of atrocities in the Democratic Republic of the Congo, found that troops under Rwandan command

³⁰ See, eg, F Hiatt 'The trouble with the War Crimes Court' *The Washington Post* 26 July 1998 C07, when he castigates supporters of the Court for 'cheering the creation of not just a court but a powerful prosecutor's office that will be accountable to almost no one, subject to none of the checks and balances that restrain law enforcement in a democracy and empowered to punish people who have virtually no say over its operation'.

³¹ 999 UNTS 171, adopted on 16 December 1966, entered into force on 23 March 1976, *per art 49*.

³² 1144 UNTS 123, adopted on 22 November 1969, entered into force on 18 July 1978, *per art 74*.

³³ OAU Doc CAB/LEG/67/3 rev 5, adopted on 17 June 1981, entered into force on 21 October 1986, *per art 63*.

³⁴ Adopted 10 December 1984, 1465 UNTS 85, entered into force on 26 June 1987, *per art 27(1)*.

³⁵ 213 UNTS 221, adopted on 4 November 1953, entered into force on 3 September 1953, *per art 66*.

committed crimes against humanity, including the systematic murder of Hutu refugees during the campaign that brought Laurent Kabila, of the Democratic Republic of the Congo, to power. The team recommended that these crimes be referred to an international criminal court. The Security Council, for political and other undisclosed reasons, chose not to pursue the matter.³⁶ Therefore, if the prosecutor were to be left to sit back and wait for states to complain or the Security Council to refer situations to him, he would have very little work and the Court would stay dormant.

On the issue of sovereignty, it must also be pointed out that the obligation of state parties to the ICC Statute should not depend on whether they are in favour of action in a particular case. States must co-operate fully, and at all times, when their co-operation is reasonably and legitimately sought by the prosecutor.³⁷ By adhering to the ICC Statute, states surrender some degree of sovereignty and freedom of action to the prosecutor acting on behalf of the international community. Indeed, states frequently enter into treaties by which they subject themselves to restrictions on their freedom of action and to binding judicial procedures in case of disputes. Establishing the ICC by way of a treaty has the same effect: It imposes restrictions on state sovereignty like any other treaty. This is inevitable. As President Arthur Robinson of Trinidad and Tobago asserted:³⁸

[The] mere fact of having an international criminal law was an indication that states recognised the need to observe particular rules of behavior and so bind themselves in their conduct in relation to individual human beings as well as other states.

The International Criminal Tribunal for the former Yugoslavia has also underscored this point when it stated that:³⁹

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as protection for those who trample underfoot the most elementary rights of humanity.

On the issue of the possible abuse of power and the commencement of unfounded prosecutions, Justice Louise Arbour, former prosecutor for both the Yugoslav and Rwanda Tribunals, aptly commented that:⁴⁰

³⁶ See 'UN hit for inaction on Congo' *Terraviva* Rome 16 July 1998 No 24 7.

³⁷ Art 86 of the Rome Statute provides that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

³⁸ Press Conference by President Robinson on 9 October 1997.

³⁹ *Prosecutor v Dusko Tadic a/k/a 'Dule'* (Case No IT-94-1-AR72), decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995.

⁴⁰ Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court 8 December 1997.

If unfounded charges are laid, the accused will be acquitted. But if persons guilty of crimes within the statute are out of reach of the prosecutor, the very purpose of the statute will be defeated.

Moreover, the prescribed qualifications of the prosecutor, and the transparent methods of his or her appointment, ensure the professional competence and impartiality of an incumbent and guard against possible abuse of his or her powers.

Regarding the stretching of resources, the prosecutor will surely be aware that such resources are not limitless. He or she will be sensible enough not to commence proceedings against every conceivable offender; but rather proceed against those persons in responsible positions, especially senior government officials, army commanders and others who might have played key roles in perpetrating particularly heinous crimes. The prosecutor must be independent, must have a discretion and be at the service of states, without becoming the servile tool of states.

The final decision of the Rome Conference was to allow the prosecutor, states and the Security Council to trigger the jurisdiction of the Court. Article 13 of the Statute provides as follows:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

3.2 State referrals

State parties to the Statute may refer to the prosecutor for investigation and prosecution any situation in which one or more of the crimes within the Court's jurisdiction might have been committed.⁴¹ These crimes need not be committed in their territory or involve their nationals. It is enough if they are committed on the territory of a state party or by a national of a state party. States that are not party to the Statute, but have made declarations under article 12(3), are also allowed to refer particular cases to the prosecutor for investigation and prosecution, provided that they undertake to co-operate under part 9 of the Statute. Nevertheless, the right of a state that is not party to the Statute to refer cases to the prosecutor is limited to crimes committed in its territory or by its nationals.

⁴¹ Art 13 ICC Statute.

It should be emphasised that, save for referrals by states that are not party to the Statute, state referrals are not restricted to specific cases in the sense of allegations against particular individuals. They cover 'situations'. A situation is a set of circumstances or episodes, such as a war or other untoward episodes, in which one or more of the crimes within the Court's jurisdiction have been committed.⁴² It is the duty of the prosecutor to investigate and determine which, if any, crime or crimes have been committed and by whom. Needless to say, in referring a situation to the prosecutor, the state concerned must, as far as is possible, provide the prosecutor with sufficient information to enable him to decide whether there is a reasonable basis to undertake the investigation. The prosecutor cannot commence the investigation unless that threshold is met.⁴³ The first two state referrals were from the Democratic Republic of the Congo and Uganda.

An advantage of state referrals is that it assures the prosecutor of the co-operation of the referring state. Another advantage is that it saves the prosecutor the political embarrassment of having to initiate proceedings in respect of situations in a certain state's territory against the wishes of that state. The third advantage is that the prosecutor need not seek the authorisation of the pre-trial chamber, which is needed when he or she initiates the proceedings *proprio motu*.⁴⁴

3.3 Security Council referrals

The Security Council, for its part, may also refer *situations* to the prosecutor when it is acting under chapter VII of the Charter.⁴⁵ For example, the Council acted under these powers when it established the *ad hoc* tribunals for the former Yugoslavia and for Rwanda.⁴⁶ Rather than creating *ad hoc* tribunals for each new situation, the Council can now

⁴² See DDN Nsereko in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) art 118, margin 6.

⁴³ In December 2003, President Yoweri Museveni of Uganda referred to the prosecutor the situation concerning the Lord's Resistance Army. The prosecutor, after determining that there was 'a sufficient basis' to conduct investigations, decided to commence the investigations; <http://icc-cpi.int/php/news/latest/php> (The Hague, 29 January 2004). However, under art 18 of the Statute, the prosecutor is obliged to notify all state parties of his intention to investigate. If, on receiving the notification, a state that otherwise has jurisdiction indicates that it is exercising or intends to exercise such jurisdiction in respect of the same situation, the prosecutor must defer to that state. The only way that the prosecutor may commence investigations and prosecution in such circumstances is by seeking and obtaining authorisation from the pre-trial chamber. See also DDN Nsereko 'Preliminary rulings regarding admissibility' in Triffterer (n 35 above) art 18.

⁴⁴ Art 15.

⁴⁵ As above.

⁴⁶ See Security Council Resolution 827 of 1993 establishing the International Criminal Tribunal for the former Yugoslavia, and Resolution 955 of 1994 establishing the International Criminal Tribunal for Rwanda.

refer such situations to the ICC. The greatest advantage of a Security Council referral is that it is binding on states, regardless of whether they are state parties or whether they 'accept' the jurisdiction of the Court. In accordance with article 25 of the UN Charter, they must co-operate fully with the Court in the discharge of its duties in respect of the referral.

Acceptance of the Security Council as one of, and not *the only*, body that can trigger the jurisdiction of the Court, did not come without a price. The permanent members of the Security Council, particularly the United States, favoured the International Law Commission provision that would have forbidden an ICC prosecution arising out of 'a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under chapter VII of the Charter, unless the Security Council otherwise decides'.⁴⁷ This provision was unacceptable to the majority of the delegations at the Rome Conference, as the Council was notorious for keeping certain situations on its agenda for an indefinite period of time without doing anything about it. If the provision were accepted, it would have resulted in the ICC never being able to take any case arising out of such situations. To appease the permanent members of the Council, the Conference adopted the following compromise, known as the Singapore Proposal:⁴⁸

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

There are four important points in respect of this provision:

The first is that, although the Council's action is billed as 'a request', it is actually a command to the Court to defer to its jurisdiction.

The second point is that the request must be made by way of resolution and that to be adopted, the resolution requires the affirmative concurrence of all the permanent members of the Council present and voting; it is liable to a veto by any of the permanent five; it is a consolation.

The third point is that it is clear from both the context and the language of article 16 that the purpose of the article was to suspend ICC action on cases arising out of a specific or particular situation that the Security Council may still have to deal with. The basis for this assertion is the assumption that, as long as the Security Council is busy with a situation that possibly involves international peace and security, other bodies, including the ICC, should not interfere. The Council must have the 'first right to act'.⁴⁹ After all, the Charter vests it with primacy in these

⁴⁷ Art 23(3) ILC draft.

⁴⁸ Art 16.

⁴⁹ See K Ambos 'The role of the prosecutor of an international criminal court from a comparative perspective' (1994) 45 *The Review of the International Commission of Jurists*.

matters. Untimely or precipitous investigations or prosecutions by the ICC might undermine its diplomatic efforts to normalise a volatile situation.⁵⁰

The fourth point is that the provision is likely to be abused, as the Council needs not give reasons for its 'request' to the Court for the stay of any prosecution. Those unstated reasons might be purely political. The 'request' may be repeated *ad infinitum*, and the Court's action stayed indefinitely. In the meantime, valuable evidence may be destroyed, and witnesses may disappear.⁵¹

Fears of abuse of the resolution did indeed materialise, just days after the Rome Statute came into force. It so happened that the mandate of the UN Mission in Bosnia and Herzegovina (UNMIBH), to which the United States made significant contributions, in the form of both human and material resources, was about to expire. The United States threatened to cut off its contributions unless its nationals who are serving, or who served in any such mission, were granted immunity from prosecution by the ICC for anything they did or omitted to do in relation to the missions. Anxious not to forfeit the United States' contributions to UNMIBH and other peacekeeping missions, the Security Council acceded to the US' demands. Purporting to act under chapter VII of the Charter, the Council on 12 July 2002 passed Resolution 1422 that reads as follows:

- 1 *Requests*, consistent with the provisions of article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
- 2 *Expresses* the intention to renew the request in paragraph 1 under the same conditions each July for further 12-month periods as may be necessary;
- 3 *Decides* that member states shall take no action inconsistent with paragraph 1 and with their international obligations;

⁵⁰ It is, however, not true that the simultaneous exercise of jurisdiction by the Court over the same matter that is being dealt with by the Council necessarily undermines the efforts of the latter. This assumption was held to be legally unsound by the International Court of Justice. The Court held that it could and did adjudge the legal aspects of a case, the subject matter of which was under the active consideration by the Council under ch VII of the Charter. No one was able to claim afterwards that the Council's efforts were thereby undermined. See *Nicaragua v United States* [1986] ICJ Reports 14. See also *United States Diplomatic and Consular Staff in Iran case (USA v Iran)* ICJ Reports (1980) 3. Generally see RStJ Macdonald 'Changing relations between the International Court of Justice and the Security Council of the United Nations' (1993) 31 *The Canadian Yearbook of International Law* 3.

⁵¹ A proposal by the Belgian delegation that would have provided for the preservation of the evidence and protection of witnesses was omitted from the final text of the Statute.

4 *Decides to remain seized of the matter.*

This resolution is of doubtful legal rectitude.⁵² First, it is a misuse of the Statute, particularly article 16. Article 16 was never intended to be the basis for granting to prospective indictees of the Court blanket exemption from its jurisdiction in respect of future and unknown situations. Article 16 envisages only existing situations with which the Security Council may be seized. The resolution justifies the invocation of the article in order 'to facilitate member states' ability to contribute to operations established or authorised by the United Nations Security Council'.⁵³ This was never the purpose of the article.

Secondly, before invoking article 16, the Council must allege the existence of an actual situation that constitutes a threat to international peace and security.

Thirdly, the resolution specifically refers to 'current or former officials or personnel from a contributing state not party to the Rome Statute'. Such reference violates article 27 of the Statute that declares as irrelevant any distinction based on official capacity, and aims at combating impunity.⁵⁴

The above assertions lose their validity even though, when passing the resolution, the Council claimed that it was acting in consistence with article 16. The resolution was merely intended to weaken the Court by perpetually stripping it of jurisdiction over potential violators of international humanitarian law. As was feared, it was renewed as a matter of course on 12 July 2003,⁵⁵ and the renewal was followed by another resolution, that of 1 August 2003, under which the Security Council set up the Multinational Stabilisation Force for Liberia and again exempted all personnel participating in the force from the ICC jurisdiction.⁵⁶ Resolution 1422, and those that followed it, are a disservice to the cause of the rule of law and respect for the law. They undermine the authority of the ICC and encourage impunity. They send

⁵² See also C Stahn 'The ambiguity of Security Council Resolution 1422 (2002)' (2003) 14 *European Journal of International Law* 85–104. See also Council of Europe Parliamentary Assembly Resolution 1336 (2003) on Threats to the International Criminal Court of 25 June 2003.

⁵³ See para 7 of the Preamble to the Resolution.

⁵⁴ Art 27 para 1 Rome Statute reads as follows: 'This Statute shall apply to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'

⁵⁵ See S/RES/1487 (2003).

⁵⁶ S/RES/1497 (2003). To show their opposition to the exemption, France, Germany and Mexico abstained from voting on the resolution. In a statement to the press immediately following the vote, UN Secretary-General Kofi Annan said: 'Frankly my sentiments are with those countries that abstained.'

the wrong signal to people who serve in peacekeeping operations and those who might be tempted to violate international humanitarian law that they can do so and get away with it.⁵⁷ Lastly, the resolutions were unnecessary, because individuals serving on UN peacekeeping missions remain under the jurisdiction of their home states. Whenever a serviceman is accused of committing a crime, he or she is immediately sent home where he or she is dealt with. As long as the home state is dealing with him or her, the case will not be admissible before the ICC. It would only be admissible if it were to be shown that the state concerned was unable or unwilling to investigate or to prosecute genuinely or effectively.⁵⁸ These resolutions may discredit the Security Council as being a servile tool of the United States' foreign policy that is hostile to the Court.⁵⁹ US attempts to renew the resolution in June 2004 failed, because of a lack of support by the majority of the members of the Security Council.

3.4 The prosecutor's initiatives

Regarding the prosecutor, the Statute empowers him to initiate investigations and prosecutions *proprio motu*, without a referral by either a state or the Security Council. He or she may act on information received from states, organs of the UN, intergovernmental and non-governmental organisations 'or other reliable sources that he or she deems appropriate'.⁶⁰ These other sources include victims, relatives of victims and eyewitnesses. However, before he or she can proceed with full investigations, the prosecutor must seek authorisation from the pre-trial chamber. The chamber, for its part, may not authorise any investigations unless it is satisfied that 'there is a reasonable basis to proceed', and that the case appears to fall within the jurisdiction of the Court.⁶¹

⁵⁷ In a statement expressing his concern over extending 'UN peacekeepers' immunity from ICC action', Secretary-General Kofi Annan said: 'I can state confidently that, in the history of the United Nations, and certainly during the period that I have worked for the organisation, no peacekeeper or any other mission personnel has been anywhere near committing the kind of crimes that fall under the jurisdiction of the ICC.' Press Release SG/SM/8749 SC/7790, 12 June 2003.

⁵⁸ Art 17 Rome Statute.

⁵⁹ This servility was further shown by Council Resolution 1502 of 26 August 2003 on the Protection of United Nations Personnel, Associated Personnel and Humanitarian Personnel in Conflict Zones. The resolution was introduced by Mexico and co-sponsored by Bulgaria, France, Germany, Russia and Syria following a terrorist attack on the UN headquarters in Baghdad the previous week, in which over 20 UN staff were killed or injured. The resolution made reference to the fact that under the Rome Statute, an attack intentionally directed against humanitarian personnel was a war crime. The reference to the Rome Statute was deleted from the resolution at the insistence of the United States.

⁶⁰ Art 15 ICC Statute.

⁶¹ As above.

There are also other preliminary steps that the prosecutor must take before he or she seeks the pre-trial chamber's authorisation. When he or she determines that there is a reasonable basis to proceed with an investigation, the prosecutor must, before applying for the trial-chamber's authorisation, notify 'all state parties and those which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned'.⁶² Within one month of receiving such notification, a state may inform the Court that 'it is investigating or has investigated its nationals or others within its jurisdiction' with respect to the acts disclosed in the prosecutor's notification.⁶³ Thereafter that state may request the prosecutor to defer to the state's investigation of those persons. When a state makes such a request, the prosecutor must comply, 'unless the pre-trial chamber, on the application of the prosecutor, decides to authorise the investigation'.⁶⁴ The pre-trial chamber may authorise the investigation where, for example, it is satisfied that the state concerned is either unwilling or unable to genuinely carry out the investigation and bring the culprits to justice. Either the state concerned or the prosecutor may appeal the decision of the pre-trial chamber to the appellate chamber. When the prosecutor has deferred to the investigations of a state, or pending the ruling of the pre-trial chamber, he or she may, exceptionally, seek the authorisation of the chamber to pursue some investigations for the purpose of preserving evidence that may subsequently be lost to the Court. This may be the case in situations of on-going armed conflicts where witnesses may be killed or go missing and vital evidence destroyed.

Where, after a referral from a state or the Security Council or on receipt of information from other sources, the prosecutor declines to investigate on the ground that 'there is no reasonable basis to proceed',⁶⁵ or declines to prosecute on the ground that 'there is not a sufficient basis for a prosecution',⁶⁶ the pre-trial chamber may, either at the instance of a state that made referral or the Security Council, 'request' him to reconsider his decision.⁶⁷ However, the 'request' can be construed as an order. This assertion is borne out by the fact that for the most part the prosecutor's decision not to investigate or to prosecute is not effective unless and until it is confirmed by the pre-trial chamber.⁶⁸

⁶² Art 18 ICC Statute. This article was inserted at the insistence of the United States. See Statement of the US Delegation on 'Article 11bis — Preliminary rulings regarding admissibility' (A/AC.249/1998/WG.3/DP.2) (3 April 1998).

⁶³ As above.

⁶⁴ As above.

⁶⁵ Art 53(1).

⁶⁶ Art 53(2).

⁶⁷ Art 53(3).

⁶⁸ Art 53(3) para (b).

Unlike a prosecutor at the national level, particularly under the common law jurisdictions, the prosecutor's powers of initiative are severely restricted. He or she cannot carry out any investigations to verify the information he or she has received. The prosecutor must rely solely on sources other than his or her office. All that he or she can do is seek additional information from states, organs of the UN, intergovernmental and non-governmental organisations or other reliable sources. He cannot commence investigations without authorisation from the pre-trial chamber. Again, the prosecutor has to defer to national jurisdictions whose only interest in a matter may be to delay or stymie the international criminal justice processes. These procedures were, doubtless, put in place in deference to the states' primary responsibility and right to investigate and prosecute international crimes that fall within their jurisdiction.⁶⁹ They ensure that the prosecutor, in exercising pre-trial powers, is accountable to some authority. Lastly, these procedures serve to allay the fears of those states that were concerned that their sovereignty might be compromised by the decisions of a 'freewheeling' prosecutor, by subjecting those decisions to scrutiny by a panel of impartial and independent judges.⁷⁰

4 Concluding remarks

From the standpoint of the rule of law and justice, the International Criminal Court is one of the greatest achievements of the twentieth century. It is a powerful weapon against impunity. However, for the Court to be effective, its jurisdictional reach must be as wide as possible. To achieve this, and in the absence of universal jurisdiction, it is imperative that as many states as possible be parties to its Statute. This will make it very difficult for perpetrators to find safe havens. States that are not able or willing to investigate situations in which atrocities have been committed must be willing to refer those situations to the Court. In this respect, in deciding to refer to the Court situations that took place in their territory, both Uganda and the Democratic Republic of the Congo must be commended.

⁶⁹ The intention of the architects of these procedures was to enable states to stop the Court's involvement 'before the prosecutor of the International Criminal Court initiated an investigation because even initiation of an investigation might interfere with the exercise of national jurisdiction'. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* (GA 50th session Supp A/50/22 September 1995 10).

⁷⁰ Generally see DDN Nsereko 'Prosecutorial discretion before national courts and international tribunals' (2004) 2 *Journal of International Criminal Justice* (forthcoming December 2004).

Civil society has in the past played a crucial role in galvanising international opinion in favour of the Court. It must continue its campaign until there is near-universal ratification. It must also continue to be vigilant to ensure that state parties live up to their obligations under the Statute and that they do not violate those obligations, as has happened with respect to bilateral immunity agreements that some have entered into with the United States.

Lastly, to exercise his *proprio motu* powers under the Statute, the prosecutor will rely largely on the independent information provided by victims and people in close proximity to the places where the crimes are committed, or to witnesses with first-hand information about the crimes. Civil society again has a vital role to play in this respect. After all, civil society constitutes 'the people' of the United Nations and the conscience of the international community.

The African Charter on Human and Peoples' Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11

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Summary

*Military governments in Nigeria adopted numerous decrees that ousted the jurisdiction of courts. This article investigates the role of the African Charter in challenging such ouster clauses. Despite being incorporated into Nigerian domestic law in 1983, much uncertainty still surrounds the status of the African Charter on Human and Peoples' Rights. The author criticises the decision in *Abacha v Fawehinmi*, in which the Nigerian Supreme Court held that the African Charter cannot be superior to the Constitution and upheld the validity of ouster clauses. With reference to case law in the United States, the author highlights the threats to human rights posed by anti-terrorist laws in the world after 11 September 2001.*

1 Introduction

The African Charter on Human and Peoples' Rights¹ (African Charter or Charter) was passed by a resolution of the Organisation of African Unity

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¹ OAU Doc CAB/Leg/67/3/Rev 5. See text in (1981) 21 *International Legal Materials* 58 and Schedule to the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act, Cap 10, Laws of the Federation of Nigeria, 1990.

(OAU) in 1981. The Charter came into force on 21 October 1986, after it was ratified by a majority of member states of the OAU.² The Charter is an African attempt to define and protect human rights at continental level.

Since the adoption of the African Charter, some African Countries have had military regimes while others have been under civilian regimes — all with varying human rights records. In an article published in 1999, Viljoen examined the domestic enforcement of the African Charter in 16 African countries.³ He finds that there was a growing awareness of the Charter during the 1990s and that there are sporadic references to the African Charter by the courts in several countries, but that none is as decisive as that of Nigeria.⁴ Viljoen finds a link between the frequency and innovative use of the Charter by the local judiciary and the arguments put forward by counsel.⁵ Another influential factor is the varying status that the Charter enjoys within the municipal laws of African countries. In some countries, treaties, once ratified, are enforceable by the domestic courts without any further need for incorporation by legislation.⁶ In other countries, once treaties are incorporated into domestic laws, they are at par with other domestic legislation.⁷ There are even some countries where treaties supercede domestic legislation.⁸

The ouster of jurisdiction of courts in matters concerning human rights is a regular feature of dictatorial regimes. Heads of military regimes in Nigeria made it quite clear that they were military regimes and not democratic governments.

11 September 2001 witnessed unprecedented terrorist attacks on America. Terrorists hijacked planes which they later crashed into the Pentagon and the World Trade Centre. A third attack aimed at the White House failed. Thousands of lives were lost. Americans were aghast. The

² F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1.

³ As above. These countries are Algeria, Benin, Botswana, Cape Verde, Congo, Ghana, Malawi, Namibia, Nigeria, Senegal, South Africa, Tanzania, Togo, Tunisia, Zambia and Zimbabwe.

⁴ Viljoen cited examples from Benin, Botswana, Ghana, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

⁵ Viljoen (n 2 above) 11 & 12.

⁶ This is the position in Namibia, where the Constitution provides: 'All existing international agreements binding on Namibia shall remain in force, unless and until the National Assembly, acting under article 63(2)(d) hereof, otherwise decides' (art 143), and 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding on Namibia under this constitution shall form part of the law of Namibia' (art 144).

⁷ Eg, in *Chafukwa Chichana v The Republic* (1996) 1 LRC 1 (cited by Viljoen (n 2 above) 6), the Malawi Supreme Court declined to apply the African Charter in the case on the grounds that the Charter has not been incorporated into local law by any local statute in Malawi.

⁸ Eg Benin: See art 147, 1991 Constitution of Benin, cited in Viljoen (n 2 above) 2.

Bush administration declared a world-wide war against terrorism. This war against faceless enemies introduced new dimensions to ouster clauses and draconian legislation. The ripples generated by the actions of the American government have had a great impact all over the world.

This paper consists of two parts. The first examines the extent to which courts in Nigeria have been able to use the African Charter as a response to draconian legislation, particularly in the case of ouster clauses. The second part examines the impact of September 11 on draconian legislation and the ouster of jurisdiction of courts.

2 The African Charter and ouster clauses in Nigeria

2.1 Background

The African Charter was incorporated into the domestic legislation of Nigeria in 1983 during the civilian government of Alhaji Shehu Shagari. It was done through the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.⁹ About ten months after the President signed the Act, the military overthrew the civilian government.

Since independence, the government of Nigeria has been mainly in the hands of the military.¹⁰ These military regimes were not known for their respect for human rights, nor for any respect for the sacredness of the independence of the judiciary. They used all the means at their disposal to evade, circumvent and pervert the legal procedures that ensured the rule of law. Ouster clauses were particularly useful to the military in this regard.

The problem with decrees¹¹ was that many touched on the rights of citizens. The military government had no qualms or inhibitions to use bills of attainder.¹² *Ad hominem* laws were made retrospective in order to deprive persons of their properties without any process of hearing. Although ouster clauses are not exclusive to military regimes in Nigeria, the overwhelming majority were enacted during military regimes.¹³ The use of ouster clauses prevented persons aggrieved by the actions of a military government from seeking redress in the courts. By barring

⁹ 2 of 1983. This Act came into effect on 17 March 1983 and is now contained in Cap 10, Laws of the Federation of Nigeria, 1990.

¹⁰ Between 1960 and 1999, the military regimes were: Ironsi (Jan–July 1966); Gowon (1966–1975); Murtala (1975–1976); Obasanjo (1976–1978); Buhari (1985–1986); Babangida (1986–1993); Abacha (1993–1998); and Abubakar (1998–1999), while the civilian administrations were Balewa (1960–1966); Shehu Shagari (1979–1983) and the few months of the interim administration of Shonekan (1993).

¹¹ Statutes (legislation) passed by the military governments at federal level were referred to as decrees. Such decrees that are still in force are now styled 'Acts'.

¹² A Bill of Attainder: Extinction of civil rights and capacities by legislation.

¹³ See G Fawehinmi 'Ouster of court's jurisdiction by statutes' in ES Olarinde *et al* (eds) *Contemporary issues in the Nigerian legal system* (1997) 67.

access to the courts, the military became a totalitarian government. In a seminal work on ouster clauses, Chief Gani Fawehinmi identifies 'several garbs' in which ouster clauses appear. These include¹⁴ retrospective laws made to protect unconstitutional laws; laws enacted to cover up the failure of leaders to hold consultation or obtain statutory consent, advice or approval required by the legislature; laws to cover up failure to comply with fundamental rights; laws to prevent the use of general process of courts; laws to stop court proceedings and nullify court orders; and laws to prevent the court from committing erring public officers for criminal contempt.

Prof Nwabueze identifies various formulas used, either singly or in combination, by military governments in Nigeria to comprehensively oust the jurisdiction of the courts. He summarises them as follows: Civil proceedings in respect of any act, matter or thing done or purported to be done under the decree were barred; the words 'purported to be done' being most significant indeed. If such proceedings had been instituted before, or after, the commencement of the decree, they were abated, discharged and made void. Any judgment, decision or order of any court given or made in relation to such proceedings had no effect or, where appropriate, was deemed never to have had effect. Specific remedies, *quo warranto*, *certiorari*, *mandamus*, prohibition, injunction or declaration, were barred. Rights guaranteed by the Constitution were excluded, with the additional stipulation that no enquiry was allowed into whether any of those rights had been contravened by anything done or purported to be done under the decree. Persons acting under these decrees were relieved of liability for their acts.

Furthermore, the jurisdiction of the courts was, either by express words or by implication, excluded whenever a special tribunal was established under various decrees for the trial of specified offences.¹⁵

The African Charter was pitted against ouster clauses in a series of cases, ending with *General Sani Abacha and Others v Chief Gani Fawehinmi*.¹⁶

The potential use of the African Charter in this regard lies in the fact that it contains valuable human rights provisions that could be used to challenge decrees which purportedly ousted the jurisdiction of courts. Article 7(1) of the Charter provides thus:

- Every individual shall have the right to have his cause heard. This comprises:
- (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and custom in force;

¹⁴ n 13 above, 68–69.

¹⁵ BO Nwabueze *The individual and the state under the new Constitution* (1979) 17.

¹⁶ [2000] 4 SCN 401 (Supreme Court) and *Chief Gani Fawehinmi v General Sani Abacha & Others* [1996] 9 NWLR (Pt 475) 710 (Court of Appeal).

- (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
- (c) the right to defence, including the right to be defended by counsel of his choice;
- (d) the right to be tried within a reasonable time by an impartial court or tribunal.

Once access to court is secured, other provisions of the Charter, such as those against retrospective legislation and those granting the right to other aspects of fair hearing, can be invoked.

The rest of this paper examines the judicial response to the use of the African Charter as a means of controlling legislative excesses of military governments in Nigeria. The position prior to the case of *General Sani Abacha and Others v Chief Gani Fawehinmi* is examined, followed by an analysis of and commentary on the judgments of the Court of Appeal and the Supreme Court in the case.

2.2 The position prior to the *Fawehinmi* judgment

In Nigeria, treaties take effect only when ratified and promulgated into law.¹⁷ Although Nigeria subscribes to the Universal Declaration of Human Rights (Universal Declaration) and other international human rights documents under the auspices of the United Nations (UN) and its agencies, these documents have no force of law in the country because they have not been incorporated into local law. No attempt has therefore been made to use these international human rights instruments in defence of human rights in Nigeria under military regimes.

However, particularly since the mid-1980s, the courts have upheld the need for the country to discharge its international obligations. In *Reinsurance Corp v Fantaye*,¹⁸ the Supreme Court held that courts in Nigeria must give effect to treaties binding on the Federal Government. Again, in *Chief JE Oshevire v British Caledonia*,¹⁹ the Court of Appeal, relying on the case of *Aeroflex v Air Cargo Egypt*,²⁰ held, amongst others, that any domestic legislation in conflict with an international convention is void.

The wider question as to the relationship between international law and municipal law was eventually narrowed down to the question of the status of the African Charter within the Nigerian legal system. Although the African Charter is an international convention, it is applicable in

¹⁷ Sec 12 1999 Constitution of the Federal Republic of Nigeria, formerly sec 12 1979 Constitution.

¹⁸ [1986] 1 NWLR (Pt 14) 113.

¹⁹ [1990] 7 NWLR (Pt 163) 489.

²⁰ Decided by the Court of Appeal of Paris on 25 March 1986 and reported in the *Uniform Law Review Biannual* 1987 Vol 2 669, published by (UNIDROT) International Institute for the Unification of Private Law in Rome.

Nigeria only as a local legislation.²¹ Two approaches to this issue were taken by the High Court when the matter first came up.²² The first considered the issue as one of a conflict between municipal and international law, and which should be resolved in favour of international law.²³ The second approach rejected the contention that the African Charter is enforceable as part of Nigerian law. The Supreme Court settled the issue raised in the second approach when it held in *Ogugu v The State*²⁴ that the Charter had become part of Nigerian domestic laws and that²⁵

[t]he enforcement of its provisions like all other laws falls within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto . . . by the several High Courts depending on the circumstances of each and in accordance with the rules, practice and procedure of such courts.

The issue raised in the first approach remained, to the very last, very controversial.

Normally, the Constitution is supreme.²⁶ However, whenever the military seized power, their very first legislative act was the suspension of the Constitution. This was done by an enabling decree, which proclaimed its own supremacy.²⁷

The supremacy of decrees was established in the early years of military intervention in Nigeria. In the celebrated case of *Lakanmi and Another v the Attorney-General (Western State) and Others*,²⁸ the Supreme Court attempted to establish the supremacy of the unsuspended parts of the 1963 Constitution over decrees promulgated by the then military government. The appellants in the case contended that their assets were unlawfully confiscated under the Forfeiture of Assets (Release of Certain

²¹ International treaties are not enforceable in Nigerian courts unless they have been specifically enacted into law by the National Assembly: sec 12(1) Constitution of the Federal Republic of Nigeria, 1999. The African Charter has been enacted into law in Nigeria via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10, Laws of Federation of Nigeria, 1990. See the further discussion on this point below.

²² See the review of the attitude of Nigerian courts to the African Charter in Viljoen (n 2 above) 8.

²³ *The Registered Trustees of the Constitutional Rights Project (CRP) v President of the Republic of Nigeria* (1994) 4 *Journal of Human Rights Law and Practice* 218 and *Richard Akinola v General Babangida & Others* (1994) 4 *Journal of Human Rights Law and Practice* 250.

²⁴ [1994] 9 NWLR (Pt 366) 1.

²⁵ n 24 above, 26–27.

²⁶ Secs 1(1) & (3) Constitution of the Federal Republic of Nigeria 1979 (now secs 1(1) & (3) 1999 Constitution).

²⁷ Eg see sec 6 Constitution (Suspension and Modification) Decree No 1 of 1966 and sec 2 Constitution (Suspension and Modification) Decree No 1 of 1984, now Cap 64, Laws of the Federation of Nigeria 1990.

²⁸ (1971) UILR 201.

Forfeited Properties, Etc). (Validation) Decree, which decree, they argued, was in effect a legislative judgment, violating the provisions of the 1963 Constitution. The respondents relied on the Constitution (Suspension and Modification) Decree 1966.²⁹ The Second Schedule to the Decree provided that the provisions of decrees 'shall prevail over those of the unsuspended parts of the Constitution'.

Justice Ademola CJN, delivering the judgment of the Court, gave judgement in favour of the appellants. His Lordship held that the decree violated the principle of separation of powers enshrined in the 1963 Constitution. His Lordship concluded that '[t]he Decree is nothing short of legislative judgment, an exercise of judicial power. It is in our view *ultra vires* and invalid.'³⁰

The military did not react well to this decision. Another decree was immediately promulgated, which not only proclaimed the supremacy of decrees over the Constitution, but also nullified the effect of the judgment in the case.³¹ The judiciary has since disowned *Lakanmi's* case and from 1970 onwards, the supremacy of decrees over all other laws became a well-established fact in Nigeria.

Confronted with a variety of ouster clauses, the judiciary, apart from occasional heroic stances, was by its own admission powerless.³² The oft-quoted declaration of this judicial helplessness is *Wang Ching Yao and 4 Others v Chief of Staff Supreme Headquarters*,³³ where the Court of Appeal stated that 'on the question of civil liberties, the law courts of Nigeria must as of now blow muted trumpets'.³⁴ From this judgment on, the judiciary retreated completely from any critical consideration of ouster clauses and became accustomed to washing their hands clear of such cases.³⁵ It became a judicial heresy to think of setting aside the provisions of any decree. So much so that in 1987, a judge of the High

²⁹ Decree No 1 of 1966.

³⁰ n 28 above, 222.

³¹ Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970. See comments in A Ojo 'Public law, the military government and the Supreme Court' in AB Kasunmu (ed) *The Supreme Court of Nigeria* (1977) 90; A Ojo 'The search for a *Grundnorm* in Nigeria — The *Lakanmi* case' 1971 (20) *International and Comparative Law Quarterly* 117–136 and Nwabueze (n 15 above) 15–18.

³² See S Amadi 'Access to justice' (1999) 1 *Human Rights Newsletter* 3–5.

³³ Reported in G Fawehinmi *The law of habeas corpus* (1986) 437. This decision attracted and has continued to attract a lot of criticism. See M Ozekhome 'Decrees, ouster clauses and judicial ineptitude' (1989) *Law and Practice* 6; IE Sagay 'The decline of judiciary as an effective and independent third arm of government' (1991) *The Lawyer* (Ekpoma) 92; and YO Alli 'Privative clauses in Nigerian laws and the attainment of justice in our courts' (1998) 4 *The Jurist* (Unilorin) 56.

³⁴ Fawehinmi (n 33 above) 447, *per* Ademola JCA.

³⁵ For examples, see *Osadebay v AG Bendel State* (1991) 1 NWLR (Pt 169) 533; *Okeke v AG Anambra State* (1992) 1 NWLR (Pt 215) 60; *Zamani Lekwot & Others v Judicial Tribunal on Civil Disturbances in Kaduna State & Another* (1993) 2 NWLR (Pt 276) 410 and *Okoroafor v Miscellaneous Offences Tribunal* (1995) 4 NWLR (Pt 387) 59.

Court felt secure enough as to rebuke counsel for 'quoting with obvious relish certain outrageous statements made by Ademola CJN in *Lakanmi's* case'.³⁶ In *Labiya v Anretiola*,³⁷ the Supreme Court enunciated the hierarchy of laws in Nigeria under military regimes as follows:³⁸

Thus on the 31st December, 1983, the status of the laws in the order of superiority would seem to be as follows —

- 1 Constitution (Suspension and Modification) Decree 1984;
- 2 Decrees of the Federal Military Government;
- 3 Unsuspended provisions of the Constitution 1979;
- 4 Laws made by the National Assembly before 31/12/83 or having effect as if so made;
- 5 Edicts of the Governors of a State;
- 6 Laws enacted before 31 December, 1983 by the House of Assembly of a State, or having effect as if so enacted.

This decision regarded decrees as supreme in Nigeria.³⁹ However, in the early 1990s, another trend started emerging. Bold judges started a direct attack on ouster clauses.⁴⁰

In October 1990, Longe J delivered a landmark judgment in *Mohammed Garuba and Others v Lagos State Attorney General and Others*.⁴¹ The applicants in the case were sentenced to death on a charge of robbery by a Robbery and Firearms Tribunal. They filed an appeal in the High Court claiming that they were unfairly sentenced to death since they were below the age of 16 years at the time of their trial and conviction. Meanwhile, they brought an application for an interim injunction restraining the respondents from executing them, pending their appeal. Section 10(3) of the Robbery and Firearms (Special Provisions) Act under which they were tried provided that

[t]he question whether any provision of Chapter IV of the Constitution of the Federal Republic of Nigeria 1979 has been, is being or would be contravened by anything done in pursuance of this Decree shall not be enquired into in or by any court of law.

Longe J, after tracing the history of human rights from the Magna Carta 1215 to the Bill of Rights 1689, Thomas Paine's *The right of man*, and finally to the Universal Declaration, held that the right to life is an age-old right. His Lordship made use of the African Charter, along this line:⁴²

³⁶ *Dr Onaguruwa v Babangida & Another*, reported in (1994) 4 *Journal of Human Rights Law and Practice* 42.

³⁷ (1992) 8 NWLR (Pt 258) 139.

³⁸ n 37 above, 162, quoted with approval in *Zamani Lekwot* (n 35 above) 410. See comments in AA Oba 'Hierarchy of laws in Nigeria under military regimes: *Labiya v Anretiola & Others*' (1995) 4 *Kwara Law Review* 116.

³⁹ See *Zamani Lekwot* (n 35 above).

⁴⁰ See an earlier review of some of these cases in Viljoen (n 2 above) 7–11.

⁴¹ Reported in (1994) 4 *Journal of Human Rights Law and Practice* 205.

⁴² n 41 above, 215.

The African Charter on Human Rights, of which Nigeria is a signatory, is now made into our law by Act 1983 cited by learned counsel for applicants. Even if its aspect in our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot be unilaterally abrogated . . . As [Justice Eso warned us], by signing international treaties, we have put ourselves on the window of the world, we cannot unilaterally breach any of the terms without incurring some frowning of our international friends.

Apart from emphasising that Nigeria needs to convince the world that it 'adjudicates according to law and procedure recognised in civilised nations', His Lordship did not advance any further arguments in support of this novel use of the African Charter.

In *The Registered Trustees of the Constitutional Rights Project (CRP) v The President of the Federal Republic of Nigeria and Others*,⁴³ the African Charter was again successfully used against ouster clauses in decrees. In this case, the Court affirmed the relevance of the African Charter. Although it was submitted that the Charter is applicable in Nigeria as local legislation and therefore should take its place in the hierarchy of laws in Nigeria, as enunciated in *Labiya's case*, Onalaja J (as he then was), deciding the case, advanced two reasons based on the African Charter to defeat the submission. The first was that, even assuming that Cap 10⁴⁴ is a decree, there is a conflict between it and the decrees ousting the jurisdiction of the court. The judge held that 'any decree, edict, act or law, which ousts the jurisdiction of courts, is construed strictly and narrowly' and that 'where the interpretation is capable of two meanings, the decree is to be interpreted in the manner which retains or preserves the jurisdiction of the court'.⁴⁵ The second reason was that Cap 10 is a treaty which has been ratified by the Nigerian government, and, since Nigeria retains its membership of the OAU, Cap 10 is binding on the federal military government.⁴⁶

Apart from the use of the African Charter, the courts have resorted to other measures to curb the legislative excesses of military administrations. In *Guardian Newspapers Ltd and Others v Attorney General*,⁴⁷ the Court of Appeal pushed the assault on draconian decrees further. In this case, the federal military government proscribed by a decree⁴⁸ all the titles published by the appellant in connection with the annulment of the June 1993 elections. The appellants sued in the Federal High Court.

⁴³ n 23 above.

⁴⁴ 'Cap' means chapter. In official compilations of statutes in Nigeria, each legislation forms a chapter described as 'Cap'. The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is contained in ch 10 of the Laws of Federation of Nigeria, 1990, hence it is simply referred to in judgments as 'Cap 10'.

⁴⁵ n 23 above, 245.

⁴⁶ n 23 above, 244.

⁴⁷ (1995) 5 NWLR (Pt 398) 703.

⁴⁸ *Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No 8 of 1994*.

While the suit was pending, the federal government enacted another decree,⁴⁹ ousting the jurisdiction of the Court to adjudicate on the case. The Federal High Court, relying on this decree, declined jurisdiction. On appeal to the Court of Appeal, the decision of the trial court was reversed. Ayoola JCA (as he then was), delivering the judgment of the Court of Appeal, held that 'the instrument described as Decree No 8 of 1994 has all the attributes of legislative punishment and is not an exercise of legislative power but of judicial power', and that⁵⁰

[i]f the instrument described as Decree No 8 of 1994 is not a decree within the intendment of Decree 107 of 1994 (*sic*), it is evident that both ouster clauses are incapable of affecting the jurisdiction of the court below.

This was the state of the law before the case of *Chief Gani Fawehinmi v General Sani Abacha and Others*.

2.3 *Chief Gani Fawehinmi v General Sani Abacha and Others*

The facts of the case are that the appellant was arrested and detained by the respondents representing the then military government in the country. The appellant challenged his detention by suing in the Federal High Court. The respondents raised a preliminary objection arguing that the jurisdiction of the Court to hear the case had been ousted by the State Security (Detention of Persons) Decree⁵¹ and Constitution (Suspension and Modification) Decree.⁵² The appellant contended that the Court had jurisdiction to hear the case. He relied on the provisions of the African Charter, which have been enacted locally in Nigeria as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁵³ The Charter forbids arbitrary arrests and detention, and gives any person so detained a right of access to court.⁵⁴ The trial judge upheld the objection of the respondents. The appellant thereafter appealed to the Court of Appeal. The Court of Appeal, without referring to the bold initiative of Onalaja J in *The Registered Trustees of the Constitutional Rights Project* case, bravely dealt with the formidable issues highlighted above.⁵⁵ The Court of Appeal reversed the decision of the trial court and held that the jurisdiction of the court cannot be ousted by any decree in view of the provisions of the African Charter embodied in

⁴⁹ Federal Military Government (Supremacy and Enforcement of Powers) Decree No 12 of 1994.

⁵⁰ 746 and 751 respectively of the judgment, n 47 above. This decision was later reversed on appeal by the Supreme Court in *Attorney General v Guardian Newspapers Ltd & Others* [1999] 5 SCNJ 324.

⁵¹ Decree No 2 of 1984, as amended.

⁵² Decree No 107 of 1993.

⁵³ Cap 10 Laws of the Federation of Nigeria, 1990.

⁵⁴ See art 7 African Charter, quoted above.

⁵⁵ *Chief Gani Fawehinmi v General Sani Abacha & Others* [1996] 9 NWLR (Pt 475) 710.

Cap 10. However, the appellant received no compensation because the Court held that he had used the incorrect procedure in commencing his suit at the trial court. The appellant further appealed to the Supreme Court. The respondent also cross-appealed.

This appeal was heard by a full court of the Supreme Court consisting of seven justices.⁵⁶ The complexity of the various legal issues involved in the appeal was reflected in the difficulty the justices had in agreeing with each other. Of the seven justices on the panel, three dissented.⁵⁷ The majority allowed the cross-appeal and remitted the case to the Federal High Court for hearing before another judge. The minority dismissed both the appeal and the cross-appeal. What is interesting about the majority judgment is the decision of Uwaifo JSC. His Lordship disagreed with the majority on the issue of ouster clauses. This judgment is therefore crucial for anyone attempting to make sense out of the discordant opinions expressed by the judges on the issues in the appeal.

The issues relevant to us are those relating to the supremacy of decrees, ouster clauses and the appropriate procedure for enforcement of the African Charter.

2.3.1 Supremacy of decrees

The Court of Appeal combined the issue of supremacy of decrees with the status of the African Charter. The Court conceded that provision of a treaty could not be enforced in municipal courts in Nigeria unless there is an enactment giving effect to the treaty.⁵⁸ This, however, was what Cap 10 had done. The Court held that, whilst Cap 10 is a local enactment, it does not belong within the hierarchy of local legislation in Nigeria. The Court held that 'the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiya v Anretiola . . .*'.⁵⁹ Having upheld the superiority of Cap 10 to all decrees, it was no longer difficult for the Court of Appeal to tackle the ouster clause.

The Supreme Court had no difficulty regarding the status of the African Charter within the Nigerian legal system. Their Lordships unanimously reversed the decision of the Court of Appeal on this issue. Their Lordships held that the African Charter cannot be superior to the Constitution. They held that in Nigeria, with regard to treaties, the principle of incorporation applies. Thus, since the African Charter has been domesticated by an Act of the National Assembly, it takes its

⁵⁶ *General Sani Abacha & Others v Chief Gani Fawehinmi* [2000] 4 SCN] 401.

⁵⁷ The majority consisted of Ogundare (who read the lead judgment), Iguh, Uwaifo and Ejiwumi JJ SC. The dissenting justices are Achike (who read the lead minority judgment), Belgore and Mohammed JJ SC.

⁵⁸ n 55 above, 756 of the judgment.

⁵⁹ n 58 above, 746–7.

position as an Act of the National Assembly. Uwaifo JSC had some particularly harsh words for the Court of Appeal in respect of the position the justices of the Court of Appeal had taken:⁶⁰

With the utmost respect to Musdapher JCA, it is an inexcusable judicial disrespect or arrogance to deny the subsistence of the hierarchical order of superiority of Nigerian laws as adumbrated by the Supreme Court in the *Labiya* case . . . Notwithstanding that the African Charter is a legislation with international flavour . . . [t]he elevation of the African Charter to a 'higher pedestal' and the denial of the continued validity or authority of the *Labiya* case by the lower court is totally absurd, untenable and unwarranted.

Yet the 'international flavour' theory of the Court of Appeal was not without effect on other justices of the Court. For example, Ogundare JSC agreed with the Court of Appeal that the Charter possesses 'a greater vigour and strength' than any other domestic statute.⁶¹ His Lordship was, however, quick to point out that that is not to say that the Charter is superior to the Constitution.⁶²

2.3.2 Ouster clause

The Court of Appeal again relied on the 'international flavour' of Cap 10. It held:⁶³

[N]otwithstanding the fact that Cap 10 was promulgated by the National Assembly in 1983 it is a legislation with international flavour and the ouster clauses contained in Decree No 107 of 1993 or No 12 of 1994 cannot affect its operation in Nigeria.

The Court concluded therefore that the ouster clauses contained in decrees could not stand in the face of the Charter, which prohibits ouster clauses.

The justices of the Supreme Court disagreed on this issue. The majority avoided the issue of the efficacy of the ouster of the jurisdiction of the court by Decree No 2 of 1984, as amended by Decree No 11 of 1994. They held that, since the detention order was not tendered at the trial court, there was nothing before the Court to show that the decrees applied to the case. This omission, they held, was fatal to the respondent's case on the issue. The minority, led by Achike JSC, held that the ouster clauses in the decrees applied to the case. Achike JSC went further to say that the Court cannot look into the reasons of the detention since the ouster of its jurisdiction is complete. Belgore JSC and Mohammed JSC agreed strongly with him.⁶⁴ Uwaifo JSC, though with the majority, joined the minority on this point, holding that the decrees

⁶⁰ n 56 above, 483–4 of the judgment. Contrast this with the sympathetic approach of Uwaifo JSC 450–1 455.

⁶¹ n 60 above, 422–3.

⁶² n 60 above, 423.

⁶³ n 55 above, 746–7 of the judgment.

⁶⁴ n 56 above, 504–505 & 508 respectively of the judgment,.

applied and that the failure to tender the detention order was not fatal to the respondent's case.⁶⁵

It would appear, therefore, that the view expressed in the minority judgment on this point is, in fact, the decision of the Court, because together with Uwaifo JSC, the tally becomes four to three in favour of upholding the decree's ouster of the jurisdiction of the court.

2.3.3 Procedure

In spite of the above, the Court of Appeal allowed a procedural matter to deprive the appellant of the fruits of his litigation. The Court held that the appellant cannot enforce his rights under the African Charter by the procedure under the Fundamental Rights (Enforcement Procedure) Rules.⁶⁶ Their Lordships held that the rules used are applicable only to fundamental rights under the Constitution.⁶⁷ The result was that the appeal was allowed in part, that is, in respect of the substantive law, while the relief sought by the appellant was denied.

The Supreme Court roundly castigated the Court of Appeal on this issue. The Court held that there was nothing wrong in using the Fundamental Rights (Enforcement Procedure) Rules. Iguh JSC further pointed out that it is not correct to say that the Applicant brought the action under the Fundamental Rights (Enforcement Procedure) Rules only. According to His Lordship, the application was brought under both the Rules and the African Charter.⁶⁸

2.4 Comment

Three and half years passed between the judgment of the Court of Appeal and that of the Supreme Court. During the interim, three things happened. The first was that the judgment of the Court of Appeal was followed by High Courts and the Court of Appeal in the cases before them.⁶⁹

The second was that the decision of the Court of Appeal was the subject of many diverse comments. The judgment of the Court of Appeal was received with mixed feelings. It attracted favourable comments from many.⁷⁰ *The Guardian* newspaper, in its editorial, called it a 'landmark judgment'.⁷¹ Others criticised the Court for holding that

⁶⁵ n 64 above, 486.

⁶⁶ Statutory Instrument No 1 of 1979.

⁶⁷ n 55 above, 748.

⁶⁸ n 56 above, 435.

⁶⁹ See eg *Comptroller of Nigerian Prisons v Adekanye & Others* [1999] 10 NWLR (Pt 623) 400 and *Chima Ubani v Director of State Security Services & Another* (1999) 1 NWLR (Pt 625) 129.

⁷⁰ See AA Oba 'A bold step in defence of human rights in Nigeria: Chief Gani Fawehinmi v Gen Sani Abacha & Others' (1997) 1 *Journal of International and Comparative Law* 152.

⁷¹ See Editorial Comment, *The Guardian* 1997-01-07.

the African Charter was superior to the decrees and the Constitution.⁷² Again, the refusal of the Court to allow the use of Fundamental Rights (Enforcement Procedure) Rules, 1979, to enforce the provisions of the African Charter drew hostile remarks.⁷³ The Supreme Court was influenced by these comments, particularly the adverse ones.

The third thing that happened was that the decision of the Court of Appeal in *Attorney General v Guardian Newspapers Ltd and Others*⁷⁴ was overturned on appeal by the Supreme Court. The judicial effort of the Court of Appeal was rendered useless by the Supreme Court, which unanimously reaffirmed the supremacy of decrees and the validity of ouster clauses contained in the decrees. According to the Court, our law reports are 'replete' with decisions upholding ouster clauses.⁷⁵ The decision of the Supreme Court has now put in a proper perspective the judicial efforts of the Court of Appeal. A re-examination of the issues in light of the decision of the Supreme Court shows that the praises showered on the Court of Appeal for its decision in *Fawehinmi v Abacha* were well deserved and that some of the criticisms were quite unmerited.

2.4.1 Status of the African Charter

The Court of Appeal was severely criticised for holding that the African Charter was superior to the decrees. However, some support this finding. They argue that where there is a conflict between a domestic statute incorporating a treaty as Cap 10 and another domestic statute (be it an Act or a decree), the former should prevail.⁷⁶ This is now largely a moot question. Whether or not the African Charter is superior to the Constitution is now an important practical question under the current democratic regime. The simple answer is that the Constitution is the supreme law of the land.⁷⁷ Although there are similar rights under both the African Charter and the Constitution, there are also some important differences. The African Charter contains some socio-economic rights

⁷² UO Umzurike 'The application of international human rights norms to Nigeria' (1997) 18 *The Advocate* 36-37 and E Ojukwu 'Is *Fawehinmi v Abacha* a correct decision?' (1997) 1 *Legal Practice Notes: Human Rights Law* 21 27-29.

⁷³ F Falana '*Fawehinmi v Abacha* — Where the Court of Appeal erred' (1997) 1 *Social Justice* 7; Ojukwu (n 72 above) 21 & CC Nweke 'Human rights and sustainable development in the African Charter: A juridical prolegomenon to an integrative approach to Charter rights' (1997) 1 *Abia State University Law Journal* 1.

⁷⁴ [1999] 5 SCNJ 324.

⁷⁵ n 74 above, *per* Wali JSC at 388.

⁷⁶ UU Chukwumaeze '*Chima Ubani v Director of State Security Services and Another: Implication*' (1999) 6 *Abia State University Law Journal* 6-10 and AG Olagunju '*Abacha v Fawehinmi: Between monism and positivism — An exposition of the application of international treaty in Nigeria*' (2001) 4 *LASU Law Journal* 101-111.

⁷⁷ Sec 1 1999 Constitution (n 17 above).

that are not justiciable under the Constitution.⁷⁸ It has been suggested that there can be no conflict between the Cap 10 and the Constitution, since Cap 10 has merely 'strengthened' the fundamental rights embodied in the Constitution and that socio-economic rights under the African Charter are similarly not 'justifiable', notwithstanding the 'mandatory nature of the language used in the Charter'.⁷⁹ This argument is premised on the reasoning that socio-economic rights in human rights documents are never meant to be justiciable.⁸⁰

2.4.2 Ouster clauses

The judgment of the Court of Appeal had a tremendous effect on ouster clauses. The decision of the Supreme Court in the *Attorney General v Guardian Newspapers Ltd and Others* and *Abacha v Fawehinmi* put an end to the euphoria spreading across the Court of Appeal. It is disappointing that, in *Attorney General v Guardian Newspapers*, all the seven justices of the Supreme Court that heard the appeal held that the courts are helpless in the face of ouster clauses in decrees. The African Charter was not considered in the appeal. However, in *Abacha v Fawehinmi*, the Supreme Court declared the African Charter ineffective against decrees generally and ouster clauses in decrees in particular. Having rejected the superiority of the African Charter over decrees, the Supreme Court had nothing else to fall back on. The Court had to submit to the decrees. It is now crystal clear that even the sternest critic of the decision of the Court of Appeal will now have to admit the superiority of the position of the Court of Appeal over the decision of the Supreme Court in terms of responsiveness to the problems of human rights violations in Nigeria.

2.4.3 Procedure

Before the appeal reached the Supreme Court, the decision of the Court of Appeal received very strong criticism on the issue of the procedure for the enforcement of the provisions of the African Charter in Nigeria. Femi Falana, a human rights activist who was counsel to the Appellant in the case, commented angrily on this aspect of the case:⁸¹

⁷⁸ See in particular the fundamental objectives and directive principles of state policy contained in ch 2 of the 1999 Constitution. Sec 6(6)(c) of the Constitution says that those provisions are not judicially enforceable; see *Okogie & Others v The Attorney General of Lagos State* (1981) 2 NCLR 337.

⁷⁹ MO Unegbu 'Resolving the dilemma of hierarchy between the African Charter and the Nigerian Constitution' (1999) 6 *Abia State University Law Journal* 19.

⁸⁰ n 79 above, 18–19, citing the examples of the International Covenant on Economic, Social and Cultural Rights, 1966, the Inter-American Convention on Human Rights and the European Social Charter, 1961.

⁸¹ Falana (n 73 above) 8.

Having critically read the celebrated case of *Fawehinmi v Abacha* (1996) 9 NWLR (PT 475) 710, it is painfully difficult to fathom the basis of the lavish encomiums that have been poured on the eminent panel of jurists that decided the case. In other words, one can assert without any fear of contradiction that the decision is a major setback in the struggle for the judicial enforcement of the African Charter. Surprisingly, the judgment has, in one fell swoop, thrown our growing human rights jurisprudence into a sea of confusion.

He argued that, in spite of the appellant's procedural error at the trial court, the Court of Appeal should have invoked the principle *ubi jus ibi remedium*⁸² to award the relief sought by the appellant.⁸³

In spite of this criticism, the boldness of the Court of Appeal in the appeal should be recognised. Again they could have blown again 'a muted trumpet'. Rather, they chose to confront the decree. Even then, the decision, given as it was during the height of the Abacha regime, had to be tactical. The Court confronted the decree but not the dictator. The Court was quick to point out that it was merely giving effect to government policy. According to the Court:⁸⁴

It must be stated that liberty in the context of modern times has now assumed a far broader conception than before and it increasingly demands protection. This Court shall take judicial notice of recent laws by way of decrees and statutory instruments and see to it that human rights of Nigeria citizens are well protected. This informed the establishment of the Human Rights Commission and the recent appointment of a panel to review the cases of people detained under Decree No 2 of 1984. As the government itself is making a serious effort to attenuate the rigors of Decree No 2, a decree not promulgated by the present regime, it is only fair that the Court should in its construction duly compliment the effort of the government to see that the fundamental rights of the citizen is not tampered with.

Such appeals to the sentiments of the military leadership were fairly common in many 'bold' judgments delivered during the military era.⁸⁵ After all, judges were wise to the fact that the military were in government not by the democratic process but through the power flowing from the barrels of their guns.

⁸² 'Where there is a right, there is a remedy' in L Rutherford & S Bone (eds) *Osborn's concise law dictionary* (1993).

⁸³ As above.

⁸⁴ 766-7 of the judgment of the Court of Appeal (n 55 above).

⁸⁵ See eg *Richard Akinola v Gen Babangida* (n 23 above), where the Court used the status of Nigeria in the international scene as leverage: '. . . And quite recently too, Nigeria has been elected to have a permanent seat at the Security Council of the United Nations organisation, the highest making [*sic*] body of the world. This country has to keep its international obligations' at 268 *per* Hunposu-Wusu]; and *Punch Nigeria Ltd & Another v Attorney-General of the Federation*, reported in (1994) 4 *Journal of Human Rights Law and Practice* 15: 'Military regimes by their very nature do not possess more than a nodding acquaintance with democracy. We must appreciate that it is not part of their tradition to impugn superior orders, let alone disobey them. That is why they deserve our sympathy in their abrupt but premeditated conversion from stratocracy to democracy. All the same, it is to be expected that government will

It would again be grossly unfair to the courageous judges of the Court of Appeal to suggest that they used the procedural point as an escape route. On the contrary, the courts have on many occasions emphasised that litigants must comply with the rules and procedure relating to commencement of actions.⁸⁶ The Court of Appeal had held in several cases before *Fawehinmi v Abacha* that it is not proper to enforce a right not created by the Constitution by means of the procedure prescribed by the Fundamental Rights (Enforcement Procedure) Rules.⁸⁷ The Supreme Court, too, had endorsed this position before and even after its decision in *Abacha v Fawehinmi*.⁸⁸

The Fundamental Rights (Enforcement Procedure) Rules, by which the appellant in *Fawehinmi's* case sought to enforce the provisions of the African Charter, were made pursuant to section 42 of the 1979 Constitution. They were specifically meant for the enforcement of 'fundamental rights'⁸⁹ enunciated under Chapter 4 of the 1979 Constitution. Admittedly, the African Charter and Chapter 4 of the Constitution both deal with human rights, yet it is clear that the African Charter is a separate document, which does not form part of the provisions of Chapter 4 of the Constitution. A perusal of the African Charter shows that the Charter covers a wider scope than the Constitution in many respects. The Fundamental Rights (Enforcement Procedure) Rules cannot therefore be applicable in the enforcement of the rights provided

aspire to meet its own laws, including court's decisions. This expectation is all the more significant now that Nigeria is contemplating to invoke the jurisdiction of the World Court over the claim made by the Republic of Cameroon to the Bakassi peninsula which has always been regarded as part of Nigeria territory. Otherwise submission to the jurisdiction of a supranational judicial organ by Nigeria will only be accepted with mixed feelings, if not outright scepticism, in view of the consistent history of defiance of her own domestic laws. More importantly, persistence disobedience of court orders puts the moral authority of the government itself into question'; and in *Mohammed Garuba & Others v Lagos State Attorney General & Others* (n 41 above): 'It is only when [human rights are protected] that [the country] can convince the world that we adjudicate according to law and procedure recognised in civilised nations' (*per Longe* J at 215).

⁸⁶ See eg *Obajimi v AG Western Nigeria* (1967) 1 All NLR 31; *Doherty v Doherty* (1968) NMLR 241; *LEDB v Awode* (1955) NLR 80; *Ademiluyi & Another v ACB Ltd* (1965) NMLR 21; *NBN Ltd v Alakija* (1978) 2 LRN 78; *Molokwu v COP* (unreported), but see *Fawehinmi* (n 33 above) 96; *Minister of Internal Affairs v Shugaba* (1982) 3 NCLR 915, 944 and *Ogugu v State* (n 24 above) 20 26.

⁸⁷ *Zamani Lekwot* (n 35 above) 410. See also *Kokoro-Owo v Local Government Service* [1995] 6 NWLR (Pt 404) 760 (CA).

⁸⁸ See *Ndigwe v Ibekendu* [1987] 7 NWLR (Pt 558) 486; *Osazuwa v Edo State Civil Service Commission* [1999] 10 NWLR (Pt 622) 290; *University of Nigeria Teaching Hospital Management Board v Nnoli* [1994] 8 NWLR (Pt 363) 376; *Nnamdi Azikwe University v Nwafor* [1999] 1 NWLR 116 and *Dongtoe v Civil Service Commission, Plateau State* [2001] 4 SCNJ 131.

⁸⁹ Not all human rights are 'fundamental rights' under the Constitution: *Merchant Bank Ltd v Federal Minister of Finance* (1961) All NLR 578; *Asemota v Yesufu* (1982) 3 NCLR 419 and *Ransome-Kuti v Attorney-General Federation* (1985) 2 NWLR 211.

by the African Charter via Cap 10. A further argument is that even the fundamental rights provisions under the 1999 Constitution (which are virtually *in pari materia* with those under the 1979 Constitution) cannot be enforced through the Rules made pursuant to the powers conferred under the 1979 Constitution, without a law so directing the use of the 1979 Rules for this purpose.⁹⁰

It is not difficult to understand the rationale for the complaint against the decision of the Court of Appeal on the issue of procedure. The Fundamental Rights (Enforcement Procedure) Rules are supposed to provide quick,⁹¹ reliable and result-oriented means of challenging human rights violations.⁹² The 'regular' process which the Supreme Court insisted on in *Ogugu's* case and which was adopted by the Court of Appeal in *Fawehinmi's* case is a notorious time and money wasting procedure, which necessarily entails long, drawn-out litigation. Such a procedure is definitely not suitable for enforcing human rights, where in almost every case time is of crucial importance. However, this is not the end of the matter.

By affirming the use of the Fundamental Rights (Enforcement Procedure) Rules when enforcing the provisions of the African Charter, the Supreme Court has not in reality added much. In practical terms, the Rules are only slightly better than the regular process as they, too, have been overwhelmed by the frightening apathy, the lethargic indifference and the administrative bottlenecks and technicalities that have made litigation in Nigeria a long gamble. The case of *Badejo v Minister of Education*,⁹³ which took eight years from the date of filing at High Court to its determination by the Supreme Court, provides a good illustration of the delay that characterises the operation of the Rules.⁹⁴

⁹⁰ See further arguments along this line in UU Chukwumaeze 'Enforcement of fundamental rights under the 1979 rules: A wrong procedure' (2001) 4 *LASU Law Journal* 96.

⁹¹ According to Odunowo J in *Punch Nigeria Ltd and Another v Attorney-General of the Federation* (n 85 above) '... the essence of this present procedure is to afford any applicant a fast, cheap and less cumbersome remedy in an application of this nature' at 26, and see also Bello CJN in *Peter Nemi v The State* (1994) 10 SCNJ 1 18.

⁹² Under the Fundamental Rights (Enforcement Procedure) Rules, 1979, the court has very wide powers which are not fettered by undue technicalities. Order 6 Rule 1 of the Rules provide that: 'At the hearing of any application, motion, or summons under these rules, the court or judge concerned may make such orders, issue such writs, and give such directions as it or he may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provided for in the Constitution to which the complainant may be entitled.' See comments on how the courts can take advantage of this rule in order to secure human rights in C Obiagwu 'The all powerful Order 6 Rule 1' *Human Rights Newsletter* January–March 1998, Vol 1 No 2 36.

⁹³ [1996] 9–10 SCNJ 51.

⁹⁴ In the case an application was filed on behalf of a primary school pupil to enforce her fundamental rights to freedom from discrimination in the 1988 Admission to the

If applicants seeking to enforce their rights under the Charter are prevented from using the Rules, they may file their action by originating summons.⁹⁵ This route is the least cumbersome of the 'regular' procedures. The procedure has been used effectively in many cases filed after the decision in *Ogugu's case*.⁹⁶ Applicants may also use the procedure under the *habeas corpus* law in cases of wrongful detention.⁹⁷ The two procedures are similar to those under the Fundamental Rights (Enforcement Procedure) Rules in that they are designed as fast and less technical alternatives to other procedures under the regular High Court Rules. However, under the Fundamental Rights (Enforcement Procedure) Rules, the court has a wider power with respect to the orders it can make and remedies it can give — and here lies their clear superiority over the High Court Rules.⁹⁸

2.4.4 Unrealised potential and lost opportunities

One wonders what would have happened if the possibilities opened up by the Court of Appeal were exploited to the fullest. It would have been interesting to challenge the legality of a military regime on the basis of its incompatibility with some of the provisions of the African Charter. For example, article 13(1) of the Charter gives the right to participation in government:

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 provisions of the law.

Article 20(1) guarantees the right to self-determination:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Are *coups* and military governments consistent with these provisions?

Federal Government Colleges. There were no disputes as to the facts and thus no oral evidence was necessary. The application, dated 29 September 1988, was decided by the High Court on 4 November 1988. The appeal went to the Court of Appeal and further to the Supreme Court where judgment was finally delivered on 20 September 1996. Even then, the judgment of the Supreme Court was most distressing. The court unanimously held that the trial court erred in striking out the application. However, there was controversy as to the order the Supreme Court should make in the circumstances. The majority held that since the application had been overtaken by events, there was no usefulness in ordering a retrial by another court. The minority preferred to make an order of retrial.

⁹⁵ See Order 1 Rule 2(2) and Order 6, Kwara State High Court (Civil Procedure) Rules, 1987 and A Aguda *Practice and procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* (1980) 18–19.

⁹⁶ Such as *CRP v President* (n 23 above).

⁹⁷ *Habeas corpus* laws applicable in the southern states. For example, the *Habeas Corpus Law*, Cap 58, Laws of Lagos State of Nigeria, 1994.

⁹⁸ See Order 6 Rule 1, Fundamental Rights (Enforcement Procedure) Rules, 1979 (quoted in n 92 above) and *Obiagwu* (n 92 above) 36.

3 The impact of the 'war against terrorism' on ouster clauses

In reaction to the September 11 attacks on America, the Bush administration launched a war against terrorism. It invaded Afghanistan and later Iraq, acts that many considered violations of international law.⁹⁹ It started a new regime of detention without trial. Persons suspected of terrorist acts are arrested and detained indefinitely without trial and without access to lawyers, friends and relatives. The USA Patriot Act,¹⁰⁰ enacted in 2001, gave legal backing to a wide range of human rights abuses against citizens generally, and aliens in particular.¹⁰¹ Since January 2002, alleged members of the Taliban and al-Qaeda, and other citizens of some 38 nations¹⁰² suspected of being terrorists, are being detained indefinitely by the American government at Guantanamo Bay, without any accountability to the UN or any of its agencies or to the regular domestic courts.¹⁰³ The government has indicated that the detainees will eventually face military tribunals which would be conducted in secrecy away from public scrutiny.¹⁰⁴ Meanwhile, the suspects are denied visits by friends, relatives and lawyers. They do not even have the right to counsel of their choice. They are provided with counsel by the government. There is no private communication between the accused and his lawyer as security officials monitor all communications between them. The standard of proof before the tribunal would be considerably lower than what obtains even in military trials.

⁹⁹ O Burkeman & J Borger 'War critics astonished as US hawk admits invasion was illegal' *The Guardian* 2003-11-20 at <http://www.guardian.co.uk/Archive/0,4271,,00.html> (accessed 31 July 2004); J Lobel 'Midweek perspectives: An American assault on international law' at <http://www.post-gazette.com/search/Default.asp> (accessed 31 July 2004); and ME O'Connell 'The myth of preemptive self-defence' paper dated August 2002 submitted to the American Society of International Law Task Force on Terrorism, available at <http://www.asil.org> (accessed 31 July 2004).

¹⁰⁰ PL 107-56, 115 Stat 272 (2001). The full title is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act).

¹⁰¹ The Act authorises, amongst others, gross violations of the right to privacy in the course of gathering information by security agents; arbitrary detention and expulsion of aliens, and secret *ex parte* applications to courts. See review of the Act in C Doyle *The USA Patriot Act: A legal analysis* (Congressional Research Service [CRS] Report for Congress, Code RL31377) 2-23 41 49-51.

¹⁰² JCK Daly 'Revealed: the nationalities of Guantanamo' — United Press International at <http://www.upi.com/view.cfm?StoryID=20040204-051623-5923r> (accessed 31 July 2004).

¹⁰³ See 'United States: Guantanamo two years on US detentions undermine the rule of law' *Human Rights Watch* 2004-01-09 at <http://www.hrw.org/english/docs/2004/01/09/usdom6917.htm> (accessed 31 July 2004).

¹⁰⁴ n 103 above, for accounts of the proposed military tribunal.

The tribunal can act on evidence obtained under torture. There is no appeal from the decisions of the tribunal. These are, by international human rights standards, gross violations of the right to a fair hearing. Many have expressed their anxiety and concern regarding these practices to the Bush administration. Even volunteer military lawyers assigned to defend the accused persons have protested the trial conditions as being unfair, and some have withdrawn in protest.¹⁰⁵

The legality of the Guantanamo detentions has also been challenged in American courts. In *Hamdi v Rumsfeld*,¹⁰⁶ which concerns an American citizen who was captured in Afghanistan and detained at Guantanamo, the trial court held that Hamdi is entitled to contest the factual basis of his arrest and detention before a court. The Court therefore ordered the government to turn over numerous materials for an *in camera* review to support Hamdi's detention. The Court of Appeal reversed this decision, stressing that, because it was undisputed that Hamdi was captured in an active combat zone, no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the government's assertions was necessary or proper. It also concluded that Hamdi is entitled only to a limited judicial inquiry into his detention's legality under the war powers of the political branches, and not to a searching review of the factual determinations underlying his seizure.¹⁰⁷ On appeal to the Supreme Court, the Court held that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker. The Court also held that he has a right to unmonitored meetings with his counsel.

In *Al-Odah v United States*¹⁰⁸ and *Rasul v Bush*,¹⁰⁹ the Court of Appeal upheld the decisions of trial court's declining jurisdiction in the *habeas corpus* proceedings filed by aliens on the ground that Guantanamo is outside the territory of America. The Court relied on the Supreme Court decision in *Johnson v Eisentrager*,¹¹⁰ which precluded regular courts in America from exercising jurisdiction over enemy aliens detained outside

¹⁰⁵ CNN.com — Military lawyers objected to tactics at Guantanamo at <http://www.cnn.com> (accessed 2 June 2004) and J Meek 'US fires defence team' *The Guardian* 2003-12-03 at <http://www.guardian.co.uk/guantanamo/story/0,13743,1098618,00.html> (accessed 31 July 2004).

¹⁰⁶ Decided on 28 June 2004. Forthcoming in 542 US (2004). See the slip judgment at <http://www.supremecourtus.gov/opinions/03pdf/03-6696.pdf> (accessed 31 July 2004).

¹⁰⁷ *Hamdi v Rumsfeld* 316 F 3d 450, 475 (United States Court of Appeals for the Fourth Circuit, 2003).

¹⁰⁸ 321 F 3d 1134 (United States Court of Appeals for the District of Columbia Circuit) (2003) WL 22070725 (10 November 2003).

¹⁰⁹ *Al-Odah v United States & Rasul v Bush* 215 F Supp 2d 55 (DC 2002).

¹¹⁰ 339 US 763 (1950).

the sovereign territory of the United States. According to the Court of Appeal, lower courts are bound to follow this decision, unless the Supreme Court overrules it. But in *Falen Gherebi v George Walker Bush and Donald H Rumsfeld*,¹¹¹ another circuit of the Court of Appeal reached a different decision. The Court of Appeal distinguished *Johnson v Eisentrager* on the facts and held that the United States exercises territorial sovereignty over Guantanamo, which is under the sole jurisdiction and control of the United States government. The Court concluded that *habeas corpus* lies in the case. The Court was emphatic in its condemnation of the action of the government:¹¹²

However, even in times of national emergency — indeed, particularly in such times — it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike. Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement. We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure, and that, contrary to the government's contention, *Johnson* neither requires nor authorizes it. In our view, the government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law.

The applicants in *Al-Odah* and *Rasul* appealed to the Supreme Court. The Supreme Court agreed to hear the two appeals which were later consolidated.¹¹³ By a majority of six to three, the Supreme Court reversed the decisions of the Court of Appeal and held that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.¹¹⁴ The minority was of the view that *Johnson v Eisentrager* applied and found no basis to overrule the 'a half century-old decision'.¹¹⁵ They held that exigencies of war and national security might justify suspension of *habeas corpus*. According to them, 'there are times when military exigency renders resort to the traditional criminal process impracticable'.¹¹⁶

¹¹¹ 352 F 3d 1278 (United States Court of Appeals for the Ninth Circuit) 18 December 2003.

¹¹² 8–9 of the judgment at <http://www.caselaw.findlaw.com/dataz/circis/9th/0355785P.pdf> (accessed 31 July 2004).

¹¹³ *Rasul v Bush*, decided on 28 June 2004. Forthcoming in 542 US (2004), but see the slip judgment at <http://www.supremecourtus.gov/opinions/03pdf/03-334.pdf> (accessed 31 July 2004).

¹¹⁴ n 113 above, *per* Stevens J, 4–17.

¹¹⁵ n 113 above, *per* Scalia J, 1.

¹¹⁶ n 113 above, 8–9.

Consequent upon the Supreme Court decision that detainees can challenge their detention, military tribunals are being constituted to hear the detention cases. One of the Tribunals commenced hearing in August 2004, in the case of three Guantanamo detainees.¹¹⁷ They are the first set of detainees to face trial. The tribunal is to decide whether the detainees are properly classified as 'enemy combatants', in which case they can be detained indefinitely without charges. For the first time since they were detained, they were allowed access to counsel.¹¹⁸ Given the nature of military tribunals generally, and this one in particular, no one can seriously expect any respect for the human rights of the detainees. Military tribunals, no doubt, cannot qualify as the 'neutral decision maker' required by the Supreme Court in *Hamdi*. There were now suits pending in civil court challenging the competence and legality of the tribunal.¹¹⁹

Even in civil court, the prospects for those detained at Guantanamo are not bright.¹²⁰ They face many logistic problems. For example, how do they secure the attendance of witnesses far away in Afghanistan if required for their defence? Then there are several judicial pronouncements which do not favour their case.

First, in *MKB v Marden*,¹²¹ the Supreme Court approved of secret trials. In this case, the appellant — a person of Middle East descent residing in America — was arrested and detained after the September 11 attacks. The case against him was that, in the course of his duties as a waiter in a restaurant, he served two of those who later participated in the attacks. He filed *habeas corpus* proceedings in the trial court. His application in the trial court and subsequent appeals at the Court of Appeal were conducted entirely in secret at the request of the United States government. He appealed to the Supreme Court, where he challenged the

¹¹⁷ These are Martin Mubanga (Briton), and former UK residents, Bisher al-Rawi and Jamil e Banna. See BBC NEWS 'US holds first Guantanamo hearing' at <http://news.bbc.co.uk/2/hi/americas/3916987.stm> (accessed 31 July 2004).

¹¹⁸ BBC 'Lawyer to visit Guantanamo trio' at <http://news.bbc.co.uk/2/hi/americas/3568702.stm> (accessed 31 July 2004).

¹¹⁹ G Holland 'Lawyers seek to block Guantanamo hearings' Associated Press Writer Washington (AP) at http://www.fsnews.findlaw.com/articles/ap_stories/a/w/1152/8-2-2004/20040802161503_32.html (accessed 31 July 2004).

¹²⁰ See generally E Cassel '*Hamdi, Padilla and Rasul v Rumsfeld and Bush*. Who really won?' at <http://www.counterpunch.org/cassel06292004.html> & www.globalpolicy.org/empire/terrorwar/liberties/2004/0629gitmoruling.htm (accessed 31 July 2004).

¹²¹ Docket 03-6747 2004 US LEXIS 1553. See details of the case in W Richey 'Secret 9/11 case before high court' *The Christian Science Monitor* 30 October 2003 <http://www.csmonitor.com/2003/1030/p01s02-usju.html> (accessed 31 July 2004); W Richey 'Supreme Court decision may limit access to terror cases' *The Christian Science Monitor* at <http://www.globalpolicy.org/wtc/liberties/2004/0224access.htm> (accessed 31 July 2004) and W Richey 'Supreme Court OK's holding of secret trials' at <http://www.commondreams.org/headlines04/0224-05.htm> (accessed 31 July 2004).

secret hearing. A coalition of news and public interest organisation sought to join the suit as interested persons after the existence of the suit came to public knowledge through a docket error in the lower court.¹²² The Supreme Court refused to intervene in the case. Most significantly, the Supreme Court also conducted the appeal in secret and did not disclose any reason for its decision.¹²³

Second, in *Rumsfeld v Padilla*,¹²⁴ the Supreme Court placed emphasis on territorial jurisdiction of courts. The case concerns an American citizen, Jose Padilla (aka Abdullahi Al Muhajir), who was arrested on a material witness warrant in Chicago two years ago. He was accused of planning to detonate a dirty bomb. By a five to four decision, the Supreme Court ruled against him because the application at the trial court was filed at the wrong court. What happened was that two days before he filed the case, the government classified him as an 'enemy combatant' and transferred him from civilian prison in New York to military custody in South Carolina. This was without the knowledge of his government-appointed attorney, who was not allowed access to him throughout. Thus, by the time the suit was filed in New York, he was no longer under the jurisdiction of the named respondents and was outside the jurisdiction of the court. The case shows that the ouster of the jurisdiction of courts can be effected by simply moving the detainees from one prison to another so that the applicant and his attorney would not be in position to know the proper parties to sue and the proper venue to file a suit.¹²⁵ With this administrative device, cases can effectively be put beyond judicial review.

Last, and more significant, is the decision in *Hamdi*, where the Supreme Court upheld the authority granted by Congress to the President to detain anyone involved in fighting with al-Qaeda or the Taliban. The authority granted when Congress voted for war in Afghanistan continues as long as the war lasts. Although the Taliban has been overthrown in Afghanistan, the United States still maintains substantial military presence in Afghanistan and thus the administration

¹²² This case was inadvertently put on the court's docket due to a clerical error and the existence of the suit thereby came to public knowledge: 'Secrecy is compounded as Supreme Court refuses to hear an appeal in *MKB v Warden Silha* Bulletin Winter 2004 Pt 1 15 at <http://www.silha.umn.edu/bulletin.htm> (accessed 31 July 2004).

¹²³ As above.

¹²⁴ Decided on 28 June 2004. Forthcoming in 542 US (2004). See the slip judgment at <http://www.supremecourtus.gov/opinions/sliplist/s542pt2.html> (accessed 31 July 2004).

¹²⁵ Cassell (n 120 above). Some have suggested that Hamdi's transfer to military custody was not intended to frustrate the suit since he was transferred to the place where all other al-Qaeda suspects were being held: '*Rumsfeld v Padilla*' at <http://www.law.duke.edu/publiclaw/supremecourtonline/editedCases/rumvpad.html> (accessed 31 July 2004).

argues that the war is not yet over.¹²⁶ Thus, any one classified as an 'enemy combatant' can be detained until 'the war is over'. The Supreme Court, in *Hamdi*, held that the standard of proof required of the government in defending this classification is not high.¹²⁷ There is no presumption of innocence in favour of the detainees. The government can proffer hearsay evidence. Once the government meets the minimal proof, the onus shifts to the detainee to show that he is not an enemy combatant. Thus, the detainees should, even in civil courts, expect no more than a perfunctory or nominal hearing.¹²⁸

The United States government's example, and its insistence that other countries join the fight against terrorism on terms similar to its own, have provided many governments across the world with an impetus to the crack down on rebels and political opponents. Anti-terrorism legislation authorising a wide range of human rights abuses has sprung up across the world.¹²⁹ African nations are not exempted from this development. African countries that have enacted anti-terrorist legislation include Cameroon, Ghana, The Gambia, Kenya, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.¹³⁰

In Nigeria, the police suggested the resurrection of the defunct anti-terrorism squad created by the late General Sani Abacha, but this suggestion was rejected by the government. This decision is commendable, as the anti-terrorist squad had a poor reputation when it was in existence. According to Rotimi Sankore, a human rights campaigner:¹³¹

¹²⁶ There are ongoing operations in Afghanistan involving 20 000 United States troops: J Abizaid, Department of Defence, General Abizaid Central Command Operations Update Briefing, 30 April 2004, <http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html> (accessed 8 June 2004).

¹²⁷ n 106 above, *per* O'Connor J, 27.

¹²⁸ Cassell (n 120 above).

¹²⁹ See an overview of the position world-wide in Human Rights Watch 'In the name of counter-terrorism: Human rights abuses worldwide — A Human Rights Watch Briefing Paper for the 59th session of the United Nations Commission on Human Rights 25 March 2003' at <http://www.hrw.org/un/chr59/counter-terrorism-bck.htm> (accessed 24 April 2004) and the overview of the position in commonwealth countries in D Bascombe 'Anti-terrorism legislation in the commonwealth: A briefing paper for the Commonwealth Human Rights Initiative' May 2003 available at <http://www.bond.org.uk/networker/dec03/warrights.htm> (accessed 31 July 2004).

¹³⁰ See generally Bascombe (n 129 above); E Sall 'Africa: Human rights after September 11, 2001' (Paper for Swedish NGO Human Rights Foundation International Council Meeting, and seminar on 'War on Terrorism or War on Human Rights' Stockholm// Houses of Parliament, 26–30 September 2003): <http://www.humanrights.se/engelska/eng.index.htm> (accessed 31 July 2004), and S Ellis & D Killingray 'Africa after September 11, 2001' (2002) 101 *African Affairs* 5–8.

¹³¹ R Sankore 'Anti-terror legislation and democracy in Africa' <http://www.peace.ca/antiterrorlegislationafrica.htm> (accessed 31 July 2004).

In all its years of existence, not a single terrorist was arrested or prosecuted. Instead, it was used to terrorise the media, human rights community, the pro-democracy movement and other real or imagined enemies.

Nigeria has, however, enacted an Economic and Financial Crimes Act.¹³² The Act criminalises, amongst others, financing of terrorism and participation in terrorism.¹³³ The activities of the Commission established under the Act are subject to the supervision of regular courts. Despite the Act, Nigeria remains on the Financial Action Task Force (FATF) blacklist to 'ensure that the country's remaining anti-money laundering deficiencies are corrected'.¹³⁴

4 Conclusion

The Nigerian Court of Appeal had much praise poured on it for its decision in *Fawehinmi v Abacha*. It is clear, however, that the true glory in the matter belongs to Justices Longe and Onalaja, whose courageous and imaginative decisions in *Garuba* and the *CRP* cases, respectively, dealt staggering blows to draconian decrees. Perhaps greater applause should go to the counsel in the *CRP* case, whom the Court itself commended for shedding 'new light and horizon on the African Charter'.¹³⁵ Again, this may be the result of the interactions of human rights non-governmental organisations in Nigeria with similar organisations across the world and intellectual support derived therefrom.¹³⁶

The military in Nigeria has retreated into the barracks. Had the Supreme Court followed the bold path blazed by the Court of Appeal, we would have been able to say clearly that whether the military comes back or not, they will forever live under the shadow of *Fawehinmi v Abacha*. The judgment of the Supreme Court has deprived us of this. Rather, both the majority and dissenting judgments of the Court have emboldened any would-be *coup* plotter with the knowledge that his administration will be beyond accountability for human rights violations in domestic courts. The lesson from Nigeria is that domestic human rights legislation may not be enough to stop massive human rights violations and this makes a strong case for concerted action by the international community and intervention by supra-national courts.

¹³² See the Economic and Financial Crimes Commission Act 2002.

¹³³ n 132 above, sec 14.

¹³⁴ 'Cutting off the flow of dirty money' (2004) 11 *CrossRoad Magazine* at <http://Nigeria.usembassy.gov/wwwhxmay04f.html> (accessed 31 July 2004). Nigeria and Egypt are the only African countries on the list: J Godoy 'Nigeria listed as money laundry' at http://www.news24.com/News24/Africa/News/0,2-11-1447_1491795,00.html (accessed 31 July 2004).

¹³⁵ n 23 above, 249 of the judgment of the Court of Appeal.

¹³⁶ See J Hatchard 'A question of humanity: Delay and the death penalty in commonwealth courts' (1994) 20 *Commonwealth Law Bulletin* 316.

International law is now being used in municipal courts to challenge violations of human rights. In particular, there has been a growing awareness of the African Charter in some African countries since the 1990s.¹³⁷ This trend is expected to continue. Human rights abuses do not start nor end with military regimes. The constitutions of some African countries, such as the Ugandan Constitution, 1995, under which Museveni's administration operates, contain grave derogations from internationally accepted human rights norms.¹³⁸ Even the Nigerian Constitution¹³⁹ does not cover all the human rights contained in the African Charter and other international human rights documents. The wider scope of the human rights provisions in the African Charter offers a challenge to the governments and the judiciary of Nigeria, Uganda and other African states. The legislature in these states should assist in the protection of human rights by enacting legislation that will make enforceable in their domestic courts the international human rights documents to which their countries have subscribed. The Nigerian National Assembly should make the African Charter enforceable through the Fundamental Rights (Enforcement Procedure) Rules. This will settle, finally, the controversy as to the appropriate procedure for enforcing the provisions of the African Charter in Nigerian courts.

We do not have any words of comfort for any one contemplating a military *coup* in Nigeria or in any other African country. The atmosphere is simply not congenial from legal and political perspectives. The weaknesses in enforcing the African Charter on the domestic front in most African countries do not preclude the Charter's enforceability at international *fora*. The world is moving towards stronger accountability at the international level.¹⁴⁰ Already, there are international criminal courts trying crimes against humanity.¹⁴¹ The potential of the African Charter has taken a new turn with the coming into force of the Protocol

¹³⁷ See generally Viljoen (n 2 above).

¹³⁸ Eg, art 23 of the Ugandan Constitution 1995 allows the detention for up to 360 days without trial of persons suspected of committing offences triable only by the High Court, while arts 69–75 of the Constitution legitimise the movement system as an alternative to the multi-party system. The movement system is based on a 'no-party system', which in practice allows no opposition parties to operate. See, generally, P Bouckaert *Hostile to democracy — The movement system and political repression in Uganda* (1999).

¹³⁹ Constitution of the Federation of Nigeria 1999.

¹⁴⁰ MK Sinha 'Human Rights Committee: A precursor of an international court of human rights' (2001) 41 *Indian Journal of International Law* 622.

¹⁴¹ See, generally, HJ Steiner *International human rights in context: Law, politics, morals — Text and materials* (1996) 1021–1109 and J Hassan 'The current trials of war criminals: Prospects and problems' (1997) *LIV Punjab University Law Journal* 53.

Establishing the African Court on Human and Peoples' Rights.¹⁴² It is imperative that this Court is constituted as soon as possible.

It is important also that the UN and human rights organisations condemn, in very clear terms, draconian legislation that is now emerging across the world under the guise of the 'war against terrorism'. Terrorism, in any form or under any guise, should be condemned in the strongest terms, but the 'war against terrorism' should not be at the cost of human rights. Terrorists are human beings, notwithstanding the repugnant aversion their actions provoke. The modern international human rights system is premised on the belief in a set of inalienable rights due to all human beings, simply by virtue of their being human beings. The world laboured hard to get this far in the search for internationally acceptable and enforceable human rights standards. The human rights norms now embodied in international treaties and other documents are still facing strong challenges from proponents of cultural relativism.¹⁴³ The uncontrolled war against terrorism has sounded a war cry for dictators and repressive governments across the world. Unless the international community reacts strongly and decisively, this may as well sound a death knell for the credibility of the international human rights system.

¹⁴² The Protocol establishing this Court was unanimously adopted by the OAU (now the African Union) Assembly of Heads of State and Government in June 1998. See text in (1997) 9 *African Journal of International and Comparative Law* 953–961. The Protocol came into effect on 26 December 2003 after the nation of Comoros became the 15th African Union country to ratify the Protocol: Amnesty International 'Establishing an African Court on Human Rights' news release issued by the International Secretariat of Amnesty International, AI INDEX AFR 01/004/2004 issued on 22 January 2004. Other countries that have ratified the Protocol are Algeria, Burkina Faso, Burundi, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

¹⁴³ See eg MJ Perry 'Are human rights universal? The relativist challenge and related matters' (1997) 19 *Human Rights Quarterly* 461–509.

The death row phenomenon and the prohibition against torture and cruel, inhuman or degrading treatment*

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Summary

The article discusses how two main approaches to the death row phenomenon can be distinguished in the jurisprudence of national courts and international human rights mechanisms. The progressive approach sees a prolonged delay in the execution of the death penalty as a violation of the prohibition against inhuman or degrading treatment. The conservative approach requires further circumstances, such as the conditions on death row and that the delay in execution is not caused by the condemned prisoner himself. The author argues that the two approaches should be easier to reconcile if courts clearly defined what they mean by torture and cruel, inhuman or degrading treatment.

1 Introduction

The death penalty is by no means of modern origin.¹ It has been suggested that the death penalty is the oldest of all punishments and has

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¹ It has been noted that the earliest recorded public debate on the desirability of the death penalty in Greece was in 427 BC; GE Devinish *The application of the death penalty in South Africa* (1990) 1; see also Amnesty International *When the state kills . . . The death penalty: A human rights issue* (1989) 72.

its genesis in the dawn of history.² However, its antiquity has failed to crystallise into universal acceptance. Indeed, at least at international law, there is a gradual but firm movement towards its abolition.³ Furthermore, statistics in relation to state practice indicate a trend towards abolition. For example, in 1978 only 16 countries had abolished the death penalty. In 2004, however, the figure has risen to 79, whereas a total of 117 states have not carried out executions in the previous 10 years.⁴

The above notwithstanding, a majority of states still maintain the death penalty.⁵ Furthermore, whilst there have been suggestions that the death penalty is prohibited at international law,⁶ such assertions are not sustainable. The Universal Declaration of Human Rights (Universal Declaration) refers to the right to life in article 3, but does not provide for explicit exceptions.⁷ It is also silent on the issue of the death penalty.

The International Covenant on Civil and Political Rights (CCPR) has a more detailed articulation of the right to life contained in article 6. Article 6 provides that 'no one shall be arbitrarily deprived of his life'. CCPR does not define the term 'arbitrarily', but it has been suggested that it was intended to mean both 'illegally' and 'unjustly'.⁸ The article proceeds to expressly address the death penalty. However, CCPR expressly allows for the use of the death penalty. Indeed, this has provided the impetus for the view that the death penalty *per se* cannot be deemed to be torture or cruel, inhuman or degrading treatment, precisely because it is

² Amnesty International (n 1 above) 239.

³ WA Schabas 'Justice, democracy and impunity in post-genocide Rwanda: Searching for solutions to impossible problems' (1996) 7 (3) *Criminal Law Forum* 553.

⁴ See R Skilbeck 'The death penalty in international law: Tools for abolition' unpublished paper presented at the Conference on the Application of the Death Penalty in Commonwealth Africa, Entebbe, Uganda, 10–11 May 2004. See also Amnesty International 'The death penalty worldwide: Developments in 2003' ACT 50/007/2004.

⁵ In 2003, a total of 1 146 executions were carried out in 28 countries worldwide. See Skilbeck and Amnesty International (n 4 above). In Africa, by the end of 2003 only 11 countries had abolished the death penalty. For a discussion on the various reasons why the death penalty will remain in force in most African countries, see L Chenwi 'Capital trials in the light of international and regional fair trial standards', unpublished paper presented at the Conference on the Application of the Death Penalty in Commonwealth Africa, Entebbe, Uganda, 10–11 May 2004.

⁶ Eg, the Secretary-General of Amnesty International has posited that deliberately killing someone violates the most basic of all human rights — the right to life, and has no place in today's world. See Amnesty International News Release *Towards a world without executions* 16 June 1999. The statement has been construed as considering the death penalty as a violation of international law. See also R Rich 'Death penalty: An abolitionist perspective' *12th Commonwealth Law Conference Papers* Vol 1 27.

⁷ For an analysis of the Universal Declaration, see LE Launderer 'Capital punishment as a human rights issue before the United Nations' (1971) 4 *Harvard Law Journal* 511.

⁸ NS Rodley *The treatment of prisoners under international law* (1999) 220.

authorised as an exception to the right to life.⁹ This has also found expression at the domestic level to repel attacks on the death penalty on the premise that the various constitutions recognise the death penalty as a limitation on or exception to the right to life.¹⁰

The above judicial orthodoxy has forced proponents of abolition to devise alternative attacks to the death penalty. This has led to the emergence of a relatively new legal doctrine, the so-called death row phenomenon, which has been defined as 'the inhumane treatment resulting from special conditions on death row and often prolonged wait for executions, or where the execution itself is carried out in a way that inflicts gratuitous suffering'.¹¹

Legal scholars, psychologists and judges appear to be unanimous about the existence of the death row phenomenon. However, the jurisprudence of national courts and international courts and/or tribunals is sharply divided about its precise contours. On the one hand, there is a view that prolonged detention on its own is a sufficient supervening event which may render the carrying out of the death penalty illegal or unjust. On the other hand, there is another view, which posits that over and above the prolonged detention, there must be demonstrated the existence of other circumstances.

The paper has four main aims. Firstly, it examines various judicial and academic views expressed on the precise nature of the death row phenomenon. Secondly, it examines a few selected decisions of national courts and international courts and/or tribunals to find out the approaches to the death row phenomenon in different jurisdictions. The national court decisions are from Zimbabwe, South Africa, Botswana, The West Indies, India, Singapore and the United States. International courts' and tribunals' decisions are those of the Judicial Committee of the Privy Council (Privy Council), the Human Rights Committee (Committee) and the European Court of Human Rights (European Court). It is by no means suggested that these are the only courts that

⁹ See the General Comment of the Human Rights Committee 20(44) UN Doc CCPR/C/21/Rev/1/Add 3. See also Chaskalson P in *S v Makwanyane & Another* 1995 3 SA 39 (CC) para 36, where he says that '[c]apital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of section 11(2) [of the interim Constitution of South Africa]'. It has been said that the statement would have been more accurate if it was framed in the negative, namely that capital punishment is now prohibited by conventional norms that have been ratified by nearly 50 states, and that this suggests an evolution of standards towards it being considered cruel, inhuman or degrading treatment. See WA Schabas 'International legal aspects' in P Hodgkinson & A Rutherford (eds) *Capital punishment: Global issues and prospects* (1996) 35.

¹⁰ See eg the Botswana case of *State v Ntesang* [1995] 4 BCLR 426 or [1995] 2 LRC 338; the Tanzanian case of *Mbushu (alias Dominique Mnyaroje) & Another v Republic* [1995] 1 LRC 216.

¹¹ WA Schabas *The abolition of the death penalty in international law* (1993) 127.

have so far dealt with the issue. However, it is submitted that the decisions are representative of the divergent views on the death row phenomenon. Thirdly, the paper examines the above decisions to determine the definition, if any, that has been given to the various components of the prohibition against torture and cruel, inhuman or degrading treatment. The aim here would further be to determine whether it is necessary to define the various components of the prohibition. Lastly, the paper attempts to reconcile the divergent views that emerge from the different jurisdictions.

2 Judicial and academic acceptance of the death row phenomenon

Literature is replete with authority describing the suffering endured by condemned prisoners. This section examines the various views expressed by jurists and other professionals about the death row phenomenon as an inevitable consequence of the imposition of the death penalty.

2.1 Delay on death row

It has been said that the death penalty inevitably causes cruelty by the delay in carrying it out.¹² The reasons for delays on death row are diverse and differ from one country to another.¹³ However, it is generally accepted that it is human nature to seek to prolong one's life by all means at one's disposal.¹⁴ Thus, in most cases, as will be seen in the section that follows, the delay is partly due to the condemned prisoner availing himself of appeal procedures.¹⁵ Indeed, as will also be seen in the next section, this is one of the major reasons for the controversy surrounding the death row phenomenon.

Whatever the reasons for the delay, it is clear that delays on death row are on an increase. In the United States, for example, an average length of time spent on death row has risen from around 13 months in 1976 to over seven years by the 1990s.¹⁶ A prisoner in Utah was executed after

¹² D Pannick *Judicial review of the death penalty* (1982) 162; in the case of *Riley & Others v Attorney General of Jamaica & Another* [1982] 3 All ER 469 (PC), the Privy Council held at 473 that 'period of anguish and suffering is an inevitable consequence of sentence of death'.

¹³ For an exhaustive discussion of the various causes of delay, see P Hudson 'Does the death row phenomenon violate a prisoner's rights under international law?' (2000) 11 *European Journal of International Law* 833 834–835.

¹⁴ In the *Riley* case (n 12 above), it was said at 479 that '[i]t is no answer to say that a man will struggle to stay alive'.

¹⁵ In the *Catholic Commission* case (n 40 below), the Supreme Court of Zimbabwe noted at 334 that the state has nothing to gain by delaying execution.

¹⁶ R Hood *The death penalty: A world-wide perspective* (1996) 136.

spending 18 years on death row since the age of 19.¹⁷ In Arkansas, a man's death sentence was commuted to life imprisonment after languishing on death row for 19 years.¹⁸ Generally, it takes an average of ten years to execute a death row inmate in the United States.¹⁹

Delays on death row are a global problem and are not peculiar to the United States. In Japan, for example, by the end of 2002 most of the over 100 people on death row had been in solitary confinement for over a decade.²⁰

In 2001 there were at least 30 condemned prisoners in Zambia who had been on death row for periods ranging from eight years to 25 years.²¹ Thus, delays on death row, for various reasons, have become the norm rather than an exception.

2.2 Academic acceptance of the death row phenomenon

A criminologist conducted a study and interviewed 35 condemned prisoners in Alabama, United States. He found that most of the inmates were preoccupied with the length of time spent on death row.²² He also found out that the isolated conditions under which death row inmates were confined on death row produced widespread feelings of abandonment, leading to what he styled 'death of personality'.²³ The symptoms of the condition, according to the study, were depression, capacity, loss of sense of reality and physical and mental deterioration. He described the condemned prisoners:²⁴

. . . massive deprivation of personal autonomy and command over resources critical to psychological survival; tomblike setting, marked by indifference to basic human needs and desires; and their enforced isolation from the living, with the resulting emotional emptiness and death.

All in all, the various studies describe the exquisite psychological torture resulting from confinement on death row. The result of such torture is often deterioration and severe personality distortions, as well as denial of reality.²⁵

¹⁷ *The Guardian* (1992-07-31) quoted in Hood (n 16 above) 137.

¹⁸ *AI United States of America: Developments on the death penalty during 1994* 17. AI Index: AMR 51/01/95.

¹⁹ Hudson (n 13 above) 835.

²⁰ Amnesty International Report 2003: Japan <http://web.amnesty.org/reprt/jpn-summary-eng> (accessed 22 July 2004).

²¹ *AI Zambia: Time to abolish the death penalty* 9. AI Index: AFR 63/004/2001.

²² R Johnson *Condemned to die: Life under sentence of death* (1981) 4.

²³ As above.

²⁴ n 23 above, 110.

²⁵ For a thorough exposition of this issue, see R Johnson 'Under the sentence of death: The psychology of death row confinement' (1979) *5 Law and Psychology Review* 141; R Johnson & JL Carroll 'Litigating death row conditions: The case for reform' in IP Robbins (ed) *Prisons and the Law* (1985).

2.3 Judicial cognisance of the death row phenomenon

There are perhaps a few issues that have cultivated mutual and universal cognisance by diverse professions such as the death row phenomenon. Various judicial bodies have echoed the sentiments expressed above in relation to the psychological trauma that a condemned prisoner is subjected to whilst on death row. In the United States case of *Ex parte Medley*,²⁶ Justice Miller observed as follows in relation to condemned prisoners:²⁷

When a prisoner sentenced to death by a court is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place.

In the same year, the United States Supreme Court in *Re Kemmler*²⁸ noted that, although the death penalty might not be cruel *per se*, it becomes cruel when it involves a lingering death, which is beyond the mere extinction of life.

The Supreme Court of India has also made reference to the suffering that a condemned prisoner is subjected to on death row. In *Ediga Anamma v State of Andhra Pradesh*,²⁹ Justice Krishna Iyer observed that³⁰

[t]he excruciation of a long pendency of the death sentence, with the prisoner languishing in near solitary confinement suffering all the time may make the death sentence unconstitutionally cruel and agonising.

In yet another case decided by the Supreme Court of India,³¹ Chandrachud CJ observed that³²

[t]he prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman or degrading punishment in circumstances of a given case.

2.4 Causes of the death row phenomenon

The above exposé reveals the undisputed existence of the death row phenomenon. What may not be clear from the above is the exact cause of the phenomenon. That is, it is not clear whether the phenomenon results from mere confinement or whether it results from a combination of confinement coupled with the treatment that death row inmates are subjected to. Thus, it is imperative to determine whether the

²⁶ 134 US 160 (1890).

²⁷ n 26 above, 172.

²⁸ 136 US 436 (1890).

²⁹ [1974] 3 SCR 329.

³⁰ n 29 above, 335.

³¹ *Sher Singh & Others v State of Punjab* [1983] 2 SCR 583.

³² n 31 above, 591.

phenomenon is suffered as a result of mere confinement on death row, or whether there need to be other circumstances like conditions on death row and the treatment that death row inmates are subjected to.

Most studies have described the psychological trauma that condemned prisoners are subjected to. The trauma has largely been ascribed to the uncertainty in relation to the date of execution coupled with conditions on death row.³³ Whereas the reactions of prisoners on death row have been likened to those of terminally ill hospital patients, it has been noted that their situation is exacerbated by other factors like isolation and deprivation of recreational and other facilities.³⁴

The conditions on death row have been crisply described as 'an austere world in which condemned prisoners are treated as bodies kept alive to be killed'.³⁵ Similarly, Vogelmann³⁶ has noted that 'living in the death row factory is a traumatic experience, whether or not it results in execution. While the condemned are there, they are the living dead.'³⁷

What can be filtered from the above is that emphasis is laid on the psychological trauma that is an inevitable consequence of the imposition of the death penalty. The mental trauma and suffering results from various factors associated with the death penalty. These factors include uncertainty of the exact date of the impending death, alternating hope and despair and the feeling of isolation. Thus, although the traditionally rough conditions on death row exacerbate the suffering, it would appear that they need not exist for a condemned prisoner to be subjected to the death row phenomenon. However, as will be noted shortly, the other view is to the effect that prolonged detention on death row would not suffice on its own for purposes of relying on the death row phenomenon to quash a sentence of death.

3 The jurisprudence of the death row phenomenon: A global perspective

The death row phenomenon has occupied the highest judicial echelons of many countries and international tribunals. This section will endeavour to provide a global perspective of the jurisprudence of the death row phenomenon. The aim of this section is to examine the divergent approaches emerging from the jurisprudence and to show that, as yet, there is no consensus as to the exact parameters of the death row phenomenon.

³³ Hood (n 16 above) 137.

³⁴ As above.

³⁵ Johnson & Carroll (n 25 above) 15.

³⁶ L Vogelmann 'The living dead: Living on death row' (1989) 5(2) *South African Journal on Human Rights* 183.

³⁷ n 36 above, 195.

3.1 The jurisprudence of national courts

3.1.1 The Supreme Court of Zimbabwe

The earliest reported case on the death row phenomenon in Zimbabwe is that of *Dhlamini and Others v Carter NO and Others*.³⁸ The appellants sought to interdict the first respondent from carrying out the sentences of death. They argued, among other things, that the delay between the imposition of their sentences and their confirmation was so inordinate as to constitute inhuman or degrading punishment in violation of section 60(1) of the Constitution of the then Rhodesia. The argument was rejected on the basis that, once a lawful sentence has been meted out, it could not be rendered unlawful by subsequent events that may be termed inhuman or degrading.³⁹

The Supreme Court was seized with a similar matter in the *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Others* case.⁴⁰ This case involved four men who had been sentenced to death. In March 1993, the four men were served with warrants for their execution. They argued that the execution would be unconstitutional due to the prolonged delay,⁴¹ coupled with the harsh conditions on the death row section of the Harare Central Prison. They relied on section 15(1) of the Constitution of Zimbabwe.

The issue before the Court was whether, even though the death sentences were the only fitting and proper punishments to have been imposed, supervening events amounting to inhuman or degrading treatment could be used to set aside the death sentences. The Court commenced by observing that prisoners are not denuded of their rights by mere conviction. The Court then held that a lawfully imposed sentence, including the death penalty, could be set aside by reason of subsequent events. The Court held that in the circumstances of the case the death sentences, if carried out, would amount to inhuman or degrading treatment.

Even though the Court discussed the various decisions of national and international courts, it failed to reconcile the divergent views emerging from the decisions. Similarly, no attempt was made to motivate the preference for the view adopted by the Court over the views adopted by other courts. For example, in relation to the decision of the Committee

³⁸ (1) 1968 RLR 136.

³⁹ n 38 above, 155.

⁴⁰ 1993 4 SA 239 (ZSC).

⁴¹ Zacharia Marichi had spent six years and 21 days, Timothy Mhlanga had spent four years and four months while Martin Bakaka and Luke Chiliko had spent four years and three months each.

in *Barrett and Sutcliffe*,⁴² the Court contented itself with saying that the dissenting opinion of Ms Chanet was more 'compelling'.⁴³

The Court held that the delay would be taken into account even if occasioned consequent upon the condemned persons taking advantage of the appeal mechanisms at their disposal. Lastly, although the Court held that prolonged delay before carrying out the death sentences could on its own violate section 15(1) of the Constitution, the decision has been criticised for putting too much emphasis on the appalling conditions on death row in Zimbabwe. It has been contended that another court in another country might rely on this in an endeavour to distinguish its scope.⁴⁴ Indeed, as it will be noted below, that is what happened in a decision of the Botswana Court of Appeal.

3.1.2 The Constitutional Court of South Africa⁴⁵

One of the first constitutional issues that the South African Constitutional Court had to grapple with was the death penalty in the case of *S v Makwanyane and Another*.⁴⁶ In that case, the accused persons had been convicted, among other things, on four counts of murder. Their appeal to the Appellate Division was dismissed. However, as a result of the issue of the validity of the death penalty, the case was referred to the Constitutional Court.

The Constitutional Court held that the death penalty *per se* constituted cruel, inhuman or degrading punishment within the meaning of section 11(2) of the then interim Constitution. Although the Court referred to decisions on the death row phenomenon, it did not directly deal with the issue.⁴⁷ However, the Court observed, *obiter dictum*, that if long delays are not considered in themselves cruel, inhuman, or degrading punishment, then this would entail gratuitous suffering which is inevitable in any system which retains the death penalty. So the case appears to endorse jurisprudence to the effect that inordinate delays in themselves constitute cruel, inhuman or degrading punishment.

⁴² Communications 270/1988 & 271/1988, *Barrett & Sutcliffe v Jamaica* CCPR/C/44/D/271/1988, 6 April 1992.

⁴³ n 40 above, 333.

⁴⁴ WA Schabas *The death penalty as cruel treatment and torture* (1996) 147.

⁴⁵ The Constitutional Court is the only body with the power to rule on the constitutionality of any Act of Parliament; sec 167 of the Constitution of the Republic of South Africa.

⁴⁶ n 9 above.

⁴⁷ For an exhaustive discussion of the case, see WA Schabas 'South Africa's new Constitutional Court abolishes the death penalty' (1995) 16 *Human Rights Law Journal* 133–148 and PM Maduna 'The death penalty and human rights' (1996) 12 *South African Journal on Human Rights* 193.

In his concurring judgment, Kentridge AJ added that:⁴⁸

The mental agony of the criminal, in its alteration of fear, hope and despair must be present even when the time between sentence and execution is measured in months or weeks rather than years.

This statement ought to be construed and understood cautiously and against the backdrop of the Court's holding that the death penalty is arbitrary and inhuman and not as laying down a general rule on the death row phenomenon.

3.1.3 The Court of Appeal of Botswana

The Court of Appeal of Botswana had occasion to address the death row phenomenon in *Lehlohonolo Bernard Kobedi v The State*.⁴⁹ The appellant was a citizen of Lesotho who was convicted by the High Court of murder, among other things, and sentenced to death on 14 October 1998. The Court of Appeal dismissed his appeal against both conviction and sentence on 22 January 1999. The appellant spent some ten months on death row before launching a notice of motion in the High Court on 9 November 1999. He contended, among other things, that the execution of the death sentence would be unfair and unreasonable by reason of delay. The application was dismissed and he appealed to the Court of Appeal.

The Botswana Court of Appeal was referred to the *Catholic Commission* case and decisions of the Privy Council prior to *Pratt and Morgan v Attorney General of Jamaica*.⁵⁰ The Court then had to decide whether to follow the Zimbabwean case or the Privy Council decisions. In so deciding, the Court said that it was necessary to make certain observations. Firstly, it noted that the death penalty and the method of carrying it out by hanging have been sanctioned by the Constitution of Botswana and therefore its imposition cannot be regarded as inhuman or degrading. It appears from the judgment that the Court relied on section 4(1) of the Constitution,⁵¹ which reads as follows:

A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.

It was, however, argued that although the death penalty appears to be contemplated by the Constitution, nevertheless its method of execution was inhuman and degrading. In response, the Court relied on its earlier⁵² decision and held that the argument overlooked the provisions

⁴⁸ *Makwanyane* (n 9 above) para 136.

⁴⁹ Court of Appeal Criminal Appeal No 25 of 2001 (unreported).

⁵⁰ (1993) 14 *Human Rights Law Journal* 338.

⁵¹ See eg 33 *per* Tebbutt JP.

⁵² *Ntesang v The State* 1995 Botswana Law Reports 151.

of section 7(2) of the Constitution, which saved any law which 'authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution'.⁵³ It will be observed from the *Pratt and Morgan* case that section 17(2) of the Constitution of Jamaica is similar to section 7(2) of the Botswana Constitution. However, in the *Pratt and Morgan* case, the Privy Council held that, while the death penalty by hanging may have been lawful and therefore not subject to constitutional attack, a prolonged wait for it was not and could never be protected by the provision. It is submitted that the same reasoning ought to apply in the interpretation of section 7(2) of the Constitution of Botswana. Unfortunately, it appears that the Court of Appeal was not referred to the *Pratt and Morgan* case. As a result, it relied heavily on *Abbott v Attorney General of Trinidad and Tobago and Others*⁵⁴ and *Riley and Others v Attorney General of Jamaica and Another*,⁵⁵ which have since been overturned by the *Pratt and Morgan* decision.

The second observation that the Botswana Court of Appeal made was that some form of mental strain and suffering was inherent in the death penalty.⁵⁶ The Court relied on the dissenting opinions of Lords Scarman and Brighton in the *Riley* case. Yet, what the Law Lords simply meant in that case was that, since mental strain and suffering are an inevitable consequence of the death penalty, it should not matter who caused the delay on death row. They did not mean, as the Court of Appeal appears to hold, that since the suffering is an inevitable consequence of the death penalty, one cannot rely on the suffering to quash the execution.

The third observation that the Court made was that a person sentenced to death will almost invariably pursue his right of appeal and as a result prolong his mental stress and anguish.⁵⁷ The Court held then that it could not agree with Gubbay CJ in the *Catholic Commission* case that the period involved in pursuing his right of appeal, or other judicial process available, should not be excluded from the consideration of whether there has been an inordinate delay in the carrying out of the death sentence from the time of its imposition.⁵⁸ This approach has been criticised for, among other things, penalising the claiming of the right to appeal by holding that the exercise of that right prevents the defendant from contending that his treatment violates the prohibition against torture and inhuman or degrading treatment.⁵⁹ Furthermore, the Court

⁵³ *Per* Tebbutt JP 33.

⁵⁴ [1979] 1 WLR 1342 (PC).

⁵⁵ n 12 above.

⁵⁶ n 49 above, 54.

⁵⁷ As above.

⁵⁸ n 49 above, 56.

⁵⁹ Pannick (n 12 above) 85.

relied religiously on the *Abbott* and *Riley* cases which, as noted, have since been overturned. The Court also relied on the United States cases of *Chessman v Dickson*⁶⁰ and *Richmond v Lewis*.⁶¹ What the Court failed to appreciate is that the United States is sharply divided on the issue, as there is yet to be a decisive Supreme Court decision. Further, as one commentator observed, it should always be remembered that United States decisions mostly deal with applications for *habeas corpus* and not appeals *per se*, and that it would be 'extravagant to punish an accused person for exercising his constitutional rights'.⁶²

The Court concluded that the delay had been largely caused by the appellant's own actions. It further held that no evidence had been placed before it to show the conditions on death row in Botswana. In fact, the Court used this as an attempt to distinguish the present case from the *Catholic Commission* case. However, as noted above, the actual conditions on death row were not decisive in that case.

3.1.4 The Supreme Court of India

Although the Constitution of India does not proscribe torture or inhuman or degrading treatment or punishment, the Supreme Court of India has since filled the *lacuna*. It has interpreted article 21, which guarantees the right to live with basic human dignity, as embodying the right not to be subjected to torture, inhuman or degrading treatment or punishment.⁶³

That decision provided the impetus for considering the question of delay in carrying out the death penalty in the case of *Vatheeswaran v State of Tamil Nadu*.⁶⁴ In that case, the Court considered the issue whether it was open to the Court to take cognisance of endless delay before execution and give relief where necessary. The Court quoted extensively from the minority opinion in the *Riley* case, and found that to take the appellants' lives after a delay of eight years would be a gross violation of the fundamental right guaranteed by article 21 of the Constitution.

While the Court conceded that anguish and suffering were inevitable consequences of the sentence of death, it held that 'a prolongation of it beyond the time necessary for appeal and consideration is not'.⁶⁵ From this statement, one gets the impression that any anguish and suffering during the period of appeal were acceptable as inevitable. However, the Court went on to say that 'it is no answer to say that a man will struggle

⁶⁰ 275 F 2d 604 (1960).

⁶¹ 948 F 2d 1473 (1991).

⁶² Schabas (n 44 above) 142.

⁶³ *Francis Cotalie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746.

⁶⁴ AIR 1983 361.

⁶⁵ n 64 above, 363.

to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading.⁶⁶ The appeal was allowed and the death sentences were set aside and substituted by life imprisonment. The Court went on to say, *obiter dictum*, that the delay of two years should be sufficient to invoke the application of article 21.⁶⁷

The *obiter dictum* in the *Vatheeswaran* case was overturned in *Sher Singh and Others v The State of Punjab*,⁶⁸ in which case the Court held that it was normal for appellate proceedings to exceed two years and that it would be inconceivable if a condemned person could delay execution to such an extent by, for instance, filing frivolous proceedings so that it had to be commuted to life under such a rule. Nevertheless, the Court endorsed the *ratio decidendi* in the *Vatheeswaran* case and held that a condemned person who had been subjected to agony and torment was entitled to rely on article 21. The Court said that it was a logical extension of the principle that supervening events may render the execution of a justly imposed death sentence harsh, unjust or unfair.⁶⁹

3.1.5 The Court of Appeal of Singapore

The Court of Appeal of Singapore dealt with the question of delay on death row in *Jabar v Public Prosecutor*.⁷⁰ In that case it was argued that it would be cruel and inhuman punishment to carry out execution in view of the prolonged delay of more than five years since the date of conviction. Reliance was placed on the Indian cases discussed above and the Privy Council case of *Pratt and Morgan*. The Court of Appeal drew a rather dubious distinction between the case at hand and the Indian decisions. The Court noted that the death penalty was not mandatory in India and as such the courts would readily consider any delay in the judicial process and make an order of the commutation of the sentence to life imprisonment. This was because the intention of the legislature in India was to make life imprisonment the general rule and the death sentence an exception to be resorted to for special reasons. The Court concluded that the situation in Singapore was markedly different because there the death penalty was mandatory. Interestingly, the Privy Council has recently held that a mandatory death sentence would be in violation of the prohibition against torture and cruel, inhuman or degrading treatment or punishment.⁷¹

⁶⁶ As above.

⁶⁷ n 64 above, 367.

⁶⁸ (1983) 2 SCR 583.

⁶⁹ n 68 above, 593.

⁷⁰ [1995] 1 SLR 617.

⁷¹ See eg *Patrick Reyes v The Queen* (2002) AC 235.

It is submitted that the Court overlooked the fact that the unambiguous finding by the Indian Supreme Court was that *supervening events* might render a lawfully and justifiably imposed death sentence unlawful. The fact that the sentence may be mandatory does not detract from the mental anguish and torment that a condemned prisoner suffers as a result of inordinate delay and harsh conditions on death row.

The Court went on to hold that, once it had disposed of the appeal against conviction and confirmed the sentence of death, it was *functus officio* as far as the execution of the sentence was concerned. With respect, the Court overlooked the fact that a challenge based on the death row phenomenon is not a challenge to the judicial sentence of death *per se*, but rather to its execution *after* an inordinate delay. This is an issue which at the appeal stage is not canvassed and therefore on which a court cannot at a later stage purport to be *functus officio*.

3.1.6 The Judicial Committee of the Privy Council

The Privy Council⁷² has dealt with a plethora of cases bearing on the death row phenomenon. The first case that the Privy Council dealt with was *Freitas v Benny*.⁷³ In that case it was held that the appellant could not complain about the delay totalling three years preceding his petition for clemency caused by his own action in appealing against his conviction.

This case was followed by the *Abbott case*,⁷⁴ in which the Privy Council dismissed as untenable a contention that a delay of eight months was so inordinate as to invoke a contravention of the appellant's constitutional rights. The Privy Council held that the delay caused by the prisoner's use of various judicial reviews could never be invoked as evidence of inhumanity. As a result, three years of appeal and two years of pardon application were excluded. Interestingly, the Privy Council observed, *obiter dictum*, that:⁷⁵

It is possible to imagine cases in which time allowed by the authorities to elapse between the pronouncement of a death sentence and a notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his sentence must have been commuted to a sentence of life imprisonment.

However, the Privy Council observed that delay in such a case would be measured in years and not months.

⁷² The Privy Council is an advisory body of the British sovereign. The Judicial Committee of the Privy Council acts, *inter alia*, as an appellate court of the Commonwealth. However, the Judicial Committee only has jurisdiction to entertain appeals from courts in independent Commonwealth countries where such right has not been terminated. Most countries in the West Indies have not terminated this right of appeal. As such, the cases discussed here will be from the West Indies.

⁷³ 1976 AC 239 (PC).

⁷⁴ n 54 above.

⁷⁵ n 54 above, 1348B–D.

The Privy Council then addressed the issue in the case of *Riley*,⁷⁶ in which the Privy Council concluded that, whatever the reasons for the delay in the execution of a death sentence lawfully imposed, such a delay could not invoke a violation of section 17(1) of the Constitution of Jamaica, which prohibits cruel, inhuman or degrading punishment. The Privy Council relied on section 17(2) of the Constitution of Jamaica and held that, since at the time immediately before the Constitution came into effect, execution would have been punishment of a description which was lawful, notwithstanding any delay between its passing and the passing of the death warrant, execution of the death penalty would be 'to the extent' that the law allowed.⁷⁷ The Privy Council further emphasised that any delay necessarily occasioned by the appellate procedures pursued was to be excluded.⁷⁸

The *Riley* case was overturned in the *Pratt and Morgan* case.⁷⁹ In that case, a period of about 14 years had lapsed between the time the death sentence was meted out and the time the applicants petitioned the Privy Council to have the sentence of death commuted to life imprisonment. Although the Privy Council found that some of the responsibility for the serious delay was attributable to the respondents, it held that the responsibility had no bearing on whether or not the overall length of detention on death row can be described as cruel and unusual punishment under section 17(1) of the Constitution of Jamaica. It held that a state wishing to retain the death penalty must ensure speedy execution after allowing a reasonable time for appeal and consideration of reprieve. It held that section 17(2) was confined to authorising descriptions of punishment for which the court may pass judgment, but did not prevent the appellant from arguing that the circumstances in which the executive intends to carry out a sentence are in breach of section 17(1).⁸⁰

The Privy Council then almost fell into the trap that the Supreme Court of India⁸¹ fell in by adding that:⁸²

In any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment.

It would appear that the Privy Council realised the potential danger in setting a rigid time frame, and therefore endeavoured to qualify its statement in the next case involving Trinidad and Tobago. This case was

⁷⁶ n 12 above.

⁷⁷ n 12 above, 473.

⁷⁸ n 12 above, 471.

⁷⁹ n 50 above.

⁸⁰ n 50 above, 343.

⁸¹ *Vatheeswaran* (n 64 above).

⁸² n 50 above, 346.

Guerra v Baptiste,⁸³ in which the appellant had been served with a warrant for his execution more than four years and ten months after his conviction. The Privy Council observed that:⁸⁴

The five-year period [enunciated in *Pratt and Morgan*] was not intended to provide a limit, or a yardstick, by reference to which individual cases should be considered in constitutional proceedings.

It held that the period should be judged by referring to the requirement that execution should follow as swiftly as practicable after sentence, after allowing a reasonable time for appeal and reprieve.⁸⁵

It is clear from the above that the present position of the Privy Council is that resort to legitimate appellate procedures should not be a bar to a contention that a delay on death row has violated the prohibition against torture and inhuman or degrading treatment.

3.1.7 The position in the United States

Various courts in the United States have dealt with the issue in various ways. In the *Chessman* case,⁸⁶ the Court of Appeal for the North Circuit declined to stay execution because the delay of 12 years was largely due to the skilful manner in which the prisoner's lawyer had managed to exhaust all available avenues. Interestingly, the Court put a lot of emphasis on the prisoner's disposition and personality, to conclude that he could not have suffered mental agony that an ordinary man would have.⁸⁷ The same reasoning was employed in various courts to deny relief to applicants who had been on death row for over 13 years⁸⁸ and 16 years.⁸⁹

However, the Supreme Court of California adopted a different approach in *People v Anderson*.⁹⁰ In that case, the Court was concerned with the question whether the death sentence violated article 6 of the state's constitutional prohibition against cruel or unusual punishment. The Court held that it did, and particularly underlined the cruelty of the delay in carrying out the death penalty. It went further to hold that an appellant's insistence on receiving the benefits that accrue to judicial review does not render the lengthy period of impending death any less torturous.⁹¹ Similarly, in *District Attorney for Suffolk District v Watson Mass*,⁹² the Supreme Judicial Court of Massachusetts held the death

⁸³ [1996] 1 AC 397.

⁸⁴ n 83 above, 39.

⁸⁵ As above.

⁸⁶ n 60 above.

⁸⁷ n 60 above, 607–608.

⁸⁸ *Potts v State* (1989) Supreme Court of the state of Georgia.

⁸⁹ n 61 above.

⁹⁰ 493 P 2d 88 (1972).

⁹¹ n 90 above, 89.

⁹² 411 NE 2d 1274 (1980).

penalty to be violative of the state's Constitution, which prohibited cruel punishment. The Court noted, *per* Justice Hennessey, that:⁹³

The fact that the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of the law must not be set-off against the right to be free from inhuman treatment.

In the same terms as in the *Anderson* case, the Court held that delay as a result of the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on him.

3.2 The jurisprudence of international jurisdictions

3.2.1 The United Nations Human Rights Committee

The Human Rights Committee is a body of 18 independent experts, which has the power to determine individual complaints on alleged human rights violations in countries that are state parties to the Optional Protocol to CCPR.⁹⁴ In terms of article 5(4) of the Optional Protocol, its decisions on the merits, which are called views, are not binding on states. However, its views may be a source of international law as highly authoritative decisions. Member states are expected to implement the decisions.⁹⁵

In *Earl Pratt and Ivan Morgan v Jamaica*,⁹⁶ the complainants had been on death row for a period of about seven years. The Committee found that prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment, even if they can be a source of mental anguish to the convicted prisoners. It, however, noted that in the case of capital punishment, different circumstances might obtain, requiring an assessment of the circumstances of each case. In the case at hand, the Committee found that the authors had not sufficiently motivated their claim that delays in judicial proceedings had turned their detention on death row into cruel, inhuman or degrading treatment. The Committee said that it is incumbent upon the author who alleges such violation to allege and prove facts over and above prolonged detention that render such detention cruel, inhuman or degrading.

In *Barrett and Sutcliffe v Jamaica*,⁹⁷ the authors, who had been on death row for a period of over 13 years, claimed that the duration of their confinement to death row was contrary to article 7 of CCPR. The Committee reiterated the sentiments it expressed in *Pratt and Morgan*,

⁹³ n 92 above, 1283.

⁹⁴ M Schmidt 'The Human Rights Committee: Process and progress' (1995) 5 *Human Rights Forum* 31–49.

⁹⁵ As above.

⁹⁶ Communications 210/1986 & 225/1987, *Earl Pratt & Ivan Morgan v Jamaica* CCPR/C/35/D/210/1986; CCPR/C/35/D/225/1987, 7 April 1989.

⁹⁷ n 42 above, 388–390.

that prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment, even though they may be a source of mental strain and anguish for the detained persons.

So, although it found the delay between the dismissal of their appeal by the Court of Appeal of Jamaica and the judgment of the Privy Council to be 'disturbingly long', it concluded that it was largely attributable to the authors themselves. This was not a unanimous decision. For example, Ms Chanet of France was of the view that a state party is not exonerated from its obligations under article 7 of CCPR, even if the long delay may be partially due to the failure of the condemned prisoner to exercise a remedy.⁹⁸

In *Joseph Kindler v Canada*,⁹⁹ the Committee was faced with a Communication in which the author complained that his extradition to Pennsylvania, United States, would be a violation of article 7. Interestingly, the communication did not deal with an actual violation. The Committee considered the decision of the European Court in *Soering v United Kingdom*,¹⁰⁰ and concluded that it was distinguishable. In particular, the Committee noted that no specific facts had been placed before it in relation to prison conditions in Pennsylvania, or about the possibility or effects of prolonged delay in the execution of the death sentence. It was for the same reasons that the communication of *Errol Simms v Jamaica*¹⁰¹ was dismissed.

The jurisprudence of the Committee therefore shows an insistence on the requirement of the existence of further compelling circumstances. What is not clear from the jurisprudence is what would suffice to satisfy this requirement.

3.2.2 The European Court of Human Rights

The European Court had occasion to address the issue of the death row phenomenon in the watershed case of *Soering*.¹⁰² Soering, a German citizen, was sought by the United States to face two charges of murder in the state of Virginia under the 1972 Extradition Treaty with the United Kingdom.

A United Kingdom judge held that Soering could be extradited. Appeals having been dismissed, Soering sought relief from the European Commission on Human Rights. He argued that his extradition would

⁹⁸ n 97 above, 390 (Appendix I to the views of the Human Rights Committee).

⁹⁹ Communication 470/1991, *Joseph Kindler v Canada*, CCPR/C/48/D/470/1991, 18 November 1993.

¹⁰⁰ Judgment of 7 July 1989, Publications of the European Court of Human Rights, Series A No 161. This case will be discussed in detail below.

¹⁰¹ Communication 541/1993, *Errol Simms v Jamaica*, CCPR/C/53/D/541/1993, 3 April 1995.

¹⁰² n 100 above.

amount to a violation of article 3 of the European Convention on Human Rights (European Convention).¹⁰³ This was because the conditions of detention at Mecklenburg State Prison, where he would be incarcerated if sentenced to death in Virginia, were particularly harsh and thus inhuman and degrading. The Commission found against him, but referred the case to the European Court.

The European Court found that there was a real risk that Soering would be sentenced to death and that, if extradited, article 3 of the European Convention would be violated. The Court assessed the conditions of detention at Mecklenburg State Prison. It also posed the question whether a delay in the appellate process in the United States could be attributable to the condemned person. The Court held that although the delay might be attributable to the condemned person and regardless of the good intentions of the state of Virginia for providing complex post-sentencing procedures, that did not detract from the mental anguish and suffering by the condemned prisoner.¹⁰⁴ The Court concluded therefore that taking into consideration the long time that would be spent on death row in extreme conditions and the personal circumstances of the applicant, including his age (18 years) and his mental state at the time the crime was committed, his extradition would be in violation of article 3.

3.3 The approaches emerging from the jurisprudence

Few issues have succeeded in cultivating mutual cognisance of the jurisprudence of national courts and international judicial bodies like the death row phenomenon. However, judicial cognisance has not translated into judicial consensus on the issue. What follows is a discussion of the two approaches that have been filtered from the above jurisprudential excursion.

3.3.1 The progressive approach

One approach to the death row phenomenon is what will herein be called the progressive approach. This approach has been adopted by the Supreme Court of Zimbabwe, the Supreme Court of India, the Privy Council and the South African Constitutional Court. Gubbay CJ in the *Catholic Commission* case referred to the approach he adopted as more 'progressive' and 'compassionate'.¹⁰⁵ This approach is basically to the effect that the execution of a death sentence after a prolonged delay is a violation of the prohibition against inhuman or degrading treatment.

¹⁰³ Art 3 is the equivalent of art 7 of CCPR. They only differ in that the European Convention does not make reference to cruel treatment.

¹⁰⁴ n 100 above, para 106.

¹⁰⁵ n 40 above, 333.

This is so regardless of the fact that the delay might have been at the instance of the condemned prisoner himself.

3.3.2 The conservative approach

The Committee has consistently held that long detention *per se* does not amount to a violation of the prohibition against cruel, inhuman or degrading treatment. It has maintained that there has to be an existence of 'further and compelling circumstances'.¹⁰⁶ This approach has been termed less progressive by the Supreme Court of Zimbabwe.

The European Court has, on the other hand, noted that:¹⁰⁷

For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable.

The severe stress was said to be inevitable despite the fact the delay might have been due to the exploitation of appeal safeguards by the condemned prisoner. Yet, ultimately what influenced the Court were the peculiar circumstances of the applicant.¹⁰⁸ It is difficult to conclude that the European Court would have reached the same conclusion if the circumstances of the applicant had been different.¹⁰⁹ Some commentators have maintained that neither the age nor the mental state of Soering influenced the court.¹¹⁰ It is submitted that the emphasis the Court laid on Soering's circumstances leads one to the inevitable conclusion that, but for these circumstances, the Court's conclusion would have been different. It is for this reason that the decision is put under the conservative approach. The Court of Appeal of Botswana and the Court of Appeal of Singapore fall within this category.

Jurisprudence on the death row phenomenon reveals the different approaches that have been adopted by different courts around the globe. Although this discussion is not exhaustive, it is submitted that, geographically, it sufficiently covers a wide spectrum of the globe as it deals with decisions from different continents. What can be observed from the above is that there are two approaches to the death row phenomenon, which are based on diverse and incommensurable convictions. These approaches have led to different decisions on similar cases.

¹⁰⁶ See para 3.2.1 above.

¹⁰⁷ n 100 above, para 111.

¹⁰⁸ See eg GJ Naldi 'The death row phenomenon held inhuman treatment' *The Review* (International Commission of Jurists) December 1989 61–62; Schabas (n 11 above) 225–226.

¹⁰⁹ RB Lillich 'The *Soering* case' (1991) 85 *American Journal of International Law* 145.

¹¹⁰ See eg M Shea 'Expanding judicial scrutiny of human rights in extradition cases after *Soering*' (1992) 17 *Yale Journal of International Law* 110.

4 The meaning of torture and cruel, inhuman or degrading treatment or punishment

What emerged from the previous section is that, although there is no consensus as to the exact parameters of the death row phenomenon, there is general acceptance that it might invoke the violation of the prohibition against torture and cruel, inhuman and degrading treatment or punishment. It must be noted that various treaties and constitutions employ different terminology. For example, whereas the Constitution of Botswana protects against 'torture and inhuman or degrading treatment', the Constitution of the United States protects against 'cruel and unusual punishment'. It has been suggested that, whilst the terminology is different, the underlying concept is the same in that the aim is to protect persons from unnecessary and undue suffering.¹¹¹ Perhaps this explains why less emphasis has been placed on the definition of these terms. However, it is submitted that defining these terms is relevant for, *inter alia*, arriving at a consensus of the exact parameters of the death row phenomenon. Only when there is consensus on how these terms are understood, can the gap between the approaches discussed in the previous section be bridged. This section embarks on a brief evaluation of the jurisprudence on the prohibition against torture and cruel, inhuman or degrading treatment or punishment. It also discusses the various approaches emerging from the jurisprudence.

4.1 The jurisprudence on torture and cruel, inhuman or degrading treatment or punishment

4.1.1 The global approach¹¹²

In the *Catholic Commission* case, the Supreme Court of Zimbabwe relied on section 15(1) of the Constitution of Zimbabwe.¹¹³ However, all the Court said in relation to the section was that it was 'nothing less than the dignity of a man, it is a provision that embodies broad and idealistic notions of dignity, humanity and treatment'.¹¹⁴ The Court seemed to overlook the fact that the section referred to various kinds of conducts or acts to which no individual ought to be subjected. Thus, for its exhaustive and industrious comparative analysis of the jurisprudence of

¹¹¹ See Hudson (n 13 above) 837.

¹¹² This approach has been referred to as 'global' in that it makes no distinction between the components of the prohibition. See NS Rodley *The treatment of prisoners under international law* (1987) 71.

¹¹³ The section reads as follows: 'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'

¹¹⁴ *Catholic Commission* case (n 40 above) 326.

the death row phenomenon, the case is less helpful in defining the prohibition that it held had been violated. It is submitted that the Court ought to have defined the various terms and said which of the acts the applicants had been subjected to.

Similarly, the Constitutional Court of South Africa in the *Makwanyane* case did not attempt to define the various concepts embodied in section 11(2) of the Constitution. Perhaps this was because the question of cruel, inhuman or degrading treatment or punishment was not the sole issue. In that case the death sentence was challenged on the basis of sections 8,¹¹⁵ 9¹¹⁶ and 10,¹¹⁷ in addition to section 11(2). According to the Court, these rights were treated as components of the inquiry as to whether the death penalty was cruel, inhuman or degrading.

The Constitutional Court also had occasion to examine this prohibition in *S v Williams*.¹¹⁸ In that case the issue was whether judicial corporal punishment violated the Constitution. However, as in the *Makwanyane* case, the question of cruel, inhuman or degrading treatment or punishment was not the only issue.¹¹⁹ In concluding that section 11(2) had been violated, the Constitutional Court declined to draw a distinction between the various components of the prohibition. The Court concluded that:¹²⁰

Whether one looks at the adjectives disjunctively or regards the phrase as a compendious expression of a norm, it is my view that at this time, so close to the dawn of the twenty first century, juvenile whipping is cruel, it is inhuman and it is degrading.

Similarly, the Privy Council has been criticised for providing no real guidance to the interpretation of the norm.¹²¹ It has been observed that it sheds no light on whether the death row phenomenon constitutes torture or whether it is inhuman or degrading.¹²²

The Committee has also not laid emphasis on defining the various components of article 7 of CCPR. It has merely found that article 7 had been violated. In some cases the Committee has expressly found that torture alone had been committed, but failed to authoritatively say which of a series of acts constituted torture.¹²³ In other cases it has

¹¹⁵ Sec 8 provided for the right to equality and is now replaced by sec 9 of the 1996 Constitution.

¹¹⁶ Sec 9 provided for the right to life which is now embodied in sec 11 of the 1996 Constitution.

¹¹⁷ Sec 10 provided for the right to respect for and protection of dignity and remains the same.

¹¹⁸ 1995 2 SA 632 (CC).

¹¹⁹ It was argued that in addition to constituting cruel, inhuman or degrading punishment, corporal punishment also violated secs 5, 9 & 10.

¹²⁰ *Per Langa J* para 91.

¹²¹ Schabas (n 44 above) 123

¹²² B Phillips '*Pratt and Morgan v Attorney General for Jamaica*' (1994) 88 *American Journal of International Law* 775.

¹²³ Eg see *Sendic (Setelic) v Uruguay* (Communication No R14/63).

specifically found that certain acts amount to inhuman treatment without defining the term.¹²⁴

The above does not mean, however, that the Committee does not acknowledge that there are distinctions between the categories. In its General Comment on article 7 of CCPR, the Committee observed that the distinctions between the categories depends on the purpose, nature and the severity of the treatment. It nevertheless concluded that:¹²⁵

The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment.

The need to draw a distinction between the categories will be discussed below.

4.1.2 The disjunctive approach

The global approach can be juxtaposed against an approach which will herein be called the disjunctive approach. This has notably been adopted by European bodies and the approach endeavours to draw distinctions between the array of prohibited acts. The European Commission in the *Greek case*¹²⁶ observed that torture encompasses inhuman or degrading treatment and that inhuman treatment embodies degrading treatment.¹²⁷ Thus the European Commission not only defined the prohibitions, but it also ranked them in order of severity.¹²⁸

Similarly, the European Court has held in *Ireland v United Kingdom*¹²⁹ that the distinctions between the various prohibitions lay in the intensity of the suffering inflicted. Although the Court was unanimous as to the difference between the various prohibitions, it was split as to the category in which the impugned acts fell. In the case of *Tyrer v United Kingdom*,¹³⁰ that involved a determination as to whether corporal

¹²⁴ Communication 37/1978, *Bouton v Uruguay*, CCPR/C/12/D/37/1978, 27 March 1981.

¹²⁵ General Comment No 20/44 (April 1992).

¹²⁶ Opinion of 5 November 1969, YB XX11 186. Extracts from the opinion of the European Commission are reproduced in the *Digest of Strasbourg Case Law Relating to the European Convention on Human Rights* Vol 1 (Articles 1–5) 100–101.

¹²⁷ The European Commission also described torture as an aggravated form of inhuman treatment and inhuman treatment as being that which deliberately causes severe suffering, mental or physical, which is unjustifiable.

¹²⁸ For more on the jurisprudence, see eg MW Janis, RS Kay & AW Bradley *European human rights law. Text and materials* (1995); R Keightley 'Torture and cruel, inhuman and degrading treatment or punishment in the UN Convention Against Torture and other instruments of international law: Recent developments in South Africa' (1995) 11 *South African Journal of International Law* 379.

¹²⁹ Judgment of 18 January 1977 (No 25) 2 EHRR 25.

¹³⁰ Judgment of 25 April 1978, Series A vol 26.

punishment of a juvenile contravened article 3 of the European Convention, the Court held that the assessment of into which category the acts complained of fell is relative.¹³¹

The European Court's interpretation involves a two-phased inquiry. The first phase of the inquiry is whether the physical or mental treatment complained of has achieved a minimum level of severity. If the answer to the first inquiry is in the affirmative, then the degree is used as a yardstick for determining the category in which to place the treatment complained of.

4.1.3 The need for defining the various prohibitions

One might question the wisdom and the need for defining the various prohibitions discussed above. In relation to article 7 of CCPR, for example, if it is found that it has been violated, does it really matter whether it is the prohibition against torture or inhuman or degrading treatment or punishment that has been violated? It is submitted that the answer is in the affirmative. This is more so in relation to the death row phenomenon where there is controversy as to its parameters. The discussion that follows elucidates this submission.

A plethora of international human rights instruments prohibit torture or cruel, inhuman or degrading treatment or punishment.¹³² This prohibition is also found in numerous domestic constitutions.¹³³ This blanket prohibition envisages that the various concepts therein are distinct. One major factor that points to the difference between these prohibitions is that at international law, the prohibition against torture is regarded as having crystallised into a norm of customary international law while other prohibitions are not.¹³⁴ The significance of this is that, at international law, even states that have not ratified the instruments prohibiting torture are nevertheless bound by the prohibition. Needless to say, in relation to other prohibitions that are not part of customary international law, no obligations will attach unless a state has ratified a treaty in question.

4.1.4 The prohibition against torture

Most of the international instruments cited above merely prohibit torture, but they do not define torture.¹³⁵ However, the United Nations

¹³¹ n 130 above, para 30.

¹³² Eg the Universal Declaration under art 5; CCPR under art 7; the African Charter on Human and Peoples' Rights under art 5 and the Convention Against Torture.

¹³³ Eg sec 7 of the Constitution of Botswana; sec 15 of the Constitution of Zimbabwe and sec 12 of the Constitution of South Africa.

¹³⁴ See the United States case of *Filartiga v Pena-Irala* 630F 2ed 874 (1980).

¹³⁵ The Inter-American Convention to Prevent and Punish Torture (the Inter-American Convention on Torture) is an exception.

Convention Against Torture (Torture Convention) defines torture.¹³⁶ From the definition, the following elements can be deduced:

- Severe physical or mental pain.
- The pain or suffering must have been intentionally inflicted.¹³⁷ In the death row phenomenon debate, this requirement is of utmost importance, as it will go a long way in determining whether or not this prohibition is violated even where the delay in execution has been at the instance of the condemned prisoner. This will be discussed in more detail in the next section.
- The intentional infliction of pain must be directed at a particular purpose.¹³⁸ It has been suggested that the list is not exhaustive or finite.¹³⁹
- The final element in the definition of torture is that it expressly excludes pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁴⁰ This element is also crucial in the context of the death row phenomenon. In the cases discussed in the previous section, there was consensus that a certain amount of mental anguish or suffering is incidental to the imposition of the death penalty. If this is accepted and it is also accepted that the death penalty can be a lawful punishment, then it might be difficult to insist that the inevitable confinement to death row may invoke a violation of the prohibition against torture. It is submitted that, as the prohibition against torture is regarded as a norm of customary international law and the Torture Convention is merely a codification of that norm, then the definition adopted in the Torture Convention should be and is of universal application.

4.1.5 The prohibition against cruel, inhuman or degrading treatment or punishment

This prohibition is not defined in any of the international instruments referred to or in any of the constitutions that the courts relied on in the cases discussed above. However, both the European Commission and the European Court have drawn distinctions between the various components of this prohibition.

¹³⁶ See art 1(1).

¹³⁷ The European Court has also assimilated this requirement into the European Convention. See *Ireland v United Kingdom*.

¹³⁸ These purposes are listed as the obtaining of information or of a confession, punishment; intimidation; coercion or discrimination. See also the *Greek* case, where the European Commission expressed the same sentiment.

¹³⁹ See D Blatt 'Recognising rape as a method of torture' (1992) 19 *New York Review of Law and Social Change* 857–858.

¹⁴⁰ It has been said that when the same provision was included in the UN Declaration on Protection From Torture, the intention was to ensure that corporal punishment would not be covered by the prohibition. See Keightley (n 128 above) 384.

It is worth noting that, in its definition of inhuman treatment, the European Commission refers to the *intention* to cause severe suffering.¹⁴¹ This definition might make nonsense of the progressive approach because it specifically requires that there has to be a deliberate intention to inflict pain or suffering. Thus, where a delay in execution has been occasioned because of the condemned person's exploitation of appeal mechanisms, one might find it difficult to establish a deliberate infliction on the part of the state. Lastly, in defining degrading treatment or punishment, there does not appear to be a requirement of intention.¹⁴²

The discussion was intended to highlight the approaches that have been adopted in relation to the prohibition against torture and cruel, inhuman or degrading treatment or punishment. It was also sought to demonstrate that the distinctions between the categories are not a matter of semantics. It is important to draw distinctions between the different categories of prohibited treatments, particularly when dealing with the death row phenomenon.

5 Reconciling the divergent approaches

5.1 The question whether the actual effect of the delay is to be shown

A major issue that has created the rift between the two approaches to the death row phenomenon is whether the actual effect of delay on the condemned prisoner must be alleged and proved. The progressive approach is to the effect that long delays are in themselves cruel, inhuman or degrading treatment. The conservative approach requires the condemned prisoner to allege and prove the existence of circumstances over and above prolonged delay.

The stance adopted by the progressive approach is difficult to support when one adopts the disjunctive approach, as it will here be recommended, in dealing with the prohibition against torture and cruel, inhuman or degrading treatment. If the disjunctive approach is adopted, then each component of the prohibition has to be defined and there must be a clear finding as to which component of the prohibition has been violated.

The definition of torture, as we have seen, has four distinct elements, three of which would not be satisfied if the disjunctive approach were adopted. One would be in difficulty to prove that pain and suffering resulting from prolonged detention is intentionally inflicted. This is more so when the delay is at the instance of the condemned prisoner.

¹⁴¹ n 129 above.

¹⁴² As above. Interestingly, the European Convention does not refer to the term 'cruel'.

Similarly, it would be impossible to prove that pain and suffering is directed at a particular purpose. Finally, any pain and suffering arising from, inherent in or incidental to lawful sanctions cannot amount to torture. It will be recalled that in all the cases that have been discussed in the study, the courts echoed the sentiment that a certain amount of suffering and delay on death row is incidental to the imposition of the death penalty. If this is accepted, and it is also accepted that the death penalty can be a lawful form of punishment, then it is difficult to support the view that long delays in themselves may invoke the violation of the prohibition against torture.

The same may be said about the prohibition against inhuman treatment, which requires that there must be an intention to cause severe suffering. Although the definition of degrading treatment does not specifically require intention to cause pain and suffering, it has been held that inhuman treatment encompasses degrading treatment. Therefore it may be argued that, by implication, it must be proved that the pain and suffering was inflicted intentionally. The only distinction between inhuman or degrading treatment lies in the severity of treatment. The end result is that, where there is a delay at the instance of the condemned prisoner which is not accompanied by any aggravating circumstances, like ill-treatment and unfavourable conditions, it would be very difficult to prove that there has been a violation of the prohibition against torture and cruel, inhuman or degrading treatment. Clearly here there would be an absence of an intention to inflict pain and suffering directed at a particular purpose.

It is submitted that the aspect of the progressive approach, which does not require the existence of circumstances over and above mere prolongation and pain and suffering, which are in any event incidental to the lawful imposition of the death penalty, might produce results that are not in consonance with the spirit of abolition. In Zimbabwe, for example, after the decision in the *Catholic Commission* case, section 15(5) of the Constitution was amended as follows:

Delay in the execution of sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be in contravention of subsection (1).

This amendment effectively overturned the *Catholic Commission* case. Although the amendment cannot be supported and has been heavily criticised,¹⁴³ it is not difficult to imagine its root cause. A government whose constitution allows for the imposition of the death penalty as a form of sentence is likely to have difficulties in accepting that *inevitable* consequences of such a sentence may render its execution unconstitutional. It is submitted that, where the carrying out of a sentence of

¹⁴³ See eg WN Chinamora 'Towards a human rights jurisprudence: Zimbabwe since independence' unpublished LLM dissertation, University of Stellenbosch, 1994 37.

death is declared unconstitutional as a result of avoidable circumstances, which are not inherent in such punishment, a state would be less inclined to overturn the decision by constitutional amendments.

It is submitted that the aspect of the progressive approach that requires only the condemned prisoner to prove mere prolongation of proceedings cannot be supported for the above stated reasons. In this regard, it is submitted that the conservative approach appears to be more attractive to the extent that it requires allegations and proof of circumstances over and above prolonged delay in detention. This is simply because a certain amount of delay and pain and suffering is inevitable in any system which retains the death penalty.¹⁴⁴

It is therefore submitted that the emphasis should not be on delay, but rather on the actual effects of detention on death row on the condemned prisoner as a result of factors like treatment, conditions on death row and the prisoner's personal circumstances.¹⁴⁵ One advantage with placing less emphasis on delay is that it would end the controversy as to what amounts to unreasonable delay. At the moment there is no consensus as to what amounts to unreasonable delay. As seen from the discussion above, different courts have had to deal with different cases in which the applicants had been on death row for differing periods of time. The five-year period set by the Privy Council in its decisions has been heavily criticised because it resulted in countries speeding up appeal procedures to meet the cut-off point.¹⁴⁶

5.2 The question whether the author of the delay is a material factor

This is another issue which is a major source of controversy between the progressive approach and the conservative approach. The progressive approach is to the effect that the cause of the delay is immaterial when the sentence is death. According to this approach, the fact that the condemned prisoner himself might have caused the delay does not detract from the dehumanising and degrading character of the delay.

According to this approach, all a condemned prisoner has to prove is that there has been a long delay from the imposition of the death sentence to the time when he is notified of the date of execution. Accordingly, a condemned prisoner need not prove that he did not

¹⁴⁴ See the *Makwanyane* case (n 9 above), the *Soering* case (n 100 above) and the *Catholic Commission* case (n 40 above).

¹⁴⁵ This seems to be in accord with the meaning of the phrase 'death row' which refers to the area in a prison where inmates awaiting execution are housed. See Hudson (n 13 above) 835.

¹⁴⁶ See *International Herald Tribune* (1997-07-08) 7 cited in MG Schmidt 'The death row phenomenon: A comparative analysis' in T Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretive approach* (2000) 70.

cause the delay.¹⁴⁷ However, in the *Catholic Commission* case, it was held that the state could show that the condemned prisoner 'resorted to a series of untenable and vexatious proceedings, which in consequence had the effect of delaying the ends of justice'.¹⁴⁸ In such a case, the onus would shift to him to show that he did not in fact do so. In the *Soering* case, the European Court found that where the delay is due to a *strategy* by a condemned prisoner to prolong proceedings, that factor would not be to his detriment.¹⁴⁹ There is a very thin line between a *strategy to delay proceedings* and an *abuse of process* by bringing vexatious proceedings.¹⁵⁰ It is submitted that this might lead to another controversy about the difference between frivolous proceedings, which shifts the burden to the condemned prisoner, and a deliberate strategy to delay proceedings, which does not.

The conservative approach is to the effect that where delay is at the instance of the condemned prisoner by availing himself of appellate remedies, then even prolonged periods of detention under severe conditions will not invoke the violation of the prohibition against torture, inhuman or degrading treatment.¹⁵¹ It is difficult to accept this aspect of the conservative approach. That is the major problem with according significance to the delay rather than the actual effects of detention on death row on the condemned prisoner. It is submitted that once the actual effects of detention on death row have been proved, it should be immaterial whether there is delay or not. It should equally be immaterial, in the event there is delay, whether he contributed to it delay or not.

According to the conservative approach, if a condemned prisoner prolongs proceedings and is then permitted to benefit from such conduct, states might be tempted to deprive condemned prisoners of effective appellate remedies.¹⁵² This appears to be an attractive argument, but it remains attractive if emphasis is placed on the delay itself. Where there is a requirement to prove the actual effects of detention on death row on the condemned prisoner, then the argument loses its cogency. In such a case, the challenge to execution would not be that it is the delay, which would be at the instance of the condemned prisoner, that has subjected him to the death row phenomenon. The argument would be that certain special circumstances on death row subjected him to the death row phenomenon. In such a case, the state would have no reason to deprive him of appellate remedies.

¹⁴⁷ Chinamora (n 143 above) 34.

¹⁴⁸ *Catholic Commission* case (n 40 above) 334.

¹⁴⁹ As above.

¹⁵⁰ L Madhuku 'Delay before execution: More on it being inhuman and degrading' (1994) 10 *South African Journal on Human Rights* 278.

¹⁵¹ *Barrett & Sutcliffe* (n 42 above) para 8.4.

¹⁵² Schmidt (n 146 above) 49.

It is submitted that the better approach is one that does not only require proof of any delay. This does not mean that a condemned prisoner would be precluded from proving that in his case, delay on its own subjected him to the death row phenomenon. A condemned prisoner should be able to prove that certain circumstances, which may include delay, have subjected him to mental and/or physical suffering. This approach, it is submitted, avoids the controversial issues inherent in both the progressive approach and the conservative approach.

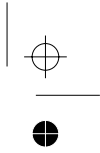
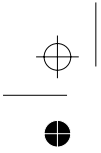
5.3 The question whether or not to define torture and cruel, inhuman or degrading treatment

This aspect was discussed at length in section 4 above. It is therefore unnecessary to belabour the issue. Suffice it to say that defining the various components of the above prohibition will go a long way in bridging the gap between the two approaches to the death row phenomenon. In this regard, the disjunctive approach is preferred over the global approach.

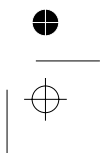
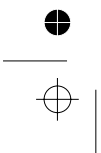
It was acknowledged above that the disjunctive approach might lead to the problem of which criterion to adopt to categorise treatment. However, it is submitted that that problem would merely be academic. The problem that might arise in adopting the disjunctive approach does not impact on the question whether there has been a violation of the prohibition against torture, cruel, inhuman or degrading treatment. In such a case, the only question would be whether a particular treatment is inhuman or degrading, which, as was seen in the *Ireland v United Kingdom* case, makes no practical difference.

6 Conclusion

It is a truism that the death row phenomenon is now firmly established as a legal doctrine. The doctrine owes its existence to the realisation that direct legal challenges to the death penalty will, for the foreseeable future, largely be unsuccessful in countries that have entrenched the death penalty in their constitutions. However, universal acceptance of the existence of the doctrine has not ensured unanimity on its precise nature. There is still controversy as to the circumstances under which a condemned prisoner would be entitled to rely on the doctrine to evade the penalty of death. In light of the importance of the doctrine, in that it provides a ray of hope for those facing the penalty of death, it is desirable to harmonise the divergent approaches on the doctrine. The progressive approach has certain inherent weaknesses as demonstrated above. It overlooks the fact that the prohibition against torture and related acts requires proof of intention aimed at achieving a particular result. The conservative approach, on the other hand, tends to penalise a



condemned prisoner for resorting to appellate procedures to avoid execution. The one major cause of the rift between the two approaches is the reluctance of the courts to define the prohibition against torture and cruel, inhuman or degrading treatment. Once each component of the prohibition is defined, as shown above, then the weaknesses in both approaches become apparent. It then becomes easier to reconcile the divergent approaches and to adopt one that places less emphasis on the actual period of the delay, and does not seek to apportion blame.



Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria

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1 Introduction

The African Charter on Human and Peoples' Rights (African Charter) bestows a specific mandate on the African Commission on Human and Peoples' Rights (African Commission) to promote and protect human rights in Africa. Article 45 of the African Charter states that, in order to fulfil this mandate, the African Commission should, amongst others, organise 'seminars, symposia and conferences'. The Commission's promotional activities have paid lip service to economic, social and cultural rights by being predominantly focused on civil and political rights.¹ Concerns have been raised by representatives of civil society organisations during several of the Commission's sessions that there is a need for a focus on socio-economic rights too.²

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¹ For a review of the Commission's promotional activities, see EVO Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (2002) 335–352.

² See eg the Report of the 17th session of the African Commission on Human and Peoples' Rights, Lomé, Togo, 13–22 March 1995, published by the African Society of International and Comparative Law 8. In the 35th session of the African Commission, the Community Law Centre, through the Human Rights Institute of South Africa (HURISA), made a statement on the role of the Commission in promoting and

Thus, in conformity with the above-mentioned mandate, and probably also in response to the aforesaid concerns, the African Commission, in collaboration with the International Centre for Legal Protection of Human Rights (Interights), the Cairo Institute for Human Rights Studies and the Centre for Human Rights at the University of Pretoria, co-hosted a seminar on 'Economic, Social and Cultural Rights in Africa', held in Pretoria from 13 to 17 September 2004. Participants, who were from both anglophone and francophone countries, included members of the African Commission, representatives of 12 African states, United Nations (UN) agencies, regional economic communities, civil society organisations, national human rights institutions, as well as academics and legal practitioners.

The background to the seminar was the widespread prevalence of poverty in Africa, on the one hand, and in sharp contrast, the numerous strides that have been made on the realisation of economic, social and cultural rights in Africa, on the other. The African Commission and some national courts have developed an impressive body of jurisprudence on these rights. However, the implementation of this jurisprudence from the governments' side has either been dismally lacking, or has been tortoise-like. Lack of implementation effectively makes a mockery of these heralded achievements. It makes them nothing more than symbolic gestures of a progressive judiciary in delineating the meaning of these rights.

Another challenge, at times worsened by the lack of compliance with the courts' decisions,³ is the prevalence of endemic poverty and under-development on the continent. The seminar was therefore premised on this contrasting reality and the need to make effective achievements in order to overcome challenges. Thus, the objectives of the seminar were:

- to specify the nature of state obligations in relation to socio-economic rights as enshrined in the African Charter;
- to identify, in the light of African realities, the priorities for the African Commission regarding the promotion of these rights; and
- to determine the measures to be undertaken to effectively realise socio-economic rights on the continent.

The deliberations within these broad objectives were to culminate in the development of a concrete outcome: the adoption of a declaration with

protecting socio-economic rights and called for an increased attention to these rights. See (2004) 5(3) *ESR Review* 16.

³ Although the South African Constitutional Court delivered a highly renowned decision in *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC) (*Grootboom*), four years after that decision, the litigants in that case are still living in deplorable conditions. See K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 2(6) *Law, Democracy and Development* 255–277.

a set of guidelines for the implementation of socio-economic rights in Africa, to be submitted to the African Commission for further adoption and endorsement. However, the seminar ended up adopting a statement instead. I deal with the nature and overview of the statement later.

2 Themes and format of the seminar

Predictably, the seminar focused on how to implement the provisions of the African Charter relating to economic, social and cultural rights effectively with respect to the role of the African Commission. It dealt with issues ranging from theoretical, conceptual to specific themes relating to these rights under the African Charter.

The seminar was officially opened by South Africa's Deputy Minister of Foreign Affairs, Ms Sue van der Merwe. It was then divided into plenary and breakaway group sessions. Papers delivered during plenary were, on theoretical and conceptual themes, the following:

- 'The nature of state obligations on economic, social and cultural rights under international law' by Prof Michelo Hansungule of the Centre for Human Rights (University of Pretoria). This paper extrapolates from the international jurisprudence the nature and scope of state duties in respect of these rights.
- 'A review of the protection of social and economic rights under the African constitutions' by Ibrahim Kane of Interights. This paper advocated for the inclusion of these rights in national constitutions, the incorporation of the relevant international instruments (for example the International Covenant on Economic, Social and Cultural Rights and the African Charter) into municipal law, and the passage of national legislation giving effect to them.
- 'The importance of equality for the realisation of economic, social and cultural rights under the African Charter' by Prof Alain Olinga of the Institut des Relations Internationales du Cameroun (IRIC). This paper dealt with the conceptual relationship between the principle of equality and non-discrimination and socio-economic rights, and argued that the advancement of the former facilitates the enjoyment of the latter, and the other way round.

Papers were also delivered on the right to primary education, primary health care, HIV/AIDS and the right of access to treatment, cultural rights, land rights and the role of women in the implementation of economic, social and cultural rights. Another presentation was delivered on the mechanisms and institutions for realising economic, social and cultural rights under the African Charter.

During the six workshops, further discussions were conducted for the purposes of developing concrete proposals for the declaration. These

workshops dealt with education, work and employment, health, land, culture and women's rights respectively. The recommendations emerging from the workshops were further discussed at the plenary sessions.

3 Some intriguing discussion points

While those heated debates leading to the recommendations are beyond the scope of this paper, one can hardly resist discussing some intriguing observations that some proposals were nothing short of ambition and vagueness. First, there was a tendency to propose a multiplicity of institutions as a solution to the lack of implementation of economic, social and cultural rights. For example, proposals were made for the establishment of special rapporteurs on education, work and employment, health, education, respectively, to operate under the auspices of the African Commission. Some even suggested that the commissioners should act as these special rapporteurs. This proposition, as the commissioners warned, was ignorant of the resource and capacity constraints in the African Commission itself, including the fact that they do not have the research staff complement like other similar institutions elsewhere,⁴ and that some commissioners are part-time members.

A proposal was also made that the state should spend more on health than on defence. The danger that such a proposal poses is that it reintroduces the hierarchical proposition that some rights are more important than others – a proposition that is ignorant of the universal principle of the interdependence and indivisibility of rights. It also has the danger of not only dividing civil society organisations who are working in different areas of economic, social and cultural rights, but it also assumes the poor and marginalised would choose health services over education, food or housing, etc.

A suggestion was made that there should be a national task force and national special rapporteurs over and above national human rights institutions, to monitor the implementation of the rights (particularly education rights). The difficulty this proposal had was that it would encourage the duplication of functions and the drainage of resources. Another proposal naively imposed unlimited obligations on non-state actors to provide social protection to poor people. Yet, while it is clear that non-state actors have a duty to respect, it is disputable whether they have an obligation to fulfil, particularly 'to provide'. The undisputed recommendations culminated into a statement.

⁴ Eg, each of the South African Constitutional Court judges has one or two assistant researchers. The Committee on Economic, Social and Cultural Rights also has a research staff complement during the time of preparing for the development of the General Comments.

4 The statement: A reflection on some controversial issues during the concluding stage

The draft statement adopted at the end of the seminar was a result of intense deliberations and heated debates. It reflects the wide-ranging nature of these deliberations *vis-à-vis* the deplorable socio-economic conditions within which a majority of African people live and the lack of effective implementation of the political commitments made in relation to several international and regional instruments, in particular, the African Charter.

4.1 The status of the statement

The status of the statement is dealt with in the introductory section of the document. As noted, the original idea of the organisers was to achieve a specific outcome: the adoption of a declaration. However, in the concluding session, during the consultative discussion stage on the so-called 'draft declaration', some commissioners objected to the use of the term 'declaration'. They argued that it would be improper for the commissioners to adopt a declaration that will also be presented to them for consideration and adoption at the next ordinary session of the African Commission. By adopting this declaration as participants would have effectively meant that they would be binding the African Commission prematurely and inappropriately. This anomaly was clear from the manner in which the sentence referring to the adoption of a declaration was framed in the introductory paragraph: 'The participants at the workshop, who included members of the African Commission' adopted the following declaration'.

It was thus felt that the word 'declaration' was too loaded in the circumstances. Rather, it should be replaced with the word 'statement'. The aforesaid anomaly was further cured by the insertion of a directional sentence:

The participants at the workshop, who included members of the African Commission . . . adopted the following statement, *which is recommended for consideration and adoption by the African Commission on Human and Peoples' Rights at its next ordinary session* (my emphasis).

The statement is not intended to be a binding document. But, as the organisers envisaged, it sets out guidelines for the implementation of economic, social and cultural rights in the region of Africa. It is prepared to guide the work of the African Commission in respect of the obligations of various stakeholders in protecting and promoting economic, social and cultural rights. However, once the African Commission adopts it by way of a resolution, then it will, like other resolutions⁵ and similar

⁵ The resolutions of the African Commission are available online at <http://www.achpr.org> (accessed 31 August 2004).

international documents,⁶ have an authoritative value in the interpretation of economic, social and cultural rights.

4.2 The Preamble

The statement describes, in the Preamble, the broad commitment of African states in implementing economic, social and cultural rights as enshrined in international human rights instruments, and highlights some of the current socio-economic deprivations that most African people continue to endure, notwithstanding these commitments. Amongst the crucial omissions in the draft document, which are now included in the statement, was whether mention should be made of the Constitutive Act of the African Union. While some argued that the Constitutive Act was irrelevant to the realisation of economic, social and cultural rights, a majority was of the view that it contained fundamental principles of democratic and human rights norms, the rule of law and good governance, all of which are prerequisites for the promotion of all human rights. Putting to an end the resistance in acknowledging economic, social and cultural rights as having the same status of justiciability as civil and political rights, was viewed as one of the serious impediments to realising the former category of rights. The questions of lack of human security due to prevailing conditions of poverty and underdevelopment and the failure to address poverty through development were raised as critical omissions in the statement. The statement identifies a catalogue of constraints to the enjoyment of economic, social and cultural rights, and calls upon states to take appropriate measures to address them. This catalogue expanded considerably from nine to 18 identified constraints (at paragraph 3) during the consultative discussion stage.

4.3 Equality and the principle of non-discrimination in the implementation of socio-economic rights

Before discussing the content of the economic, social and cultural rights under the African Charter, in line with the principle of interdependence and indivisibility of rights, the statement reiterates the obligations of the state to eliminate all forms of discrimination (at paragraph 4). An interesting observation, though, in this provision is the specific mention of only three vulnerable groups: women, refugees and internally

⁶ The General Comments generated by the Committee on Economic, Social and Cultural Rights, the supervisory body of the International Covenant on Economic, Social and Cultural Rights, have been very useful and instructive in construing socio-economic rights at both international and municipal level. Eg, the African Commission itself has relied on it; see eg Communication 155/96, *The Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria (SERAC)*. So has the South African Constitutional Court in *Grootboom* (n 3 above).

displaced persons. This reflects the strong voices and representation of the representatives of these groups, and perhaps the absence of representativity of other vulnerable groups who often and similarly face discrimination, for example indigenous peoples and people with disabilities. Another observation is that the seminar deliberations rarely addressed issues from children's rights perspectives other than girl children. It is important that in future seminars, the organisers look into the issue of representation with great sensitivity.

4.4 Content of the rights

The draft statement contained a closed list of the contents of each socio-economic right under the African Charter. During the closing discussion, a non-exhaustive list phrase was introduced. Thus, each introductory sentence states that 'the right to . . . under the Charter entails, *amongst other things*, the following . . .' (my emphasis). This phrase was not only important in giving leeway to the African Commission and other judicial bodies to expand on it, but it was also in line with the specific brief to the workshops and paragraph 11 of the statement. The brief was that delegates would identify only the essential content of the rights. So, the lists contained in the workshop reports, which culminated into a comprehensive list in the statement, were not, in the first place, exhaustive. Paragraph 11 specifically states that contents identified are only the core essentials of economic, social and cultural rights.

The drafters of the document probably envisaged a much more expansive list of rights in the final statement. They included not only the African Charter provisions, but also those that are not expressly recognised under the Charter, like the right to social security and protection, shelter, housing and food. They were arguably motivated to do so by the African Commission's innovative reading in of these rights into the Charter in *SERAC*.⁷ However, the seminar objected to these rights being included alongside protected rights. It was argued that, rather, there should be a provision at the end of the statement that describes the core content of the unprotected rights and their relationship with other rights. Paragraph 10 of the final statement attempts to do this, but inadequately so. It simply mentions the indivisibility and interdependence between the protected and unprotected rights and enlists the latter without substantiating on its core content as was done with the former.

Perhaps, to link these core contents to the much broader contents, a specific cross-reference should have been made to the other international documents that are authoritative on the nature and scope

⁷ n 6 above.

of these rights in fuller detail. These documents include the relevant General Comments.⁸ On unprotected rights, reference could also have been made, at least, to the relevant international documents such as General Comment No 12 (the right to adequate food) and General Comment No 4 (the right to adequate housing), where the content of these rights is much more detailed, save to say that the scope of the content of the right to social security has not yet been established. Another way of referencing these interpretive documents would have been to recognise them in the Preamble as important reference documents for construing economic, social and cultural rights under the African Charter.

An interesting observation, though, is that not only is the list of the core contents of cultural rights (compared to others) short, but there also seems to be an obvious lack of substance to it. As noted in the Preamble, the provisions relating to cultural rights are found in articles 17(2) and (3), 18(1) and (2) and 61 of the African Charter. It is unimaginable (even to a person not working in the field of cultural rights) that those five core contents are really the only identifiable ones. However, the lack of substance and the shortness of the list are reflective and a consequence of the spirited debates that the session on cultural rights triggered. Unlike with other rights, differences on the points of departure on cultural rights were enormous and a stumbling block to moving the discussion to the recommendation stage. In serious contention were conceptual and definitional issues of what constitutes 'culture' as opposed to (as was confused with) 'customs' and 'traditions'. Thus, what transpires in the final statement is not really surprising.

However, the substantial lack of consensus on the nature and scope of cultural rights requires urgent attention. The seminar recommended broadly (without action attached to it) that consensus needs to be developed in this area. However, this recommendation is unfortunately not captured in the final statement. A specific recommendation should have been that the African Commission should hold a seminar specifically on cultural rights with the view to developing consensus on its nature and scope. This seminar would also address the tendency, as was highlighted during the seminar, to de-link cultural rights from economic and social rights, thus often neglecting or marginalising the former.⁹ Perhaps the proposed seminar should re-affirm the importance

⁸ In particular, General Comment No 14, 'The right to the highest attainable standard of health (art 12 of the Covenant)'; General Comment No 13, 'The right to education (art 13 of the Covenant)'; and General Comment No 4, 'The right to adequate housing (art 11(1) of the Covenant)'.

⁹ This was particularly pointed out by Thiphanyane in critiquing his former institution, the South African Human Rights Commission. Thiphanyane was with the South African Human Rights Commission from 1996 to 2004 as Head of the Research and Documentation Unit. He is now with the Commission on Cultural, Linguistic and Religious Rights as Operations Officer.

of the interdependence and indivisibility of these rights by exploring, not only culture as a self-standing right, but also the cultural aspects of all economic and social rights as well as civil and political rights.

4.5 The recommendations

The statement makes a number of guiding recommendations on the duties of various stakeholders, namely the African Union, the African Commission, the states, civil society organisations, national human rights institutions and international and regional entities in realising economic, social and cultural rights. The emphasis of these recommendations is not so much on creating new duties, but on pointing out and quashing inaction and/or the inadequacies of actions in implementing these rights in accordance with the commitment enshrined in the international instruments and regional frameworks to which most states are bound.

However, the core content of the rights and the recommendations (with obligations of stakeholders) seem to be de-linked from one another. To link them, perhaps, there should have been a provision, following paragraph 11, stating that states and other relevant stakeholders must take all appropriate measures to achieve the realisation of the core content of economic, social and cultural rights as described in the preceding provisions. Without this linking provision, the danger exists that some stakeholders will read their obligations narrowly to exclude those inherent in the core content of the right. This is further exacerbated by the fact that obligations under the recommendations are — without 'amongst others' after, for example, 'states should' — a closed list, meanwhile they do not exonerate all the duties that the aforesaid core content of the rights should naturally impose. Also, the recommendations refer to the obligations of selected core contents of the rights. A declaration of what a right entails is useless if it is not linked to specific measures that ensure that it is realised. For core contents, measures are expressly spelt out under the recommendations. What should be done with those that are not so explicitly spelt out, and who should do it?

The significance of recognising human rights as a fundamental objective of development and that development should achieve the full realisation of all human rights was emphatically articulated in the closing paragraph of the statement.

5 Conclusion

The seminar was an important departure to the African Commission activities for the promotion and protection of economic, social and cultural rights. Participants from wide ranging sectoral representation

applauded the African Commission and its partners for this epoch making event, notwithstanding some serious shortfalls and difficulties experienced during the planning and organisation stage. For example, the fact that some important speakers, like Katarina Tomasevski (UN Special Rapporteur on the Right to Education), Paul Hunt (UN Special Rapporteur on the Right to Health) and Judith Bueno de Mesquita, could not attend the seminar, is an example in point.

The final statement, while incomplete in some areas, provides a useful guide to the core content of and recommendations on how to implement economic, social and cultural rights under the African Charter effectively. Some of the recommendations were quite profound. Unlike a judicial body, the African Commission's decisions are recommendatory and accordingly have no legal force. This was noted as the greatest weakness and that to cure it, the African Union should speed up the establishment of the African Court on Human and Peoples' Rights. In the meantime, the African Union should follow up on the recommendations of the African Commission to ensure implementation of its decisions by the state parties to the African Charter. Non-governmental organisations and civil society organisations should continue bringing cases to the African Commission, and engage in other collaborative initiatives with the Commission.

No doubt, the recommendations in the final statement, if implemented accordingly, will go a long way to strengthening the efforts to the realisation of economic, social and cultural rights on the continent. The ball is now in the African Commission's court to endorse and adopt this statement and its recommendations in its next ordinary session from 23 November to 7 December 2004. Once this is done 'hopefully it becomes a resolution of the Commission' this document will become a useful tool for advocacy activism between civil society organisations and states.

Recent developments in the African regional human rights system

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1 African Commission's Annual Activity Report not adopted

The African Commission on Human and Peoples' Rights (African Commission) has a dual mandate, in that it aims at *promoting* and *protecting* the rights in the African Charter. Under article 59 of the African Charter on Human and Peoples' Rights (African Charter), measures taken by the African Commission remain confidential until approved by the Organization of African Unity (OAU) Assembly of Heads of State and Government (now the African Union (AU) Assembly). On the basis of this article, the sessions of the African Commission have been divided into public and private (closed) parts. During the public part of a session, the promotional work of the Commission is discussed. This part of the session includes reports by commissioners about their promotional activities, the examination of state reports submitted under article 62 of the Charter, and contributions by non-governmental organisations (NGOs) about their work and oral interventions on burning human rights issues in Africa. During private sessions, the Commission considers individual (and inter-state) communications alleging violations of the Charter by member states. This part of the proceedings is closed to the public, with the exception of litigants involved in the case.

The findings and full texts of these decisions are included in the Commission's Annual Activity Report, tabled at the sessions of the AU Assembly.¹ The Commission normally has two sessions annually, one around March and one around October. An annual report submitted in

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¹ These reports are available at <http://www.achpr.org> (accessed 31 October 2004).

June or July, when the Assembly usually meets, comprises findings of the last two Commission sessions. Decisions become part of the public domain only once they are published as part of an approved Annual Activity Report, which is the authentic source of, and one of the most important mediums for, disseminating the Commission's findings. Other matters, such as those of a financial or administrative nature, and the adoption of concluding observations after examination of a state report, are also dealt with during closed sessions. Also, any result of such deliberations is contained in the annual report, and becomes a public document only after adoption by the AU Assembly.

Over the years, the African Commission has not received much attention from the OAU Assembly, or from the Council of Ministers.² Its annual report was usually tabled late during the summit of African leaders, evoked little, if any, comment and was adopted without discussion. This state of affairs underscored the OAU's formalistic adherence to, rather than substantive engagement with, human rights matters. In the absence of any pressure at a political level, it is no small wonder that state compliance with findings of the Commission remained negligible.

At its 3rd ordinary session, the AU Assembly for the first time decided not to adopt the Commission's report. This decision followed a debate in the Executive Council about the Commission's report of a mission to Zimbabwe, undertaken soon after the 2002 presidential elections, in which the Commission seemingly 'presents damning allegations of a clampdown on civil liberties surrounding Zimbabwe's 2002 presidential elections, including arrests and torture of government opponents, lawyers, and pro-democracy activists'.³ The rather procedural objection was raised that the Zimbabwean government did not have prior access to the report, that it was surprised by the report, and was not given an opportunity to respond to the report. It is unclear why the Assembly accepted this objection, especially in the light of the Commission's usual practice to ask the government for its comments before adopting the report.⁴ It appears that the comments were solicited from one department in Zimbabwe (the Department of Justice), while another

² Meetings of the OAU Council of Ministers (now the AU Executive Council) usually precede the Assembly summit. Issues are debated more vigorously at ministerial level, leaving it to the Heads of State and Government to formally adopt a predetermined consensus position. The importance of the role of ministers is reflected in the Protocol Establishing an African Court on Human and Peoples' Rights, which in art 29(2) provides that the Council of Ministers (now the Executive Council) is to monitor the execution of the Court's judgments on behalf of the Assembly.

³ 'Zimbabwe govt shrugs off damning report' *Mail & Guardian Online* <http://www.mg.co.za/Contents/13.asp?ao=11833> (accessed 7 July 2004).

⁴ See eg the report of the mission of the African Commission to Sudan (1–7 December 1996), to which is attached the comments of the Department of Foreign Relations.

department (the Department of Foreign Affairs) was unaware of the report.⁵

In its decision, the Assembly urges all member states to co-operate with the African Commission and 'the various mechanisms it has put in place, and implement its decisions in compliance with the provisions of the African Charter'.⁶ Noting that some of the Commission's reports on state parties are presented 'without their observations', the Assembly invites the African Commission 'to ensure that in future its mission reports are submitted together with the comments of the State Parties concerned and to indicate the steps taken in this regard during the presentation of its Annual Activity Report'.⁷ The Assembly therefore decides to suspend 'the publication of the 17th Annual Activity Report . . . pending the possible observations by the Member States concerned'.⁸

It was reported that, in his initial response, the Zimbabwean Foreign Minister pledged to respond in seven days to the Commission's report. Subsequently, though, a spokesperson for the Department of Foreign Affairs insisted that a member state is expected to submit its response '*sine die* (with no time limit)', adding that the main concern of the Zimbabwean government is to 'establish the *bona fides* of the African Commission's report on Zimbabwe'.⁹ However, no public response seems to have been forthcoming since the suspension of approval of the report.

Consideration of the report should not have been suspended. Even if it is so that the incorrect department landed up with the report, this lack of government co-ordination should not be allowed to thwart the Commission's work by providing a disingenuous 'defence' to governments. The government's subsequent position should also be criticised. Governments cannot be allowed unlimited time to consider its response to reports by the Commission.¹⁰ Such an approach would mean that the Commission is held to ransom by the willingness of the state to respond. If this were the case, the Commission would be reduced to await a reply

⁵ According to the Zimbabwean Human Rights Forum, the government received the report on 5 February 2004 (*Mail & Guardian Online* (n 3 above)).

⁶ AU Doc Assembly/AU/Dec 49(III), Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc EX.CL/109 (V) para 4.

⁷ n 6 above, para 5.

⁸ n 6 above, para 6.

⁹ G Phiri 'Zimbabwe in no hurry to respond to AU report' *The Zimbabwe Independent* <http://www.theindependent.co.zw/news/2004/July/Friday16/992.htm> (accessed 16 July 2004).

¹⁰ In respect of its communication procedure, the Commission has adopted the approach that 'where allegations of human rights abuse go uncontested by the government concerned the Commission must decide on the facts provided by the complainant and treat those facts as given'; *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 40.

without any means to accelerate the process. The essence of these reports is that they deal with issues of current concern. There are already many reasons why delay in the adoption of mission reports is rife, for example due to the requirement that the Commission as a whole has to adopt the report that has been undertaken by a small group or single commissioner. States cannot, every time they disagree with the views of a body set up under the regional AU body, cry foul.

In any event, the report was not adopted. As a consequence, the findings in the Commission's report have not been adopted and therefore cannot be made public. This unprecedented step by the government has stalled the work of the Commission.

Fortunately, the delay in publication of the report runs not for a year, as would have been the case in the past, but for only six months. At the same session, the time frame of AU Assembly meetings was changed. In the past, the Assembly met once a year, usually in June or July. In accordance with a decision, the Assembly now meets every six months.¹¹ The question may be posed whether the cycle of reports by the Commission should also be changed to coincide with that of the Assembly. There is no reason why the Commission's report should wait for the June meeting, if there is one in, say, January. The African Charter refers to 'reports' that have to be submitted, without indicating their periodicity.¹² One of the major drawbacks of the Commission's work have been delays at many levels. The Commission should therefore use the opportunity to submit a six-monthly report to the Assembly. In other words, the Commission should adopt a report after each session, to be tabled at the forthcoming Assembly meeting.

Despite the negative effect of the suspension of the report's consideration, the side effects may be viewed in a more positive light. Perhaps a precedent has now been set for a more open and rigorous discussion of the African Commission's annual reports. Ironically, the Commission may have been strengthened in that more prominence has been given to its work than before, thus raising its visibility and increasing its potential impact. Another unintended consequence was the amount of publicity given to the alleged human rights violations in Zimbabwe.¹³

¹¹ Decision on the periodicity of the ordinary sessions of the Assembly, AU Doc Assembly/AU/Dec 53 (III) (the Assembly now meets twice a year) para 4.

¹² Arts 59(2) & (3) African Charter.

¹³ See eg B Tromp 'AU slams abuses in Zimbabwe' *The Sunday Independent* (4 July 2004) 1.

2 Third extraordinary session of the Commission held on Darfur

In terms of its Rules of Procedure, the African Commission may decide to hold extraordinary sessions.¹⁴ In the OAU era, such meetings were held on two occasions: once in Banjul (June 1989), to adopt the Commission's Rules of Procedure, and once in Kampala, Uganda (December 1995), in the aftermath of the genocide in Rwanda. A third extraordinary meeting, aimed at formulating a response to the situation in the Darfur region of Sudan, was held in Pretoria between the Commission's 35th and 36th sessions, on 19 September 2004.

At its 35th ordinary session, in May/June 2004, the African Commission considered the second state report of Sudan.¹⁵ One agrees with the observations by Commissioner Rezag-Bara that the government of Sudan should be commended for submitting its human rights record for the Commission's examination in difficult and sensitive times. However, the examination of the report lacked focus and a consideration for the urgency of the situation in Darfur. Instead, detailed technical and routine questions were posed about issues such as institutional mechanisms, for instance the Civil Service Board, freedom of expression, personal status laws and the right of prisoners to vote. Although some incisive questions were also posed about Darfur, the misallocation of time caused these to be neglected: It took the commissioners about two and a quarter hour to ask questions, but after less than an hour the Sudanese representative was asked to wrap up and summarise his answers. As a result, a number of questions were left unanswered, allowing the representative to brush over alleged government involvement in the Darfur conflict.

Significantly, though, the Sudanese representative invited the Commission to undertake a mission to Sudan, and undertook to provide the mission with every possible aid and assistance. In its private session, the Commission decided to send a fact-finding mission to the region.¹⁶ This fact-finding mission visited Sudan from 8 to 18 July 2004. It was composed of Commissioner Sawadogo, the Chairperson of the African Commission, and three commissioners (Commissioner Melo, Special Rapporteur on the Rights of Women in Africa, Commissioner Nyanduga, Special Rapporteur on Refugees, Displaced Persons and Asylum Seekers in Africa and Commissioner Mohammed Abdellahi Ould Babana, commissioner responsible for human rights promotion in Sudan). A

¹⁴ Art 3 1995 Rules of Procedure of the African Commission.

¹⁵ The discussion of the 35th session is based on personal observations; notes on file with author.

¹⁶ Information about the fact-finding mission is derived from the Commission's press release.

legal officer at the Secretariat of the African Commission (Robert Kotchani) accompanied them. At the end of the mission, the Chairperson of the African Commission sent a request to President Bashir of Sudan, regarding the necessity to take urgent provisional measures in respect of security, the protection of women, access to displaced persons and the supply of humanitarian assistance, the need to reassure the safe return of displaced persons to their villages, the deployment of human rights observers and the to ensure the right to fair trial for political prisoners.

The Commission met in Pretoria on 19 September for its extraordinary session. The main purpose of the meeting was to discuss and adopt the report of the Commission's fact-finding mission to Darfur. This report also remains confidential until adoption by the Assembly. Even if it agreed on the report, and made recommendations, the Commission interpreted its mandate to mean that it can only make this report public once it has been contained in the Annual Activity Report, and once the Assembly has adopted that report.

Unofficial reports indicate that the Commission finds in its report that the government of Sudan, through its security forces, has been involved in 'war crimes and crimes against humanity, and massive human rights violations'.¹⁷ The Commission is further reported to have recommended the establishment of an independent international commission to investigate international crimes in Darfur.¹⁸

Two disappointing features characterised the extraordinary session. The Commission met for only one day, instead of the two days mentioned in its press release. NGOs that were flown in at great cost were not allowed an opportunity to make representations to the Commission.

The crisis in Darfur is not only testing the African Commission, but poses a challenge to the AU as a whole. Different to the OAU, the AU is armed with article 4(h) of its Constitutive Act, which allows for the 'right' of the AU to 'intervene' when the AU Assembly decides that grave circumstances so permit. A new body, the AU Peace and Security Council, has also been instituted to deal with Darfur-type situations.

Although its actions fall short of an 'intervention', the AU's efforts were not insignificant. The Peace and Security Council adopted a number of resolutions, for example, urging the Sudanese government to demonstrate a greater commitment and determination to address the prevailing situation in Darfur and to extend full co-operation to the AU

¹⁷ 'Darfur: the new name of genocide' *Vanguard* (Lagos), available at <http://clk.atdmt.com/goiframe/4544465/nwyrkepd0560000003ave/direct;wi.720;hi.300/01http://allafrica.com/stories/printable/200410010065.htm> (accessed 31 October 2004).

¹⁸ As above.

Mission in the Sudan (AMIS) to allow it to act more effectively.¹⁹ Together, the AU Assembly and Peace and Security Council involved themselves in encouraging and facilitating negotiation,²⁰ the establishment of a Ceasefire Commission and the deployment of observers as part of AMIS. By the end of October 2004, there were 597 troops on the ground in Sudan, still far short of the envisaged total of 3 320 personnel.²¹

3 Election of judges postponed; Assembly calls for integration of the African Court of Human and Peoples' Rights and African Court of Justice

Many years in the making, and adopted in 1998, the Protocol to the African Charter Establishing an African Court on Human and Peoples' Rights (Protocol) was ratified by the required 15 AU member states by December 2003 and entered into force on 25 January 2004. Currently, 43 states have signed the Protocol and 19 states²² have ratified it. As it is required to do under the Protocol, the AU Commission called for the nomination of judges to the African Court on Human and Peoples' Rights (African Court). In a *note verbale* of 5 April 2004,²³ the AU Commission gave the following very important direction relating to the application of article 18 of the Protocol, which provides that 'the position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the Office, as determined by the Rules of Procedure of the Court':²⁴

. . . State parties should request nominees to complete detailed biographical information indicating judicial, practical, academic, activist, professional and other relevant experience in the field of human and peoples' rights. Such biographical information should also include information on political and other associations relevant to determining questions of both eligibility and incompatibility. In addition, nominees should submit statements indicating how they fulfil the criteria for eligibility contained in the Protocol.

¹⁹ AU Doc PSC/PR/Comm(XVI), 17 September 2004.

²⁰ Inter-Sudanese political talks on the crisis in Darfur have been going on in Abuja, Nigeria, since 23 August 2004, under the auspices of the AU, and with the support of the international community.

²¹ AU Press Release No 098/2004, Addis Ababa, 28 October 2004. The African Union deploys more troops in Darfur as part of its efforts to strengthen AMIS.

²² Algeria, Burkina Faso, Burundi, Comoros, Côte d'Ivoire, Gabon, The Gambia, Lesotho, Libya, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo, Uganda.

²³ AU Doc BC/OLC/66.5/8/Vol V, Addis Ababa, 5 April 2004.

²⁴ A copy of the letter is on file with the author.

As a guide for state parties in interpreting the question of incompatibility, the Advisory Committee of Jurists in the establishment of the Permanent Court of International Justice (now the International Court of Justice (ICJ)) had pointed out that '[A] member of government, a Minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office, though they would be eligible for appointment as arbitrators to the Permanent Court of Arbitration of 1899, are certainly not eligible for appointment as judges upon our Court.'²⁵

The *note verbale* also calls on states to consider involving civil society in the process and to 'employ a transparent and impartial national selection procedure in order to create public trust in the integrity of the nomination process'.

The Protocol prescribes that the election process should start 'upon entry into force of the Protocol', with a request to state parties to the Protocol to nominate candidates for the position of judge.²⁶ A list of candidates then has to be transmitted to all AU member states 'thirty days prior to the next session' of the Assembly.²⁷ However, these elections did not take place. One of the factors delaying the election was lobbying by NGOs on the basis that member states would have insufficient time to nominate appropriate candidates. As a consequence, the Assembly also did not decide on the seat of the Court.

Not only was consideration of these two issues postponed to the following Assembly session, the whole future of the Court was placed in jeopardy. Surprisingly, the Assembly overturned a previous decision not to fuse the African Court with the African Court of Justice.²⁸ In its 'Decision on the seats of the African Union', the AU Assembly decides, in paragraph 4, that 'the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into one Court', and requests the Chairperson of the AU to 'work out the modalities on implementing Paragraph 4 above and submit a report to our next Ordinary Session.'²⁹

In a statement, a coalition of NGOs in South Africa responded to the challenge posed by the AU Assembly's resolution.³⁰ The statement

²⁵ See PCIJ/Advisory Committee of Jurists *Procès-Verbaux* of the Proceedings of the Committee 16 June–24 July 1920 693 715–716 (1920).

²⁶ Art 13(1) Protocol.

²⁷ Art 13(2) Protocol.

²⁸ When the Protocol on the African Court of Justice was adopted, the draft proposal providing for the fusion of that Court with the African Court on Human and Peoples' Rights was rejected. See AU Doc EX/CL/Dec 58 (III), July 2003, available at <http://www.africa-union.org> (accessed 31 October 2004).

²⁹ AU Doc Assembly/AU/Dec 45 (III), <http://www.africa-union.org> (accessed 31 October 2004).

³⁰ This initiative was supported by, amongst others, the following organisations and individuals: Foundation for Human Rights; Centre for African Renaissance Studies, University of South Africa; Human Rights Institute of South Africa; Centre for Human Rights, University of Pretoria; Centre for Socio-legal Studies, University of

accepts that there may be valid reasons to merge the two courts,³¹ but argues strongly that the Assembly decision to integrate the two courts 'should not be interpreted as suspending in the short term the process' to establish the African Court on Human and Peoples' Rights, 'since the Protocol establishing that Court has already entered into force'. The statement continues as follows:³²

There may be cogent reasons for the establishment of a single AU court. However, the process of drafting a new Protocol or to amend existing Protocols would be a lengthy one, considering that the drafting of the ACHPR Protocol took more than three years and the drafting of the ACJ Protocol took more than a year. Furthermore it took another five years before the ACHPR received the requisite number of ratifications for it to come into effect. A year after its adoption the ACJ Protocol has received only a quarter of the ratifications required for it to come into effect. Even if the process is speeded up it is likely to take another three or four years before a new Protocol comes into effect and a merged court is established. The urgency of the human rights situation in Africa cannot wait another four years for the establishment of the ACHPR.

It is therefore imperative that the ACHPR is established whilst the discussions around merger and the establishment of a single AU court continue. These deliberations cannot be rushed and have to carefully consider the various administrative, legal, political and juridical issues that would have to be incorporated into a new Protocol to ensure that human rights is not relegated in any merged court, but that it is given prominence alongside other issues of importance to the AU such as economic integration and trade. Civil society in South Africa is committed to playing an important role in these discussions.

The statement also calls for the speedy establishment of the Human Rights Fund, which has been recommended by the first AU Ministerial Conference on Human Rights held in Kigali, Rwanda, in May 2003.

It is therefore trusted that the Assembly will, at its next session, elect the eleven judges and assign a seat, so that the African Court on Human and Peoples' Rights may start functioning.

KwaZulu-Natal; Centre for the Study of Violence and Reconciliation; Human Rights Development Initiative; Centre for Conflict Resolution, University of Cape Town; Lawyers for Human Rights; Professor David McQuoid-Mason, University of KwaZulu-Natal, President of the Commonwealth Legal Education Association; Hanif Vally, Head of Human Rights Unit, Commonwealth Secretariat; and Prof Vincent O Nmehielle, School of Law, University of the Witwatersrand.

³¹ For some of these arguments, see NJ Udombana 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication?' (2003) 28 *Brooklyn Journal of International Law* 811. For some of the arguments against a merged institution, see F Viljoen & E Baimu 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 241 254–255.

³² The statement is on file with the author.



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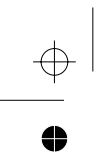
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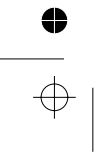
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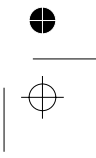
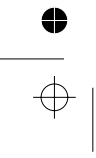
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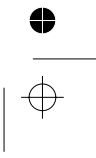
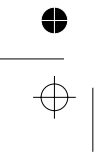




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Source: <http://www.africa-union.org> (accessed 30 September 2004)

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03
Angola	02/03/90	30/04/81	11/04/92	
Benin	20/01/86	26/02/73	17/04/97	
Botswana	17/07/86	04/05/95	10/07/01	
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98
Burundi	28/07/89	31/10/75	20/06/04	02/04/03
Cameroon	20/06/89	07/09/85	05/09/97	
Cape Verde	02/06/87	16/02/89	20/07/93	
Central African Republic	26/04/86	23/07/70		
Chad	09/10/86	12/08/81	30/03/00	
Comoros	01/06/86	02/04/04	18/03/04	23/12/03
Congo	09/12/82	16/01/71		
Côte d'Ivoire	06/01/92	26/02/98		07/01/03
Democratic Republic of Congo	20/07/87	14/02/73		
Djibouti	11/11/91			
Egypt	20/03/84	12/06/80	09/05/01	
Equatorial Guinea	07/04/86	08/09/80	20/12/02	
Eritrea	14/01/99		22/12/99	
Ethiopia	15/06/98	15/10/73	02/10/02	
Gabon	20/02/86	21/03/86		14/08/00
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99
Ghana	24/01/89	19/06/75		
Guinea	16/02/82	18/10/72	27/05/99	
Guinea-Bissau	04/12/85	27/06/89		
Kenya	23/01/92	23/06/92	25/07/00	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03
Liberia	04/08/82	01/10/71		
Libya	19/07/86	25/04/81	23/09/00	19/11/03

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COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Madagascar	09/03/92			
Malawi	17/11/89	04/11/87	16/09/99	
Mali	21/12/81	10/10/81	03/06/98	10/05/00
Mauritania	14/06/86	22/07/72		
Mauritius	19/06/92		14/02/92	03/03/03
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04
Namibia	30/07/92		23/07/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03
Sahrawi Arab Democratic Republic	02/05/86			
São Tomé and Príncipe	23/05/86			
Senegal	13/08/82	01/04/71	29/09/98	29/09/98
Seychelles	13/04/92	11/09/80	13/02/92	
Sierra Leone	21/09/83	28/12/87	13/05/02	
Somalia	31/07/85			
South Africa	09/07/96	15/12/95	07/01/00	03/07/02
Sudan	18/02/86	24/12/72		
Swaziland	15/09/95	16/01/89		
Tanzania	18/02/84	10/01/75	16/03/03	
Togo	05/11/82	10/04/70	05/05/98	23/06/03
Tunisia	16/03/83	17/11/89		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01
Zambia	10/01/84	30/07/73		
Zimbabwe	30/05/86	28/09/85	19/01/95	
TOTAL NUMBER OF STATE PARTIES	53	45	35	19