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Recent publications

Editorial

The African Union Assembly of Heads of State and Government (AU Assembly) at its last session, held in Khartoum, Sudan, in January 2006, considered and authorised the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights (African Commission or Commission) (Doc EX CL/236 (VIII)). This procedure is regulated by article 59 of the African Charter on Human and Peoples' Rights (African Charter). For only the second time, the Assembly did not approve the publication of an activity report by the Commission as submitted.

It will be recalled that the first occasion was in 2004, when Zimbabwe objected to the publication of the Commission's 17th Activity Report on the basis that it was not granted an opportunity to respond to allegations contained in the Report on an on-site mission to Zimbabwe conducted by the African Commission in 2002. As a result, the whole Report was placed under wraps pending submission of the Zimbabwean response. After the Commission had received these comments, they were included in the Report, which the AU Assembly approved at its next session (in 2005).

On the most recent occasion, the Assembly authorised the publication of the 19th Activity Report of the African Commission and its annexes, except for the part containing the resolutions on Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe. It then added a request to the concerned member states to make available to the African Commission, within three months of the adoption of the Assembly decision, their views on the resolutions. The African Commission is requested to submit a report thereon to the next ordinary session of the Executive Council (July 2006).

The AU Assembly further instituted a practice that in all future instances, the African Commission must ensure that it enlists the responses of all state parties to its resolutions and decisions before submitting them to the AU Executive Council or the AU Assembly for consideration. States are given three months to communicate their responses to resolutions and decisions to the Commission.

The AU Assembly decision blurs the important distinction between

the Commission's promotional and protective mandates and significantly curtails the ability of the African Commission to fulfil its mandate to be a watchdog in respect of human rights on the continent.

Under the African Charter, only protective measures dealing with communications are confidential until authorised by the AU Assembly. States have always, under a well-developed communications procedure, been allowed to express their views on communications, and their views have been taken into account in findings. These findings are included in the activity report after states have had ample opportunity to participate in the proceedings. Giving states another opportunity to express their 'views' after a 'decision' has been taken serves no purpose.

By contrast, the African Commission's promotional mandate is not confidential and plays itself out in public sessions. Resolutions on countries usually arise from public discussion at the NGO forum preceding the Commission's sessions and from the public debate during the Commission's sessions on the human rights situation in Africa. These discussions inform the resolutions of the Commission. Not being 'findings' or 'decisions', these resolutions form part of the Commission's promotional mandate. Its legal basis is in article 45 of the African Charter, which is not part of the chapter dealing with the Commission's protective mandate. As these resolutions are therefore not subject to authorisation, the AU Assembly is not competent to block their publication. Resolutions need not be sent to states for their comments. There is no legal basis to require this, and as a practical matter, such a requirement (and the timeframes of a three month response period) will seriously impede the African Commission's ability to respond in a timeous and meaningful fashion to emergency situations of serious human rights violations.

The approach followed in this regard flies in the face of the promise of a greater commitment to human rights in the AU Constitutive Act. It is accepted that the Commission does not have the teeth of a court to bite, but the approach followed by the AU Assembly strips the watchdog in a significant way of its ability even to bark.

Turning to more positive developments: At the same session, the AU Assembly confirmed the names forwarded to it by the Executive Council (Doc EX CL/241 (VIII), and thereby elected the first 11 judges of the African Court on Human and Peoples' Rights (Assembly/AU/Dec 100 (VI)). They are: Ms Sophia AB Akuffo (Ghana, elected for a two-year term); Mr GW Kanyiehamba (Uganda, two-year term); Mr Bernard Makgabo Ngoepe (South Africa, two-year term); Mr Jean Emile Somda (Burkina Faso, two-year term); Mr Hamdi Faraj Fanoush (Libya, four-year term); Mrs Kelello Justina Mafoso-Guni (Lesotho, four-year term); Mr Jean Mutsinzi (Rwanda, six-year term); Mr Fatsah Ouguergouz (Algeria, four-year term); Mr Modibo Tountry Guindo

(Mali, six-year term); Mr El Hadji Guisse (Senegal, four-year term) and Mr Gérard Niyungeko (Burundi, six-year term).

Generally, these judges comply with the requirements of independence and impartiality. One judge, Mr Somda, is a legal adviser to the Burkinabe Minister of Justice. Hopefully, the AU Assembly will determine the seat of the Court at its next session, in June 2006, and the Court will start functioning later in 2006.

The first human rights treaty adopted by the AU, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), entered into force on 25 November 2005. Highlighting this important event, the *Journal* in this issue focuses on some aspects of the Women's Protocol, which to date has been ratified by 17 African states (see Table of Ratifications in this issue).

The editors thank the following people who acted as referees over the period since the previous issue of the *Journal* appeared: Divine Afuba, Jean Allain, Cecile Aptel, Wolfgang Benedek, Christelle Diwouta, Bernard Dougherty, John Dugard, Kristin Henrard, Mosunmola Imasogie, Waruguru Kaguongo, Hye Young Lim, Tshepo Madlingozi, Gino Naldi, Charles Ngwena, Diane Orentlicher, Michael Reisman, Engela Schlemmer, Gabriel Shumba and Ben Twinomugisha.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The devil is in the details: The challenges of transitional justice in recent African peace agreements

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Summary

Over the last seven years, warring parties in Burundi, the Democratic Republic of Congo, Liberia and Sierra Leone have signed peace agreements that include detailed provisions aimed at securing transitional justice. The novelty is not the growing use of transitional justice mechanisms in the aftermath of violent conflict, but rather that these mechanisms are being increasingly designed within the peace negotiation process. An examination of these four agreements illustrates a curious phenomenon: Alleged human rights violators are involved in the articulation of transitional justice mechanisms at the initial stages, without victim representation, transparency and dialogue. This article examines three underlying justifications for including transitional justice in peace agreements and finds that all three fail to adequately justify the inclusion of transitional justice blueprints in the

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The views expressed here reflect the personal opinions of the authors and not those of their respective institutions.

initial stage of the peace process. First, including blueprints for transitional justice within peace agreements may actually weaken, rather than strengthen, the likelihood of a holistic and integrated transitional justice strategy by allowing alleged perpetrators to dictate the terms of justice. Second, including these details within peace agreements is not necessary to further conflict resolution efforts. Third, including detailed designs through undermining justice may also undermine state building. The inclusion of detailed transitional justice processes in peace agreements is not necessarily a clear victory for victims and human rights activists. At best, peace agreements may provide a foundation on which future transitional justice strategies can build.

1 Introduction

According to traditional wisdom, warring parties will not agree to peace if such peace also includes measures to hold them accountable for their actions during the conflict. The peace agreements for El Salvador (1992) and Guatemala (1996), which both included the establishment of a truth commission, stand in stark contrast to at least eight peace agreements signed between 1989 and 1999 that did not make reference to transitional justice mechanisms, much less include operational transitional justice design elements.[1] Yet, since 1999, peace agreements that plan transitional justice mechanisms have been signed by parties to conflicts in Burundi, the Democratic Republic of Congo, Liberia and Sierra Leone.[2] It is becoming increasingly common for peace agreements to include processes that help societies account for past abuse.[3] It cannot, however, be assumed that the inclusion of transitional justice operational blueprints in peace agreements is a positive development for victims of abuse, often at the hands of signatories to

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[1] These eight cases, with varying levels of success in establishing peace, include Angola (1994), Cambodia (1991), Republic of Congo (1999), Guinea-Bissau (1998), Mozambique (1992), Philippines-MNLF (1996), Somalia (1993), and Tajikistan (1997). See generally the United States Institute of Peace 'Peace Agreements Digital Collection' http://www.usip.org/library/pa.html and INCORE at the University of Ulster 'Conflict Data Service' http://www.incore.ulst.ac.uk/services/cds/agreements (accessed 28 February 2006).

[2] The choice of cases is not intended to imply that this is solely an African phenomenon. Transitional justice mechanisms have been included in peace accords in other regions as well, including El Salvador (1992) and Guatemala (1996). Rather, these cases were chosen as the most recent peace agreements for internal armed conflicts in Africa (since 1999), which in turn provides a more stable basis for comparison among these four cases than if cases from different regions had been selected. The Linas-Marcoussis Agreement for Côte d'Ivoire, signed 23 January 2003, was excluded from this study.

[3] The emphasis here is on mechanisms, since, as Chesterman notes, while peace agreements in the 1990s have contained mechanisms of accountability, such as amnesties, none have included an 'explicit obligation to punish any offences'; S Chesterman *You, the people: The United Nations, transitional administration, and state-building* (2004) 159.

the agreements. This raises an important question: What reasons underlie the inclusion of such detailed transitional justice processes in peace agreements? [4]

This article begins with an overview of transitional justice, followed by an assessment of the key transitional justice mechanisms included in each of the four peace agreements. These cases are then used to inform a broader analysis of three primary justifications for designing transitional justice within peace agreements: justice and reconciliation, conflict resolution and state building. Note that the question presented here is not whether transitional justice writ large should be included. Indeed, there are compelling moral, legal, and strategic arguments supporting the inclusion of transitional justice. Rather the question explored in this essay is whether the inclusion of detailed operational transitional justice mechanisms can be justified.

2 An overview of transitional justice

Transitional justice strategies are usually pursued where national institutions lack the capacity and/or legitimacy to provide justice and redress to victims, particularly in the context of mass abuse. It consists of processes, strategies and institutions that assist post-conflict or post-authoritarian societies in accounting for histories of mass abuse as they build peaceful and just states (ie backward-looking mechanisms that support forward-looking processes). While certain elements of transitional justice, such as prosecutions, have a long history, it is only in the last decade that individual transitional justice strategies have coalesced into a field of study and action. At present, most practitioners agree that transitional justice includes four basic areas: prosecutions, truth-telling, institutional reform and reparations. Each aspect of transitional justice addresses a particular need on the part of victims, and indeed for the larger society. For example, prosecutions, among other things, respond to society's need for establishing a judicial record of events and providing the means for punishment when found guilty. Truth-telling can help victims express their experiences and provide a forum for both more general public listening and understanding.

These four aspects of transitional justice are also complementary. The effective provision of justice in one area, such as prosecutions, can buttress efforts in the other three, contributing to greater victim satisfaction.[5] For rural survivors of abuse, judicial trials of military leaders in

[4] Peace agreements are only one element of a larger peace process. As such, it would be premature to draw more general conclusions about the contribution (or not) of transitional justice to peace in post-conflict states.

[5] P de Greiff 'Justice and reparations' in P de Greiff (ed) *The handbook on reparations (*forthcoming May 2006*).*

the country's capital may seem remote from their immediate experience at the hands of their neighbours. In this context, truth-telling measures can assist victims in integrating and understanding their experience within the larger conflict.[6] When implemented in isolation, on the other hand, transitional justice measures may not seem credible to victims. Institutional reform, without a public discussion on the role of certain institutions in the conflict, can be seen as an empty gesture unlikely to address victims' needs. Moreover, without an adequate sense of how institutions may have facilitated abuse in the past, success in reform may be limited. Hence, experts in transitional justice have argued that holistic integrated transitional justice strategies are more likely to succeed in reconciling divided communities to a common future through addressing the abuses of the past.[7] This, in turn, has implications for how transitional justice is pursued.

Certainly, transitional justice can be implemented in a top-down fashion. But it is unlikely to result in the societal internalisation that is regarded as central to eventual reconciliation.[8] While the catalogue of abuses may be the same from conflict to conflict, societies differ not only in the scope and depth of abuse, but also in how those experiences are addressed. Ideally, transitional justice acknowledges the different experiences of victims, perpetrators and observers, as well as the relationships among them, in an effort to promote justice and reconciliation. The goal of transitional justice is not to create one version of the truth, but rather to create the space for victims to receive justice and redress as part of a larger public commitment to reconciliation. For these reasons, current practice eschews a cookie-cutter approach to transitional justice, preferring an inclusive participatory process to the design of transitional justice mechanisms.[9]

3 Case studies in peace agreements

Peace agreements generally include commitments by the parties to respect the Universal Declaration of Human Rights (Universal

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6 See generally P Hayner *Unspeakable truths. Facing the challenges of truth commissions* (2002).

7 See eg A Boraine 'Transitional justice as an emerging field' International Development Research Centre 11 March 2004 http://www.idrc.ca/uploads/user-S/10829975041revised-boraine-ottawa-2004.pdf (accessed 28 February 2006).

8 H van der Merwe 'Top down versus bottom up approaches to justice' The Truth and Reconciliation Commission and community reconciliation http://www.csvr.org.za/papers/ paphd3.htm (accessed 28 February 2006).

9 Report of the Secretary-General 'The rule of law and transitional justice in conflict and post-conflict societies' 3 August 2004 UN Doc S/2004/616 http://www.undp.org/bcpr/jssr/ 4_resources/documents/UN_2004_Rule%20of%20Law.pdf (accessed 28 February 2006).

Declaration) (or reference key human rights concepts, such as equality and individual rights). Forward-looking mechanisms, such as a human rights ombudsman or department within the Ministry of Justice responsible for human rights, are often established to serve an important function in delineating standards that may contribute towards the effective protection of human rights in the future. They do not, however, directly address the needs of society as a result of abuse perpetrated during the conflict, or establish accountability for past atrocities.

The primary focus of this discussion is to detail the obligations undertaken by signatories at the negotiating table to shed light on the degree to which designing transitional justice mechanisms within peace agreements is justified. These peace agreements are not reached in a vacuum, however. The political interests and considerations of national, regional and international actors are relevant at every step, including at the negotiation table.

The agreements below include both forward and backward-looking transitional justice mechanisms. Examined, in chronological order, they are:

- Sierra Leone: Lomé Peace Agreement, signed 7 July 1999;
- Burundi: Arusha Peace and Reconciliation Agreement, signed 28 August 2000;
- Democratic Republic of Congo (DRC): Global and Inclusive Agreement on Transition, signed 17 December 2002; and
- Liberia: Comprehensive Peace Agreement, signed 18 August 2003.

3.1 Reaching the negotiating table

Peace agreements become necessary when, as in these cases, the governments fail to meet the primary responsibility of states: the establishment and preservation of public security. Negotiations between belligerents are critical aspects of restoring public security, ideally through the successful implementation of a carefully negotiated peace agreement. The success of these agreements to effectively restore peace varies significantly from case to case. Each of the peace agreements examined here was preceded by numerous failed agreements. However, at the time of writing, the peace processes in Burundi, Liberia and Sierra Leone showed significant progress.

To use the example of Sierra Leone, the peace negotiations that began in Lomé in May 1999 were held in the absence of a viable alternative for the government. President Ahmed Tejan Kabbah was experiencing serious setbacks in containing the rebels, particularly Foday Sankoh's Revolutionary United Front (RUF). The new civil government in Nigeria, concerned about the costs in terms of life and money of peacekeeping in a country where the peace would not hold, was inclined to shift resources towards internal needs.[10] This

[10] A Adebajo *Building peace in West Africa* (2002) 97.

prospect would remove Sankoh's military options for control of the territory of the state, and would have resulted in the *de facto* partitioning of Sierra Leone, with the rebels holding a large percentage of the resource-rich areas.[11] On his side, Sankoh needed to resolve the issue of his conviction for treason, and subsequent death sentence.

A number of actors, both internal and external, were critical in bringing the government and rebels to the negotiating table. The active participation of Sierra Leonean civil society, particularly the Inter-Religious Council of Sierra Leone, which gained the confidence of government and rebels alike in earlier peace negotiations, was particularly important. The Council was instrumental in bringing President Kabbah and Sankoh to meet in advance of the negotiations. Recognising the importance of having the potential sub-regional spoilers on board, the Council persuaded Liberian President Charles Taylor to attend the negotiations.[12]

The negotiations, which began in May with the signing of a ceasefire, concluded in July with the signing of a peace agreement between the government of Sierra Leone and the RUF. During the two months that negotiations were underway in Lomé, negotiators focused on a primary objective: bringing to an end the violent conflict ravaging the country. Lomé was the result of political expediency, rather than justice.[13] Numerous realities had to be factored in, particularly the position of strength the RUF was negotiating from, *vis-à-vis* President Kabbah's government. While much of Sierra Leonean society was against power-sharing with the RUF, the pressure to end the war at all costs, and the very real threat of the RUF re-igniting the war, compelled a peace agreement with numerous concessions to the demands of Sankoh and the forces he controlled.[14]

3.2 Prosecutions

Amnesties are very often one of the most controversial elements in a peace agreement. All of the peace agreements examined refer to amnesties for combatants and leaders. Continuing the example of Sierra Leone, the Lomé Peace Accord extended the widest possible immunity from prosecution by 'grant[ing] absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the

11 As above.
12 Adebajo (n 10 above) 98.
13 Personal interview with UN official (1) NY January 2006.
14 As above.

signing of the present Agreement'.[15] Indeed, the pardon was enormously controversial, resulting in outrage on the part of Sierra Leonean citizens and human rights activists.[16] The Special Representative of the Secretary-General entered formal reservations to the agreement, on the grounds that the United Nations (UN) does not recognise amnesty for crimes against humanity, genocide or war crimes.[17] The inclusion of amnesty for those perpetrating the war in Sierra Leone, and specifically for Sankoh, was a direct concession to the rebels in Lomé who, as during previous peace agreements, demanded a blanket amnesty. At the time of the negotiations in Lomé, they were in a strategic position to receive what they wanted — not only would Sankoh's conviction for treason not end in execution; he would be awarded the Vice-Presidency and control over important state resources.

In Burundi, the peace agreement provided for a partial amnesty, prohibiting amnesty for acts of genocide, war crimes, crimes against humanity and *coups d'état*.[18] These prohibitions reflect the issues and sensitivities relevant to Burundi. They can also be understood in the context of the sub-region Burundi inhabits, as well as the involvement of strong regional mediators determined to avoid any possibility of catastrophe on the scale of Rwanda. The 1993 assassination of the first democratically elected, and first Hutu, president, Melchior Ndayaye, and the subsequent *coup* attempt staged by the Tutsi-dominated army, were watershed moments in the history of Burundi. When a second *coup* staged in 1996 to re-establish a political order led by an

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15 Lomé Peace Agreement, 7 July 1999, Sierra Leone, Part 3 art IX (2). It also specifically mandated an amnesty for Foday Sankoh, the leader of the RUF/SL, and awarded him a lucrative position as head of the governing board of the Commission for the Management of Strategic Resources, National Reconstruction and Development; Part 2 art VII.

16 The Special Court for Sierra Leone, a mixed national-international tribunal established by the Security Council after the Lomé Peace Accord failed to quell the violence, has subsequently found that this amnesty does not apply to crimes under international law, including acts of genocide, crimes against humanity and war crimes. Special Court for Sierra Leone Case SCSL-2004-15-PT, Case SCSL-2004-16-PT), Summary of Decision on Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, 15 March 2004 http://www.sc-sl.org/summary-SCSL-04-15-PT-060.html (accessed 28 February 2006).

17 OY Elagab 'The Special Court for Sierra Leone: Some constraints' (2004) 8 *International Journal of Human Rights* 260.

18 Arusha Peace and Reconciliation Agreement 28 August 2000, Burundi Protocol III art 26(l). See also Report of the Secretary-General (n 9 above) (noting that peace agreements must '[e]nsure that peace agreements and Security Council resolutions and mandates . . . (c) reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court; in UN, the rule of law and transitional justice in conflict and post-conflict societies'.

army-installed President Buyoya resulted in the region imposing an embargo on Burundi, the government agreed to move toward negotiations in 1998.[19] However, the role of regional actors in compelling a political solution to the conflict in Burundi cannot be underestimated. Nelson Mandela, who served as mediator for Burundi following the death of Julius Nyerere in 1999, insisted that the rebel movements be included in the negotiations, though the political elite wanted to exclude them from the talks.

Part of the agreement reached in Arusha was that the transitional government of Burundi should request the UN Security Council to establish an international judicial commission of inquiry to investigate acts of genocide, war crimes and other crimes against humanity from independence in 1962 to the signing of the agreement in 2000.[20] At the time of signing, however, some predominately Tutsi parties expressed reservations on the provisions contained in the Accord, and stated that they did not 'subscribe' to it.[21] Nevertheless, the agreement signed by the 19 parties in Arusha required the government of Burundi to formally request the establishment of an international tribunal should the Commission's report 'point to the existence of acts of genocide, war crimes and other crimes against humanity'.[22] While addressing the call for the exploration of the nature of the conflict in Burundi, as well as acknowledging the history of exclusion that is central to the post-colonial history of Burundi, the agreement displaced accountability for initiating and implementing a process of investigation to the international community — perhaps necessary in a historically divided society, where reconciliation between the ethnic groups would have to be a very 'delicate process' requiring impartiality.[23]

The most vaguely defined amnesty clause of these peace agreements is the Liberian Comprehensive Peace Agreement, which states that the transitional administration 'shall give consideration to a recommendation for general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict'.[24] There is no specification on whose recommendation or which criminal acts would be excluded from receiving amnesty. While presenting a risk that crimes

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19 F Reyntjens 'Burundi: A peaceful transition after a decade of war?' (2006) 105 *African Affairs* 117.

20 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol I, ch 2, art 6 para 10.

21 Reyntjens (n 19 above).

22 n 18 above, Protocol I, ch 2, art 6 para 11.

23 Reyntjens (n 19 above).

24 Accra Comprehensive Peace Agreement 18 August 2003, art XXXIV. In the law establishing the Truth and Reconciliation Commission, the TRC is mandated to recommend amnesty for individual applicants for crimes other than for 'violations of international humanitarian laws and crimes against humanity in conformity with international laws and standards'. The Truth and Reconciliation Act, art VI, sec d.

constituting serious violations of international law may be granted amnesty, the vague language provides space for Liberians to define and then advocate for prohibitions against amnesties based on the particular needs and expectations of Liberian society. The objections of the UN and local civil society have reportedly postponed the adoption of an amnesty in Liberia.

Although prosecution is not mentioned in the text of the Global and All-Inclusive Agreement for the DRC, Resolution DIC/CPR/05, adopted at the Inter-Congolese Dialogue in Sun City, tasks the transitional government with requesting the UN Security Council to establish an 'International Criminal Court' for the DRC.[25] The proposed court would investigate serious crimes committed since 30 June 1960, the date of Congolese independence from Belgium. There are a variety of reasons why negotiators may have deemed it fit to include both an amnesty and a prosecutorial process. Negotiators representing armed groups may support prosecutions to eliminate rival leaders within their own group. Other parties, aware of the cost of such tribunals to the international community, might have risked endorsing calls for a tribunal that they knew was unlikely to be established. By asking for an international tribunal, parties to the agreement can improve their domestic and international reputations and consolidate their shaky *bona fides* as representatives of the people. For a variety of reasons, then, leaders of civil society, armed groups and President Joseph Kabila regularly and publicly called for the establishment of such a tribunal.[26]

All the agreements that refer to prosecutions designate an explicit and activating role for the international community upon which the entire process hinges. If the international community fails to respond or ignores the request, then the prosecutorial process envisioned in these agreements never starts.

At the same time, amnesties have not been dependent on the international community. The Sierra Leone government granted absolute and free pardon to Foday Sankoh on day one of the agreement. DRC

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[25] Resolution DIC/CPR/05 on the Establishment of an International Criminal Court. Done at Sun City, South Africa, in March 2002. The Global and Inclusive Agreement, part V1DI notes: 'The government shall determine and conduct the policy of the nation in accordance with the Resolutions of the Inter-Congolese Dialogue.' The Preamble of the Transitional Constitution notes that the Constitution is 'loyal to the relevant resolutions of the Inter-Congolese Dialogue . . . and to the Global and Inclusive Agreement'. Accordingly, the resolutions appear to be legally binding and part of the overall package of transitional peace agreements.

[26] Integrated Regional Information Networks *DRC: Armed movements accept idea of criminal tribunal*, 21 January 2003 http://www.irinnews.org/print.asp?ReportID=31824 (accessed 28 February 2006) and Integrated Regional Information Network *DRC: Government requests establishment of UN criminal court* 17 January 2003 http:// www.irinnews.org/print.asp?ReportID=31754 (accessed 28 February 2006).

President Joseph Kabila decreed amnesty for 'acts of war, political crimes and crimes of opinion' during the conflict.[27] In Burundi, the parliament passed a law granting 'temporary immunity to political leaders returning from exile who committed crimes from 1962 to 27 August 2003' - the date the law was passed.[28] In addition, as one of the conditions of the CNDD/FDD joining the Burundi peace process after the Arusha Agreement was signed, all belligerents (government and rebels) are to receive temporary immunity for both leaders and soldiers.[29]

3.3 Truth-telling

Truth-telling[30] mechanisms can include the establishment of investigatory commissions as part of the prosecutorial process, commissions mandated to collect the truth to promote national reconciliation, or projects that 'map' patterns of violations through the collection of written evidence. Peace agreements for Liberia and Sierra Leone include relatively few provisions regarding the actual powers of the proposed truth and reconciliation commissions, giving space for these to be elaborated by civil society and the citizenry at large. The Comprehensive Peace Agreement tasks the Liberian Commission with three specific activities: to provide a forum for addressing impunity and allowing victims and perpetrators to share experiences; to address the root causes of the Liberian crises; and to make recommendations on the rehabilitation of victims.[31] It requires that commissioners be drawn from 'a cross-section of Liberian society' — a relatively common phrase in these peace agreements. The truth commission is also not referenced in the otherwise extensive timetable annexed to the agreement. Liberia brings to the fore the question of timing — while some may interpret the Commission's failure to begin its work during the mandate of the transitional government, it could also be argued that the delay provided the space for an inclusive process. When negotiators worked to reach an agreement among warring factions in Accra, one consideration would have been the fact that many of those victimised by war in Liberia were displaced, and therefore would return home before being able to participate in the Commission.

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27 Agence France-Presse *DR Congo Pres declares amnesty for acts of war, political crimes* 17 April 2003 http://www.reliefweb.int/w/Rwb.nsf/0/6b2e254cbd80faf5c1256d0b0055ce64? OpenDocument (accessed 28 February 2006).

28 Integrated Regional Information Networks *Burundi: 2003 chronology* 7 January 2004 http://www.irinnews.org/print.asp?ReportID=38776 (accessed 28 February 2006).

29 Integrated Regional Information Networks *Burundi: Government, rebel group finalise talks, resolve outstanding issues* 3 November 2003 http://www.irinnews.org/print.asp?ReportID=37591 (accessed 28 February 2006).

30 For a comparative analysis of truth commissions, see Hayner (n 6 above).

31 Accra Comprehensive Peace Agreement (n 24 above) art XIII.

Similarly, the Lomé Peace Agreement for Sierra Leone provides a broad outline of the Commission's jurisdiction, namely crimes committed since 1991 and duties, such as recommending measures to rehabilitate victims, but refrains from specifying operational guidelines. The agreement specifies that commissioners should 'be drawn from a cross-section of Sierra Leonean society with the participation and some technical support of the international community'.[32] Its most restrictive provision requires that the Commission be established within 90 days of signing the agreement in July 1999.[33] However, the situation in the country, as well as operational constraints, precluded the Commission from meeting these deadlines.

In contrast to Sierra Leone and Burundi, the jurisdiction, activities and operations of the Truth and Reconciliation Commission (TRC) in Burundi are fully specified in the peace agreement.[34] The Truth Commission negotiated by parties to the Burundi Arusha Accord appears to be closely modelled on the South African Truth and Reconciliation Commission of 1994. The proposed truth commission will have the power to grant amnesty, which, excepting the South African truth commission, has not been granted to the approximately 30 such truth commissions to date. The Commission is mandated to 'establish the truth' about serious acts of violence since independence in 1962, including the identification of victims and perpetrators. In the name of reconciliation, it will have the ability to make recommendations on reparation measures and on more general social and political measures to foster healing. The Arusha Agreement provides for a two-year mandate (with the possibility of a one-year extension) and outlines the selection criteria and process for commissioners. The agreement also includes a rigid implementation timetable that includes the establishment of the truth commission as well as other transitional measures.[35] Although these timetables are routinely violated, if this timetable had been adhered to, the general public's involvement in, and engagement with, the truth commission process would have been seriously curtailed for lack of time.

Similarly, the Inter-Congolese Dialogue Resolution on the institution of a 'truth and reconciliation commission' provides little space for

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[32] Lomé Peace Agreement (n 15 above) art XXVI sec 3.

[33] Although the statute establishing the TRC was passed in February 2000, its inauguration was delayed until July 2002 due to general insecurity and lack of funding.

[34] Arusha Peace and Reconciliation Agreement (n 18 above) Protocol I, ch 2, art 8.

[35] According to the peace agreement, the Transitional Government is required to establish the TRC not later than six months after taking office; Arusha Peace and Reconciliation Agreement (n 18 above) Protocol 5, art 5(4). Although the government has expressed support in principle, little progress has been made in its implementation as of December 2005. United Nations 'Fifth Report of the Secretary-General on the United Nations Operation in Burundi' 21 November 2005 UN Doc S/2005/728, http://un.org/Docs/sc/sgrep05.htm (accessed 28 February 2006).

discretionary judgment or creative design. In marked contrast to the Sierra Leonean and Burundian agreements (which had both been signed prior to the DRC negotiations), commissioners are drawn from the ranks of the negotiating parties (ie each group is represented), which clearly presents problems of holding objective and impartial discussions about past impunity.[36] Second, the DRC Commission is mandated to 'identify the nature, causes and extent of the political crimes and large-scale violations of human rights ... since independence', including those crimes committed outside of DRC territory, but nevertheless related to the conflicts in the DRC.[37] It has the power to award a limited amnesty[38] for full confession of crimes of a political nature, which presumably is applicable to both combatants and leaders. The Commission is also tasked with several responsibilities incommensurate with its abilities as an agency independent of government. 'Deciding the fate' of victims and 'taking all necessary measures to compensate them and completely restore their dignity' can only be accomplished by the government; the Commission has neither the reach nor resources necessary to achieve these objectives.[39] The DRC Truth and Reconciliation Commission is tasked with a series of largely unrealisable objectives, including the reconciliation of the main political actors (both among themselves and with the Congolese people); the emergence and consolidation of the rule of law; and the rebirth of a new national and patriotic consciousness, among other things. Indeed, many truth commissions are saddled with unrealistic expectations, In this respect, the DRC is no different.

The cases of Burundi and the DRC are prime examples of over-determining the shape and functioning of transitional justice mechanisms in peace agreements. Transitional justice mechanisms in general, and truth telling and reparations in particular, require the involvement of the general public to be successful. Through broad consultation, institutions and mechanisms can be shaped to directly respond to the most pressing needs as articulated by the people themselves. In addition, the process of involving the public in designing truth commissions, in and of itself, can contribute towards healing and solidarity.[40]

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36 The Congolese National Assembly and Senate adopted a law establishing a Truth and Reconciliation Commission on 30 July 2004. *Loi No 04/018 du 30 Juillet 2004 portant Organisation, Attributions et Fonctionnement de la Commission Vérité et Reconciliation*. In that law, the Commission is composed of 21 members, including the eight members specified during the Inter-Congolese Dialogue and named in note lxviii.

37 Inter-Congolese Dialogue Resolution DIC/CPR/04 paras 3 & 4.

38 That is, the amnesty could not apply to 'crimes of genocide or crimes against humanity'; n 37 above, para 8.

39 n 37 above, para 5.

40 B Hamber 'Narrowing the micro and macro: A psychological perspective on reparations in societies in transition' and P de Greiff 'Justice and reparations' in De Greiff (n 5 above).

At the same time, wide discretion in the design of transitional justice measures is not a guarantee of public involvement. Initial discussions on the Truth and Reconciliation Commission in Liberia, including the appointment of commissioners, started as an exclusive process that only opened following the protest of Liberian civil society as well as the regional and international actors that have invested time and resources into the Liberian peace process. The selection process was finally conducted under the oversight of the Economic Community of West African States (ECOWAS) and the UN, in consultation with civil society and political party representatives. The names of all nominees, including those appointed by the Chairperson, were published in the Liberian newspapers, with an invitation for the public to evaluate all names and present any reason why any nominee was not fit for the role of commissioner. In February 2006, newly elected President Ellen Johnson-Sirleaf inaugurated the Liberian Truth and Reconciliation Commission, following two years of discussion and planning.[41]

It may be considered that actors opposing discussion on past impunity can use the discretion provided in the agreement to delay implementation, or to manipulate the process. However, an expedited process is not necessarily the best case scenario — and, within reason, mechanisms with the objective of reconciliation should not be dependent on the timetable of external actors. For example, representatives of civil society in Sierra Leone used the delay between the Lomé agreement and the inauguration of the Truth and Reconciliation Commission in 2002 to discuss how the Commission could best assist victims and suggest priorities for the Commission's attention. So discretion and delay are not necessarily counter-productive for ensuring responsive transitional justice measures, but they do need to be accompanied by formal guarantees of broad public consultation and discussion.

3.4 Institutional reform

Institutional reform, within a transitional justice context, involves the altering of the government's structures, mandates and composition through the creation of new entities, the abolishment of specific agencies, and/or the retooling of existing departments and personnel with the aim of improving the government's protection of human rights. It can include the creation of new oversight mechanisms (such as commissions) or mandate existing institutions, such as the legislature, with greater oversight powers. All four peace agreements include provisions

[41] 'Government inaugurates Truth and Reconciliation Commission' *The Analyst* (Monrovia), 21 February 2006 http://allafrica.com/stories/200602210220.html (accessed 28 February 2006).

for the establishment of a governmental Human Rights Commission or Ombudsman.[42] This is not particularly new, since most peace agreements have little trouble adopting forward-looking mechanisms. The ways in which institutional reform is implemented may achieve different degrees of accountability for the past. The establishment of a new institution with a mandate to investigate current and future abuses entails little accountability for past crimes. However, some practitioners argue that reforming the composition of an institution, in terms of its ethnic, gender, religious or geographic representation, can play an important role in preventing future violence, while correcting for discrimination in the past.[43]

It is worth noting that the Arusha Accord, including the Annexes, details a comprehensive forward-looking vision of the structure of the new government and its responsibilities towards its citizens. For example, it calls for the reform of the judiciary to promote judicial independence and correct existing gender and ethnic imbalances.[44] Of the cases examined, Burundi goes the farthest in addressing structural inequalities, including gender inequality. It calls for adopting legislation on women's inheritance rights and makes numerous references to gender balance in government ministries and commissions. The agreement also mandates the creation of an institution to (1) identify the problems faced by women as a result of Burundi's crises and (2) propose solutions to the transitional government that would be necessary 'to promote and support the advancement of women', given the difficulties that women have had and still continue to face.[45]

As the conflict in Burundi centres on the allocation of political, economic and military power, historically linked to ethnic affiliation, the peace agreement reached in Burundi explicitly requires ethnic balance in every governing institution. For example, when the ethnic diversity of the community is not reflected in the make-up of the Commune Council, the Senate is mandated to 'order the co-option of persons . . . from

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42 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol II ch 1, art 10; Global and Inclusive Agreement on Transition (n 25 above) Part V 4(a); Accra Comprehensive Peace Agreement (n 24 above) Part 6 art XII, 2a; Lomé Peace Agreement (n 15 above) Part 2 art VI (2)(vii).

43 The Secretary-General argues: 'Peace and stability can only prevail if the population perceives that politically charged issues, such as ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of the right to property or citizenship and territorial disputes between states, can be addressed in a legitimate and fair manner. Viewed this way, prevention is the first imperative of justice.' The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General UN Doc S/2004/616 (2004) para 4.

44 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol I ch 2 art 7 no 18(b).

45 Arusha Peace and Reconciliation Agreement (n 18 above) Annex IV ch 2 art 2.5.2. The Annexes are legally binding and part of the overall Arusha Agreement.

an underrepresented ethnic group . . . provided that no more than one-fifth of the Council may consist of such co-opted persons'.[46] The Arusha Accord also requires that the first transitional President and Vice-President be of different ethnicities and represent different political parties.[47] This provision is in recognition of the difficult balance transitional justice will have to strike in Burundi — all sectors of public life require reform, however, this reform must not be seen as punitive.

When it comes to backward-looking institutional reforms, the agreements are far from comprehensive. An important element of the Liberian Comprehensive Peace Agreement is the complete dismantling of the armed forces of Liberia. Decommissioned former army personnel interested in joining the new army must be re-recruited following a vetting exercise whereby their personnel records are examined for indications of human rights abuse.[48] It was clear to all present in Accra during the peace negotiations that the Liberian army had been discredited completely within most segments of Liberian society.

The peace accord in Burundi does not provide for the systematic vetting of its military personnel, nor could it — suggestions of an overhauling reform of the historically Tutsi-dominated army, even in spite of the role it has played in perpetrating *coups* in that country, could turn the Tutsi elite against any new dispensation, and would likely be strongly resisted by Rwanda. Nevertheless, the Arusha Agreement does exclude from government service soldiers found guilty of genocide, war crimes, and crimes against humanity.[49]

3.5 Reparations

Reparations[50] are efforts to specifically address the variety of harms suffered by victims of human rights abuse.[51] To that end, reparation programmes may seek to *rehabilitate* victims through the provision of

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46 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol II ch 1 art 6 no 18.

47 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol II ch 2 art 15(12). As a result of power-sharing negotiations in 2001 in Pretoria, the negotiating parties also agreed that after 18 months of the initial three-year transitional period, President Pierre Buyoya (an ethnic Tutsi) would step down and the presidency would be assumed by an ethnic Hutu. On 30 April 2003, Domitien Ndayizeye (an ethnic Hutu) assumed the presidency and Alphonse Kadegend (an ethnic Tutsi) assumed the vice-presidency. Integrated Regional News Networks *Burundi: President Buyoya transfers power to Ndayizeye* 30 April 2003 http://www.irinnews.org (accessed 28 February 2006).

48 Accra Comprehensive Peace Agreement (n 24 above) Part 4 art VII (2a).

49 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol III ch 2 art 14.

50 For detailed case studies and thematic analysis of reparation programmes, see De Greiff (n 5 above).

51 P de Greiff *Reparations and transitions to democracy* (draft manuscript) (2003).

'medical and psychological care, as well as legal and social services';[52] *compensate* victims for physical or mental harm, lost opportunities, and material damages;[53] and provide *restitution* to victims through restoring their legal rights, employment and property, for example.[54] Reparations can also include symbolic measures, such as apologies, reburials, monuments, or days of remembrance in honour of victims, which can provide victims with redress that material reparations are incapable of providing. None of the four agreements contain an explicit reference to reparations writ large; instead they focus on repairing harm through rehabilitation.

The Liberian agreement briefly refers to rehabilitation in article XXXI, where it tasks the National Transitional Government of Liberia with 'design(ing) and implement(ing) a programme for the rehabilitation of war victims'. The TRC has subsequently given itself the task of providing recommendations to the Heads of State on (1) the reparations on rehabilitations of victims and perpetrators; (2) the need for continued investigations; (3) legal, institutional and other reforms; and (4) prosecution of certain cases. It is instructive that the focus of rehabilitation is not solely on those defined as victims, but also includes perpetrators of the war. This may indicate that the focus in Liberia is centred more on reconciliation than on persons who fought in the war, primarily youth combatants, who are now regular Liberians looking for an opportunity to rebuild a life in a war-ravaged country. Other actors who were once active or complicit in the civil war are now political actors, which can be, depending on their degree of liability, a constructive transformation.

In Sierra Leone, where conflict resulted in thousands of amputees, several mechanisms have been established to support the rehabilitation of war victims. The National Commission for Resettlement, Rehabilitation and Reconstruction (later re-named the National Committee for Social Action (NaCSA)) is tasked with the needs of women and their potential contribution to reconstruction.[55] Generally, while the Lomé Peace Agreement provides for a number of options to access rehabilitation services, reparation is often linked to general developmental goals unrelated to the abuse or victimisation experienced by individual citizens.

The Arusha Accord for Burundi takes an expansive view of reparations, including a series of recommendations designed to support

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[52] See the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Economic and Social Council Commission on Human Rights, 60th session E/CN 4/2004/57 (2003).

[53] n 52 above, para 22.

[54] n 52 above, para 21.

[55] Lomé Peace Agreement (n 15 above) part 2 art VI, 2 vii & art XXVIII.

healing and foster reconciliation. The agreement calls for the establishment of a National Commission for the Reintegration of War Victims to address the needs of the large internally displaced and refugee populations and creates a National Fund for War Victims, to support their reintegration into their communities.[56] Compensation is also addressed, though only as it applies to property that was plundered and cannot be restored to its original owner (ie restitution).[57] Arusha was also the only of the four agreements to include symbolic measures of reparations (although not referred to as such in the agreement). These measures include the construction of a monument, inscribed with the words 'never again'; the identification of mass graves and if desired, the dignified reburial of a loved one; and a day of remembrance for victims of the conflict.[58]

A common option is for proposed truth commissions to be tasked with making recommendations on reparation measures to rehabilitate war victims or promote reconciliation and forgiveness.[59] Often, however, the Commission's mandate outpaces its authority. However, these expressed authorities are limited, as the Commissions do not have budgetary authority to implement their findings or to compel governments to implement their recommendations. Making reparations contingent on the government's implementation of a TRC recommendation may mean no reparations at all.[60] It is questionable if a desired role for truth commissions would be the implementation of a reparations programme; arguably, their function is to provide a space for healing, rather than compensation.

4 Justifications

In all of the cases examined, thousands (or in DRC, millions) of people have been killed, displaced or otherwise victimised in the execution of the violent conflict.

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56 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol 1 ch 2 art 7 & Protocol IV ch 1 art 9.

57 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol 1 ch 2 art 7 no 25(c).

58 Arusha Peace and Reconciliation Agreement (n 18 above) Protocol 1 ch 2 art 6 no 7 & 8.

59 Lomé Peace Agreement (n 15 above) Part 2 art VI 2ix; Comprehensive Peace Agreement (n 24 above) Part 6 art XIII 1; Arusha Peace and Reconciliation Agreement (n 16 above) Protocol 1 ch 2 art 8.

60 The case of South Africa may be instructive here. The South African government, five years after the issuance of the TRC's Final Report, announced a much more limited reparations policy than the TRC had recommended. Many had feared that they would not implement a programme at all, if not for a vocal constituency and the existence of civil suits against apartheid-era businesses. For more, see C Colvin 'Reparations in South Africa' in De Greiff (n 5 above).

Justice, in this context, ideally contributes to restoring individual dignity and promoting reconciliation.[61] The ends of transitional justice can be supported by conflict resolution and state building. Establishing a durable peace arguably ends situations of massive abuse, promoting individual dignity and security. Building a just and effective state provides essential guarantees of non-repetition that can promote reconciliation. But simply because the ends may be mutually supportive does not mean that the means to achieve those ends are equally supportive. Indeed, the means to achieve one end may undermine other equally legitimate ends. For example, limiting the peace negotiations to warring parties may promote conflict resolution, but not transitional justice. (Alternatively, broad participation may further the objectives of transitional justice, but not conflict resolution.)

4.1 Justice

One possible justification for including such detailed provisions in each of these agreements is simply to ensure justice for victims within the new state framework. Transitional justice becomes a price attached to the re-allocation of political authority among armed groups. In each of the cases discussed, the transitional government was composed of members of competing armed groups. The detailed inclusion of transitional justice may reflect a lack of faith on the part of mediators that armed groups will actually adhere to less detailed commitments. But it is not yet clear that including these blueprints results in their implementation. For every Sierra Leone, where the most prominent mechanism, the Truth and Reconciliation Commission, has been implemented, there is a Burundi, where progress in implementation has been both intermittent and slow.

Moreover, these blueprints are likely to be incomplete. Even if parties to the conflict undertook the design of transitional justice mechanisms with the genuine intention of promoting full accountability and redress, they lack the necessary information from victims to do so. All peace agreements in this study allowed for some degree of input from unarmed political parties and civil society. In some instances, as in Sierra Leone and Liberia, there was very active and important participation from local leaders and women's groups. In Burundi, 19 political parties (some linked to armed groups) participated in the Arusha negotiations. It could be argued that these groups had little leverage *vis-à-vis* armed groups in the negotiating process. But the broader point is whether these groups can realistically be expected to effectively represent specific victim demands for justice in exclusive peace negotiation forums when violence is still the norm. Decades of cyclical violence in the

[61] P de Greiff 'Justice and reparations' in De Greiff (n 5 above).

region have resulted in one of the largest regionally dispersed populations in recent history. Different armed groups may control separate sectors of a country, further complicating travel and open discussion. Second, the closed-door nature of the negotiations certainly prevented non-armed representatives from consulting with their membership as the mechanisms were developed. Any operational details resulting from peace agreement negotiations would still require the input of society at large.

Designing transitional justice mechanisms within peace agreements could also reflect the idea that some justice is better than none. By having armed groups explicitly agree to detailed though imperfect provisions, future conflict over the scope and depth of these mechanisms would be avoided. But this assumes that the interests and positions of the armed groups are static and fixed. Alliances both among and within armed groups can change. Particularly where the battles involve multiple armed groups, the new political reality can shift existing alliances among the various groups. Even within armed groups, leadership battles may lead to less support for amnesties, for example, if the ascendant sub-group believes it is less culpable. The deals made during peace negotiations then become rigid mechanisms, which neither armed groups nor the general public are able to amend or supplement once the agreement has been signed.

Under either argument, lack of faith or some justice is better than none, the actual content of these transitional justice mechanisms is still relevant. The impact of armed groups is most clearly seen in the amnesty provisions (accompanied by relatively weak provisions on prosecution) in each of the agreements. But other areas of transitional justice are similarly rendered less effective.

The composition of the Truth and Reconciliation Commission for the DRC, as stated in the Global Agreement and the Transitional Constitution, requires that each of the negotiating parties be represented in its offices and that a representative of civil society serves as President.[62] In concrete terms, this means that the commissioners are representatives of the warring parties, that is, the Kabila-led government, the RCD-Goma, the MLC, the RCD *Mouvement de liberation*, the RCD-N, the Mai Mai militias, in addition to a representative each from civil society

[62] The Global and Inclusive Agreement on Transition requires that the president of the Truth and Reconciliation Commission (as with all of the institutions designed to 'support democracy') be a representative of civil society. The Transitional Constitution in art 157 further states: 'The other constituent and entities of the Inter-Congolese Dialogue form part of their respective offices.'

and the unarmed opposition.[63] The government and many of the armed groups have each been accused of serious violations of human rights, including systematic rape and targeted ethnic cleansing[64] — so it would be fair to question the ability of such representatives to impartially and objectively 'identify the nature, causes and extent of the political crimes and large-scale violations of human rights committed in the DRC, since the country's accession to independence'.[65] Through the staffing of mechanisms, the design of the mandate, the powers and independence granted, armed groups can wield considerable influence on the shape and weight of transitional justice strategies.

In addition to overt obstruction, the peace agreements also omit measures that might be desirable. Of the four agreements, only Burundi provides for symbolic reparations, such as monuments. Broader participation may have resulted in stronger institutional reform measures, such as the vetting of military and police forces.

Allowing armed parties to negotiate the form and content of transitional justice strategies devoid of transparency or public comment creates serious difficulties in achieving justice, which contributes to reconciliation and healing in post-war societies. There is a difference between soliciting 'buy-in' (or at least guarantees of non-interference from militarised groups) and giving these same groups almost sole control over the design and implementation of a country's transitional justice strategy.

At best, the detailed design of transitional justice mechanisms within the context of peace agreements is imperfect in achieving justice for victims. At worst, armed groups party to the agreement can pay lip service to the demands of victims, while creating transitional justice mechanisms devoid of substance or applicability. It is far from clear that including blueprints for justice within peace agreements enhances, rather than detracts from, the desired outcome of dignity and reconciliation.

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[63] The *Commission Vérité et Réconciliation* (Truth and Reconciliation Commission) includes: (1) Président (Forces Vives) Jean Luc Kuye Ndondo; (2) 1er Vice-Président (RCD) Benjamin Serukiza ; (3) 2ème Vice-Président (Opp.Pol.) not yet named; (4) 3ème Vice-Président (Mai-Mai) Yaka Swedy Kosko; (5) Rapporteur (RCD-ML) Claude Olenga Sumaili; (6) 1er Rapporteur Adjoint (ex-Gouv) Musimwa Bisharhwa; (7) 2ème Rapporteur Adjoint (RCD-N) Vicky Idy Biboyo; (8) 3ème Rapporteur Adjoint (MLC) Mika Ebenga. Les Institutions de la Transition en Rdc et Leurs Animateurs, non-officiel, 7/19/04 http://www.monuc.org/downloads/Transitional_Government_DRC_July_2004.pdf (accessed 28 February 2006).

[64] See Human Rights Watch 'Democratic Republic of Congo: Confronting impunity' 20 February 2004; Human Rights Watch 'DR Congo: War crimes in Bukavu' Human Rights Watch Briefing Paper, June 2004; Human Rights Watch 'World Report 2003: Democratic Republic of Congo' January 2003; http://www.hrw.org (accessed 28 February 2006).

[65] Global and Inclusive Agreement on Transition (n 25 above) Inter-Congolese Dialogue Resolution DIC/CPR/04 on the Institution of a Truth and Reconciliation Commission.

4.2 Conflict resolution

Given the less than hopeful impact on achieving justice, perhaps including operational details of transitional justice, enhances the aims of a complementary goal: conflict resolution. Indeed, one could argue that when negotiated as part of a peace agreement, transitional justice positively impacts peace negotiations by expanding the issues in controversy. In Burundi, the negotiating groups did agree on the need for an international commission of inquiry into genocide and crimes against humanity, but disagreed on whether the inquiry should cover events since 1965 or only events beginning in 1993.[66] This is not unique to Burundi; the same issue has plagued discussions in the DRC. The *Rassemblement Congolais pour la Democratie* (RCD) proposed that the jurisdiction of the international tribunal included in the peace accord include events since independence, 30 June 1960, but the *Mouvement de Liberation du Congo* (MLC) and the RCD-National (RCD-N), also signatories to the DRC accord, preferred 1996 (the start of the first Congolese war that ended in the removal of Mobutu and the installation of Laurent Désiré Kabila as President).[67] In such contexts, transitional justice is manipulated to justify the abuse that occurred — by legitimising the reasons one party went to war or by marginalising the abuse within a larger political context.

The expansion of issues through including transitional justice may or may not support the goal of ending the conflict. On the one hand, expanding the number of issues enlarges the 'negotiating pie' and provides negotiators with more opportunities to co-operate through trading or exchanging concessions. In addition, the fact that these issues are being negotiated represents a first step to settling conflicts through discussion and not violence. While this does not necessarily bode well for achieving justice (since most armed groups could agree that impunity is better than justice) it may enhance the end of violent conflict in the short term.[68]

In such scenarios, however, transitional justice is reduced to a means of conflict resolution, rather than an independent end. It is also unclear to what extent detailed transitional justice mechanisms are necessary to enlarge the options available to negotiators. It is certainly worth asking

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[66] Fondation Hirondelle *Burundi - Peace talks - 2000 Jan/Jun - Archives: Summary of Committee Work 3 March 2000* http://www.hirondelle.org/hirondelle.nsf/ caef-d9edd48f5826c12564cf004f793d/ad3e621352a4e280c12569360069c8ca?Open-Document (accessed 28 February 2006).

[67] Integrated Regional News Networks *DRC: Armed movements accept idea of criminal tribunal* 21 January 2003 http://www.irinnews.org (accessed 28 February 2006).

[68] Through building the rule of law, transitional justice can also contribute towards conflict prevention efforts. Conversely, as the cycles of violence in Burundi demonstrate, continuing impunity may lead to future outbreaks of violence.

whether other incentives could perform the same function without sacrificing the goals of transitional justice.

Another argument for including details for future transitional justice mechanisms could be its potential as a deterrent to violating the peace agreements. Armed groups, it could be argued, would be on notice that future violations could not only result in prosecution, but could undermine their political legitimacy during the transition. This is a compelling argument in theory, but violence in the Democratic Republic of Congo and Burundi after the signing of the agreements casts empirical doubt.[69] Moreover, it does not address why the details are necessary for deterrence. Does a commitment to certain transitional justice mechanisms (without the operational details) provide less deterrence than one that incorporates the negotiating positions of armed groups? Indeed, the more concessions made during the negotiations, the less of an impact for any future mechanism reducing its deterrent value.

4.3 State building

Could state building, then, justify the inclusion of detailed transitional justice benefits despite the imperfect justice result? Transitional justice also includes an explicit state-building component: institutional reform. Liberia is engaged in a comprehensive effort to vet its new security forces, as mandated by its peace agreement. Burundi explicitly provides for measures to enhance the role of women within the society and the government. Both of these measures contribute to the construction of a just state. Both of these measures address the legacy of past abuse.

Transitional justice and state building are similar in other ways. Neither process is particularly fast in producing results.[70] Neither process can be imposed externally and still be effective.[71] In addition, the two processes are mutually supportive. Restoring individual dignity and facilitating reconciliation can play an important role in ensuring the sustainability of newly created institutions and creating a shared vision for the state. Conversely, creating effective, responsive, and effective institutions is an important signal to victims that they are respected and included within the new state. Moreover, transitional justice can help

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69 See eg United Nations Department of Public Information 'Security Council: 2005 Roundup' 20 January 2006 http://www.un.org/News/Press/docs/2006/sc8614.doc.htm (accessed 28 February 2006) (noting the continuing violence in the DRC).

70 S Chesterman *et al* (eds) 'Making states work' *International Peace Academy and United Nations* (2005).

71 As above.

lay the foundation for a 'social contract', which is an essential component of state building.[72]

Yet, all of these similarities do not address whether including the operational details of such mechanisms in peace agreements enhances the state-building project. It is clear that transitional justice can contribute to state building (whether it should is another matter beyond the scope of this paper). But if the impact of transitional justice is lessened through including operational details in peace agreements, does that not detract from its potential contribution to state building?

5 Conclusion[73]

Negotiations focused on the primary purpose of bringing violent conflict to an end are not conducive to designing an inclusive process that takes into consideration the full range of needs society has for reconciliation and justice. While it makes sense to limit discussions at the negotiating table to mediators and warring parties, peace negotiations, exclusive by design and nature, are not necessarily the appropriate forum to design transitional justice mechanisms.[74] While accountability and reconciliation should clearly be a part of the peace process, viability and inclusiveness dictate that planning these mechanisms be outlined through a separate process. But this analysis does not imply that there should be a strict separation between transitional justice writ large and peace agreements.

Including a broad foundation for transitional justice within peace agreements can lead to increased support for the eventual mechanisms. First, establishing the principle of justice for past crimes in peace agreements also creates additional opportunities to provide justice and redress for victims outside of the obligations contained in the agreement. The negotiation of peace agreements is but one element of a larger peace process. The Lomé Accord, through establishing a Truth and Reconciliation Commission mandated to 'address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation',[75]

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[72] See eg The World Bank and the United Nations Development Programme 'Workshop Report: Rebuilding post-conflict societies' September 2005 http://siteresources.worldbank.org/INTLICUS/Resources/FinalStatebuildingworkshopreportEXT.doc (accessed 28 February 2006).

[73] In a survey as large as this, important questions remain unanswered. While this paper has focused on the actual text of the agreements, within a few years it should be possible to understand more thoroughly how the actual text does or does not prejudice the practical outcome.

[74] Personal interview, UN Official (2) NY January 2006.

[75] Lomé Peace Agreement (n 15 above) art XXVI (1).

committed the negotiating parties to accounting for the past. These public commitments do not preclude the establishment of additional transitional justice measures not included in the original agreement,[76] such as the Special Court for Sierra Leone, which found that this amnesty does not apply to crimes under international law, including acts of genocide, crimes against humanity and war crimes.[77] Although progress has been slow, the Liberian peace accord — of the four surveyed here — best achieves the balance between broad support for transitional justice mechanisms and detailed design.

Second, including transitional justice can formally involve international actors in the transitional justice process.[78] In some cases, but not all, international involvement can provide a degree of objectivity in deeply divided societies, particularly in the area of prosecutions. Formally involving international actors in the design and implementation of transitional justice mechanisms may provide a perception of impartiality. It is also more likely to result in assistance and funding.[79]

Justice for victims of massive abuse is increasingly a non-negotiable

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[76] Special Court for Sierra Leone, Case SCSL-2004-15-PT, Case SCSL-2004-16-PT Summary of Decision on Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord 15 March 2004 http://www.sc-sl.org/summary-SCSL-04-15-PT-060.html (accessed 28 February 2006).

[77] The Special Court for Sierra Leone was established in 2000, after continuing violations of the Lomé Accord and the kidnapping of 500 UN peacekeepers. In its authorising Resolution 1315, the Security Council notes the Lomé Peace Agreement and the efforts therein to promote the rule of law as one factor underlying their decision to establish the Special Court. The exact text reads: '*Noting also* the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law' S/RES/1315 (2000). In another example, local NGOs — with the support of the OHCHR — initiated a mapping project to better understand the breadth and impact of the conflict on individual lives. Through collecting written and oral testimonies across the country, the mapping project established a pattern of violations, increased understanding of the different types of violations, and introduced for some, primarily internationals, the grave impact these violations had.

[78] A study by Steve Stedman at Stanford University found that the 'willingness of external actors to take sides as to which demands and grievances are legitimate and which are not' is a determining factor in the successful management of internal conflicts. Indeed, the common denominator for whether a peace agreement actually leads to peace is not whether or not parties received amnesty or whether the peace agreement included transitional justice mechanisms, but rather the 'unity and co-ordination among external parties in defining the problem, establishing legitimacy for the strategy and applying the strategy'. See SJ Stedman 'Spoiler problems in peace processes' (1997) 22 *International Security* 52.

[79] The Lomé Peace Agreement states that the membership of the Truth and Reconciliation Commission includes the 'participation and some technical support of the international community'. The TRC has certainly faced financial obstacles; but it has also received crucial international resources (both in personnel and funding). Lomé Peace Agreement (n 15 above) art XXVI (3).

issue.[80] Peace agreements can make an important contribution in providing a *foundation* for a deliberative and inclusive design process, but mediators should be cautious in simultaneously designing transitional justice mechanisms and negotiating peace. First, peace agreements should include processes that facilitate broader discussion of the past and ways in which to address it. The focus should be on guaranteeing as much space as possible for public participation and input into transitional justice strategies and creating institutions flexible enough to respond to the public's demands. For example, the peace agreement could create an independent human rights commission, ideally one that bars adherents of armed groups from membership, mandated to initiate such discussions. Second, peace agreements can enumerate the types of abuses perpetrated (allowing for the addition of more) and commit negotiators to seeking justice for victims. By providing a platform for a more inclusive design process, less determinative peace agreements may contribute more towards justice in the long term.

[80] In the words of Juan Mendez: 'What is impermissible is to put ''official forgiveness'' above all other considerations, and to allow clemency to thwart truth, justice, and reconciliation. Forgiveness that leaves perpetrators in their places of power and influence and that prevents the truth from being discovered is not forgiveness: It is impunity.' J Mendez 'National reconciliation, transitional justice, and the International Criminal Court' (2001) 15 *Ethics and International Affairs* 33.

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Criminal justice through international criminal tribunals: Reflections on some lessons for national criminal justice systems

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Summary

This article explores some lessons national criminal justice systems may draw from the law applicable to, and the jurisprudence engendered by, United Nations ad hoc *international criminal tribunals, with emphasis on the International Criminal Tribunal for Rwanda. In adjudicating the core international crimes of genocide, crimes against humanity and war crimes, these tribunals have broken new ground that enrich the development of international law. It is noteworthy that the contribution of these tribunals is also relevant to national criminal justice systems. The article argues that, although UN* ad hoc *tribunals are more recent and lesser developed than national criminal justice systems around the world, and were not established strictly speaking as oversight mechanisms to verify that actions of states give effect to international law, several aspects of the law applicable to, and the jurisprudence of, UN* ad hoc *tribunals may guide the reform and development of national criminal justice systems in their procedural, evidential and substantive laws, and bring them to the standards of international law and human rights.*

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1 Introduction: Issues and aims

This article explores some lessons national justice systems may draw from certain aspects of the law applicable to, and the jurisprudence engendered by, United Nations (UN) *ad hoc* international criminal tribunals in dispensing international criminal justice, with emphasis on the *ad hoc* UN International Criminal Tribunal for Rwanda (ICTR). Established in 1994 by the UN Security Council, the ICTR is mandated to prosecute persons responsible for genocide and other serious transgressions of international humanitarian law that took place in Rwanda and neighbouring states between 1 January 1994 and 31 December 1994.[1]

The thesis of this article is that, although *ad hoc* international criminal tribunals and the international justice system are more recent, less developed and seem to face more challenges compared with national criminal justice systems around the world, some aspects of the law applied, and the jurisprudence engendered by, *ad hoc* international criminal tribunals contain lessons that may guide and enrich not only international law, but also national criminal justice systems. Those aspects of the law of, and jurisprudence engendered by, international criminal tribunals may guide the reform and development of national criminal justice systems, in both their procedural, evidential and substantive laws, and bring them up to the standards of international law and human rights. Although not established, strictly speaking, as an oversight mechanism to verify that actions of states give effect to international law, as is the case with global and regional institutions established under human rights treaties, the law applied by, and the jurisprudence engendered by, the ICTR can influence state actions. Moreover, national institutions, such as legislatures and law reform agencies may draw lessons from it in reforming state laws and practices. The wide dissemination of the jurisprudence and procedures of the ICTR, like that of other international criminal tribunals, is vital in this effort.

International criminal tribunals have played a pivotal role in responding to gross violations of human rights and transgressions of international humanitarian law, particularly when national systems have been unable or unwilling to respond. International criminal tribunals are instrumental in stamping out impunity for gross human rights violations that constitute international crimes. A culture of impunity for international crimes has characterised various national systems. The laws

[1] Statute of the International Tribunal for Rwanda, Annex to UN Security Council Resolution 955 of 8 November 1994.

applied by international criminal tribunals and the jurisprudence they engendered have underscored the fact that international crimes, notably the core crimes of genocide, crimes against humanity and war crimes, are a concern of the entire human family and transcend state sovereignty. Arguably, these tribunals are key building blocks in the effort to ensure that states not only co-operate with the tribunals in the discharge of their mandates, but also embrace norms of international criminal law in order to deal with international crimes, particularly the core crimes just mentioned.

Taking the pioneering role in criminalising genocide and war crimes committed in internal armed conflicts, the ICTR has innovatively and progressively elaborated the crimes within its jurisdiction in ways that develop not only international law, but also inform national criminal justice systems in different ways. In addition, some aspects of the laws applied to, and the jurisprudence engendered by, the ICTR enrich substantive, evidential and procedural aspects of international law, aspects that may equally enrich national criminal justice systems in their response to crimes in full conformity with internationally accepted standards.

The guidance and enrichment of national criminal justice systems by international criminal tribunals are even more critical at a time when national criminal systems are constantly revisiting and expanding their laws and practices in response to contemporary concerns, notably terrorism. While such expansions are necessary in dealing with crimes, if they are unguided and unrestrained, they may pose dangers to internationally accepted norms, such as fair trial and due process rights and guarantees of suspects and accused persons.

In examining lessons that may be drawn by national criminal justice systems from international criminal tribunals, especially the ICTR, this article is arranged as follows:

Part 2 below provides the background to the analysis. It examines, *inter alia*, the background to the establishment and also the challenges of international criminal tribunals *vis-à-vis* national criminal justice systems.

With the emphasis on the ICTR, part 3 identifies and explores some aspects of the law and jurisprudence of international criminal tribunals that may be relevant in enriching national justice systems, and enhancing their standards of international law and human rights. Part 4 embodies concluding recapitulations.

2 Background to the establishment and challenges of international criminal tribunals *vis-à-vis* those of national justice systems

Overall, compared with national criminal justice systems, international criminal tribunals and the international criminal justice system are more recently established, less developed and face several challenges.

After the post-World War II Nuremberg and Tokyo International Military Tribunals (IMT), no international criminal tribunal was established to adjudicate international crimes[2] until 1993, when the UN Security Council established the UN International Criminal Tribunal for the Former Yugoslavia (ICTY)[3] and later the ICTR. These tribunals' jurisdictions are not universal; that of ICTR is limited to Rwanda and neighbouring states, while that of the ICTY is limited to the former Yugoslavia. Thus, even the well-codified international genocide crimes and war crimes had for a long time remained without international judicial enforcement, notwithstanding having been committed often.[4] The absence, at the international level, of fully fledged and/or permanent legislative and executive machineries with clear-cut divisions of labour for making and enforcing laws, as is the case in many national criminal justice systems, creates several challenges for the functioning of international criminal tribunals. These tribunals have had to grapple with questions arising from or relating to laws they are to apply in the adjudication of crimes. They also have had to rely on states and other institutions to obtain witnesses, effect arrests and enforce sentences.

On the other hand, although, like the international system, they have for a long time not addressed core international crimes overall, national criminal systems have been operational for a long time in enforcing

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[2] There have been scholarly efforts to distinguish between international crimes and transnational crimes, but such efforts face difficulties. International crimes are created directly by international law, especially through treaties but also through customary international law. Broadly, international law authorises or requires states to criminalise, prosecute and punish international crimes. Transnational crimes may not strictly be based in international law. Transnational crimes involve a transnational element (eg conspirators of money laundering, or drug trafficking, may be stationed in more than one nation). International crimes may not require a transnational element. Eg, apartheid, genocide and crimes against humanity do not require such element. The distinction, however, seems blurred. Many transnational criminal activities constitute international crimes. This includes crimes such as the taking of hostages, counterfeiting currency, slavery and slave-related crimes, crimes against maritime navigation, unlawful use of mail for terror activities, etc. See generally J Paust *et al International criminal law* (1996) 18. For further commentary on the core international crimes, see below.

[3] Like the ICTR, the ICTY was established by the UN Security Council pursuant to Resolution 827 of 25 May 1993, to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.

[4] See generally A Cassese *International criminal law* (2003) 3-5.

national criminal laws. Thus they possess established institutions, including the judiciary, courts, police and corrections facilities, for the enforcement goals of criminal justice. These goals include delivering justice for all, by bringing to justice the perpetrators of crimes and helping to rehabilitate them, while at the same time protecting the innocent.[5] These goals also encompass the detection of crime, the enforcement of court orders, such as collecting fines and supervising community and custodial punishment.[6] Also, national legal systems worldwide have on the whole established substantive and procedural criminal laws, most of which are well-codified in legislation passed by national legislative bodies. They also have in place more or less permanent institutions that are involved in the enforcement of criminal law.

The very nature and magnitude of international crimes, such as those that engulfed Rwanda in 1994, present critical difficulties. International crimes are characterised by extreme barbarity, involve large numbers of victims and perpetrators and normally have taken place during armed conflict, whether internal or international. These aspects present difficulties, not only in identifying and apprehending perpetrators, but also of accessing and securing witnesses and victims who face serious risks of reprisal for co-operating with the tribunals. Related to the overwhelming magnitude of international crimes are the attendant multiple objectives the prosecution of such crimes must serve, including stamping out the culture of impunity; halting and deterring future transgressions; and contributing towards national reconciliation, reconstruction and the restoration of peace and security.[7] Giving effect to these and achieving the proper balance among conflicting values, such as the interests of the international community and victims in having perpetrators punished and deterred from offending again, is a complicated undertaking.

The timeframe, background and methods for the establishment and operation of international criminal tribunals also create challenges. As is demonstrated by the Nuremberg and Tokyo Tribunals, and of late the ICTR and ICTY, as well as the Special Court for Sierra Leone (SCSL),[8] the

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5 See generally 'The criminal justice system (CJS) of England and Wales — Dispensing justice fairly and efficiently' http://ww.cjsonline.gov.uk/the_cjs/aims_and_objectives/index.html (accessed 28 February 2006).

6 As above.

7 See UN Security Council Resolution 955 (1994), 3453rd Meeting of 8 November 1994 for the establishment of the ICTR.

8 The SCSL was set up jointly by the government of Sierra Leone and the UN, pursuant to Security Council Resolution 1315 (2000) of 14 August 2000. It is mandated to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

establishment of these tribunals and the invocation of 'international criminal law' have often been triggered by or in the aftermaths of gross human rights violations and transgressions of international humanitarian law. The recently established International Criminal Court (ICC)[9] shares the same impetus. The IMT was accused of enforcing 'victor's' justice, while the UN Security Council's establishment of the ICTR and ICTY other than by treaty, as is the case with ICC, was challenged as illegal by accused persons.[10]

It follows that the ICTR, like the ICTY, has had to confront not only challenges to the legality of its establishment, as well as questions as to its independence and impartiality, but also questions relating to the legality, scope and content of the laws it applies. These are both substantive and procedural. Whether or not these international criminal tribunals are in the position and can in practice afford justice to persons appearing before them and whether they have succeeded in achieving the aims for which they were established, have thus been differently answered.

Some commentators have taken a very skeptical approach towards *ad hoc* international criminal tribunals. For instance, they have argued that the assumption that the establishment of the ICTY and ICTR would put an end to serious crimes, such as genocide, and take effective measures to bring to justice persons responsible for such crimes, are 'at least with regard to the Rwandan Tribunal . . . deeply flawed'.[11] The ICTR 'will have little, if any, effect on human rights violations of such enormous barbarity'.[12] The same commentators have also questioned the motive for establishing such tribunals. In respect of the ICTR, for instance, they have argued that its establishment was '[t]o deflect responsibility, to assuage the conscience of states which were unwilling to stop the genocide, or to legitimise the Tutsi regime . . . '[13]

It also follows from the above that, whether *ad hoc* international tribunals may afford lessons to national criminal justice systems may be a subject of contention.

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[9] The Court was established under the Rome Statute of the International Criminal Court. See UN Rome Statute of the ICC, A/CONF 183/9, 17 July 1998. The Statute was adopted by 120 states participating in the 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' on 17 July 1998. The Statute entered into force on 1 July 2002. The ICC is mandated to complement national jurisdictions in the prosecution, *inter alia*, of genocide, crimes against humanity and war crimes committed after 1 July 2002 when the Statute entered into force.

[10] See below.

[11] M Mutua 'From Nuremberg to the Rwandan Tribunal: Justice or retribution?' (2000) 6 *Buffalo Human Rights Law Review* 77-78.

[12] As above.

[13] As above. See also P Ironside 'Rwanda *gacaca*: Seeking alternative means to justice peace and reconciliation' (2002) 15 *New York International Law Review* 31 34.

This article argues that, despite the above criticisms, *ad hoc* international criminal tribunals and the international criminal justice system in general may provide some lessons that may enrich national legal and justice systems. International criminal tribunals possess a unique status and mandate *vis-à-vis* national courts and institutions which place them in a position to play a pivotal role in setting important standards that may guide and enrich not only international law, but national criminal justice systems. For instance, while national courts as well as international tribunals are mandated to impartially and fairly dispense justice, it is widely accepted that international courts are or should be the watchdogs for the protection of universal human rights norms, particularly where national systems are unwilling or unable to protect those rights.[14] Indeed, it is indisputable that international criminal tribunals, beginning with the IMT, and later the existing tribunals (including the ICTR, ICTY and ICC), have been established as a response of the human family to gross human rights violations within national systems rising to such levels of magnitude and barbarity as to shock human conscience and to warrant the response of the international community as a whole.

Against this background, many analysts have correctly argued that the roles of international criminal courts transcend mere adjudication of cases, to include such roles as '[e]xtending the rule of law and [bringing] national courts up to the standards of international law'.[15] It appears that the ICTR has accepted its special position, as can be discerned from a statement of the judges of the ICTR in one of the cases, *Barayagwiza v Prosecutor*.[16] In that case, the judges ordered the release of a defendant because of 'egregious'[17] delays in indicting and bringing him to justice following his arrest and detention, emphasising that:[18]

> The Tribunal — an institution whose primary purpose is to ensure that justice is done — must not place its imprimatur on such violations. To allow the

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14 S Stepleton 'Ensuring a fair trial in the International Criminal Court: Statutory interpretation and the impermissibility of derogations' (1999) 31 *New York Journal of International Law and Politics* 535.

15 n 14 above, 546.

16 *Jean-Bosco Barayagwiza v Prosecutor* ICTR-97-19 (Appeal Chamber), judgment of 3 November 1999. Hereafter, the abbreviation AC is used to indicate Appeal Chamber judgments and decisions, while TC is used to indicate judgments and decisions of Trial Chambers.

17 n 16 above, para 109.

18 n 16 above, para 112. On the prosecutor's application for review of the decision, however, the Appeals Chamber found that on the basis of newly discovered facts, the violations suffered by the appellant and the omissions of the prosecutor were not the same as those which emerged from the facts on which the decision to release the appellant was founded. Accordingly, the Appeals Chamber vacated the remedy of dismissal of the indictment and the release of the appellant. See *Prosecutor v Barayagwiza* Decision (Prosecutor's Request for Review or Reconsideration), judgment of 31 March 2000.

> appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals — including those charged with unthinkable crimes — would be among the most serious consequences of allowing the appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

The above position is critical in underscoring that, in responding to international crimes, however barbaric and heinous, internationally accepted norms, including those of fair trial and due process, cannot be suspended or derogated from — a position that is normally assailed by national criminal systems, as shown below.

Many national criminal systems need guidance, particularly from international criminal tribunals, when responding to contemporary crimes. There is no doubt that the reach of substantive criminal laws of states is constantly expanding, especially in response to contemporary concerns, about both national and transnational criminal activity, ranging from crimes in such areas as consumer protection, environmental control, to trafficking in drugs and humans, abductions, money laundering, trafficking in obscene materials and the threat posed by terrorism. Indisputably, in effecting such constant revisiting and expansion of national laws and enforcement agencies, as well as interstate co-operation in penal matters in order to respond to the ever-emerging contemporary problems of crime, there is a danger that internationally accepted norms might be endangered, including the fair trial and due process rights of suspects and accused persons.

The proliferation of organised crime always comes with new challenges, calling for constant re-thinking and strategising (nationally and through state co-operation), to ensure an effective response, but a key lesson from international criminal tribunals, is that such responses must also be in accord with internationally established norms, particularly universally recognised human rights and fundamental freedoms. International criminal tribunals also contain important insights regarding the implementation of a proper balance between the interests of society or humanity in dealing with crime, *vis-à-vis* the rights of individuals, including not only accused persons, but also witnesses and victims.

3 International criminal tribunals: Lessons for national criminal justice systems

As shown in the following analysis, despite challenges that *ad hoc* international criminal tribunals have had to address, most of which are novel in nature, the law applied and the jurisprudence engendered by those

tribunals, especially the ICTR, include important aspects that may enrich not only international law, but also national justice and legal systems. Those aspects relate to procedural as well as substantive legal issues. It is not possible within the confines of this article to deal with all such aspects. A few of these follow:

3.1 Stamping out impunity

International criminal tribunals, including the ICTR, are instrumental in responding to gross human rights violations constituting international crimes, the search for justice and truth for the victims of such crimes, and the struggle against impunity that have characterised the larger part of human history, especially in Africa.[19] The establishment of the ICC, with its mandate to assume jurisdiction, *inter alia*, when national courts are unable or unwilling to respond to the commission of international crimes, was also motivated by the need to stamp out the culture of impunity for gross human rights violations. Importantly, as shown below, these tribunals are also building blocks for involving or mobilising national criminal systems to take part in similar efforts. The success of the *ad hoc* tribunals in apprehending and bringing to justice the perpetrators of crimes has put in place a historical record of atrocities before the guilty could re-invent the truth. It has also galvanised international efforts for the establishment of the ICC.[20] The ICC, an organ of global jurisdictional reach,[21] and whose Rome Statute has been ratified widely, has the potential of completing the tribunal's efforts of stamping out impunity. States ratifying the Rome Statute of the ICC are obligated to assume jurisdiction over international crimes; failure to do so compels the ICC to assume jurisdiction.[22]

As noted earlier, for over half a century since the efforts at Nuremberg and Tokyo, the world has experienced situations of criminality involving gross and widespread violence amounting to international crimes, but no judicial enforcement, whether international or national, took place.

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19 See generally GW Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003) 53-106; K Ancheampong 'The Rwandan genocide and the concept of the universality of human rights' (1992-1993) 8 *Lesotho Law Journal* 87; Human Rights Watch 'The scars of death: Children abducted by the Lord's Resistance Army in Uganda' Report of September 1997, http://hrw.org/reports97/uganda/index.html (accessed 28 February 2006).

20 See generally Cassese (n 4 above) 341-342; MP Scharf 'The politics of establishing an international criminal court' (1995) 6 *Duke Journal of Comparative and International Law* 167; GW Mugwanya 'Expunging the ghost of impunity for severe and gross violations of human rights and the commission of *delicti jus gentium*: A case for the domestication of international criminal law and the establishment of a permanent International Criminal Court' (1999) 8 *Michigan State University Journal of International Law* 765.

21 Cassese (n 4 above) 341.

22 See para 10 Preamble and arts 1, 15, 17, 18 & 19 Rome Statute.

Even long established national courts were either unwilling or unable to respond to gross human rights violations and the transgressions of international humanitarian law. In the case of Rwanda, before the establishment of the ICTR in 1994 to deal with the country's bloodbath and criminality, genocide targeting a minority group had taken place in 1959, 1963, 1966, 1973, 1990 and 1992,[23] but neither the international community nor Rwanda's courts and institutions took action to punish the perpetrators. Other than those of Rwanda, national courts in other countries where international crimes were committed took no action, because many states had not embraced the notion of universal jurisdiction in international law in order for them to assume jurisdiction over crimes not committed by their nationals and occurring outside their territorial jurisdictions.[24] Countries where such crimes occurred did not take legal action to bring offenders to justice, either because they were unable or unwilling to do so because of factors such as the breakdown of the legal system as a result of the crimes, or because those in power participated in the crimes, or states chose to grant immunities and amnesties, instead of criminal prosecutions for fear that prosecutions may not promote reconciliation.

International criminal tribunals, including the ICTR, are instrumental in dealing with impunity. In the case of Rwanda's 1994 bloodbath, the massacres dismantled almost the entirety of the country's judicial system and rendered Rwanda virtually incapable of implementing the massive task of bringing to justice all the perpetrators of the crimes. Those who masterminded the genocide, mainly members of the self-proclaimed interim government of 1994 and senior members of the Rwandan army, had fled into exile and established their seat in Zaire from where they prevented other refugees from returning. They also planned and launched attacks against Rwanda, leading to more deaths and the exacerbation of tensions and violence. In such circumstances, the UN Security Council deemed it necessary to establish an independent and impartial international criminal tribunal to bring to justice

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[23] MM Wang 'The International Criminal Tribunal for Rwanda: Opportunities for clarification, opportunities for impact' (1995) 27 *Columbia Human Rights Law Review* 180-181; Provisional *Verbatim* Records of the UN Security Council, 3453rd meeting, 8 November 1994, New York, UN Doc S/PV.3453) 13-15 (deliberations by Rwanda's representative).

[24] Universal jurisdiction stems from the notion that some international prohibitions (such as the core international crimes of genocide, crimes against humanity and war crimes) are so important that their commission by anyone, anywhere, warrants any nation to assume jurisdiction. Thus, under universal jurisdiction, the nationality of the offender or the territory where the crime is perpetrated is immaterial. Unfortunately, for many states to assume jurisdiction, they consider the nationality and territory where the crime is committed, hence the wide recognition of states of nationality and territorial jurisdiction in international law. On the different grounds of jurisdiction in international law, see generally T Hillier *Principles of public international law* (1999) 124-141.

those responsible for the genocide and other transgressions of international humanitarian law in Rwanda and neighbouring states between January and December 1994.

Since the issuing of indictments against eight accused persons, beginning on 28 November 1995, the ICTR has apprehended and brought to its detention facility in Arusha, Tanzania, 69 persons, comprising mainly those persons who masterminded the 1994 genocide in Rwanda. They include the Prime Minister of the 1994 self-proclaimed interim government, as well as many other members of that government. There are also senior army officials, high-ranking central and local government officials, intellectuals and church and other influential personalities who played a key role in the perpetration of the genocide. Twenty-five of these have already been tried, of which 22 have been convicted (including the Prime Minister) and three have been acquitted. Cases involving 25 other persons are in progress, while the rest will be initiated in the coming years. The ICTY, based at The Hague, has similarly succeeded in apprehending and bringing to justice several key perpetrators of massacres and other violations of international humanitarian law in the former Yugoslavia.

Through its law and jurisprudence, the ICTR is noteworthy for involving states and their national institutions in the discharge of its mandate. Arguably, this involvement has laid the foundation for the dismantling of the culture of impunity for international crimes beyond the life of the ICTR. National criminal justice systems, especially those that are parties to the Rome Statute of the ICC, are to take part in this effort as a treaty obligation. Importantly, the ICTR has identified principles that states must observe in their response to international crimes. They are the following:

First, it is the obligation of states to co-operate with international criminal tribunals. Article 28(1) of the ICTR Statute provides that states *shall* co-operate with the ICTR in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. This provision reaffirms an earlier UN Security Council Resolution on the same subject.[25] Under article 28(2), states are under an obligation to comply without undue delay with any request for assistance or order issued by a Chamber of the ICTR, including, but not limited to:

- the identification and location of persons;
- the arrest or detention of persons;
- the surrender or the transfer of the accused to the ICTR;
- the taking of testimony and the production of evidence; and
- the service of documents.

[25] See eg UN Security Council Resolution 955 (1994) (n 7 above) and Resolution 978 of 27 February 1995.

The obligations laid down in article 28 prevail over any legal impediment to the surrender or transfer of any accused or of a witness to the ICTR existing under the national law or extradition treaties of the state concerned.[26] States cannot invoke national laws or the absence of extradition treaties between them and the ICTR to refuse to co-operate with the ICTR. Even where information in possession of a state may raise concerns of public or state security, states are under an obligation to co-operate.[27] ICTR judges have on occasion reiterated the obligation of states to co-operate with the Tribunal, sometimes issuing subpoenas to compel states to co-operate with the Tribunal's orders, including for allowing witness appearance, interviews or access to relevant evidence.[28] Under ICTR rule 7 *bis*, in the event of a failure by a state to co-operate, the President of the ICTR shall notify the Security Council.

Also important is the ICTR's involvement of national criminal justice systems in the prosecution of international crimes. Pursuant to UN Security Council Resolutions 1503 (2003) and 1534 (2004), both the ICTR and ICTR are scheduled to complete trials by 2008 and appeals by 2010. In order to effectively complete its mandate, like the ICTY, the ICTR will transfer some cases to national courts for prosecution, pursuant to rule 11 *bis* of its Rules of Procedure and Evidence. The ICTR's transfer of cases to states is not only critical in involving states in the fight against impunity; it also underscores principles that must be observed by national courts in responding to international crimes. Under rule 11 *bis*, transfer of cases for which an indictment is already confirmed is a judicial determination. The objective of this is to ensure that ICTR judges are satisfied that the national court is adequately prepared and capable of giving a fair trial. It follows that the ICTR Trial Chamber, *proprio motu* or at the request of the prosecutor, after having given the prosecutor and the accused (if he or she is in the custody of the Tribunal) the opportunity to be heard, may order such referral '[if satisfied . . . that the accused will receive a fair trial in the courts of the state concerned and that the death penalty will not be imposed or carried out'.[29]

In order to ensure the above, the ICTR prosecutor may send observers to monitor proceedings in the courts of the state concerned.[30]

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26 Art 58 ICTR Statute.

27 See eg Rule 66(C) ICTR Rules of Procedure and Evidence.

28 See eg *Prosecutor v Bagosora et al,* ICTR-98-41 *Decision on Prosecutor's Request for a Subpoena Regarding Witness BT*, decision of 28 August 2004; *Prosecutor v Bagosora et al, Request to the Republic of France for Co-operation and Assistance Pursuant to Article 28 of the Statute*, decision of 22 October 2004; *Prosecutor v Bagosora et al, Request to the Government of Rwanda for Co-operation and Assistance Pursuant to Article 28 of the Statute*, decision of 31 August 2004.

29 Rule 11 *bis* (C). Under rule 11*bis* (H), a Trial Chamber decision may be appealed by the accused or the prosecutor as of right.

30 Rule 11 *bis* (D)(iv).

Moreover, at the request of the ICTR prosecutor, and after affording opportunity for the state's authorities to be heard, an order of transfer may be revoked by the ICTR Trial Chamber before the accused is found guilty or acquitted by the national court.[31] The state shall comply with such revocation in line with article 28 of the Statute which obligates states to co-operate with the ICTR.[32]

From the above, the ICTR may be credited for contributing to efforts for the elimination of impunity for gross human rights violations constituting international crimes, and for laying an important foundation for involving states in this effort. It is also important to note that the ICTR law identifies principles that states must observe in dealing with international crimes.

3.2 Any court or tribunal, whether 'special' or otherwise, must be established by law, and must respect fair trial and due process guarantees

An important aspect of ICTR jurisprudence which may guide and/or restrain states, particularly today when states around the world are taking steps to respond to contemporary crimes such as terrorism, arises from the ICTR's construction of the notion 'established by law'. This jurisprudence underscores standards that must be met by any court or tribunal, whether specially constituted to deal with special crimes or not. Such courts or tribunals must be established by law, and must provide all guarantees of fairness, justice and even-handedness in full conformity with internationally recognised human rights norms.

The ICTR and the ICTY have met challenges by accused of their legality. The question was posed whether these tribunals were *established by law*, and whether they are competent to try anyone. The fact that both the ICTR and ICTY were established, not by treaty or general consent of states (as is the case with the ICC), but by UN Security Council Resolutions under chapter VII of the UN Charter, has raised the question whether the tribunals were legally established. Such issue is critical, since it is widely accepted that a vital component of the right to fair trial and due process is that trials must be conducted by tribunals or courts *established by law*.[33] Thus, if tribunals were 'illegally' established, it would render their trials equally 'illegal' and 'illegitimate'. Similarly, it would generally render an inquiry into their contribution to criminal justice somewhat superfluous.

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31 Rule 11 *bis* (F).
32 Rule 11 *bis* (G).
33 See eg art 14(1) International Covenant on Civil and Political Rights; art 6(1) European Convention on Human Rights; art 8(1) Inter-American Convention on Human Rights.

As shown below, an examination of the law under which the Tribunals were established, and the construction given to that law by the Tribunals, demonstrate that the Tribunals are not illegal or illegitimate. Importantly, the Tribunal's construction of the guarantee of trials by courts or tribunals *established by law* also contains aspects that may guide approaches in national systems, particularly at the present time when states are creating special courts or procedures to respond to contemporary crimes, such as terrorism. The jurisprudence also underscores that state sovereignty cannot be invoked when international crimes are at issue, a position critical for efforts to deal with those crimes.

Chapter VII of the UN Charter, under which the ICTR and ICTY were established, empowers the UN Security Council to deal with threats to international peace and breaches of international peace, but it does not expressly provide the Council with powers to establish criminal tribunals in order to deal with such threats. Despite the absence of an explicit provision for the establishment of judicial institutions, such as courts or tribunals, such establishment is legitimately within the powers of the UN Security Council, a body established by treaty and thus by the consent of states, to choose the judicial process, as one of the measures to deal with threats to or breaches of international peace under chapter VII of the Charter. This position is particularly defensible in view of the now widely accepted nexus between international justice, human rights and international peace, as summarised by the UN Secretary-General in the following statement: '[T]here can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law.'[34]

This position has been reiterated in a recent UN General Assembly special resolution in remembrance of the Rwandan genocide, where the Assembly observed that:[35]

> Exposing and holding perpetrators, including their accomplices, accountable, as well as restoring the dignity of victims through acknowledging and commemorating their suffering would guide societies in the prevention of future violations.

The jurisprudence of the ICTR and ICTY on the legality of the Tribunals was addressed in two cases, *Prosecutor v Kanyabashi*[36](for the ICTR), and *Prosecutor v Tadic*[37] (for the ICTY).

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[34] Mr Kofi Annan's statement following the delivery by the ICTR of its first judgment on genocide (the *Akayesu* judgment), the first such judgment by an international court. The statement is available at http://www.ictr.org/about.htm (accessed 28 February 2006).

[35] UN Doc A/RES/58/234, Plen 39(b), 23 December 2003.

[36] *Prosecutor v Kanyabashi* ICTR-96-15, decision on the Defence Motion on Jurisdiction, 18 June 1997.

[37] *Prosecutor v Tadic*, Decision on the Defence Motion on Jurisdiction, 10 August 1995 (TC), and the Appeals Chambers decision in the same case, ie Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

In the *Kanyabashi* case, the accused challenged, among others, the legality of the ICTR, arguing that the UN Security Council lacked the ability to legally establish a criminal tribunal under chapter VII of the UN Charter. It was argued that a judicial institution is not a measure contemplated by chapter VII of the Charter for dealing with threats to peace or breaches of international peace. The accused also submitted that the establishment of the ICTR violated the sovereignty of Rwanda as the Tribunal was not established by treaty through the UN General Assembly. Moreover, Kanyabashi argued that the ICTR could not have jurisdiction over individuals directly under international law. The Trial Chamber dismissed Kanyabashi's motion on the following grounds.

First, the Trial Chamber found that article 39 under chapter VII of the UN Charter[38] affords the UN Security Council a margin of discretion 'in deciding when and where there exists a threat to international peace'.[39] While noting that it was not within the competence of a judicial institution such as the Tribunal to objectively assess the factors the Security Council may consider prior to determining which situation constitutes a breach of peace or threat to international peace, the Trial Chamber found that the human rights situation in Rwanda in 1994 presented some discernible and objective factors in such assessment. Thus, the Trial Chamber[40]

> took judicial notice of the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into the neighbouring countries which by itself entailed a considerable risk of serious destabilisation of the local areas in the host countries where the refugees had settled.

Moreover:[41]

> The demographic composition of the population in certain neighbouring regions outside the territory of Rwanda . . . showed features which suggest[ed] that the conflict in Rwanda might eventually spread to some or all of these neighbouring regions.

The Trial Chamber's consideration of the issue of refugees fleeing to neighbouring countries, alongside the possibility of violence spilling over into neighbouring states, as constituting threats to international peace, is defensible and finds support in research and scholarship.[42]

Concerning Kanyabashi's contention that the establishment of a

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38 Art 39 of the UN Charter provides that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'.

39 n 36 above, para 20.

40 n 36 above, para 21.

41 As above.

42 See eg L Henkin 'Humanitarian intervention' in L Henkin & L Hargroves (eds) *Human rights: An agenda for the next century* (1994) 383, 389; Mugwanya (n 19 above) 121-122.

judicial institution for prosecuting genocide and other transgressions of international humanitarian law was not a measure contemplated by chapter VII of the UN Charter for restoring international peace, the Trial Chamber held that article 41 of the Charter provides a non-exhaustive list of actions that the Security Council may take. In order to respond to threats to the peace, breaches of the peace and acts of aggression, article 41 of the UN Charter provides that the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the UN to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. A judicial institution 'clearly falls within the ambit of measures to satisfy that goal'.[43] As noted above, this approach gives effect to the established recognition of the nexus between justice, human rights and peace. Enforcing accountability for human rights violations and transgressions of the rule of law through the judicial process breaks the cycle of impunity for those transgressions and may contribute to sustainable respect for the rule of law and peace in society.

The *Kanyabashi* decision also invokes the ICTY appeals decision in *Tadic*. This decision addresses most of the issues raised in *Kanyabashi* in detail. The *Tadic* decision recognises that the powers or discretion of the UN Security Council under article 39 are not totally unfettered,[44] but that the Council[45]

> has a very wide margin of discretion . . . to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace.

The establishment of a judicial institution fell within the scope of article 41, which provides for 'measures not involving the use of force' (as opposed to measures of a military nature under article 42, or 'provisional measures', under article 40).[46] The measures set out in article 41[47]

> are merely illustrative examples which obviously do not exclude other measures *such as the establishment of a judicial body*. All that the article requires is that they do not involve 'the use of force'. It is a negative definition.

Whether or not a prosecution by a tribunal was an appropriate measure was a matter that fell within the discretion of the Security Council. In any case,[48]

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43 *Kanyabashi* (n 36 above) para 27.
44 *Tadic* (n 37 above) para 29.
45 n 37 above, para 32.
46 n 37 above, paras 34-36.
47 n 37 above, para 35 (my emphasis).
48 n 37 above, para 39.

> [i]t would be a total misconception of what are the criteria of legality and validity to test the legality of such measures *ex post facto* by their success or failure to achieve the ends (in the present case, the restoration of peace . . .).

Addressing whether the Tribunal was *established by law* as required in the international human rights law instruments mentioned earlier, the Appeals Chamber noted the differences between most municipal legal systems, on the one hand, and international legal settings on the other: The former provides clear-cut divisions of labour between the legislature, executive and judiciary, but under the latter, the divisions are not so clear-cut.[49] It was thus not possible to apply the obligation imposed by the requirement that courts be *established by law* on states (ie the observance of strict division of labour to ensure that that the administration of justice is not a matter for executive discretion, but is regulated by laws made by the legislature) to the international legal setting.[50] Instead, two constructions of the term *established by law* are appropriate to the international legal setting. First, it meant the 'establishment of international criminal courts by a body which, though not a parliament, has limited power to take binding decisions'.[51] The Security Council, when acting under chapter VII of the UN Charter, fulfils this test, since it makes decisions binding by virtue of article 25 of the Charter.[52] The second and most sensible construction of the term 'established by law' is that the establishment must be in accordance with the rule of law. In other words,[53]

> [i]t must be established in accordance with the proper international standards; it must provide all guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments.

It appears from the *Tadic* and *Kanyabashi* decisions that these two constructions must be read together: Thus the body establishing the court must be 'competent' in keeping with the relevant legal procedures,[54] and must ensure the guarantee of a fair trial highlighted above. As shown below, the ICTR and ICTY are established as independent

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49 n 37 above, para 43. Eg, regarding judicial functions, 'the International Court of Justice is clearly the *principal* judicial organ' (UN Charter art 92). There is, however, no legislature in the technical sense of the term, in the UN system and, more generally, no parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects. n 37 above, para 43.

50 n 37 above, para 43.

51 n 37 above, para 44.

52 As above.

53 n 37 above, para 45.

54 *Kanyabashi* (n 36 above) para 43; *Tadic* (n 37 above) paras 42 & 45. The *Tadic* Appeals decision thus explains that an international criminal court could not be set up 'at the mere whim of a group of governments' (n 37 above, para 42).

organs, and are obligated to accord all persons appearing before them the right to a fair trial and due process.

The foregoing jurisprudence appears competently to address the legality of the *ad hoc* tribunals for Rwanda and the former Yugoslavia. As shown above, determining whether a court or tribunal was legally established in a municipal setting may be easier than making a similar determination in an international law setting, which lacks clearly defined divisions of labor between the legislature, executive and judiciary. The jurisprudence engendered by the decisions above addressed a complex question. Their approaches to construing the UN Charter appear correctly to construe the relevant provisions in their context and in light of their objects and purposes, an approach sanctioned under the Vienna Convention on the Law of Treaties (1969). A restrictive construction of Security Council powers and the measures the Council may deploy under articles 39 and 41, as excluding the establishment of tribunals to try those involved in massive transgressions of international humanitarian law, would be incompatible with the terms of those provisions in their context and in light of their objects and purposes. The provisions give examples of the measures the Council may take without seeking to be exhaustive, thereby allowing the Council a margin of discretion necessary to deal with threatening breaches of peace or threats to peace.

While the above jurisprudence addressed the legality of the two *ad hoc* international tribunals, certain other aspects are relevant not only to international law, but to the rule of law and practices in national legal systems in general. For instance, the *Tadic a*ppeals decision explained the obligation imposed on states by the requirement that trials must be conducted by courts *established by law*. As pointed out above, the Tribunal noted that many national legal systems clearly define the division of labour among the legislature, executive and judiciary. It follows that the requirement that trials must be conducted by courts or tribunals *established by law* imposes on states the obligation to observe a strict division of labour to ensure that the administration of justice is not a matter for executive discretion, but is regulated by laws made by the legislature.[55]

In addition to fulfilling the above somewhat procedural requirements, national systems, like the international system, must observe *substantive* obligations, namely, that any court or tribunal established by them, whether 'special' or 'extraordinary', must genuinely afford the accused the full guarantees of fair trial.[56] This approach is pertinent in guiding

[55] n 37 above, para 43.

[56] n 37 above, para 45, also citing, *inter alia*, the approaches of the Human Rights Committee (established under the International Covenant on Civil and Political Rights of 1966) in construing art 14 of the Covenant. See eg the Committee's General Comment on art 14, HR Comm 43rd session, Supp No 40 para 4, UN Doc A/43/40 (1988); *Caribono v Uruguay*, HR Comm 159/83, 39th session Supp No 40 UN Doc A/39/40.

and restraining states and the international community, particularly today when states are trying to respond to organised crimes such as terrorism, including by establishing special or extraordinary courts.[57] Invoking the practices of the UN Human Rights Committee, the *Tadic* appeals decision notes that such courts or tribunals are subjected to close scrutiny in order to ascertain whether they ensure compliance with fair trial requirements.[58]

Also important are the Tribunals' approach to the limits of state sovereignty when international crimes, such as crimes of genocide, crimes against humanity and war crimes, are at issue. Perpetrators of such crimes cannot invoke state sovereignty and the doctrine of *jus de non evacando*[59] against the jurisdiction of international tribunals. Those crimes are a concern of the entire human family and transcend state sovereignty; their prohibition assumes a universal character.[60] Implied in these statements is the urgent need for states to embrace the notion of universal jurisdiction discussed earlier, not only to co-operate with international criminal tribunals, but also to domesticate international criminal law in order to deal particularly with the core crimes of genocide, crimes against humanity and war crimes.[61] Such domestication should involve the codification of those crimes in state penal laws for prosecution before national courts. States should also co-operate, not only with international tribunals, but with each other in extraditing offenders and lending assistance to each other in the investigation, prosecution and punishment of core international crimes.

3.3 Impartiality and independence

In addressing accused persons' challenges regarding its independence and impartiality, the ICTR has provided jurisprudence that enriches

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57 See generally F Reinares 'Democratic regimes, internal security policy and the threat of terrorism' (1998) 44 *Australian Journal of Politics and History* 351, summary available at http://www.blackwell-synergy.com/links/doi/10.1111/1467-8497.00026 (accessed 18 August 2005); 'Secret terror courts considered' *BBC News* 9 August 2005, available at http://news.bbc.co.uk/1/hi/uk_politics/ 4133564.stm (accessed 10 August 2005); 'Britain mulls special courts for terror suspects' *Associated Press* 9 August 2005, available at http://www.foxnews.com/story/0,2933,165185,00.html (accessed 11 August 2005) (reporting that the British government was considering creating special, closed-door anti-terror courts for pre-trial hearings to determine how long suspects can be held without charge).

58 *Tadic Appeals Decision* (n 37 above) para 45.

59 This principle is derived from constitutional law in civil law jurisdictions. This principle means that persons accused of certain crimes should retain their right to be tried before the regular domestic criminal courts rather than by politically founded *ad hoc* tribunals which, during emergencies, may fail to provide impartial justice. See *Kanyabashi* (n 36 above) para 31; *Tadic Appeals Decision* (n 37 above) paras 61-64.

60 *Tadic* (n 37 above) paras 55-64; *Kanyabashi* (n 36 above) paras 33-36.

61 See generally Mugwanya (n 20 above).

international law. That jurisprudence may also guide national courts. The right to a trial before impartial and independent courts or tribunals is also universally recognised as a key component of the rights to fair trial and due process.[62] The ICTR's jurisprudence enriches our understanding of these rights in important respects, and of the role of judges. As shown below, the jurisprudence identifies objective and subjective criteria delineating the concepts of independence and impartiality. Some aspects of the criteria identified by the ICTR may guide national courts in different ways. Importantly, ICTR jurisprudence develops an aspect uncommon in common law systems, namely judges' intervention and questioning of witnesses. Such intervention and questioning are critical in the search for the truth. ICTR jurisprudence elucidates principles for distinguishing such legitimate intervention by judges from bias or lack of impartiality.

Historically, challenges to tribunals' independence and impartiality are commonplace. The Nuremberg Tribunal faced critical challenges to its in independence and impartiality, not only from the defendants but also from a number of scholars. The IMT has been criticised as 'a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law committed during war'.[63] Challenges against the independence of the IMT included, first, that the 'victorious' states established the IMT and appointed their nationals as judges.[64] Secondly, 'these judges oversaw the collection of evidence, [and] participated in selecting the defendants and in the drafting of the indictments'.[65] It was also argued for the defendants that the judges could not pass judgment on them since the 'victor' states were equally culpable for atrocities.[66] Despite these, it may be argued that, as a matter of international law, the victors were competent to try members of the defeated armed forces for violations of the law and customs of law.[67] The judges' participation in investigations and preparation of indictments may be impugned, but considering that the only alternative responses at the time were 'victors' vengeance' (ie summary execution) or leaving the perpetrators to go free (thus perpetuating impunity), the IMT trial may be credited as a triumph of justice and the rule of law.[68]

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62 See eg art 14(1) International Covenant on Civil and Political Rights; art 6(1) European Convention on Human Rights; art 8(1) Inter-American Convention on Human Rights; art 7(1)(d) African Charter on Human and Peoples' Rights; art 10 Universal Declaration of Human Rights.

63 V Morris & M Scharf *The International Criminal Tribunal for Rwanda* (1998) 10.

64 As above.

65 As above.

66 As above.

67 As above.

68 As above.

As noted above, the ICTY and ICTR were not established by so-called 'victors' (the two states), but by the UN Security Council acting on behalf of the international community. As shown below, the ICTR and ICTY judges are not appointed by the two states, and those judges do not take part in investigations or preparation of indictments as such. They only confirm indictments independently prepared by the prosecutor. Despite these, as shown below, defendants appearing before the Tribunals have impugned their independence and impartiality. The Tribunal thus has had occasion to address those challenges.

The meaning and scope of the independence and impartiality of courts and tribunals have been the subject of debates and deliberations by international human rights institutions. Under the oldest regional human rights system, the European human rights system, the independence of a court or tribunal may be determined by the manner of appointment and duration of office, guarantee from outside interference and the appearance of independence, among other factors.[69] According to the African Commission on Human and Peoples' Rights (African Commission) (established under the African Charter on Human and Peoples' Rights (African Charter) of 1981), once it is found that a court or tribunal is partial on face value, for instance due to its membership or composition or the mode of appointment, that partiality overrides the claimed good character or qualifications a member or members of such court or tribunal may possess.[70]

The Statute of the Tribunal and Rules of Procedure embrace a number of factors that are of key importance to ensuring the independence and impartiality of judges and the Tribunal as a whole. First, the Tribunal is governed by its own Statute and Rules of Procedure and Evidence adopted by the judges pursuant to article 14 of the Statute. Under rule 89 of those Rules, the Tribunal is not bound by national rules of procedure and evidence. Instead, it can apply those rules which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.[71]

Under article 12 of the Statute, both permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, the Tribunal's Statute provides that due account shall be taken of the experience of

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69 See generally F Jacobs & R White *The European Convention on Human Rights* (1996) 138.

70 Communication No 60/91, *Constitutional Rights Project v Nigeria* para 37; Communication No 87/93, *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* para 31; and Communication No 67/91, *Civil Liberties Organisation v Nigeria (in respect of the Nigeria Bar Association*) para 19.

71 Art 89(B) Statute of the ICTR.

the judges in criminal law, international law, including international humanitarian law, and human rights law.[72] The judges of the ICTR, like the ICTY, are elected by the UN General Assembly from a list of names submitted by the UN Security Council. The procedure followed is intended to prevent undue influence from any member state or states in the composition and membership of the Tribunals' judges.[73] In further elaboration of the notion of independence and impartiality under article 12 above, rule 15(A) provides that:

> A judge may not sit at trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in such circumstances withdraw from that case.

Furthermore, under rule 15(D), no member of the Appeals Chamber shall hear any appeal in a case in which another judge of the same nationality sat as a member of the Trial Chamber.

Besides the provisions of its Statute and Rules, in practice, the judges of the ICTR have elucidated the meaning and scope of the requirement of impartiality and independence of courts or tribunals in the course of adjudicating case challenging its independence and impartiality. This has afforded the Tribunal the opportunity to further illuminate the scope and contents of those concepts in international law, and the jurisprudence engendered is also relevant to national legal systems.

In the case of *Prosecutor v Kayishema & Ruzindana*,[74] for instance, the appellant (Kayishema) challenged the independence and impartiality of the ICTR. He argued that the UN was partially responsible for the genocide that occurred in Rwanda in 1994, and that since the Tribunal was established by this same UN, this tainted the legitimacy and independence of the Tribunal.[75] He further claimed that the Tribunal was under pressure from Rwanda to 'systematically [deliver] verdicts against one ethnic group'.[76] Furthermore, the appellant contended that[77]

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72 Art 12 Statute of the ICTR.

73 Eg, in appointing the 11 permanent members of the Tribunal, pursuant to an invitation for nomination of judges by the UN Security-General addressed to all permanent members of the UN and non-member states maintaining permanent observer missions at the UN, each state may nominate up to two candidates meeting the qualifications set out in art 12, and no two of whom shall be of the same nationality, and neither of whom shall be the same nationality as any judge who is a member of the Appeals Chamber. The Secretary-General forwards the nominations received to the Security Council. From those nominations, the Council establishes a list of no less than 22 and no more than 33 candidates, taking due account of the adequate representation on the ICTR of the principal legal systems of the world. The list is then forwarded to the General Assembly which elects the 11 judges. Only candidates receiving an absolute majority of votes become judges.

74 *Prosecutor v Kayishema & Ruzindana* (AC) ICTR-95-1, 1 June 2001.

75 n 74 above, paras 52-53.

76 n 74 above, para 53.

77 n 74 above, para 52.

> the idea of the Tribunal administering justice to contribute to the process of national reconciliation and the restoration and maintenance of peace runs counter to the concept of justice as understood by states under the rule of law.

The Appeals Chamber dismissed the appellant's claims, *inter alia*, because they were not substantiated by evidence (for example the alleged pressure from Rwanda),[78] or irrelevant to the independence and impartiality of the Tribunal (for example the alleged involvement of the UN in the Rwanda events),[79] but also because the claims could not meet the objective and subjective elements delineating the concepts of independence and impartiality.

Regarding the objective criteria, the *ratio* in the *Kayishema* judgment is that independence and impartiality of a court or tribunal may be discerned from an examination of its jurisdiction and standing *vis-à-vis* other institutions, including those responsible for establishing such court or tribunal. In the case of the ICTR and ICTY, the objective test is that they were established by the UN Security Council as judicial organs with jurisdiction, and as entirely independent of the organs of the UN.[80] As an independent entity,[81]

> [the Tribunal] is not in place to interpret the actions of the United Nations in general, and . . . as an *ad hoc* Unite Nations judicial organ, the Tribunal issues decisions within its jurisdiction, as established by Security Council Resolution 955, and within the inherent jurisdiction of any tribunal.

The contents of the subjective elements of independence and impartiality of courts or tribunals are wide-ranging. According to *Kayishema*, the Appeals Chamber explained as follows: A judge is presumed to be impartial until proven otherwise. This is a subjective test: Impartiality relates to the judge's own personal qualities, his intellectual and moral integrity. A judge is bound only by his conscience and the law. That does not mean that he rules on cases subjectively, but rather that he rules according to what he deems to be the correct interpretation of the law. An unbiased and knowledgeable observer is thus sure that his objectivity does not give the impression that he is not impartial, even though in fact he is. Moreover, before taking up his duties, each judge makes a solemn declaration, obliging him to perform his duties and exercise his powers as a judge 'honourably, faithfully, impartially and conscientiously'.[82]

There is no doubt that the above requirements enrich international law and may be relevant to national courts. This jurisprudence under-

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78 n 74 above, para 61.
79 n 74 above, para 59.
80 n 74 above, para 55.
81 n 74 above, para 56.
82 n 74 above, para 55.

scores, *inter alia*, that justice must not only be done, but that it must be seen to be done. This principle, though widely recognised in national systems, must guide judges when confronted by requests that they should recuse themselves in certain cases. The ICTR's jurisprudence is noteworthy for underscoring, *inter alia*, that judges examine all surrounding circumstances to determine whether objectively such circumstances give rise to an appearance of bias.[83]

However, also salient to national systems, especially those of common law countries, is the jurisprudence that has arisen from ICTR and ICTY judges' interventions and questions put to witnesses during testimony. Such interventions, which are particularly rare in common law systems, as opposed to civil law systems, are important in the search for the truth. In a number of cases, however, such questioning or interventions by ICTR judges or statements made by them have been challenged by accused persons as demonstrating bias on the part of the judges.

Under the ICTR and ICTY Rules of Procedure and Evidence, which are drawn largely from rules of procedure and evidence from the common law and civil law systems, judges are empowered to have control over the mode and order of interrogation of witnesses as well as the presentation of evidence in order (a) to make interrogation and presentation effective for the ascertainment of the truth and (b) to avoid needless consumption of time.[84] Moreover, a judge may put questions to a witness at any stage of his or her testimony.[85]

The latter is critical in the search for the truth. When exercising their powers under the Rules above, defendants facing trials have sometimes raised issues of bias on their part. The issue is: How do you distinguish the legitimate exercise by the judges of their powers and statements or actions from bias or lack of impartiality? This is a complex question. The case of *Rutaganda v Prosecutor*,[86] which also addresses the notions of impartiality, identifies pertinent principles or criteria that may direct the interpretation of impartiality, and guide judges on issues of bias. In the *Rutaganda* case, the Appeals Chamber explained that[87]

> [t]here is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
> A A judge is not impartial if it is shown that actual bias exists.

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83 See eg *Rutaganda v Prosecutor* ICTR-96-3, Appeals Chamber Judgment, 26 May 2003. See also below.

84 Rule 90(F) ICTR Rules of Procedure and Evidence.

85 Rule 85(B), similar to Rule 85 of the ICTY Rules of Procedure and Evidence.

86 n 83 above.

87 n 83 above, para 39, citing ICTY Appeals Judgment in *Frundzija* para 189.

B There is unacceptable appearance of bias if:
  i a judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if a judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a judge's disqualification from the case is automatic; or
  ii the circumstances would lead to a reasonable observer, properly informed, to reasonably apprehend bias.

The test of the 'reasonable observer', according to the Appeals Chamber, means that[88]

> . . . the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold.

From the above case, it appears that, although judges have the powers to make interventions in exercising their powers to control proceedings, it must be borne in mind that any judge is under an obligation to[89]

> rule on cases according to what he deems to be the correct interpretation of the law, by ensuring that his behavior does not give the impression to an unbiased and knowledgeable observer that he is not impartial.

3.4 Material jurisdiction, law applicable and key aspects of jurisprudence engendered

The jurisdiction of the ICTR, like the ICTY, is limited to the prosecution of the core international crimes of genocide, crimes against humanity and what are collectively known as war crimes.

Under article 2 of the ICTR Statute, the crime of genocide is defined as the commission of enumerated criminal acts with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Those criminal acts are: killing members of the group; causing bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part; imposing measures intended to prevent birth within the group; and forcibly transferring children of the group to another group.

Under article 2(3) of the ICTR Statute, besides the substantive crime of genocide, the Tribunal has the competence to punish complicity in genocide and what may be described as inchoate acts of genocide, defined under the Statute as 'other acts of genocide': conspiracy to commit genocide; direct and public incitement to commit genocide; and attempt to commit genocide.

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88 n 87 above, para 40.
89 n 87 above, para 41.

Crimes against humanity are defined under article 3 of the ICTR Statute as certain enumerated crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Those crimes are: extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts.

War crimes encompass certain enumerated criminal acts or violations if committed in conjunction with the war; they thus require a nexus with the war.[90] In international law, war crimes are laid down in the four Geneva Conventions of 1949, which establish rules applicable to international conflicts.[91] The 1977 Protocol I to these Conventions equally applies to international conflicts. If a conflict is not international, only 'common article 3' to these Conventions is applicable. This article contains limited guarantees of protection.[92] Protocol II to the Conventions also relates to non-international conflicts, and will come into play for states parties to it.[93] The ICTR Statute criminalises for the first time common article 3 and Protocol II. This is an important development, which may influence national courts to extend their legal norms and deal with crimes committed during non-international conflicts. The ICTR provides for a wide range of crimes meant to protect civilians during such conflicts. These are, among others, violence to life, health and physical or mental well-being, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishment, taking of hostages, acts of terrorism, outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced persecution and any form of indecent assault, the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording judicial guarantees which are recognised as indispensable by civilised peoples, and threats to commit any of the foregoing acts.[94]

In rendering international criminal justice, the *ad hoc* Tribunals for Rwanda and the former Yugoslavia have made a notable contribution to defining these crimes and to developing international criminal law and jurisprudence. As noted earlier, many national legal systems have not embraced universal jurisdiction over international crimes. The domestication of international criminal law by states is necessary to ensure that national courts and institutions collaborate with international tribunals in dealing with international crimes, particularly the

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90 Art 4 Statute of the ICTR.

91 See generally T Buergenthal *International human rights law in a nutshell* (1995) 248-255.

92 n 91 above, 256-257.

93 n 91 above, 262-265.

94 Art 4 Statute of the ICTR.

core crimes of genocide, crimes against humanity and war crimes. The ICTR and ICTY have elucidated the meanings and contents of those crimes, elucidations that not only enrich international law, but which may also assist national systems in their efforts to domesticate international criminal law. It is not possible within the confines of this article to engage in a detailed examination of the jurisprudence engendered by the Tribunals. A few highlights are shown, with emphasis on the ICTR.

First, considering the apparent overlap among criminal acts constituting the three core crimes above, the Tribunal has succeeded in elaborating the key elements delineating each of the crimes, particularly the crime of genocide *vis-à-vis* other crimes. The ICTR was the first international criminal tribunal to adjudicate and find a person guilty of genocide.[95] The Tribunal has clarified that, contrary to popular belief, 'the crime of genocide does not imply the *actual extermination* of group (*sic*)'.[96] Instead, it means the commission of any of the above enumerated criminal acts *with the specific intention* of destroying a protected group in whole or in part. Thus, even a single murder may constitute genocide if committed with such intent.[97]

What distinguishes genocide from massive murders as understood in many national legal systems, or from any of the other core international crimes, is specific intent, or what some judges have called *dolus specialis*. That intent is different from 'general *mens rea'*, which only involves a showing that 'the defendant desired to commit the act which served as the *actus reus'*.[98] 'Specific intent', which has also been defined as the 'surplus of intent',[99] or 'an aggravating criminal intention',[100] requires proof that the accused, in addition to desiring to bring about the *actus reus* (for example the killing of members of a group), must have desired to destroy a protected group in whole or in part. According to *Prosecutor v Akayesu*, special intent of a crime, such as is required of the crime of genocide,[101]

> is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus the special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

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95 *Prosecutor v Akayesu* ICTR-96-4, judgment of 2 September 1998.

96 n 95 above, para 497 (my emphasis).

97 See eg *Akayesu* (n 95 above) para 521; *Prosecutor v Musema*, Trial Chamber Judgment para 165. For a contrary position, see Cassese (n 4 above) 102. Art 6(c)(1) of ICC's Elements of Crimes endorses the ICTR position.

98 S Emanuel (ed) *Criminal law* (1992-93) 13.

99 See *Prosecutor v Stakic* (TC) para 520. See also D Stuart *Canadian criminal law: A treatise* (1995) 217-220.

100 Cassese (n 4 above) 103.

101 *Akayesu* (n 95 above) para 498. See also *Prosecutor v Rutaganda* (TC), ICTR-96-3 59.

Another notable contribution of the ICTR to an understanding of these crimes, notably genocide, is its finding, the first in international law, that rape and other acts of sexual violence can constitute genocide if committed with specific intent to destroy a group. In *Akayesu*, which was the first judgment of an international tribunal to hold a person guilty of rape as genocide, the Trial Chamber held that[102]

> rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict (*sic*) harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

The *Akayesu* judgment also explained how rape may fall under 'measures intended to prevent birth' within a targeted group, and thus lead to its destruction in whole or in part. According to the judgment:[103]

> In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

In addition, *Akayesu* explained in the following terms that rape and other acts of sexual violence are capable of destroying the victim physically and mentally, causing them to refuse further procreation:[104]

> [The] Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

The ICTR's definition of rape is also noteworthy. The Tribunal's approach may enrich or guide national criminal laws and practices which tend to be restrictive in their construction of the crime of rape.

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[102] *Akayesu* (n 95 above) para 731. *See also Prosecutor v Kayishema & Rutaganda* (TC), ICTR-95-1 para 95.

[103] n 102 above, para 507.

[104] n 102 above, para 508.

In many national systems, rape has been defined as non-consensual intercourse, but there appears to be variations among the systems as to whether such intercourse must involve penetration by the male organ, or whether acts of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.[105] The *Akayesu* judgment pursues a purposive approach, noting that 'rape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'.[106] It thus concludes that:[107]

> The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.

It is argued that the above approaches are defensible. A mechanistic approach to the definition of rape, which concentrates only on the physical penetration of a specific body part by another body part, undermines the protection that must be afforded to victims of rape and sexual violence.

The Tribunal's approach to what amounts to consent in rape is also noteworthy. Consent is a common defence raised by defendants in many national legal systems in answer to rape charges. According to the ICTR, the absence of consent of the victim of rape need not take the form of physical force, but all surrounding circumstances must be examined holistically. A broad range of coercive circumstances negate consent. For instance:[108]

> Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* [militias] among refugee Tutsi women at the Bureau Communal.

The jurisprudence from the ICTY pursues a similar approach. In *Kunarac*, for instance, the ICTY explained that '[c]onsent [for purposes of rape] must be consent given voluntarily, as a result of the victim's free will, *assessed in the context of the surrounding circumstances*'.[109] The approaches of the ICTR and ICTY are correct and may enrich national systems, many of which are yet to embrace such approaches.[110] A

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105 n 102 above, para 596.
106 n 102 above, para 597.
107 n 102 above, para 598.
108 n 102 above, para 688 (my emphasis).
109 *Prosecutor v Kunarac et al* Trial Chamber Judgment para 460. This position was upheld by the Appeals Chamber. See *Prosector v Kunarac et al* Appeals Chamber Judgment paras 127-129.
110 It appears that only a few legal systems have yet embraced such an approach. See generally *Prosector v Kunarac et al* Appeals Chamber Judgment para 130.

mechanistic approach to consent that emphasises physical force is wrong. It ignores that coercion takes various forms, hence the need to take into account all surrounding circumstances.

The Tribunal's Rules of Procedure may also provide critical guidance for many national legal systems in their approach to the crime of rape. Under rule 96, with the exception of a child victim, no corroboration of a rape victim's testimony is required. Moreover, consent shall not be allowed as a defence under the following circumstances:

(a) if the victim has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
(b) if the victim reasonably believed that if h/she did not submit, another might be so subjected, threatened or put in fear.

Before evidence of the victim's consent is admitted, the accused must satisfy a trial chamber *in camera* that the evidence is relevant and credible.[111] Prior sexual conduct of the victim shall not be admitted in evidence or as defence.[112]

The above positions are critical in enhancing protection and justice in relation to victims of rape and sexual violence. They legitimately transcend defences that perpetrators of such crime have traditionally misused to avoid criminal responsibility.

Finally, in view of the principle of legality in criminal law, expressed as *nullum crimen sine lege*, it is necessary to comment briefly on the sources of substantive law applied by the ICTR and ICTY. The question of legality was addressed in the establishment of the Tribunals. In the case of the ICTY, in his report to the Security Council, the UN Secretary-General recommended that the ICTY should apply existing principles of international law which were part of customary international law. The rationale was that[113]

> the application of the principle of *nullum crimen sine lege* [required] that the international tribunal [applied] rules of international humanitarian law which are beyond any doubt part of customary international law so that the problem of adherence of some, but not all states to specific conventions does not arise.

In the case of the ICTR, a broader approach to the law applicable was adopted by including in the Statute 'international instruments regardless of whether they were considered part of customary international law or whether customarily entailed individual criminal responsibility for the perpetrators of the crimes'.[114] Does this mean that the ICTR violates the principle of legality?

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111 Rule 96(iii) Rules of Procedure and Evidence of the ICTR.
112 n 111 above, rule 96(iv).
113 Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc S/25/704 (3 May 1993) para 34.
114 UN Doc S/1995/134 3-4 para 12.

As noted above, international crimes are created by international law directly, especially through treaties, but also through customary international law. The ICTR includes crimes defined in treaties, such as the Genocide Convention of 1948 and common article 3 to the Geneva Conventions and of Additional Protocol II. Rwanda, like many other states, was a party to these treaties. In any case, the ICTR, like the ICTY, has found that various provisions of those treaties are part of customary international law and involve the notion of individual responsibility for transgressions.[115] From these, it may be concluded that ICTR jurisprudence is important in guiding national courts in construing the core crimes adjudicated by the Tribunal.

3.5 Procedure and evidence

The ICTR and ICTY each possesses Rules of Procedure and Evidence to govern proceedings. Those Rules of Procedure and Evidence are adopted by the judges, and extend over a wide perimeter. The Tribunals' Statutes contain few articles dealing with procedural law,[116] and overall, the law-making processes of international law and scholarly efforts paid little attention to procedural law. In this regard, the elaboration of Rules of Procedure and Evidence by the Tribunals is noteworthy for developing international law in the areas of procedure and evidence. Although the Rules of Procedure and Evidence were drafted by the judges on the basis of existing criminal procedures and practice, and reflect an interplay among the major common law and civil law systems of the world, some aspects of those Rules of Procedure and Evidence may be pertinent to the development or enrichment of rules of procedure and evidence applied by national courts. As the Rules of Procedure and Evidence governing the Tribunals cover several areas, only a few are highlighted here.

Overall, the Rules embrace a flexible approach. Their chief rationale is the facilitation of substantive justice. They endeavour to draw on rules

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115 See eg *Prosecutor v Musema* (TC) ICTR-96-13 para 240; *Prosecutor v Kayishema & Ruzindana* (TC) ICTR-95-1 paras 156-158; *Akayesu* (n 95 above) paras 608, 610 & 611-617.

116 See eg Statute of the ICTR, art 17 (on the powers of the Prosecutor to initiate investigations and question victims, suspects and witnesses to collect evidence and prepare indictments); art 18 (on review of indictments by a judge); art 19 (providing in general terms, *inter alia*, that trials shall be fair and expeditious, and must be conducted in accordance with the Rules of Procedure and Evidence, with full respect to the rights of the accused with due respect to the protection of witnesses and victims); art 20 (containing a catalogue of fair trial and due process guarantees); art 21 (identifying some measures that may be taken to protect witnesses and victims); art 22 (on the pronouncement of judgments and the imposition of sentences); art 24 (on appellate proceedings); art 25 (review proceedings); and art 27 (on pardon and commutation of sentences). Overall, these provisions are brief, and details on the subject matters they address are contained in the Rules of Procedure and Evidence.

applicable in both common and civil law systems, hence benefiting from rules and practices developed over the years.

A key rule is rule 89. Under rule 89(A) of the ICTR, similar to rule 89(A) of the ICTY, the Tribunals are not bound by national rules of evidence. In cases not expressly covered by the Rules, the Tribunals shall 'apply rule of evidence which in [their] view best favour a fair determination of the matter before [them] and are consonant with the sprit and general principles of law'.[117] Under rule 89(C), a Chamber 'may admit any relevant evidence which it deems to have probative value'.

Under rule 89, the judges have elaborated extensive jurisprudence to deal with critical issues, many of which are also faced by national courts worldwide. These include the admission of hearsay evidence, accomplice evidence, documentary evidence, evidence of other persons charged and facing charges before the Tribunal, and prior witness statements. Overall, the judges have pursued a flexible approach to the admission of evidence, taking a two-pronged approach to the matter. First, any evidence, including evidence falling in the enumerated categories, is admissible as a general rule 'regardless of its form',[118] as long as it is deemed to be relevant and has probative value. The second stage is that of evaluation, or determination of probative value, or weight to be attached to the evidence. In other words, the admission of evidence during the first stage is not equivalent to accepting it: Judges have to assess the weight attached to any evidence that is admitted, and can either accept or reject it at the time of determining an issue before them. The notions of 'relevance' and 'probative value' are broad terms. They have in some cases been clarified. For instance, in *Musema* it was held that:[119]

> [f]or evidence to be relevant and to have a nexus between it and the subject matter, such evidence must be reliable. The same is true for evidence which is said to have probative value.

Under this flexible approach, the jurisprudence of the Tribunals is to the effect that whether or not any evidence (except that of a child victim under rule 90(C)) will require corroboration is a matter to be determined in each case. In other words, it is not a requirement that certain evidence must be corroborated. It follows from this, for instance, that 'hearsay evidence in not inadmissible *per se*, even when it is not corroborated by direct evidence'.[120] In practice, depending on all the

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117 Rule 89(B) ICTR/ICTY Rules of Procedure and Evidence.

118 *Prosecutor v Musema* (TC) ICTR-96-13 para 34.

119 n 118 above, para 36, also citing *Prosecutor v Celibici* ICTY (TC) Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Muci, to Provide a Handwriting Sample, Case No IT-96-21-T (21 January 1998) (RP D5395-D5419) para 34.

120 *Prosecutor v Nahimana et al* (TC) ICTR-99-52 para 97.

circumstances, in some cases, judges have taken or viewed some evidence with caution, for instance, hearsay evidence, or the evidence of accomplices, and required corroboration.[121]

As noted earlier, it is not a requirement that the evidence of a rape victim (except a child, under rule 90(C)) must be corroborated, an approach rejected in some national legal systems. It must be stated that national legal systems that require as a rule that evidence of a rape victims be corroborated violate gender equality.[122] The claim that corroboration is needed to guard against false charges is unfounded; surely, the risk of laying false charges cannot be limited only to rape and sexual offences.[123] The Tribunal is thus saluted for pursuing an approach that recognises gender equality, an approach that should influence national legal system that perpetuate stereotypes that are inimical to the protection of women.

Also of note are the Tribunal's rules on disclosure, or what some legal systems refer to as discovery. The Rules of the Tribunals guard against criminal trials 'by ambush'. They thus impose extensive disclosure obligations on the prosecutor, an approach uncommon in some national legal systems. Under rule 66A(ii) of the ICTR Rules, the prosecutor must disclose to the accused all the supporting materials that were used for the confirmation of an indictment within 30 days of the initial appearance of the accused. Moreover, not later than 60 days before the date set for trial, the prosecutor must disclose to the accused copies of statements of all witnesses whom he intends to call. Upon good being shown, the Chamber may permit the prosecutor to disclose to the defence statements of additional witnesses after the trial has commenced.[124] Furthermore, under rule 68(A), the prosecutor must, as soon as practicable, disclose any exculpatory material. Such materials encompass materials that may suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence. Under rule 67(A)(i), as early as reasonably practicable, and in any event prior to the commencement of the trial, the prosecutor shall notify the defence of the names of the witnesses that he intends to call to establish the accused's guilt, and in rebuttal of any defence plea of which the prosecutor has received notice.

The defence, on the other hand, has limited disclosure obligations.

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121 n 120 above, para 97.

122 A number of legal systems provide definitions of rape that allow a rape victim to be of either sex. Arguably, in such legal systems, there is no gender inequality if the rule of corroboration is applied to both male and female victims.

123 See the Namibian case of *S v D & Another* (1992) 1 SA 513 (Frank J, 515-516). See generally GW Mugwanya 'Augmenting the struggle for gender equality in Uganda: A case for the domestication of international human rights standards' (1999) 19 *Netherlands Quarterly of Human Rights* 235 264.

124 Rule 66(A)(ii) Rules of Procedure and Evidence for the ICTR.

For instance, if, in addition to the above materials that must be disclosed to the defence by the prosecutor, the defence makes a request to obtain full statements of persons referred to in the supporting materials, but disclosure of whose statements is not obligatory, this request creates a reciprocal disclosure.[125] It entitles the prosecutor to inspect any books, documents, photographs and tangible objects which are within the custody or control of the defence and which it intends to use as evidence at the trial.[126] In addition, if the defence seeks to rely on an alibi, it is under an obligation to notify the prosecutor of such intention. It then must disclose to the prosecutor the place(s) which the accused claims to have been present at the time of the crimes with which he is indicted and the names and addresses of the witnesses and any other evidence upon which the accused intends to rely to establish the alibi.[127] Similarly, the defence is under an obligation to disclose to the prosecutor names and other evidence in support of any other special evidence the accused seeks to invoke, such as diminished responsibility.[128] The failure by the defence to discharge these obligations, however, does not limit the accused's right to rely on the defences in question, although such failure may be taken into account by the judges in weighing the merits or credibility of the defences raised by an accused.[129]

It is clear from the above that the prosecutor's disclosure obligations are wider and somewhat stringent, but their discharge is critical in availing the accused of all the relevant information to enable him prepare his defence, a guarantee recognised under international law. The approach of the ICTR may guide national systems in their efforts to afford fair trial and due process to accused persons.

Also of note in the Statute and Rules of Procedure and Evidence of the Tribunals is the effort to expressly codify a catalogue of rights of the accused, from investigations and through to trial. The reason for this is to ensure the right to a fair trial and due process to all persons appearing before the Tribunals. In addition to some of the rights identified above, the law and practices of the Tribunals are also noted for incorporating human rights in their sentencing regime, such as excluding the death penalty and corporal punishment. While a number of states still embrace these penalties, and while the notions of 'cruel, inhumane and degrading' punishment may be the subject of degrees of vagueness, corporal punishment and the death penalty are difficult to reconcile with the prohibition of cruel, inhumane and degrading punishment.

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125 n 124 above, rule 66(B) & 67(C).
126 As above.
127 n 124 above, rule 67(A)(i).
128 n 124 above, rule 67(A)(ii).
129 *Prosecutor v Musema* (TC) ICTR-96-13 para 107.

3.6 Rights of witnesses and victims

Another important aspect of the law and jurisprudence of international criminal tribunals relates to their efforts to strike a balance between the rights of the accused to a fair trial and due process *vis-à-vis* other competing values, particularly the rights of victims and witnesses.

Such balance is very critical. As noted earlier, witnesses and victims may be exposed to danger in the form of retaliation for co-operating with the Tribunals, a problem that may in varying degrees also afflict witnesses appearing before national courts. Many witness appearing before UN tribunals need protection. It follows that the Tribunals have had to address a complex task of balancing the rights of the accused with those of victims and witnesses appearing before the Tribunals. There is no doubt that witnesses are indispensable to any trial, unless an accused pleads guilty. If witnesses and victims refuse to testify for either party because of safety concerns, such refusal undermines the process of justice.

The efforts by international criminal tribunals to identify criteria for balancing the rights of the accused and those of witnesses and victims constitute a fundamental contribution to the evolution of international criminal justice standards, and may also guide national courts when faced with similar challenges.

An analysis of the law and jurisprudence engendered by the ICTR and ICTY points to an endeavour to carefully balance the conflicting values of protecting witnesses and victims, while at the same time endeavouring to ensure that the core minimum guarantees of fair trial and due process are not undermined. The Tribunals' 'balancing' approach attempts to ensure that, while victims and witnesses must be afforded protection, the accused is always afforded adequate time to prepare his defence, and that his rights to confront and cross-examine witnesses are respected.

Under article 19 of the Statute, trial chambers of the ICTR are under an obligation to afford fair and expeditious trials in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Trial chambers are thus to pay attention to the protection of witnesses and victims by ordering appropriate measures of protection to them, while at the same time ensuring that the rights of the accused are respected. Article 21 of the Rules of Procedure and Evidence makes provision for the protection of witnesses and victims, including the conduct of *in camera* proceedings and the protection of the victim's identity. Under rule 69, *in exceptional circumstances* either of the parties may apply to a trial chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the chamber orders otherwise. Non-disclosure of the identity of victims and witnesses is intended to protect those victims and witnesses who may be

endangered because of the testimony they provide to the Tribunal. Because non-disclosure of the identity *ipso facto* affects the right of the accused to prepare his defence, the jurisprudence of the Tribunals has had to strike a balance between the life and security of witnesses and victims and the right of the accused to fair trial, notably by ensuring that the anonymity of witnesses and victims is not permanent and not total.

Total and permanent anonymity of a witness prior to and during the testimony of the witness would be irreconcilable with the rights of the accused. This is thus not allowed by the Tribunals' Statutes and the Rules of Procedure and Evidence, as well as by the practices of the trial chambers. Under rule 69(c), subject to rule 75, the identity of the victims shall be disclosed within such time as determined by the trial chamber to allow adequate time for the preparation of the prosecution and the defence. Under rule 75, a judge or trial chamber may, *proprio motu* or at the request of either party or the victim or witness concerned, or the Victims and Witness Support Unit, order appropriate measures for the safeguard of the privacy and security of victims and witnesses, *provided that the measures are consistent with the rights of the accused*.[130]

In practice, the judges have also elaborated key criteria to guide the balancing of conflicting values. For instance, in *Prosecutor v Bagosora*,[131] a trial chamber has held that[132]

> [t]o grant protective measures to a witness, pursuant to Rule 75, the following conditions must apply; Firstly, the testimony of the witness must be relevant and important to a party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied.

In some cases, such as *Prosecutor v Nahimana et al*,[133] some witnesses were especially vulnerable to danger. Trial chambers have had to offer 'extraordinary measures' of protection to such witnesses, such as testifying by video link from a location away from the Tribunal. Such extraordinary measures must not negate the rights of the accused to a fair trial. Thus, even those extraordinary measures, such as testifying by video link, must allow the right to confront the witnesses. Moreover,

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130 My emphasis.

131 *Prosecutor v Bagosora*, ICTR-96-7, decision on the extremely urgent request made by the defence for the protection measures for Mr Benard Ntuyahaga, 13 September 1999.

132 n 132 above, also citing one of the earliest decisions in the case of *Tadic: Prosecutor v Tadic*, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, 10 August 1995.

133 *Prosecutor v Nahimana, Barayagwiza & Ngeze* (TC), ICTR-99-52.

while the identity of the witnesses and the content of their statements are the subjects of restrictions, they have to be disclosed to the defence at least some time prior to the testimony.[134]

4 Conclusion

An inquiry into the contribution of international criminal tribunals to international criminal justice, and lessons for national justice and legal systems, includes several issues, and thus may extend over a very wide area. Only a few critical issues have been addressed above. International criminal tribunals are indispensable in ongoing efforts to foster accountability for transgressions of human rights and to break the culture of impunity and the cycles of violence and disrespect for the rule of law. They occupy a centre stage in ongoing efforts of ensuring that those who commit core crimes, particularly genocide, crimes against humanity and war crimes, do not escape justice by hiding under the veils of state sovereignty, immunities, or the breakdown or incapacities of national legal systems, particularly as a result of massacres and other acts of violence.

The above discourse has highlighted some areas where the Tribunals' jurisprudence, especially that of the ICTR, may positively influence and enrich the laws and practices of states, both in their substantive, evidentiary and procedural arenas. Indeed, in such areas, the Tribunals' jurisprudence provides important precedents for reforming national laws to bring them to the standards of international law, including international human rights law. As noted above, such influence and enrichment of national criminal systems by international criminal tribunals are critical in a time when national systems are constantly revisiting and expanding their laws to respond to contemporary crimes such as terrorism. Unless they are guided and restrained, national responses to such crimes may endanger internationally accepted norms, such as fair trial rights and due process rights of suspects and accused persons. The laws and jurisprudence of the ICTR contain some relevant guidance.

International criminal tribunals can achieve some influence over national systems if their work and jurisprudence are widely disseminated and accessed by national legislatures, law reform agencies, lawyers and others. The ICTR has a website with relevant case law, and some of its judgments have been published, also on a CD-ROM.[135] More needs to be done, however, to publicise the Tribunal's work.

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[134] *Media* case (n 133 above). See Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001.

[135] http://www.ictr.org.

Unfortunately, the international media has not given the ICTR the same coverage as that afforded the ICTY.[136] This needs to change.

[136] See generally K Moghalu 'The International Criminal Tribunal for Rwanda in perspective' paper presented at the African Dialogue II Conference, Arusha, Tanzania, 24-26 May 2002 6 (on file with author).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Apology and trials: The case of the Red Terror trials in Ethiopia

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Summary

The Red Terror was a campaign of terror by the military government (Derg) that ruled Ethiopia from 1974 to 1991. The Derg era was characterised by massive human rights violations, including crimes against humanity. The Red Terror trials are the prosecutions of the Derg officials who are suspected of committing mass human rights violations. The trials are unique in the sense that they have largely taken place in Ethiopia, with local impetus and without the involvement of the international community, as was the case in Rwanda, Sierra Leone or the former Yugoslavia. The author argues in favour of retributive justice, making the prosecution of mass human rights violations the duty of the state. In this regard, the author provides the major arguments in favour of the prosecution of human rights violations. The article also examines the major problems in prosecuting human rights violations in general, and the problems presented by the Red Terror trials in particular. However, the author also argues that the recent request on the part of the Derg officials to make a public apology to the Ethiopian people needs to be part of the remedial process. It is argued that apology should be part of the acceptance of responsibility and accountability for mass human rights violations (as retributive justice demands) and not necessarily as part of an incipient strategy of amnesty.

1 Introduction: Background to the 'Red Terror'

While the pre-1974 Ethiopia experienced different human rights violations, the most severe human rights violations in the country's recent

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history were in connection with the 1974 revolution. In 1974, the acute economic poverty and political suppression led to mass uprisings of sections of society against the rule of Emperor Haile Selassie I. The popular movement, primarily carried out by students, peasants and workers, in the same year led to the break-down of Ethiopia's monarchy.

However, there was no organised political group to assume leadership so as to respond to the acute political and socio-economic problems of the country. The student movement was divided into leftist radical groups, which were not able to forge an agreement and assume the leadership that was badly needed. During the revolutionary disarray, the military — under the name of Derg[1] — seized power in September 1974. In the same year, the Derg suspended the Constitution and established a military government.[2] The Derg soon established itself as a 'permanent and irrevocable self-perpetuating group', rejecting all calls for civilian rule.[3] In November 1974, the Derg executed 60 officials of the former imperial government without a court hearing.[4] This event marked the beginning of 17 years of state-sponsored terror and violence against the people of Ethiopia.

Following the summary executions of the 60 former officials of the imperial government of Haile Selassie I, the next period, spanning from 1975 to 1988, was ruled by 'the law of the jungle' and was characterised by the most atrocious human rights violations.[5] In the days leading up to May Day in 1977, the Ethiopian Peoples' Revolutionary Party (a leftist political party opposed to the military junta) youth committees planned a nationwide demonstration demanding civilian government.[6] The Derg, however, managed to thwart their plan in what later became known as 'the May Day Massacre': Hundreds of young people, planning to participate in the demonstration, were executed on 29 April 1977.[7] The massacre was a manifestation of the Derg's unparalleled brutality. The massacre continued for days and, according to an eye witness, over 1 000 young people had been executed by 16 May. Their bodies were left in the street and ravaged by hyenas at night.[8]

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1 'Derg' is the name assumed by a committee of 120 commissioned and non-commissioned low-rank officers of the air force, police force and the territorial army.

2 Y Haile-Mariam 'The quest for justice and reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 *Hastings International and Comparative Law Review* 667 674.

3 F Halliday & M Molyneux *The Ethiopian revolution* (1981) 87.

4 TS Engelschin 'Prosecutions of war crimes and violations of human rights in Ethiopia' (1994) 8 *Yearbook of African Law* 43.

5 Haile-Mariam (n 2 above) 677.

6 Engelschin (n 4 above) 43.

7 As above.

8 D Haile *Accountability for crimes of the past and the challenges of criminal prosecution: The case of Ethiopia* (2000) 15.

Some families, who were fortunate enough to identify the bodies of the murdered youth, were required to pay for the bullets that were used to kill their sons and daughters before they could claim the corpses.[9]

In July 1977, the *Zemecha Menter* or ferreting-out campaign was directed and conducted by the Derg against what it called anti-revolutionary and reactionary elements. The action resulted in the death of over 1 000 people and the arbitrary detention of 1 503 persons accused of belonging to one or other political party.[10]

The worst came in the days of the notorious urban Red Terror — 'a term borrowed from the Russian revolutionary lexicon meaning the liquidation of counter revolutionaries'.[11] The Red Terror in Ethiopia was the largest and best-known campaign of official violations of human rights perpetrated by the Derg.[12] The Red Terror Massacre was officially launched in November 1977 and lasted until 1980.[13]

During its campaign of Red Terror, the Derg officially killed a generation that had no resort to the rule of law. The Red Terror resulted, amongst other crimes, in summary executions, arbitrary detentions, disappearances and torture. A writer described the terror as follows:[14]

> Thousands of young people were gunned down on sight and in peaceful, public demonstrations in Addis Ababa and other towns. Bodies littered the streets of Addis Ababa with Marxist slogans pinned to them. Rural towns did not fare any better. Some who escaped the cities and took refuge in their hometowns were caught and executed by peasant and urban dwellers associations' militia. Thousands more disappeared and are still missing. In 1977, it was estimated that 30 000 to 50 000 people were executed without ever having charges brought against them. Most of the victims were young, between the ages of 14 and 30.

Amnesty International reported that the total of persons killed by the end of the Red Terror campaign alone ran as high as 150 000 to 200 000. The killings continued well into 1980.[15] In response to the call made by Amnesty International to stop the killings, the Derg was quoted as follows: 'If they [Amnesty International] say we do not have to kill people, aren't they saying we have to quit the revolution? The cry to stop the killing is a bourgeois cry.'[16] The entire period was characterised by serious human rights violations; these constituted state-sponsored terror in the form of sexual abuse, summary execution, torture,

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9 As above.
10 Engelschin (n 4 above) 43.
11 Haile-Mariam (n 2 above) 677.
12 Engelschin (n 4 above) 43.
13 As above.
14 Haile-Mariam (n 2 above) 678.
15 As above.
16 Haile (n 8 above) 13.

arbitrary arrest and detention, disappearance, unlawful dispossession of property and forced settlement.[17]

At the end of 17 years of brutal human rights violations marked by terror and violence, the Derg was finally overthrown on 8 May 1991 by the Ethiopian People's Revolutionary Democratic Front (EPRDF). In May 1991, the EPRDF arrested and detained approximately 1 900 individuals suspected of violating human rights during the Derg.[18] The EPRDF called for the establishment of a transitional government in which all political parties could participate. Upon the establishment of the transitional government, the Special Prosecutor's Office was established in 1992 to investigate and prosecute the massive human rights violations of the Derg era.[19] The Special Prosecutor's Office immediately investigated the human rights violations and submitted the first charges in October 1994 before the Central High Court of the transitional government. These trials are the first of their kind in Africa and elsewhere, as they have taken place in Ethiopia, through local impetus and without the involvement of the international community as in Rwanda or the former Yugoslavia. The trials are still continuing at federal and regional courts.[20]

This article is written in the wake of a call to the government by top Derg officials on trial to be given a forum to 'apologise' to the Ethiopian people. On 13 August 2004, 33 top former Derg officials, on trial for genocide and other serious human rights violations during the Red Terror, wrote a letter to the Prime Minister to be given a forum where they may 'beg the Ethiopian public for their pardon for the mistakes done knowingly or unknowingly' during the Derg regime.[21] There has been no official response from the government as of this date.

The article attempts to show why the Derg officials should be allowed to expose what had happened and apologise to the Ethiopian people.

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17 Not only the Red Terror period, but also the entire Derg regime was characterised by massive human rights violations. For instance, a forced resettlement programme of the Derg, purportedly carried out for military purpose as a counter-insurgency strategy, resulted in the death of approximately 100 000 rural people between 1984 and 1986. Food relief for the 1984 famine in the country was prevented from reaching the victims, causing many thousands to perish. For further details, see Trial Observation and Information Project 2000.

18 Trial Observation and Information Project (2000), Consolidated Summary and reports from observations made in 1996, 1997, 1998 and 1999, compiled and distributed by NIHR's project 'Ethiopia's Red Terror trials: Africa's first war tribunal' 1.

19 Proclamation 40/92, the Proclamation for the Establishment of the Special Prosecutor's Office, 1992.

20 For some details, see part 4 below.

21 The letter was first published by the *Ethiopian Reporter* on 26 June 2004. Among the Derg officials who signed the letter are former Vice-President Colonel Fiseha Desta, former Prime Minister Captain Fikreselasie Wogederes and the notorious henchmen of dictator Mengistu Hailemariam, Captain Legesse Asfaw and Major Melaku Tefera.

The writer does not argue in favour of apology at the expense of the judicial process. Rather, the writer argues that the investigation and prosecution of the human rights violations during the Red Terror, and public apology by the violators, are all part of the remedial process. In other words, the paper argues that the duty to investigate and prosecute and public apology by the violators are not mutually exclusive.

In line with the central theme, the second section of the article attempts to provide moral and legal reasons to show why the prosecution of Derg officials for massive human rights violations is a duty of the state. In the third and fourth sections, the article highlights some of the major problems faced during the investigation and prosecution of past human rights violations in general, and the major problems faced by the Red Terror trials in particular. The fifth section of the article attempts to illustrate why former Derg officials need to apologise and tell the facts to the Ethiopian people. As such, the fifth section attempts to show why apology is an equally valid and important part of the remedial process and why it is not excluded by the duty to investigate and prosecute. The link between the trials and the process of apology will also be analysed under this section. The last part of the article concludes the argument.

2 The obligation to investigate and prosecute

The purpose of the investigation and prosecution of human rights violations is not all about the provision of 'just desert'.[22] The investigation and prosecution of human rights violations are important parts of remedial justice, not only for purposes of deterrence, but also for upholding the rule of law. The fact that the rule of law is one of the most cherished principles of humanity has been affirmed time and again. Government is the entity responsible for ensuring respect for the rule of law in a society. The responsibility of the government to uphold the rule of law has been expressed as follows:[23]

> In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously . . . For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

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[22] M Maiese *Retributive justice* (2004) http://www.beyondintractability.org/essay/retributive.justice (accessed 1 March 2006) refers to retribution as a way of returning what one deserves in line with his or her actions.

[23] D Shelton 'Reparations for victims of international crimes' in D Shelton (ed) *International crimes, peace, and human rights: The role of the International Criminal Court* (2000) 49.

The purpose of the investigation and prosecution of human rights violations, like the aims of punishment in criminal law, is to be an effective insurance against future repression. As such, officials and the public would learn that crime is punishable and that nobody is above the law. Orentlicher aptly stresses that 'when we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations'.[24]

The prosecution of human rights violations serve as a way of publicising the atrocities committed. It is true that publicity may be achieved in other ways. But as Nagel points out:[25]

> It is the difference between knowledge and acknowledgment. It is what happens and only happens to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene.

Moreover, for individual victims, prosecutions have a symbolic meaning. For the victims, justice is only served if the proper investigation and prosecution are carried out by the state. For the victims, 'doing justice means to uncover the truth of what took place, establish the identities of those responsible and subject them to the appropriate sanctions'.[26] For instance, the women who were made sexual slaves by the imperial army of Japan during the Second World War rejected an offer of compensation and argued that only prosecution by the Japanese government would redress the abuse committed upon them.[27] An absence of justice on the part of victims means betrayal by the state and a major setback for victims trying to put the past behind them and continue with their lives. Failure to investigate and prosecute human rights violations may also encourage individual victims to take the law into their own hands, leading to a spiral of conflict in a society.

Under international law, the explicit obligation of states to prosecute is provided for in the Convention on the Prevention and Punishment of the Crime of Genocide[28] and in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[29] The United Nations (UN) Human Rights Committee has repeatedly stressed that the investigation and prosecution of human rights violations are part of states' obligations of redress to the victims. The UN Human

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24 DF Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' in NJ Kritz (ed) *Transitional justice — General considerations* (1995) 375.

25 Cited in L Huyse 'Justice after transition: On the choices successor elites make in dealing with the past' http://caswww.elis.ugent.be/avrug/pdf01/zuidaf03.pdf (accessed 1 April 2006).

26 HS Ardiles 'The absence of justice' in C Harper (ed) *Impunity: An ethical perspective* (1996) 107.

27 M Minow *Between vengeance and forgiveness* (1998) 105.

28 General Assembly Resolution 260 A (III) art VI.

29 General Assembly Resolution 39/46 art 7.

Rights Committee explains that, in cases of torture, article 2(3) of the Convention against Torture obliges the government to 'conduct an inquiry into the circumstances of the victim's torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future'.[30] The UN Human Rights Committee also expressed its opinion that states are obliged to investigate and prosecute cases involving arbitrary executions and disappearances.[31] In the case *Bautista de Arellana v Colombia*, the UN Human Rights Committee found further that[32]

> disciplinary and administrative remedies alone were not 'adequate and effective' to redress the violation, suggesting that anything short of criminal prosecution would not comply with the requirements of the Covenants.

Under the Inter-American human rights system, the Inter-American Court of Human Rights interpreted the obligation to 'ensure' found in article 1(1) of the American Convention on Human Rights as inclusive of the state's obligation to prevent, investigate and punish violations of the rights recognised by the American Convention on Human Rights.[33] Furthermore, the Inter-American Commission found that the Chilean response was inadequate in relation to the violations that occurred during the Pinochet regime. In the case of *Garay Hermosilla et al v Chile*, the Inter-American Commission on Human Rights found that[34]

> the government's recognition of responsibility, its partial investigation of the facts and subsequent payment of compensation were not enough, in themselves, to fulfil its obligations under the Convention. Instead, the state has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims.

The UN Commission on Human Rights also stressed that investigation and prosecution are part and parcel of the process of redressing human rights violations. Under the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the Commission stated that the duty to investigate and prosecute is part of the obligation of states to respect, ensure respect and enforce international human rights norms.[35] The document also

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30 D Shelton *Remedies in international human rights law* (1999) 324.
31 As above.
32 As above.
33 Orentlicher (n 24 above) 396.
34 Case 10.843, Report 36/96, cited in Shelton (n 30 above) 324.
35 UN Doc E/CN 4/2005/L 148, art 3 (adopted by the UN Commission on Human Rights at its 56th meeting, 19 April 2005).

states that statutes of limitations shall not apply to human rights violations that constitute crimes under international law.[36]

The interpretation given by major human rights bodies to the right to an effective remedy and the moral perspectives mentioned above show that the investigation and prosecution of human rights violations are part of the obligations of states to provide an effective remedy to victims of human rights violations. Again, it should be emphasised that the investigation and prosecution of violations are not only useful for specific victims, but also for society at large in upholding the very crucial principle of the rule of law. Failure to investigate and prosecute human rights violations on the part of states brings the victims to the conclusion that there is 'absence of justice'.[37] The reoccurrence of violations will also be highly probable, as past violators walk free with impunity and potential violators learn from such failure of the state to uphold its duty.[38]

3 Problems in the execution of the duty to investigate and prosecute

There are numerous problems involved in the effective investigation and prosecution of the violations at national level in the case of past human rights violations. The state apparatus creates some of these obstacles and others result from long-standing political, social and economic problems in society. For the purpose of this article, only some of the major problems will be touched on in the following paragraphs.

In states that suffered state-sponsored human rights violations, the duty to prosecute is often relinquished in favour of impunity. Impunity is 'exemption from punishment or penalty',[39] in this case exemption from being charged, tried and punished for human rights violations. Impunity may be given by way of amnesty laws, presidential pardons, or it may also happen by default, that is, 'the deliberate lack of any action at all'.[40] One reason given in favour of impunity is the need for national reconciliation. Silva rightly laments that, under the guise of reconciliation, people who had been responsible for atrocious human rights violations, such as summary executions, mass crimes, massacres of children and old people, are allowed to go free.[41] Reconciliation is a process that is based on forgiveness on the part of victims of human

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36 n 35 above, art 6.
37 Ardiles (n 26 above) 105.
38 Shelton (n 30 above) 326.
39 PR Baeza 'Breaking the human link: The medico-psychiatric view of impunity' in Harper (n 26 above) 73.
40 C Harper 'From impunity to reconciliation' in Harper (n 26 above) ix.
41 RG Silva 'Some ethical and pastoral reflections: Towards a citizens' movement against impunity' in Harper (n 26 above) 21.

rights violations and an acknowledgment of guilt and the acceptance of punishment on the side of the violators.[42] On the other hand, impunity allows human rights violators to go free and unpunished, in many instances without any acknowledgment of what they had done. Impunity 'institutionalises evasiveness, the concealment of the offender and contempt for the suffering of the victim'.[43] Thus, the idea that impunity may be used to achieve national reconciliation is very difficult to justify.

Another motivation for impunity is the reality of the situation faced by successive governments and emerging democracies. One form of transition is when a dictatorship gives way to democratic government by way of negotiations. The other is the democratisation of the government when part of a dictatorship still maintains a good grip on political and economic power. In both cases, new governments are faced with 'Hobson's choice' between their survival and that of democratic principles such as the rule of law, upon which their existence was founded.[44] These governments consider impunity as the best way to maintain a democratic transition and their grip on power by attempting to disregard past human rights violations. Their appeal seems like saying 'there is a dragon living on the patio and we had better not provoke it'.[45] The reality faced by governments in a delicate process of transition to democracy and by governments that are not free of all dictatorial institutions such as the army is unequal political power. It would be a contradiction in terms to let human rights violators go free as if what they have committed is acceptable. Rosenberg points out this anomaly when she describes 'the desire for maintaining short-term equilibrium can have great long-term costs. It can damage the legal system, the rule of law and future civilian control of security forces.'[46]

Even when impunity is rejected, the process of investigating and prosecuting human rights violations is not an easy task. In connection with the duty of investigation, a crucial problem is the lack of skilled manpower needed for effectively investigating the violations within a reasonable period of time. The problem becomes crucial where large-scale human rights violations were committed under systematic government structures, over a long period of time. A lack of skilled manpower is also a big problem at the stage of prosecuting human rights violators. Whilst prosecutions need to be carried out by highly-skilled

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42 n 41 above, 23.
43 As above.
44 Orentlicher (n 24 above) 376.
45 T Rosenberg 'Reconciliation and amnesty' in A Boraine *et al* (eds) *Dealing with the past: Truth and reconciliation in South Africa* (1997) 66.
46 n 46 above, 68.

and efficient prosecutors, this is not always the case in many prosecutions of past human rights violations.[47]

Prosecution also presupposes a well-established judicial system. The system needs not only be well equipped, but it must also be run by qualified judges and prosecutors with an awareness of human rights and an ability to pursue new issues in human rights law. This is an important problem in an economically poor country during a transition from dictatorship to democracy. New governments usually attempt to reform the judicial system. To reform the judicial system, one needs qualified and educated persons lest any reshuffling may leave the court empty. The complete absence of a viable court system or the unwillingness to use the national court for prosecution of human rights violations is a major reason for the establishment of an international court to prosecute violations.[48]

The high number of suspects is another problem when prosecuting human rights violations. The perpetrators involved in a single crime are usually large in number. Starting with top officials in government, the chain of command reaches the lowest person who executed the order or the decision of the high-ranking officials. The chain of command is complicated and the number of people involved is large, especially in a country where the whole state apparatus is engaged in official and systematic human rights violations. As a result, one has to reach a decision as to whom to prosecute and whom not to. This is a very difficult task. It is pointed out that[49]

> if those who pulled the trigger or ran the torture chambers are prosecuted while those who gave ambiguous or unwritten orders to 'take care of' putative political or social opponents are let free, both the credibility of the process and the hopes of non-repetition suffer.

It is difficult to give an adequate solution to the problem of whom to prosecute. It may suffice to point out that the prosecution process should not be an ambitious venture that attempts to charge every single person directly or indirectly affiliated with a regime, without any record of participation in human rights violations.[50]

Another major problem in the prosecution of human rights violations is the problem that no laws prohibited these crimes at the time when violations occurred. Through the principle *nullum crimen sine lege*, legal

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47 This is a problem of national prosecutions in particular. See eg some of the problems of the Ethiopian Red Terror trials under part 4 below.

48 See the rationale behind the establishment of the International Courts for the former Yugoslavia and Rwanda.

49 N Roht-Arriaza 'Sources in international treaties of an obligation to investigate, prosecute, and provide redress' in N Roht-Arriaza (ed) *Impunity and human rights in international law and practice* (1995) 287.

50 See part 4.1 below on how the Ethiopian Special Prosecutor classified defendants in the Red Terror trials.

theory has recognised that there is no crime without a specific sanction by the law. The state in which the violations occurred may not be party to the international human rights treaties which make the violations illegal and prosecution of the violators a duty. The domestic laws of the state may be silent on many human rights violations. Some of the violations may even have been legal or barred by statutes of limitations under existing domestic laws. Nevertheless, in these situations human rights treaties and the Nuremberg precedents have given courts power to bypass *ex post facto* problems to at least prosecute suspects of violations of general principles of law.[51] Moreover, the silence of domestic laws cannot bar the prosecution of international crimes such as genocide and crimes against humanity. The elements of these heinous crimes are recognised as customary international law, needing to be punished wherever they occur.[52]

4 The 'Red Terror' trials in Ethiopia

4.1 Investigation and prosecution

The duty to investigate and prosecute human rights violations committed by the Derg regime on the part of the Ethiopian state emanates from the arguments outlined above and the following additional legal obligations under national and international law. The suspects of the violations committed by the Derg regime in Ethiopia are accused of the commission of grave human rights violations, among others, genocide, crimes against humanity, torture, rape and forced disappearances, which are crimes under the penal code of the country.[53] Failure on the part of the government to investigate and punish these crimes will be a violation of the right to equal protection of the law enshrined in article 7 of the Universal Declaration of Human Rights, article 26 of the International Covenant on Civil and Political Rights, as well as article 3 of the African Charter on Human and Peoples' Rights, all of which are made part of the law of Ethiopia.[54]

The principle of equal protection of the law requires the uniform application of existing laws of the country.[55] The obligation assumed

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51 Roht-Arriaza (n 49 above) 288.

52 See W Czaplinski 'State responsibility for violations of human rights' in S Yee & W Tieya (eds) *International law and the post-Cold War world — Essays in memory of Li Haopei* (2001) 177.

53 Trial Observation and Information Project (n 18 above) 5. See also art 281 Ethiopian Penal Code 1957.

54 Art 9 Proclamation 1/1995 Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995.

55 J Th Möller 'Article 7' in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights — A common standard of achievement* (1999) 170.

will be an affirmation of a government's very reason of existence, that is, the protection of persons under its jurisdiction from crimes without any discrimination. Protection involves not only prevention, but also the investigation and prosecution of crimes. Ethiopia has signed and ratified the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) long before the occurrence of the Red Terror and other human rights violations. Thus, the government has a duty to investigate, prosecute and punish all acts of genocide under the Genocide Convention.[56] What is more, many of the crimes alleged to have been committed during the Red Terror are described in international customary law.[57] This entails the duty of any government to investigate and prosecute the specific crimes of genocide, crimes against humanity and torture and all their manifestations, regardless of which local laws exist, which treaties have been adhered to, or when the crime occurred.

Recognising its duty of investigating and prosecuting the perpetrators of the Red Terror and other systematic human rights violations committed by the Derg regime, the transitional government of Ethiopia expressed its commitment to realising its duty in a letter in 1994 to the UN Assistant Secretary-General for human rights. The relevant part of the letter reads as follows:[58]

> The fight against impunity is a legitimate concern of the international community as stated in the Vienna Declaration adopted by the World Conference on Human rights . . . 'The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed to prosecute its perpetrators.' According to these principles, it is the duty of the Transitional Government of Ethiopia to bring to justice those persons with respect to whom there are serious reasons for considering that they are responsible for serious violations both of international law and domestic law that can be assimilated in some cases to crimes against humanity . . . The crimes committed under the former regime were not only crimes against the victims and the Ethiopian people; in many cases they were crimes against humanity — crimes that the international community has a particular interest to prevent, to investigate and to punish. *The Transitional Government of Ethiopia is aware of its obligations concerning the duty to prosecute the systematic violations of human rights and the grave breaches of humanitarian law.*

In a bid to realise its duty, the transitional government established the Special Prosecutor's Office (SPO) in 1992 to investigate and prosecute

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[56] Genocide Convention (n 28 above) art IV.

[57] n 53 above.

[58] See E/CN 4/1994/103, letter dated 28 January 1994 from the Permanent Representative of the Transitional Government of Ethiopia to the United Nations Office at Geneva addressed to the Assistant Secretary-General for Human Rights (my emphasis).

persons who were suspected of human rights violations during the former military regime.[59] In February 1993, the SPO received about 1 900 detainees from the police commission, a month after it officially began to perform its functions.[60] It took the transitional government almost a year to reform the judiciary and establish an independent office of investigation and prosecution.

The importance of carrying out the trials internally as part of a healing process and of establishing a new era of the rule of law was restated by the head prosecutor of the SPO, Girma Wakjera:[61]

> Some think a country like Ethiopia cannot afford such actions. The opposite is the fact: As a nascent democracy we cannot afford a continuation of governmental impunity, we cannot afford a lack of confidence in democratic institutions, like courts. We cannot afford old wounds to fester and infect our society for years to come.

In 1994, the SPO filed the first charges against 73 Derg members and later, in 1997, it filed charges against a total of 5 198 public and military officials of the former government, proceeding with what are collectively called the 'Red Terror trials'.[62] The Red Terror trials are the first of their kind on the African continent. Out of the total of 5 198 charged, 2 246 were charged while in detention and 2 952 were charged *in absentia*.[63] The defendants are classified into three main categories by the SPO:[64]

> *The policy makers*: those who deliberated and designed the plan of genocide and other human rights violations (top commanders and administrators, heads of police and security forces); *the field commanders*: those who were instrumental in the implementation of the plan by transmitting orders from the policy makers to the material offenders including their additional orders (investigation departments, mass organisations, committee of revolutionary guards); and *the material offenders*: those involved in the material commission of the crimes in line with the nation wide plan (members of the revolutionary guard, death squads, members of special forces).

The charges brought against the defendants include genocide and crimes against humanity, torture, murder, unlawful detention, rape, forced disappearances, abuse of power and war crimes.[65] The main charge against the top officials of the Derg regime is the crime of genocide. The SPO charged the former officials with committing

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59 See Proclamation 40/92 (n 19 above).

60 Trial Observation and Information Project (n 18 above).

61 JV Mayfield 'The prosecution of war crimes and respect for human rights: Ethiopia's balancing act' (1995) 9 *Emory International Law Review* 553.

62 As above. Note that the Derg officials are not only prosecuted for the Red Terror campaign but also for various crimes including violations of the laws of war.

63 F Elgesem *The Derg trials in context — A study of some aspects on the Ethiopian judiciary* (1998) 7-8.

64 Trial Observation and Information Project (n 18 above) 5 (my emphasis).

65 n 53 above, 6.

genocide by deliberately and systematically planning to exterminate opposition political groups, which is a violation of article 281 of the 1957 Ethiopian Penal Code.[66] It is interesting to note that article 281 of the 1957 Ethiopian Penal Code, unlike the Genocide Convention, extends its protection to political groups in addition to national, ethnic, racial and religious groups.

The Red Terror trials are carried out all over the country. The trials of the majority of the defendants are carried out before the Federal High Court in Addis Ababa. Regional Supreme Courts are responsible for Red Terror trials in the regional states. The trials illustrate a belief against impunity for human rights violators. The trials constitute a contrast to the custom of unlawfully executing government officials in the history of the country. Indeed, the Derg officials are going through a process completely absent in the case of millions who were summarily executed by the same officials.[67]

The trials are also meant to be detailed historical records of human rights violations carried out by the Derg regime. The prosecutions inform the public of what happened in a bid to deter future recurrences of similar violations of human rights. The Preamble of the Proclamation establishing the SPO affirms this purpose by stating that the establishment of the SPO is meant to be[68]

> in the interest of a just historical obligation to record for the posterity the brutal offences committed and the embezzlement of property perpetrated against the people of Ethiopia and to educate the people to make them aware of those offences in order to prevent the recurrence of such a system of government.

For the victims, the trials symbolise that justice can be served even after a regime of anarchy. For victims of horrifying violations, the investigation and prosecution of the violators are also ways of finding out what actually happened to their families and to themselves. Many victims' families, even to this date, do not know what really happened to their family members.[69]

4.2 Major problems of the 'Red Terror' trials

As ambitious and historical as they are, the Red Terror trials are faced with crucial problems. Highlighting some of the main problems of the trials would help to contextualise section 5 of this article.

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66 n 53 above, 3.
67 See part 1 above for some of the atrocities.
68 Preamble Proclamation 40/92 (n 19 above).
69 See Trial Observation and Information Project (n 18 above) 49.

4.2.1 The judiciary

In Ethiopia, judicial independence and continuity have never been the hallmark of the legal system. The judiciary under the Derg regime was controlled directly by the executive. Upon coming to power, the transitional government dismissed most senior judges, alleging that they were in one way or another connected to the defunct regime.[70] This action created a gap that led to an acute shortage of skilled and experienced judges. Thus, the duty to preside over the complicated and demanding Red Terror trials fell to junior and inexperienced judges. Some of the new judges, especially in the regional states, were persons who were either trained for a very short time or without any training in law or experience in the courts.[71]

There were also not enough judges. Moreover, most judges, especially those working outside of the capital city (Addis Ababa), were faced with a serious shortage of legal materials crucial for their work. There is no system of consolidating laws and distributing them to judges in the country. The judges spend most of their time handling court administration, writing down the words of witnesses and oral arguments which could have been done by court clerks.[72] The judges also conduct their own research without any assistants.[73] All these shortcomings led to the very slow progress of the Red Terror trials and to long adjournments. A good number of former Derg officials and collaborators of the defunct regime are still awaiting verdicts from the courts. The absence of speedy trials for the accused is one failure of the trials. What is more, the lack of efficiency and the long years in handling the cases have already put the symbolic importance of the trials into oblivion.

4.2.2 The Special Prosecutor's Office

The SPO also suffered a number of setbacks that eventually affected the trials. The SPO was established in 1992 to investigate and prosecute human rights violations that occurred during the Derg regime.[74] From the very beginning, the SPO suffered from an acute shortage of skilled human and financial resources to carry out the huge task of investigating and prosecuting the human rights violations of the Derg regime. The complicated violations that occurred during the Derg regime and the number of directly and indirectly implicated persons in the violations were all huge tasks to deal with. The gathering of evidence, the

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70 Mayfield (n 61 above) 590.
71 As above.
72 M Redae 'The Ethiopian genocide trial' (2000) 1 *Ethiopian Law Review* 1 7.
73 As above.
74 n 18 above.

investigation of cases and the framing of charges were tasks that required an efficient system of prosecution.

Apart from the top officials who were arrested in 1992, many suspects were still at large when the trials began in 1994. The duty to apprehend suspects was being carried out by the SPO after the federal and regional police were reluctant to collaborate with the SPO, under the pretext that their powers of investigation were usurped by the SPO.[75] Because of the lack of co-ordination and collaboration between the police and the SPO, many suspects were tried *in absentia*, thereby affecting their right to defend themselves. The trial process was also affected by long adjournments caused by the procedural requirements that had to be satisfied before a suspect is tried *in absentia*. The lack of a speedy and efficient investigation and prosecution also caused the loss of interest and support for the trials from the international community.

4.2.3 Public defenders

A basic right of the accused is the right to counsel. The Ethiopian Federal Constitution and international human rights treaties ratified by the country provide that the accused have the right to legal counsel. In cases of serious offences, the Federal Constitution provides that the state should assist an indigent defendant in the provision of legal counsel.[76] In the case of the Red Terror trials, the state provided legal counsel at its own expense to the defendants who asserted that they were indigent and who were accused of serious human rights violations, including genocide and crimes against humanity. Initially, some of the top Derg officials were better off than the prosecution, as they were provided with the best lawyers the country could provide. However, the majority of the defendants in the Red Terror trials were left to the newly established public defender's office.[77]

The public defender's office was a new institution which was established in 1993 with a few lawyers, most of whom had no formal training and experience in high level proceedings.[78] Public defenders lacked formal skills to deal with the complex national and international legal concepts involved in the trials. Moreover, the number of public defenders involved is completely out of proportion to the number of the defendants who needed service from the office. The shortage of public defenders caused the assignment of one public defender to represent defendants with conflicting interests, such as superior defendants and subordinate defendants in a given action.[79] Thus, the lack of institutionalised public defence experience in the country and the lack of skilled

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75 n 18 above, 11.
76 Art 20 Proclamation 1/1995 (n 54 above).
77 Trial Observation and Information Project (n 18 above) 10.
78 As above.
79 As above.

and efficient human resources had a negative impact on the rights of the defendants in the Red Terror trials.

4.2.4 The issue of capital punishment

Ethiopia retains capital punishment.[80] There have been calls to the Ethiopian government to abolish capital punishment. Since 1999, the Federal High Court has sentenced Red Terror convicts to death for the commission of genocide and crimes against humanity.[81] The possibility of capital punishment and the lack of an extradition treaty remain the main reasons behind the refusal of many states to hand over suspected former Derg officials, including the top Derg leader, Mengistu Hailemariam. For instance, Italy has repeatedly refused to hand over Derg officials who took refuge in its embassy in Addis Ababa after the fall of the Derg in 1991. Recently, the Italian Embassy in Addis Ababa stated that principles of international law and the Italian Constitution do not allow it to hand over the two Derg officials unless there are assurances that the former officials will not face the death penalty.[82] The governments of the USA and Zimbabwe also refused to extradite the most wanted former Derg officials to face trials in Ethiopia.[83]

To date, all the above governments refused to bring the accused Derg officials to their courts to face trials for genocide and other serious human rights violations. In Ethiopia, however, these officials are being tried *in absentia*. In January 2005, US federal agents used the new Intelligence Reform Act to arrest Kelbesa Negewo, a former Derg security officer who was sentenced to life imprisonment by an Ethiopian court for the commission of crimes against humanity during the Red Terror in his native Ethiopia. Kelbessa is now facing deportation proceedings in the United States.[84] The SPO is reported to be in favour of

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80 Arts 281, 282 & 522 Ethiopian Penal Code 1957.

81 There is no official record of the total of death sentences passed by the courts during the Red Terror trials in the country. The first death sentence was passed *in absentia* in 1999 on Getachew Terba, former Derg security officer, for crimes against humanity (see http://www.amnesty.org/ library). Colonel Tesfaye Woldeselasie, the ex-security head of Derg, and General Legesse Belayneh, former head of the central investigation department of Derg, were sentenced to death in August 2005 (see http://www.news24.com, 11 August 2005). The latest death sentence was handed down to Major Melaku Tefera of Derg (also known as the 'Butcher of Gondar' (Northern Ethiopian town)) in December 2005 for genocide and crimes against humanity (see http://www.int.iol.co.za, 9 December 2005).

82 *Ethiopian Reporter* 23 June 2004, press release from the Italian Embassy in Addis Ababa.

83 Redae (n 72 above) 8. The absence of an extradition treaty is also used as a reason.

84 See http://www.washingtontimes.com, 5 January 2005. It was reported that Kelbesa Negewo made false statements about his involvement in the Red Terror to obtain US citizenship. This led to the revocation of his US citizenship by a US District Court in Atlanta in October 2004.

the death penalty for a 'limited number' of the Derg officials who are found guilty of genocide and crimes against humanity.[85]

5 Apology and trials — Mutually exclusive?

At the beginning of 2004, 33 former top government officials of the Derg regime, who are on trial for serious crimes, including genocide, wrote a letter to the incumbent Prime Minister of Ethiopia asking to be provided with a national forum where they can apologise to the Ethiopian public for the grave human rights violations during the Red Terror. Part of the letter read:[86]

> We, the few who are being tried for what happened, realise that it is time to beg the Ethiopian public for their pardon for the mistakes done knowingly or unknowingly.

Whilst the request is a surprising move by the Derg officials, the response to the question depends on an understanding of the meaning and relevance of apology and the relation of the request to the ongoing Red Terror trials.

Apology results after a feeling of remorse over what happened. As such, apology is a revelation of the facts around a situation and an admission that the events were wrong. The expected outcome of the whole process of apology is the lessening of hatred and the building of a better society based on the lessons learnt. Apology gives victims the chance to heal and wrongdoers the chance for forgiveness and for acceptance of their responsibility for wrong actions. Schultz describes the process of apology in the following terms:[87]

> First, a genuine apology implies that the party feels responsible and is therefore taking responsibility. While this might imply an admission of a mistake, it can also effectively mean a reversal of previously held views or policies. Secondly, a genuine apology is fuelled by sincere regret for the past harm caused. In other words, if given the chance to go back and do it all again, the party would act differently. In this respect, the apology would include little or no defense of one's past actions. Lastly, a genuine apology might require that reparations be made — especially in the case that those who are being apologized to are still being harmed as a result of past actions. Otherwise, the offended party is likely to think of the apology as just words.

However, not all words and acts of apology have genuine goals.

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85 See Haile (n 8 above) 42; Mayfield (n 61 above) 574. Note also that the International Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court do not provide for the death penalty.

86 n 21 above.

87 N Schultz *Apology and forgiveness* The Conflict Resolution Information Source, University of Colorado (2003, http://www.crinfo.org/CK.Essays/ck.apology.jsp) (accessed 1 March 2006) 1.

Apology can be made for different tactical reasons.[88] Taken at face value, the request of former Derg officials for a chance to apologise to the Ethiopian people is a positive step towards reconciliation that is needed in the country. However, a true apology presupposes a genuine remorse and an admission of wrong actions with full exposition of what happened. The facts of the Red Terror and other massive human rights violations of the Derg era are still unclear for many. A full account of the events will be helpful to come to terms with the past. Historical records will also benefit from a full account of the facts. A public admission about how the Derg regime carried out mass murder and violence will also help to boost the public confidence sapped by the Red Terror. It will help curb the continued grave human rights violations that persisted for almost a generation.

All these positive aspects of the process of apology cannot be accommodated by the trials because of the very nature of court proceedings. Even though trials are a clear sign of upholding the rule of law and may serve as a form of revealing the truth, they suffer shortcomings in so far as an account of the whole truth is concerned. Trials are mostly about ascertaining individual responsibility through the application of rules of law and the presentation of relevant evidence. In law, the truth is a claim that is supported by evidence. The standards to be met and the procedural requirements of the law may or may not coincide with a revelation of the whole truth. Thus, the use of other methods of exposing the facts, such as the process of apology, will strengthen the remedial process.

The processes of apology and that of trials need to be seen as complementary rather than opposed to each other. In dealing with the case of the request to be able to apologise of the former officials of the Derg regime in Ethiopia, it is instructive to show that an effective remedy for past human rights violations goes beyond prosecution and investigation. The right to an effective remedy for past human rights violations encompasses duties of investigation, prosecution, compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition on the part of the state. The right to an effective remedy for human rights violations constitutes all the aforementioned components. Each component of the right to an effective remedy has different foundations under international law.[89] Compensation, restitution and rehabilitation

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88 See eg Mayfield (n 61 above) 569 for the justifications of the Red Terror in the defence presented by the former Derg Prime Minister, who is also one of the officials who made the request for apology.

89 See Basic Principles (n 35 above); see also General Assembly Resolution 39/46 art 14; General Assembly Resolution 2200(XXI) arts 6 & 16; see also DJ Harris *Cases and materials on international law* (1983) 40; P Malanczuck *Akehurst's modern introduction to international law* (1997) 256; T Meron *Human rights and humanitarian norms as customary law* (1989) 42.

are concerned with helping victims in terms of economic, social and psychological factors. Satisfaction and guarantees of non-repetition include:[90]

- verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim(s) or others;
- the search for the bodies of those killed or who disappeared and assistance in the identification and reburial of bodies in accordance with the cultural practices of the families and communities; and
- apology, including public acknowledgments of the facts and acceptance of responsibility.

Even though the Red Terror trials and the process of apology may be described as components of the same remedial process, the relationship between them remains unclear. The relationship between the request of the Derg officials to be given a forum to apologise of their own free will and the ongoing trials needs to be analysed. Should a genuine process of apology by the Derg officials be a reason for amnesty? The answer is in the negative for the following reasons: Amnesty for Derg officials will be against the legal duty of the government to investigate and prosecute the persons responsible for violations. The process of apology should not be used as a tactical move on the side of former officials to evade punishment and responsibility rather than exposing the truth for genuine reconciliation. A constitutional rule which bans amnesty for persons who are convicted of crimes against humanity also reinforces the case against amnesty for the former officials.[91]

If amnesty is not a trade-off for apology, does it mean that the process of apology may give rise to legal liability when the Derg officials admit to actions and facts which they might not have admitted to during trial? Legally, apologies are not automatically taken as admissions of legal liability because of the possibility of undue influences. The issue is whether to exempt the former officials from legal liability due to their free admission of facts during the process of apology or to use admitted facts against them during trial. In other societies, the process of finding the truth through different bodies such as truth commissions has gathered relevant evidence for subsequent prosecutions.[92]

In the case of Ethiopia, the question of amnesty or impunity was settled already when the government opted to investigate and prosecute the human rights violations. As such, the government did not negotiate with the former officials for amnesty in exchange for a full exposition of the facts and a public admission of responsibility for past

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90 Basic Principles (n 35 above) art 22.
91 Proclamation No 1/1995 (n 54 above) art 28.
92 PB Hayner *Unspeakable truths — Facing the challenge of truth commissions* (2002) 102.

human rights violations. Exemption from legal liability for the Derg officials will simply be against the ongoing trials. Thus, the prosecution or any interested party should not be banned from using any fact or relevant information in criminal or civil suits against the Derg officials.

If the Derg officials are looking for a process where they can apologise to the public, while at the same time receiving exemption from liability, their request to apologise is hardly genuine. After all, a genuine apology is not only to admit mistakes and to feel remorse; it is also a decision to take responsibility for one's actions. However, it is worth noting that a genuine apology as a result of a full disclosure of the facts and an acceptance of responsibility for these facts may be taken as a sign of reformation on the side of the former officials. This may in turn lead to mitigation during sentencing.

6 Conclusion

Unlike the popular misconception, the process of apology does not result in automatic amnesty for perpetrators of human rights violations. Rather, the processes of apology and prosecution are equally valid and relevant parts of the remedial process when dealing with past human rights violations. As such, one does not exclude the other. Whilst the investigation and prosecution of human rights violations are duties upon states, the process may not be successful. A lack of skilled man-power, dire financial resources and institutional inefficiency in the national legal system are all problems that count against speedy and efficient trials. Due to these and other problems inherent to trials, apology is essential in the remedial process. However, apology should not be used as a pretext to evade punishment and responsibility for human rights violations. The Ethiopian Red Terror trials, with all their shortcomings, are justified in terms of the duty of the state to investigate and prosecute past human rights violations. However, the recent request for apology made by the Derg officials needs to be given due attention as part of the remedial process, as it is essential for a full disclosure of the facts around the Red Terror and other massive human rights violations in the recent past.

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HIV/AIDS law and policy in Cameroon: Overview and challenges

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Summary

From the detection of the first HIV/AIDS case in Cameroon, the government's action has been swift in addressing the situation through defined policies. Although the initial stages were fraught with problems and proved wary, more policies were adopted against the background of instituting a well defined programme and institutional framework to control the pandemic. This article identifies HIV/AIDS strategies in Cameroon from a policy perspective, as well as legal considerations, with the aid of judicial experience elsewhere in Africa, most particularly, the Southern African Development Community (SADC) region. It catalogues and examines some of the major challenges confronting or likely to confront HIV/AIDS policies in Cameroon. In as much as the collaborative involvement of various actors — public, private and the civil society — is necessary to boost the implementation of national strategies, collaborative research, accountability and an appropriate legal framework, amongst others, are vital to give meaningful impetus to control HIV/AIDS in Cameroon.

1 Introduction

> [T]he HIV pandemic . . . has been described as 'an incomprehensible calamity' It has '. . . claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy'.[1]

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1 *Minister of Health & Others v Treatment Action Campaign & Others* 2002 5 SA 721 (CC) para 1.

> Le VIH et le SIDA affaiblissent le tissu social et économique. Au-delà des tragédies humaines, le VIH et le SIDA conduisent à la dégradation de la santé et de l'éducation des citoyens . . . Ils peuvent aussi avoir un impact sur l'environnement de l'investissement et les flux des capitaux étrangers.[2]

The quotes above are neither the words of alarmists, nor are they wilful pronouncements of anxiety aimed at provoking fear and uncertainty. They are simply perspectives wholly in keeping with the gruesome image befittingly depicting a contemporary predicament — HIV/AIDS — and its consequences that have beset humankind. AIDS has killed more than 20 million people since the first cases were diagnosed in 1981, including 2,9 million people in 2003 alone.[3] There are currently about 40 million people around the world living with the HIV/AIDS. Sub-Saharan Africa is the worst hit region, alone accounting for 70% of all persons living with HIV. Most African states seem to have accepted this fact in contemporary political rhetoric, but they do not take the required efforts and measures to control the pandemic until the death toll has become disastrous, particularly that of people of working age — the group hardest hit. African states have warily, but steadily, in the last few years, come to realise and accept the consequences of their passive and nonchalant attitude and have joined the international community in the fight against this scourge as a top priority. Indeed, a scourge that 'has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy'.[4]

The HIV/AIDS pandemic is one of the major challenges presently facing the African continent; alongside the scourge of political instability, war and poverty. African states face huge and incessant demands in relation to access to education, land, housing, health care, food, water and social security. Yet, there is this 'unprecedented killer' that is 'claiming more lives than all wars and disasters'.[5] Although this picture may resemble a hackneyed HIV/AIDS-lamentation scenario, it is no exaggeration. HIV/AIDS therefore is not only a health concern, but equally a human rights concern.[6] The African Commission on Human and Peoples' Rights (African Commission) has declared that 'the HIV/AIDS pandemic is a human rights issue which is a threat against humanity'.[7]

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2 *Coalitions des Entreprises Contre le VIH/SIDA 'Lignes directrices pour le développement de coalitions des entreprises contre le VIH/SIDA'* (2004) 1 (HIV and AIDS weaken the social and economic fabric. Beyond the tragedies of humankind, HIV and AIDS engender the health and educational degradation of citizens . . . They may also impact on the investment climate and foreign capital flows (my translation)).

3 M Cichocki 'World AIDS Day 2004, Women, girls, HIV & AIDS' http://aids.about.com/od/ womensresources/a/aidsday.htm (accessed 31 March 2006).

4 n 1 above, para 1.

5 Nelson Mandela, addressing a crowd of music fans in December 2003 at a concert organised to support the fight against HIV/AIDS.

6 See S Gumedze 'HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 184-189.

7 Resolution on the HIV/AIDS Pandemic — Threat Against Human Rights and Humanity (2001) para 1.

In Cameroon, however, the most significant infectious and parasitous pathology remains malaria, accounting for 43% of deaths of infants below five years, followed by serious respiratory infections that account for 27% of deaths of children of the same age group.[8] To these may be added new forms of deadly and costly diseases that are common to countries in epidemiological transition, such as heart disease, metabolic diseases, trauma and cancers. Yet, the infection rate of HIV/AIDS is alarming.

2 Brief survey of the evolution of HIV seroprevalence in Cameroon

The first HIV/AIDS case in Cameroon was diagnosed and reported in 1985. Since then, the seroprevalence has been increasing systematically, making it the most dreadful disease in Cameroon which has attracted the most intense eradication efforts over the last few years. Indeed, in one decade, 1987 to 1998,[9] the seroprevalence rose from 0,5% to 7,2% in the general population.[10] In 2000, it rose further to 11% and in 2002 it was almost stagnant, as there was only a slight increase of 0,8% over the last figure, placing the country among the 25 most infected countries in the world.[11] Between 1985, the year of the first diagnosed case of HIV/AIDS infection in Cameroon, and 2002, the disease accounted for 53 000 deaths, 210 000 orphans and one million people living with the disease.[12] In the first 13 years of the disease in Cameroon, the infection rate was multiplied by 14, suggesting that about one out of 14 Cameroonians that were sexually active was infected with the virus,[13] and in 15 years (1987 to 2002), there was a 23-fold increase, the age group between 20 and 39 years. The vulnerable classes within this group are: military personnel (15%); commercial sex workers (25% to 45%); and truck drivers (18%).[14] Other communities with a high infection rate include those living along major highways and populations along the Chad-Cameroon pipeline.[15] On the

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8 *Programme National de Lutte Contre le SIDA (PNLCS) 'Plan stratégique de lutte contre le SIDA au Cameroun 2000-2005'* Yaoundé (October 2000) 5.

9 The seroprevalence during the in-between period of that decade was as follows: 1,04% in 1988; 2% in 1992; 3% in 1994; 5% in 1995; and 5.5% in 1996.

10 In 1986, there were 21 diagnosed cases; 6 843 new cases were officially registered in 1998, bringing the number to 20 419. See PNLCS (n 8 above) 9.

11 *Comité National de Lutte Contre le SIDA (CNLS) 'Le Cameroun face au VIH-SIDA: une réponse ambitieuse, multisectorielle et décentralisée'* 8.

12 See CNLS (1994) *'La riposte du Cameroun au VIH-SIDA: l'expérience de la prise en charge par les ARV'* ColoriSprint — Cameroon 6. See also National AIDS Control Committee (NACC) 'Impact of HIV/AIDS in Cameroon' Yaoundé (2000).

13 PNLCS (n 8 above) 5.

14 As above.

15 CNLS (n 12 above) 8.

whole, women are more vulnerable, with statistics showing three infected women for every two infected men.[16] The 2004 estimates indicate that there has been a considerable decrease in HIV seroprevalence in the active sexual population, estimated at 5,6% by the country's Health Minister in October,[17] and by an undated Technical Explanatory Note on the Third Cameroon Demographic and Health Survey (DHS-III). The Permanent Secretariat of the Central Technical Group of the National AIDS Control Committee (NACC) notes (as proof of the reliability of the findings) in the Technical Explanatory Note that the figures obtained from a representative national sample 'reflect the real situation of HIV seroprevalence in [the] country' and that it 'falls within the range of the estimations for Cameroon by UNAIDS' (that is 6,9%, understood as between 4,8% and 9,8%).

3 The framework of HIV/AIDS policy

Efforts at staging an efficient barrier against the increase of the HIV/AIDS pandemic are essentially national, that is, government's elaboration and implementation of policies, and the putting into place of appropriate infrastructures, particularly institutions, to implement such policies. But, experience in this domain has shown that, generally, governments cannot, alone, formulate and implement such policies, as well as conceive appropriate institutions without aid — financial, material, logistic or otherwise. The international community in this regard heralds aid. The international community has championed financial assistance and has set guidelines to orientate national policy on the subject.

3.1 The legal framework

3.1.1 General considerations

Cameroon has acceded to the major international and regional human rights treaties and instruments. At the international level, they in include the International Covenant on Economic, Social and Cultural Rights (CESCR) of 1966 (ratified by Cameroon on 24 June 1984); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979 (ratified on 23 August, 1994); and the Convention on the Rights of the Child (CRC) of 1989 (ratified on 11 January 1993). At the regional level, they include the African Charter on Human and Peoples' Rights (African Charter) of 1981 (ratified on 20 June 1989) and

16 As above.

17 E Tumanjong 'Health survey shows AIDS rate of 5.5 percent in Cameroon' *Associated Press* http://www.aegis.org/news/ads/2004/ADOY2225.htm (accessed 31 March 2006).

the African Charter on the Rights and the Welfare of the Child (African Children's Charter) of 1990 (ratified on 5 September 1996).

At the time the first HIV cases were diagnosed, many of these instruments, including CESCR, were already in force. They contain provisions relating to health generally, but not to any specific illness(es). Even instruments that succeeded the pandemic and which deal with protection of the rights of specific vulnerable groups of persons such as children (CRC, African Children's Charter), failed to mention HIV/AIDS. Both the Guidelines on State Reporting to the African Committee on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) have barely mentioned HIV/AIDS. Nonetheless, the question is, why specifically mention HIV/AIDS when, at the time of entry into force of the first human rights treaties, there existed (and there still exists) diseases of concern such as malaria, poliomyelitis, tuberculosis, and so on, which could have as well, from the foregoing logic, warranted specific mention. The bottom line, however, is that any aspect of health, including HIV/AIDS, should invariably be read into the right to health provisions in those instruments espousing a minimum standard. Generally, this is referred to as the *best or highest attainable state of physical and mental health*, whatever the purport attributed to this standard.

Also, there are relevant international and regional resolutions, declarations and guidelines on HIV/AIDS, established principally by United Nations (UN) organs and the then Organization of African Unity (OAU), now the African Union (AU), as the case may be.

A remark should be made here on the effect of duly ratified treaties and international agreements entered into by Cameroon. Once they are ratified and published, they 'override national laws, provided, however, that the other party implements the said treaty or agreement'.[18] In other words, they have a direct effect once ratified. The implication is that, since there is no specific bill of rights in Cameroon containing the fundamental rights of citizens, international treaties and agreements have the full force of legislation in the country (in their relevant domains and/or provisions), as long as they have received the fiat of ratification. It is true that in international law, the binding nature of declarations, decisions, guidelines, and such, as compared to duly ratified treaty obligations, remains doubtful. Viljoen strikes the balance as follows:[19]

> Obligations of states derive from regional and sub-regional levels. These are now discussed, with particular reference to the rights-based approach, and keeping the distinction between moral (non-binding or persuasive) and legal

[18] Art 45 1996 Constitution.

[19] F Viljoen 'The obligation of governments in a time of HIV/AIDS' (2005) 15 *Interights Bulletin* 47.

(or binding) obligations in mind. Moral obligations derive from membership in international organisations and from declarations, statements, policies and ethical guidelines. Legal obligations, taking the form of treaties, laws and decisions, bind states under international law.

At the national level, the legal framework is scanty as there are neither specific legislation nor enough persuasive jurisprudence of national courts in the domain of HIV/AIDS. In this article, ample reference is made to the jurisprudence of foreign courts, especially those of the Southern African region where the culture of litigation in the domain is far more advanced, in order to enhance the understanding, conceiving and shaping of the future national legal framework for HIV/AIDS policies in Cameroon.

The legal framework can thus be examined from three perspectives: international, regional and national, in that order.

3.1.2 The international framework

Cameroon has acceded to a good number of international human rights instruments.[20] Those reviewed above, part of the relevant human treaties ratified by and applicable in Cameroon, invariably contain, directly or indirectly, health standards which state parties must ensure for all citizens through relevant measures. These standards should obviously be read in relation to HIV/AIDS, as well as any other illnesses or health conditions. Thus, the obligations under article 25(1) of the Universal Declaration, article 12(1) of CESCR, article 24 of CRC and article 12(1) of CEDAW relating to health must be read in relation to HIV/AIDS against the background of the 'highest attainable standard of physical and mental health' (particularly contained in CESCR).

The UN Joint Programme on HIV/AIDS (UNAIDS) and the Office of the United Nations High Commissioner for Human Rights adopted International Guidelines on HIV/AIDS and Human Rights, 1996 (Guidelines)[21] during a joint consultative meeting of these organs. The Guidelines focus on three crucial areas, including the protection of public health.[22] The sixth of the Millennium Goals of the UN General Assembly focuses on the need to specifically control HIV/AIDS and malaria pandemics, along with others.

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[20] See C Heyns & P Tavernier (eds) *Recueil juridique des droits de l'homme en Afrique* (2002) 5.

[21] Second International Consultation on HIV/AIDS and Human Rights (Geneva, 23-25 September 1996), Report of the Secretary-General E/CN.4/1997/37 Annex 1.

[22] Improvement of governmental capacity in relation to its responsibility for multi-sector co-ordination and accountability, reform of laws and legal support services focusing on anti-discrimination, protection of public health, and improvement of the status of women, children and marginalised groups, and increased private sector and community participation, including capacity building and responsibility of civil society .

3.1.3 Regional

The main instrument at the regional level in Africa that guarantees the right to health is the African Charter, which is binding on all AU member states. It has been remarked above that, although the African Charter does not specifically refer to HIV/AIDS or any other pandemic on the continent, even those which existed before its coming into force, such as malaria and tuberculosis, should be read into the ambit of the relevant provision(s) relating to health. The African Charter enjoins state parties in articles 16(1) and (2) to ensure that citizens 'enjoy the best attainable state of physical and mental health' and 'to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. In the case of *Purohit and Moore v The Gambia*,[23] the African Commission recognised the fact that millions of African people do not enjoy the right to better physical and mental health because of poverty. Yet, the Commission expressed the desire to read in article 16 of the African Charter, the obligation on state parties to take concrete and selective measures while fully drawing the benefits of available resources, in order to ensure the full realisation of the right to health without discrimination.[24]

The then OAU adopted a number of resolutions specifically addressing HIV/AIDS. The first in line is the Tunis Declaration on AIDS and the Child in Africa of June 1994. Through this Declaration, member states proclaimed, amongst other issues, their commitment to '[e]laborate a ''national policy framework'' to guide and support appropriate responses to the needs of affected children covering social, legal, ethical, medical and human rights issues'.[25]

The second is the Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa, adopted by the Assembly of the 32nd ordinary session of Heads of State and Government. At this meeting, African leaders were urged to implement those declarations and resolutions that were adopted in the past with specific reference to the Tunis Declaration. The third, a special summit of African Heads of State and Government in 2001, was devoted to HIV/AIDS. This resulted in the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases of April 2001[26] and the Abuja Framework for Action for the Fight against HIV/AIDS, Tuberculosis and Other Related Infectious Diseases to implement the principles in the Abuja

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[23] Communication No 241/2001, decided at the 33rd ordinary session of the African Commission, May 2003, 16th Annual Activity Report.

[24] See para 84 of the decision.

[25] Att6/Decl.1 (XXX) para II(1).

[26] http://www.un.org/ga/aids/pdf/abuja_declaration.pdf (accessed 17 February 2006).

Declaration.[27] The Abuja Declaration translated the very lofty perceptions and ambitious of the Heads of State and Government concerning HIV/AIDS through an intimate conviction which they linked to the continent's agenda for poverty reduction. The Heads of State and Government reiterated their strong commitment to address the exceptional challenges of HIV/AIDS, tuberculosis and related infectious diseases by setting aside 15% of annual budgets to improve health.[28]

It is important to note that the Heads of State and Government realised the massive impact of HIV/AIDS on the African continent, which remains the most hit region in the world by the pandemic. As such, they considered HIV/AIDS as a 'state of emergency in the continent'.[29] To this end, the Heads of State and Government vowed to discard tariff and economic barriers to HIV/AIDS funding and related activities, to place the fight against the pandemic at the forefront and of highest priority in national development plans through a comprehensive multi-sector strategy that involves all government development sectors, as well as a broad mobilisation of all levels of society, including the private sector, civil society, trade unions, religious organisations schools, youths, media, persons living with HIV/AIDS (PLWHA), and so on.[30]

3.1.4 The national framework

The national legal framework for HIV/AIDS control in Cameroon is very weak as it is still very dependent on international and regional frameworks. The main texts governing the HIV/AIDS policy in Cameroon are those creating the various institutions in charge of implementing HIV/AIDS policy and those governing specific issues, such as decisions relating to the reduction of the cost of anti-retroviral (ARV) drugs and the decentralisation of ARV treatment at the local level. The only law that refers to HIV/AIDS is the 2003 law regulating blood transfusion.[31] However, there are important texts on HIV/AIDS in the pipeline. This is the case, for example, of a draft law on the rights and obligations of PLWHA. In addition, government has entered into agreements with some pharmaceutical companies for the production of generic drugs at a much lower cost. In the absence of specific HIV/AIDS legislation, the reading of relevant provisos in the revised Constitution of 1996, the Penal Code and case law, may help indicate the possible juristic approaches to HIV/AIDS in Cameroon.

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27 The Abuja Framework conceptualises the commitments made in the Abuja Declaration into strategies. These are available at http://www.onusida-aoc.org/Eng/Abuja%20Declaration.html (accessed 1 March 2006).

28 Abuja Declaration (n 27 above) para 26.

29 n 27 above, para 22.

30 n 27 above, para 23.

31 Law 2003/014 of 22 December 2003 regulating blood transfusion.

The Constitution

As seen above, there is no specific national instrument, such as a bill of rights, that contains and guarantees fundamental rights in Cameroon. The revised 1996 Constitution clearly gives full effect to the fundamental rights and freedoms spelt out in the Universal Declaration, the African Charter and all duly ratified international conventions relating thereto. Unlike the constitutions of some other African countries that clearly and extensively deal with fundamental rights under separate relevant headings,[32] the Cameroon Constitution merely recalls the country's commitment to the relevant human rights instruments and specifically mentions some, such as the right to life, the right to work and the right to property. While there may be doubts and a divergence in views as to the persuasiveness and binding power of the preamble of a constitution in comparison with the constitutional provisions themselves, article 65 of the 1996 Constitution unequivocally discards such debate. This article provides that '[t]he Preamble shall be part and parcel of this Constitution'. The obvious implication is that the Preamble is no less than any part of, or provision in, the Constitution; the fundamental rights expressly or impliedly referred to in the Preamble have the same status and effect as individual provisions in the body of the Constitution.

The Preamble to the Cameroonian Constitution guarantees fundamental rights; equal rights and obligations for all persons. It provides that the state should provide 'conditions necessary for their development' and as such, 'every person has a right to life, to physical and moral integrity'. The Preamble does not specifically mention the right to health as it does with other socio-economic rights, such as the right to work or the right to property. However, the right to health may be read into the spirit and broad ambit of the right to life. The upshot is that PLWHA, as much as any other patients or persons afflicted by health problems, have full constitutional rights to be catered for by the state.

The Penal Code

The criminal law of Cameroon does not address the issue of harmful HIV-related behaviour. In the absence of specific anti-HIV/AIDS legislation, the criminal law of Cameroon, as embodied in the Cameroon Penal Code (Penal Code) and other legislation, could have been helpful in incorporating offences relating to criminal conduct amounting to the spread of the disease. However, as a law conceived in the late 1960s, a time when the most criminally reprehensible conduct of the present

[32] Eg, Part 1 of the Constitution of the Republic of Mali of 25 February 1992; Part II of the revised Constitution of the Republic of Senegal of 2 March 1998; Part I of the Constitution of the Republic of Gabon of 26 March 1991 (as amended in 2005).

time was not foreseen, it can only be interpreted to make provision, by analogy, for HIV/AIDS-related criminal conduct. This is what effectively happened in the case of *Ministère Public et Noumen Théophile c Kinding Yango Huguette*.[33]

In this case, the respondent, Miss Kinding, a nurse and ex-misstress of the accuser, Mr Noumen Théophile, was accused of wilfully injecting two of Théophile's children with HIV. It was established that she acted out of revenge because she could not accept the unilateral termination of their relationship by the accuser and because she had discovered that she was HIV positive, while he was not. She took the two children, Tchantchou Noumen, a secondary school form two student, and his younger brother, Ngachine Noumen, a primary school pupil, away during school hours under false pretences and injected them with a 'red substance' on 24 January 2002. She testified under oath that she injected the children with the BCG and VAT vaccines. The results of the first HIV test carried out a few days after the incident (28 and 29 January) proved negative. However, the results of a second test carried out 90 days later confirmed that Tchantchou Noumen was HIV positive by inoculation and that the same fate had befallen Ngachine Noumen, who additionally was infected with the hepatitis B virus. The Nkongsamba High Court found the accused guilty of capital murder under sections 276(1)(a) and (b) of the Penal Code. That is, committing murder after premeditation and by poisoning. Consequently, she was condemned to death by firing squad. The Court also ordered the accused to pay costs and acceded to the prosecution's prayer to order a symbolic franc as damages.

In the absence of express provisions in the Penal Code relating to HIV/AIDS-related offences, inferences may be drawn from other relevant provisions which have a bearing on the activity that amounted to the contamination of the two children. In fact, facing a legal void, the defence team took this approach and invoked sections of the Penal Code. But the question is whether their reading of the sections they invoked was simply misguided or whether it was a strategy to help their case and obtain a lighter sentence for the accused. However, the Court's own analogy, drawn from existing sections, was logical given the facts of the case. Both positions will be examined briefly to show how relevant provisions of the Penal Code may be used effectively used to criminally punish HIV/AIDS-related conduct.

The defence based its case on sections 228 and 285 of the Penal Code, read together with section 74. The latter section deals with the mental element of a crime, *mens rea* or intention. Section 228 deals

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[33] *Tribunal de Grand Instance de Nkongsamba*, judgment 113/crim of 25 June 2003. See generally R Djila *'VIH/SIDA — contamination par inoculation de substances sanguines infectées — tentative de meurtre avec préméditation par empoisonnent'* (2005) 60 *Juridis Périodique* 25-30.

with dangerous activities and states in subsection (2)(c) that 'whoever, rashly and in a manner liable to cause harm to any person . . . administers any drug or other substance' will be punished with imprisonment from six days to six months. For its part, section 285 deals with constructive force. It provides in paragraph (b) that 'the administration of any substance harmful to health' is deemed to use force on one's person. Both sections refer to 'harm' as the consequence of the accused's conduct. 'Harm' simply means physical or other injury or damage[34] and thus excludes death. The question is whether injecting someone with the HIV virus amounts to 'harm'. If one were to refuse referring to seropositive persons as 'patients' because they have not yet reached AIDS, the impression one is left with is that such persons suffer no harm even if wilfully contaminated. The reasoning here being that they are only carriers of the disease, at least at the time of incubation, before full-blown AIDS. Indeed, the defence in the *Noumen case* contended that since the victims of the accused's act would neither immediately develop AIDS nor immediately die from the consequences of the injected HIV virus if they received the appropriate drugs, the accused's act could be likened to harmful conduct under sections 228(2)(c) and 285(b). This was an attempt to reduce HIV to a transitory and treatable disease or liken it to a situation of a non-lethal overdose, thereby weakening the mental element of intention. However, knowing that the virus is lethal in its long-term effect, the Court refused to concede that the accused's act had simply occasioned harm. Moreover, the concept of intention means that the offender desires his act, foresees and intends the consequences thereof, and acts so that they may happen. The motive of the crime (in the sense of the ultimate objective of committing the offence) is generally irrelevant, save as evidence pertaining to identity or *mens rea.*[35] There is no doubt that the accused's act was intended and that she desired the consequences thereof — death. The occurrence of death in HIV infection takes years, such that on distracted reasoning, one may clearly suggest there is a break in the chain of causation between the act and the consequence, coupled with the fact that the death results rather from opportunistic infections than the HIV virus itself.

The Court was left with two alternatives: either to indict under section 260 or under section 276 of the Penal Code, read together with section 74. Section 260 deals with infectious diseases. The first subsection provides that 'whoever by his conduct facilitates the communication of any dangerous infectious disease shall be punished . . .' Once more, the element of intention is weakened and the question is whether at the time of injecting the HIV serum, it *per se* was a 'dangerous infectious

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[34] *Cambridge advanced learners dictionary* (2003).
[35] E Colvin *Principles of criminal law* (1986) 96.

disease'. The latter standard would hardly have been met because the accused herself was HIV positive and had not developed full-blown AIDS. The last option the Court had was sections 276(1)(a) and (b) of the Penal Code under the rubric 'intentional killing and harm'. Sections 276(1)(a) and (b) provide that whoever commits murder, that is causes another's death, after premeditation or by poisoning, shall be punished with death. It is obvious that the mental and the material aspects of the offence were present. Miss Kinding's act was not only premeditated by extracting a portion of her own HIV contaminated blood into a syringe for subsequent injection, but she actually proceeded to the material phase of injection, death not being immediate but certain.

As the *Noumen* case was heard a year before the 2003 law regulating blood transfusions was passed, the decision was solely based on the Penal Code. However, were this case to be heard today, under the 2003 law, the decision would hardly be different. In effect, this law essentially subjects penalties relating to noxious and/or unconsented transfusions to those under the Penal Code. The 2003 law merely metes a sentence of between three months to one year and/or a fine (about US $181,81 to US $909) where the transfusion is carried out by a competent person in an approved centre without a (sick) transfusee's consent.[36] Obviously by analogy, this provision extends to situations where the transfusee was not sick. The rationale in the *Noumen* case could be read as covering any negligent or wilful conduct leading to transmission of the HIV virus, either by rape or even consensual sexual intercourse, if at the time of the act, the HIV-positive offender actually knew, or reasonably ought to have known, of her or his status.

In the event that the conduct leading to the transmission of the HIV virus is not intentional, such conduct may be slated under section 289 of the Penal Code, which deals with unintentional killing and harm. The section provides that causing the death of another or to cause harm such as sickness, by lack of due skill, carelessness, rashness or disregard of regulation, is punishable by imprisonment of three months to five years or a fine or both.

The legal system and case law

It is important at this juncture to briefly examine the Cameroonian legal system to understand how HIV/AIDS litigation may be carried out in relation to the country's almost unique legal status.

Cameroon has a bijural status by virtue of the country's colonial past. Cameroon was first colonised by the Germans at the close of the 19th

[36] Art 14. The transfusee's consent is mandatory and should be clearly stated in written or oral form by herself or himself or a legal representative (art 8(1)). The doctor shall act in the interest of the transfusee if she or he cannot personally express the consent (art 8(2)).

century after the Berlin onference in 1884 on the partition of Africa. Following the defeat of Germany in World Wars I and II, Cameroon became, respectively, a mandated territory of the League of Nations and a trust territory of the UN under both British and French rule. During those periods, Cameroon inherited a dual legal system from its colonial masters. That is why, in the former British controlled section, now commonly referred to as anglophone Cameroon, English common law and procedures are applicable, while French civil law and procedures are applicable in the former French-controlled section, francophone Cameroon. However, in areas of law here harmonisation has been achieved by national, sub-regional or regional efforts,[37] the bijurality is inoperational at the level of substantive rules only, save where the harmonisation, as in the case of criminal law, involved adjectival rules. That notwithstanding, in the courts of both parts of Cameroon, in the event of *lacunae*, obscurity or incompleteness in the law, or for simple reasons of inspiration and persuasiveness in the *ratio decidendi* of judgments, recourse is primarily made to French and English law and jurisprudence, as the case may be.[38]

Litigation against criminal HIV/AIDS-related conduct in both parts of Cameroon may either be criminal or civil. Such litigation will most obviously relate to the transmission of the HIV virus, whether wilfully or not.

Under the French legal system, as applied in francophone Cameroon, the offence is also a crime and a civil wrong. As a crime, the action is instituted by the legal department, since the offence is against the state. As a civil wrong, the action is for damages at the behest of the injured party, to repair the prejudice suffered. The actions are normally separate, with the criminal action being decided before the civil action. There are two situations here. The first is that the injured party may be joined to the criminal action as a civil party (*partie civile*) if she or he so desires. In this situation, the court will sit in both its criminal and civil jurisdiction. However, the rule is that criminal proceedings must first be completed before civil proceedings for damages are commenced. Thus, instead of instituting a separate action, the injured party has the benefit of saving the expenses of a separate civil action in terms of cost and time. The second is that the injured party may decide to institute a separate civil action for damages, but this can be done only after the determination of the criminal action. In both situations, therefore, the criminal action takes precedence over the civil action in time. Even if the separate civil proceedings were commenced before the criminal proceedings, the former must be stayed until the determination of the

[37] Such as in the areas of criminal law and procedure, labour law, family law, land law, company law, commercial law, public law, etc.

[38] Art 68 of the 1996 Constitution which gives its blessing to this practice.

latter. This precedence of criminal proceedings over civil proceedings is based on the principle in French law that '*le pénal tient le civil en l'état'*, meaning the criminal action takes precedence over civil action. However, in both situations, the outcome of the criminal action does not influence the outcome of the civil action.

In the *Noumen* case, the prosecution opted to be joined to the criminal action as a civil party and asked for a symbolic compensation of one franc. However, if the prosecution had preferred to take a separate civil action to claim damages (after the criminal action), it would have been for the moral prejudice suffered by the two infected children, based on article 1382 of the French Civil Code. The article provides that any human act which causes damage to another obligates the author of the act to repair the damage.[39] The moral prejudice here would be based on the psychological trauma suffered by the children for knowing that they were infected with the HIV virus.

Under English law, as applied in anglophone Cameroon, such conduct equally amounts to either a criminal and/or a civil action. The difference with the practice in francophone Cameroon is that the injured party cannot be joined to the criminal action as civil party; the two actions are separate. The only similarity is that the criminal action precedes the civil action for damages.

The civil action in anglophone Cameroon would certainly be based on tort for intentionally infecting someone with a disease under the extension of the rule in *Wilkinson v Downton*.[40] Thus, where, for example, the disease is venereal, as it is likely to be in the case of HIV, contracted from cohabitation, Winfield and Jolowicz hold that the position is doubtful, although they find it hard to see why fraudulent concealment by the person suffering from the disease would not negate the consent of the infected party to continue cohabitation and make the infection tortuous battery or even criminal murder.

3.2 The institutional framework

Government has developed an elaborate system for the implementation of the HIV/AIDS policy in Cameroon that ensures a near-sound policing of the policies for effective implementation. This may be because of government's speedy response to the disease and its effects. Way back in 1985, the year of the first diagnosed HIV case in Cameroon, the government put in place a National AIDS Scientific Committee

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39 Case ch civ 13 January 1923, DP 1923, 1, 52.

40 (1897) 2 QB 57. The rule is that an act wilfully done which is calculated to cause physical harm and that actually causes harm to another is a tort, although it cannot be considered as any specie of trespass to the person or any other specific tort. See WVH Rogers *Winfield & Jolowicz on tort* (1994) 74-75.

(NASC), followed two years later by a National AIDS Control Programme (NACP) in 1987.

The institutions in charge of the HIV/AIDS policy in Cameroon are divided into two groups comprising structures operating at the central and local levels. There are, on the one hand, *ad hoc* structures under the NACC and, on the other hand, structures under the national health system. The NACC is the highest policy-making body at the national level, chaired by the Minister of Health. The NACC is a multi-sector body, involving public and private sectors, bilateral and multilateral partners, as well as non-governmental organisations (NGOs) in the fight against AIDS. Immediately following the NACC is the Joint Follow-up Committee chaired by the Minister in charge of Territorial Administration and Decentralisation. Next is the Central Technical Group (CTG),[41] headed by a permanent secretary. The CTG is the implementing organ. It ensures the co-ordination, monitoring and implementation of AIDS control activities in all sectors. Under the NACC at the provincial level is a Provincial Committee for HIV/AIDS control,[42] followed by the Provincial Technical Group comprising five units. At the outreach level, there is a Local Committee in charge of community response, that is, linking different communities to the Provincial Technical Group.

The national health system in Cameroon, generally (and for HIV/AIDS control, in particular) is decentralised to meet health needs in distant regions of the country, unlike the services of other ministerial departments that are simply concentrated on the local levels by the central administration following the administrative break-up of the country (provincial, divisional, sub-divisional and district services, in that order). The health system has its own administrative breakdown. For instance, 'district hospitals', which would have been found in districts only by virtue of the normal administrative political break-up, are also found in divisions and sub-divisions.

Parallel to the above structure is traditional medicine that is fully recognised by the state. It should be noted here that in Cameroon, traditional medicine and practice have consistently been recognised by succeeding instruments of the Ministry of Health.[43] The 2002 Decree

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41 At the central level, the CTG comprises the following four sections: a health response section, a sector response, a communication and behaviour change section and an administration and finance section.

42 A unit for communication and behaviour change, a unit for the management of PLWHA, a monitoring and evaluation unit, an epidemiological and surveillance unit and a unit for research.

43 In fact, traditional medicine is not only recognised, but it is within the organisation chart of the Ministry of Health. See Decree 89/011 of 5 June 1989, repealed and replaced by Decree 95/040 of 7 March 1995, repealed and replaced by Decree 2002/209 of 15 August 2002.

on the organisation chart of the Ministry of Health includes a separate service under the Sub-Directorate in Charge of Primary Health Care in charge of traditional medicine — the Traditional Socio-Sanitary Service.[44] This service is responsible for the follow-up of activities linked to traditional socio-sanitary services and the enhancement of collaboration between tradi-practitioners and public health services.[45]

Although it has been difficult to regulate this sector due to the surge of quacks in the name of traditional healers and quackery in the name of traditional medicine, accredited tradi-practioners serve as entry points for HIV/AIDS PLWHA into public hospitals for effective management, as we shall see below.

4 Strategies for HIV/AIDS control

It should be noted from the outset that the current framework put in place to combat the spread of the HIV/AIDS pandemic in Cameroon is essentially conceived in the light of international guidelines and policies set out above. It has been mentioned that the initial framework for HIV/AIDS control was contained in the NACP. The NACC and the NACP conceived and implemented a number of plans with success: a short-term plan, a medium-term plan I running from 1988 to 1992, a medium-term plan II running from 1993 to 1995, and a framework plan for HIV/AIDS control for the period 1999 to 2000. The shortcomings of the programme were mainly due to poor co-ordination, inadequate involvement of other non-health sectors, a serious increase in the infection rate and insufficient resources.[46]

4.1 The National AIDS Strategic Plan

The challenges faced by NACP necessitated a more focused and planned approach, to be taken over by the National AIDS Strategic Plan (NASP) 2000-2005.

4.1.1 Context of the National AIDS Strategic Plan

From 2000, there was a new framework for strategies by the government as contained in the NASP for the period 2000 to 2005. This plan was conceived against the background of the failures of the NACP, amidst socio-economic crisis, characterised by corruption and poverty; an atmosphere that only facilitated the spread and increase of the HIV

44 2002 Decree (n 43 above), art 34(2).
45 n 43 above, art 37(1).
46 See PNLCS (n 8 above) 9. In effect, these shortcomings led to the 14 times multiplication of the prevalence of the infection rate in 13 years mentioned earlier.

infection rate. It therefore became an important issue as government declared the disease an emergency and embarked on a merciless fight. An important point to note about the NASP is that its implementation is both decentralised and multi-sector, that is, it is managed by the NACC through its central, provincial and outreach level structures, as seen above. It was presented to the national and international community and adopted on 4 September 2000 by the Prime Minister. It is important to note here that the control of HIV/AIDS is included in Cameroon's poverty reduction strategy as one of the country's priorities and this inclusion was documented as best practice by UNAIDS.[47]

4.1.2 Objectives of the National AIDS Strategic Plan

Since September 2000, NASP, which covers a period of five years (2000 to 2005), has been run. NASP aims at attaining the following objectives:

- reducing the risk of contamination of children from birth to five years and educating children between the ages of five and 14 years on healthy life skills and healthy sexual behaviour patterns;
- developing an information system geared towards monitoring the sexual behaviour change in adults;
- reducing mother-to-child-transmission (PMTCT);
- reducing the risk of contamination through blood transfusions; and
- increasing solidarity by developing national solidarity mechanisms with regard to PLWHA and their families, assuring their medical coverage and psycho-social management, promoting and protecting their rights, and involving associations in this regard.[48]

The NASP envisages, in addition, measures essentially aimed at attaining the above objectives, namely: the construction of a national and regional blood transfusion centres; the establishment of HIV voluntary counselling and testing centres in the ten provinces of Cameroon; the promotion of condom use, mainly among the following vulnerable groups: students, military personnel, commercial sex workers and truck drivers; community mobilisation; increased involvement of the public and private sectors, including religious denominations; and inter-personal communication.

These objectives and accompanying measures are expected to be achieved through a five-stage process clearly defined in the NASP.[49] The following are the strategies elaborated to attain those objectives. These strategies may be examined under two heads, namely control strategies and control components.

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47 CNLS (n 11above) 11.
48 See PNLCS (n 8 above) 11.
49 As above, 12-16.

4.2 Control strategies

4.2.1 Health sector strategy

The health sector strategy, within the framework of the diseases control programme, envisages HIV/AIDS control using the following strategies:[50]

(1) development of medical and social mechanisms for the management of PLWHA;
(2) prevention of PMTCT, clinical management of sexually transmitted infections (STIs) and safe blood transfusion;
(3) promotion of voluntary counselling and testing and the use of male and female condoms;
(4) institution of a communication plan involving the public media (national radio stations); and
(5) sensitisation of youths in schools, universities and out of school milieus, women, workers and the rural population.

4.2.2 Implementation manuals and action plans

The Central Technical Group elaborates and disseminates implementation manuals on the various components of the Multi-Sector HIV/AIDS Control Programme. These documents define the policy of each component of the programme and the methods of implementation. Meanwhile, the AIDS Control Action Plan aims at implementing the NASP.

4.3 Control components

4.3.1 Health response

The content of this component is the central axis for HIV/AIDS control. It is imbedded in the activities of the health sector that aim at monitoring the evolution of the disease, reducing its spread and improving on the quality of life of PLWHA and persons affected by HIV/AIDS. To achieve these goals, the following activities are carried out:

Secured blood transfusion

In the early days following the discovery of HIV, blood transfusion was the main mode of transmission, apart from sexual relations or the use of contaminated needles. Today, there is fear of blood transfusion for clinical purposes, even where it is aimed at saving life, for fear of contamination or religious beliefs. Some denominations (for example, Jehovah's Witnesses) abhor and reject blood transfusions. However, in order to restore confidence in the practice of blood transfusion (which is vital

[50] As above, 12-13.

for clinical purposes beyond mere fears or beliefs) and to ensure the safety of those receiving blood, the government has passed the 2003 law. Additionally, the government has created national blood transfusion centres and subsidises agents and consumables to enable proper transfusions.

Prevention of mother-to-child-transmission

The PMTCT programme in Cameroon went operational in 2000 in only one site. The major strands of this programme include: voluntary testing and counselling for pregnant women and their partners; the prescription and administration of ARVs such as Nevirapine during pregnancy and delivery; the promotion of low-risk obstetrical practices; and the promotion of feeding options adapted to newborn babies of seropositive mothers. Between 2000 and 2001, the success of the PMTCT programme sparked its extension to all ten the provinces, 162 sites in 30% of the health districts.[51] A few specialised centres have undertaken a 'PMTCT plus' programme, which is an extension of the PMTCT services to the partners of HIV-positive mothers and caring for such mothers and their babies.[52] In addition to the implantation of PMTCT sites, guidelines on PMTCT have been elaborated. It should be noted that the PMTCT programme is a joint project funded by the Cameroon government, the World Bank, UN Children's Fund and the Centre for Disease Control (CDC), Atlanta, through the Cameroon Baptist Convention.

Clinical management

Accredited Treatment Centres (ATCs) for the management of PLWHA with ARVs that have trained and qualified personnel were created by the government in all ten provinces.[53] ATCs are complemented by Treatment Units (TUs) for the management of PLWHA at the district level of the national health system, involving both private and public hospitals. Within ATCs and TUs, PLWHAs receive ARVs against opportunistic infections and prevention. Only ATCs and TUs are allowed to prescribe ARVs. This involves the recruitment of PLWHA for treatment. The accessibility and affordability of ARVs have been increased considerably by the decentralisation of ARV treatment to the local level (60 units all over the national territory) and the reduction of ARV costs. Before 2000, the

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51 CNLS (n 11 above) 12. In 2003, a total of 62 817 pregnant women received counselling, out of which 42 872 were tested; 7,7% of the women tested were HIV positive; 80% of the 1 432 HIV-positive women were given Nevirapine during pregnancy and continued to take it at delivery; 1 303 babies born of such mothers were treated with Nevirapine.

52 CNLS (n 11 above) 12.

53 See Ministerial Decision 0118/MSP/CAB of 16 March 2001.

cost of ARVs was between US $1 100 and US $909 per month. A ministerial decision reduced it to about US $109 per month and further to between US $27,27 and US $50 per month, by a second decision in 2003. A third decision in 2004 radically reduced the cost to between US $5,50 to US $12,72 per month for the first line of treatment.[54] The driving force behind the reductions was a number of factors, including:

- government's partnership with the Access Initiative in 2001 and negotiated arrangements with generic pharmaceutical companies such as CIPLA;
- government's contribution through the Highly Indebted Poor Country Initiative (HIPC) as part of the Poverty Reduction Strategy Paper (PRSP) 2000-2004;
- funds received under the World Bank's Multi-Country AIDS Programme (MAP);
- funds received from the Global Fund for the fight against AIDS, Malaria and Tuberculosis (Global Fund) under the World Health Organisation's (WHO) '3-by-5' initiative;
- government's elimination of customs duties on ARVs and other essential drugs;
- direct government subsidy; and
- contribution towards drugs, reagents and laboratory consumables by the World Bank, WHO and the French Co-operation.[55]

The upshot is that by the end of 2003, more than 7 500 PLWHA were on ARV treatment. However, this accounted for only about 8% of PLWHA. The NACC estimated that with increased funds received from the Global Fund under the '3-by-5' initiative, about 50 000 PLWHA would be on ARVs in 2005.

ARVs used in Cameroon are those recommended under national protocols developed on a consensual basis in collaboration with international experts. Quality control of ARVs is ensured by the National Essential Drug Procurement Centre (NEDPC) in partnership with the regional National Drug Quality Control Laboratory (NDQCL) which is approved by WHO. NEDPC is the only institution that is authorised to supply ARVs in ATCs.

Psycho-social management and social de-stigmatisation

An important aspect of the control component is managing the psychological aspects of PLWHA. HIV/AIDS is seen as 'an emotional, frightening and stigma-laden condition'.[56] Unlike other dreadful diseases,

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[54] By 2000, the average cost of the ARV package was US $260 per month per PLWHA. From March 2001 to August 2002, it fell to US $73 per month per PLWHA.

[55] See CNLS (n 11 above) 13.

[56] M Kirby 'The never-ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 166.

HIV/AIDS carries stigma that frequently leads to isolation or rejection and/or discrimination by others. The feeling of isolation is characterised by shame. The disease is perceived by many as a shameful disease, since it is considered the result of promiscuous conduct. Rejection and discrimination by others are occasioned by the fear of being contaminated by, or simply the fear of having any physical dealings with, 'a dead person walking' — social stigmatisation or victimisation. Both these phenomena are caused by a lack of knowledge about the disease, and, principally, its modes of transmission.

Paragraph 12 of the Abuja Declaration recognises that stigma, silence, denial and discrimination against people living with HIV/AIDS increase the impact of the epidemic and constitute a major barrier to an effective response to it. The Cameroonian government has since 1992 developed a policy in this regard and created a sub-directorate for AIDS control with a bureau for psycho-social management of PLWHA and persons affected by HIV/AIDS. Also, within the Multi-country AIDS Project (MAP), the government signed agreements with the ministries in charge of women's affairs and social affairs, and these ministries have developed their own sector plans within their various departments. Again, there are training guidelines for psycho-social management of PLWHA and a training module. Both the guidelines and the module were developed by an NGO, Care and Health Programme (CHP), supported by the government of the United States. The government uses the guidelines to train counsellors on psychological management of PLWHA and persons affected by HIV/AIDS. Workshops are organised. It should be noted that the guidelines of Doctors without Borders (*Médecins Sans Frontières)* are also used here. Furthermore, within the Country Control Mechanism (CCM) of the Global Fund, there is a home-based care policy that seeks to link treatment centres to communities, thereby spreading the psycho-social management care of PLWHA to outreach areas.

Social de-stigmatisation is the aim of both the public and the private actors, such as companies and NGOs, including NGOs of PLWHA. Following the creation of the first association of PLWHA, Association of United Brothers and Sisters *(Association des Frères et Soeurs Uni),* in 1994, a first network for the associations of PLWHA, Cameroonian Network of Persons Living with HIV/AIDS (*Réseau Camerounais de Personnes Vivantes avec le VIH/SIDA — Re CAp+),* was created in 2000. It has benefited from the support of the African Network of People Living with HIV/AIDS, UNAIDS and the German Co-operation (GTZ). PLWHA are involved in the implementation of NASP and are statutory members of the NACC, the joint follow-up committee.[57]

[57] See generally CNLS (n 12 above) 24.

The de-stigmatisation process through psycho-social management, employment and capacity building of PLWHA ultimately results in a respect for their fundamental rights as human beings. In this light, a draft law to govern the rights and obligations of PLWHA and persons affected by HIV/AIDS is underway. This law, it is hoped, will facilitate and foster the implementation of principles of non-discrimination, equality and participation.[58]

Epidemiological surveillance

There is a surveillance system in Cameroon based on international standards. The focus of this surveillance system is to carry out studies and produce estimates on HIV prevalence among the general population, from test results of pregnant women and prenatal consultations. As mentioned earlier, a demographic health study that started in December 2003 in Cameroon had, for the first time, an HIV component. Its first estimate in 2004 produced a more precise estimation of HIV prevalence, if one were to go by the Technical Explanatory Note mentioned earlier on.

Voluntary counselling and testing

Fear of HIV/AIDS caused a sense of 'deliberate ignorance' in the attitude of the general population. This results in people not wanting to know whether they are infected by the HIV virus, probably also because of the fear of social stigmatisation. It has been a struggle to encourage people to realise that knowing their HIV status is an entry point to care, treatment and support and that AIDS is just like other diseases. Indeed, HIV/AIDS is less dangerous than cancer and even less dangerous than a mortal stroke, for example, in terms of immediacy of death, since it can be clinically managed for quite a long time, if only one is psychologically fit. Thus, counselling is done in two phases: the pre-testing phase and the post-testing phase. Voluntary testing is also encouraged, and presently there are 11 voluntary testing and counselling centres created with the support of the French Co-operation service in Cameroon and the Chantal Biya Foundation — the Circle of Friends of Cameroon (CERAC). These centres provide appropriate stigma-free counselling towards voluntary testing to encourage behavioural change.

Community response

This control component is geared towards empowering local communities to undertake activities based on an awareness of the disease, the

[58] As above.

reduction of its impact by developing prevention action plans[59] and support for PLWHA and persons affected by HIV/AIDS. Thus, communities in rural and urban areas, as well as vulnerable groups, such as sex workers, truck drivers, street children and others, are provided support adapted to their peculiarities.

Sector response

Sector response is essentially geared towards supporting the public sector, private enterprises, religious denominations and major communities in the design and implementation of their HIV/AIDS control plans. The successes here have been remarkable. HIV/AIDS control plans have been instituted in various public institutions, including those of the ministries of higher education, defence, national education and women and social affairs, religious communities, private institutions, universities and research institutes.[60] The major focus of this component is on assistance to PLWHA and persons affected by HIV/AIDS to encourage de-stigmatisation.

Funding

There can be no meaningful HIV/AIDS control if there is insufficient funding of strategies. As seen earlier, the state, through the HIPC[61] and partners (private, bilateral and multilateral donors) essentially contribute to the funding of the ARVs. Government subsidises ARVs to the tune of about US $1 million per year since 2002.[62] Government received US $50 million from the World Bank's MAP for the period 2001 to 2005, while funding from other national and international partners for the period 2000 to 2005 amounted to US $40 million. In other words, the total amount of funding by national and international donors for the period of the NASP (2000 to 2005) stands at US $90 million. PLWHA contribute by procuring ARVs at affordable prices. The private sector has also been active in this direction, as companies such as ALUCAM, CDC, and CIMENCAM now have their own ARV procurement programmes for their employees and their families. Pilot projects funded by the World Bank in view of increasing accessibility of PLWHA

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59 A total of 2 442 action plans by local communities have been supported technically or financially by the programme. See CNLS (n 12 above) 17.

60 As above.

61 Government has realised a progressive increase in its HIV/AIDS budget. The Ministry of Health's budget for HIV/AIDS was only US $13 000 in 1995, but by 2001, it rose to US $1,8 million. US $9 million was budgeted from the HIPC initiative for HIV/AIDS within the framework of the execution of PRSP 2000-2004. Some of these funds were allocated to ARV procurement, thereby reducing the average monthly cost of treatment for PLWHA to US $34 per month. See CNLS (n 11 above) 14.

62 CNLS (n 11 above) 9.

to ARV treatment show on the evaluation of the PLWHA's ability to pay for ARVs in 2003 that they either contributed nothing at all or contributed between 25,5% and 75% of the cost.[63]

Private sector implication

This is a major and salutary component in HIV/AIDS control. Indeed, the government has opted for a decentralised and multisector approach, actively involving the private sector, since it is evident that a single-handed fight cannot be effective. The Abuja Declaration enhances such an approach 'through a comprehensive multisector strategy which involves all . . . development sectors and mobilisation of societies' at all levels, including the private sector, civil society, NGOs and others.[64] Enterprises of the private sector are resulting in viable partners in HIV/AIDS control. Currently, the NACC has partnership agreements with about 43 private structures, including the Inter-Employers' Union (GICAM) and 42 private companies. The cost of the public/private sector partnership over a period of four years is US $5 145 458 for the financing of HIV/AIDS control programmes in 43 private enterprises employing about 70 000 people.[65] Out of that amount, the NACC contributes the lesser share of US $2 118 032, 84, that is, about 49% of the total budget, while the remaining share of 51% is provided by the private enterprises of the partnership. These figures speak for themselves about the collaboration, zeal and involvement of the private sector in HIV/AIDS control in Cameroon.

Role of parliament

Since 2003, the National Assembly of Cameroon has participated in HIV/AIDS control, although its efforts have remained limited. The Standing Orders of the National Assembly of Cameroon (Standing Orders) establish a number of Parliamentary Committees, each having a specific competence.[66] Hence, article 16 of the Standing Orders provides for a Committee on Cultural, Social and Affairs which has public health as one of its areas of competence. In 2003, the Speaker of the

63 *As* above, 15.
64 Para 23.
65 See CNLS *'Le partenariat public/privé dans la lutte contre le VIH/SIDA'* 9-10. For the major achievements, lessons, challenges and perspectives of the partnership, see above, 10.
66 See generally ch VI. Art 19(1) of the Standing Orders provides: 'The substantive study of a matter may be entrusted to only one Committee, other Committees may ask to give their opinion on the same matter.'

National Assembly created a Sector Committee for the Fight against HIV/AIDS (Sector Committee).[67]

The Sector Committee works in collaboration with the NACC and is represented by its Chairperson. The aim of the Sector Committee is ensuring that each ministry has made a budgetary allocation for HIV/AIDS control. The Sector Committee's activities have not been diverse and animated. So far, sensitisation tours in some of the provinces of Cameroon constitute its main activity. Members of parliament who are part of the Sector Committee represent the Committee in their respective provinces.

5 Major challenges in the fight against HIV/AIDS

5.1 State reporting

While some African countries have been very prominent in state reporting on HIV/AIDS as a requirement of international human rights instruments, others have not, despite express commitments in that regard. State reporting is a means of monitoring a country in terms of respect, promotion and protection of human rights through periodic reports to the appropriate body set up for that purpose under a treaty. In the absence of state reporting, it is difficult to assess concretely state responses to HIV/AIDS from an international perspective, that is, whether international standards on the issue have been met. Specialised human rights instruments provide bodies before which state parties are required to submit periodic reports on the human rights situation in their respective countries. These are monitoring bodies or supervisory mechanisms.

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[67] Order 2003/091/AP/AN. Hon Amougou Nkolo, who is the Sector Committee's Chairperson and initiator of its creation, is of the opinion that the Sector Committee is not a 'committee' in the sense of art 16 of the Standing Orders. The article states that committees are set up each legislative year after the election of the Permanent Bureau of the National Assembly. Meanwhile, the Sector Committee is a permanent body. Again, the Secretary-General of the National Assembly convenes Committee meetings, while the Chairperson of the Sector Committee convenes its meetings. In short, the rules of procedure relating to their setting up and functioning of Parliamentary Committees *per* the Standing Orders are not in line with those of the Sector Committee. According to Hon Amougou, though called 'Committee', the Sector Committee is rather a Parliamentary Group. But the worry here is that according to art 15 of the Standing Orders, Parliamentary Groups may only be formed 'according to political parties'. In other words, Parliamentary Groups are Parliamentary alliances aimed at fostering the goals of each political party represented in parliament and as such cannot be made up of Members of Parliament (MPs) from other political parties. Yet, the Sector Committee is a mixed body made up of (all) MPs from all political parties represented in the National Assembly. The only feature that makes the Sector Committee resemble a real Parliamentary Committee in the sense of ch V of the Standing Orders is that it bears the name 'Committee'. It is therefore a *sui generis* Parliamentary Committee.

At the international level, socio-economic rights are governed by CESCR. The procedure of reporting is based on articles 16 to 22. Reporting on these rights is on the measures adopted by state parties and the progress made in achieving the observance of the rights recognised under CESCR, indicating, where necessary, difficulties confronting their implementation. Unlike the International Covenant on Civil and Political Rights (CCPR), that provided for the creation of a Human Rights Committee (HRC), to implement the rights thereunder, CESCR did not provide for the creation of such a committee. CESCR simply provided that reports were to be submitted to the UN Secretary-General who shall then transmit them to the Economic and Social Council (ECOSOC) for consideration.[68] Copies of reports or parts therefrom may be forwarded to specialised agencies, so long as the reports, or the parts therefrom, fall within their competences.[69] The control of socio-economic rights is currently ensured by an independent organ — the Committee on Economic Social and Cultural Rights (Committee on ESCR), created in 1985 by ECOSOC.[70]

The history of Cameroon's reporting to the Committee on ESCR is dismal. So far, only the initial report has been presented. The first periodic report has still not been submitted. The initial report was submitted in 1998,[71] and was presented in 1999 at the Committee on ESCR's 21st session. Though it was accepted, it was criticised for lacking in terms of form and substance. In the domain of the right to health, not only was the report very scanty, but specifically with respect to HIV/AIDS, which is of relevance here, the report provided no statistics on PLWHA and prevalence rates, as well as no statistics on other related infectious diseases.[72]

At the regional level, the supervisory mechanism under the African

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68 Art 16(1).

69 Art 16(2)(a).

70 Res 1985/17 of 28 May 1985. The peculiarity of the CESCR Committee is that, unlike the Human Rights Committee, it is not a treaty-based organ, but rather a subsidiary organ of ECOSOC created by a resolution of the latter. See generally F Sudre *Droit international et européen des droits de l'homme* (2001) 498.

71 UN Document E/C.12/Q/CAMER/1 of 17 December 1998.

72 See art 12 of UN Document E/1990/5/Add 35 on the list of issues to be clarified in Cameroon's initial report on socio-economic rights defined in CESCR. The reporting situation to other specialised treaty bodies seems relatively better. To the Committee on the Elimination of Discrimination against Women under CEDAW, Cameroon only presented its initial report in 2000 and no periodic report. To the Committee on the Rights of the Child under CRC, the initial report was presented in 2003 and thereafter no periodic report followed. Before the Committee against Torture (under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984), and the HRC under CCPR, three periodic reports have been presented, and before the Committee on the Elimination of Racial Discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ratified in 1971) 14 periodic reports have been presented.

Charter is the African Commission. The African Commission's mandate includes the review of state parties' compliance with the African Charter through periodic reports in addition to its promotion and protective mandate (alongside its power to review complaints from states). Again, Cameroon has not often reported to the African Commission. Cameroon only succeeded in presenting its belated initial report at the 31st session of the African Commission in Pretoria in 2002. Because the delay of the initial report caused delays in the presentation of periodic reports, this initial report was considered to be all the periodic reports in arrears. However, HIV/AIDS was discussed very briefly in the report. Only two issues were addressed very briefly: HIV prevalence rates and four control strategies.

Because of Cameroon's lack of reporting, the success of the country's HIV/AIDS polices cannot be objectively ascertained since the only appropriate mechanisms that could have done so have been neglected. Even when such policies seem to be working from a national perspective, this is not enough, as policies need to be frequently tested and reformed against the background of international standards, independent stakeholders' appreciation and experiences from elsewhere.

5.2 Rights and obligations of PLWHA

PLWHA constitute a vulnerable class in need of special protection by virtue of their status as much as children, women or the disabled. PLWHA, therefore, should have certain rights, including the right to health. The right to health is a central or core human right; a needs-based right that transcends and further enhances the *raison d'être,* enjoyment and realisation of the whole ensemble of human rights. Access to ARVs and drugs for the treatment of opportunistic infections is essential for PLWHA to enjoy their right to life[73] and their right to health.[74] It should be recalled that access to essential medicines forms part of the core content of the right to health, which states should be able to provide irrespective of their available resources.[75]

The right to health in the case of HIV/AIDS comprises access to proper treatment based on human rights principles, including non-discrimination in health as to age, race, sex and disability. Although in Cameroon there are only policies dealing with the rights of PLWHA, the experience elsewhere, such as in Zimbabwe (in the absence of specific legislation dealing with such rights), or the judicial experience

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73 Human Rights Committee (HRC) General Comment 6 'The right to life' (1982) para 5.

74 LT Diaz 'Protection of access to essential treatment for people living with HIV/AIDS in Uganda from a human rights perspective' unpublished LLM dissertation, University of Pretoria, 2005 1. See also Committee of Social, Economic and Social Rights (CESCR) General Comment No 14 'The right to the highest attainable standard of health' (2000) UN Doc E/C12 2000/4.

75 As above.

in South Africa, is instructive. Here, the enhancement of access to proper treatment incorporates a number of specific rights, such as the right to consultation before action is taken, the right to choice of care, the right to drugs, the right to informed prior medical consent to medical action, the right not to be discriminated against in medical schemes and the right to education, as well as encouragement of insurance company schemes that take into consideration the needs of PLWHA.[76]

A few South African cases may be helpful in identifying some specific rights that HIV/AIDS PLWHA may benefit from.[77] The first is the case of *Joy Mining Machinery Division of Harnischfeger SA Pty Ltd v National Union of Metal Workers of South Africa*.[78] In this case, the Labour Court ruled that anonymous testing of employees in accordance with the relevant law was legal on 11 conditions, including the fact that at no time should such an employee be asked his name, the information should not be recorded as a sample and the employer must make it clear that it does not intend to discriminate against that employee. In *A v SAA*,[79] the plaintiff tested HIV positive in a pre-employment test and was refused employment as cabin attendant by South African Airways. The court held that such a refusal on the grounds of the applicant's status was unjustified and awarded compensation. In *Zungu v ET Security Services,*[80] the applicant, who was a security guard, had full-blown AIDS and was dismissed. He sued for unfair dismissal on the grounds that he could still perform his duties as a security guard. The Commission for Conciliation, Mediation and Arbitration (CCMA) held that the AIDS stage of the illness made it impossible for him to perform his duties. The CCMA found that his dismissal was lawful and that the respondent had acted in good faith. The rationale in this case clearly shows that in as much as PLWHA have rights, so do they have duties, running parallel to those rights. In fact, they owe a duty of care not to intentionally, knowingly or negligently contaminate others at any stage of the illness.

In Zimbabwe, there is specific legislation on HIV-related criminal behaviour — the Sexual Offences Act entitled 'Prevention and Spread of HIV'. It is an offence, punishable by up to 20 years' imprisonment, for someone with knowledge of her or his HIV status to intentionally do anything which she or he knows or reasonably ought to know will infect another person with the virus, or is likely to lead to the infection of another person, whether or not she or he is married to that person.

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76 See Centre for the Study of AIDS & Centre for Human Rights 'HIV/AIDS and human rights in Zimbabwe' (2004) 23-25.

77 See Centre for the Study of AIDS & Centre for Human Rights 'HIV/AIDS and human rights in South Africa' (2004) 22-23.

78 J158-2002; (2002) 23 ILJ 391 (LC).

79 J1916/99.

80 KN505-48.

Where the HIV offender is convicted of rape or sodomy, irrespective of whether she or he was aware of her or his status, she or he can be sentenced to imprisonment of up to 20 years. In fact, the Zimbabwe National HIV/AIDS Policy (1999) in its Guiding Principle recommends that the wilful transmission of HIV in any setting should be considered a crime similar to inflicting other life threatening injuries to another.[81]

In Cameroon, the Preamble of the 1996 Constitution proclaims equality and non-discrimination. The rights of PLWHA may easily be abused through stigmatisation and discrimination. It is true that the current practice in Cameroon is to secure the rights of PLWHA, especially their labour rights. This is the thrust of the agreement between the NACC and the employers' network, led by GICAM and *Citoyenne Assurances*, and that between GICAM and ReCAp, mentioned earlier. The South African cases reviewed above show that labour rights of HIV/AIDS victims (especially with regard to employment) are very precarious. Yet, the jurisprudence of South African courts reveals no tolerance in respect of the infringement of labour rights of PLWHA. Such jurisprudence is sound and the *ratio decidendi* could be adopted elsewhere, as in Cameroon, if the national programme for HIV/AIDS control is anything to go by.

Nevertheless, while PLWHA have rights, they also have obligations. Indeed, the approach of the African Charter is that the rights of the African peoples should be complemented by obligations where necessary. Thus, in as much as PLWHA have well defined rights, they also have corresponding obligations in relation to the containment of the disease. The 2003 law on blood transfusion and the *Noumen* case are statutory and judicial efforts in this direction. These are efforts to criminalise and punish negligent or intentional conduct that leads to the transmission of the HIV virus.

5.3 Sensitisation

Sensitisation about HIV/AIDS in Cameroon has been effective. It is estimated that over 90% of the population, both rural and urban, know about HIV/AIDS, its transmission mechanisms and prevention methods.[82] The Minister of Health (Chairman of the NACC) noted with satisfaction in October 2004 during the signing of the co-operation agreement with the Support to International Partnership Against AIDS in Africa (SIPAA) that 'the silence has so far been successfully broken; this is time to educate the population, especially women and children who are most vulnerable to the pandemic'.[83]

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81 National HIV/AIDS Strategic Framework 2000-2004 39.
82 http://allafrica.com/stories/200411150553.html (accessed 31 March 2006).
83 As above.

The creation of awareness about HIV/AIDS has been successful so far but, as mentioned earlier, the success does not reflect on sexual behaviour patterns, especially in the use of condoms or abstinence. As concerns the use of condoms, the 2000-2002 phase of the NASP — the emergency plan phase — had as objective a 100% use of condoms.[84] That is, to incite the use of both male and female condoms, encourage voluntary testing and information, education and communication in view of inciting sexual behaviour change. The multi-sector approach seems to have added impetus to the awareness of the disease. In addition, the local and community responses have been instrumental in this regard as seen from the demographic and health survey mentioned earlier. For instance, the response rates after seeking consent to collect blood samples for testing was 93% nationwide in 2003.

5.4 Co-operation and research

Co-operation and research on HIV/AIDS in Cameroon have been remarkable. Co-operation has mainly focused on working out, orientating and implementing HIV/AIDS policy. Co-operation involves all sectors, public/private as well as bilateral and multilateral donors and NGOs. The private sector has been instrumental in HIV/AIDS control. This is demonstrated by the actions of GICAM that is engaged in the promotion of HIV/AIDS workers' rights, and private companies that have developed a health-related social security policy in favour of their workers and their families. Some have even gone as far as drawing up an action plan to fight HIV/AIDS and this seems to be a tendency in almost all business enterprises.

In addition to instances of co-operation with bilateral and multilateral donors and NGOs addressed earlier on in this paper, in October 2004, officials of the NACC and the Support to International Partnership against AIDS in Africa (SIPAA) signed a co-operation agreement to intensify activities against the HIV/AIDS pandemic in the country. The SIPAA programme is a three-year initiative, managed by Action Aid International Africa, and funded by the UK Department for International Development to enhance international partnership action against AIDS in Africa.[85] However, on 6 May 2005, the NACC noted that its activities were not co-ordinated and that those of bilateral donors within the framework of the NASP befell a similar fate, and so recommended harmonised and co-ordinated action plans.

With regard to research on HIV/AIDS in Cameroon, the government has encouraged efforts. Professor Anomah Ngu, a medical researcher and former Minister of Health in Cameroon, for instance, has made

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84 PNLS (n 8 above) 18.

85 http://www.healthlink.org.uk/world/sipaa_01.html (accessed 1 April 2006).

clinically tested breakthroughs in this field that have led to impressive clinical management of PLWHA. Government has recognised and encouraged Anomah Ngu's enterprise through financial support. The visit to HIV/AIDS research centres in 2003 by imminent researcher and co-discoverer of the deadly *ebola* virus, UNAIDS Executive Director and UN Deputy Director, Dr Peter Piot, was considered a recognition of Cameroon's efforts in HIV/AIDS control.[86] Also, in February 2006 the Chantal Biya International Reference Research Centre for HIV/AIDS Prevention and Management (CIRCB) was inaugurated. The Centre's research largely focuses on post-natal PMTCT, specifically to find a vaccine that protects infants against HIV transmission during breastfeeding. The Centre's immediate goal is to develop paediatric vaccine trial protocols by 2006 and 2007.[87]

Research on HIV/AIDS in Cameroon is undertaken in the public and private spheres. Public research has been operated by the Ministries of Health and Higher Education via the Faculty of Medicine and Bio-Medical Sciences. Private research is very promising, but has remained rather isolated. Research is still uncollaborative and unco-ordinated. Proof of this is that CDC Atlanta has separate projects with the Ministry of Defence, while the Faculty of Bio-Medical Sciences and the Institutes of Tropical Medicines in London and Antwerp sometimes have separate research projects. During these projects, the home ministry — the ministry in charge of scientific research — is not involved directly, but rather has a protocol agreement with the NACC. Thus, one finds public institutions of the same system engaged in isolated and perhaps competing struggles on an issue of national interest. This is a serious dilemma since it weakens national efforts on HIV/AIDS research and confuses private donors who may not know where and how to channel their support. Worse still, the very essence of the NASP is defeated.

The consequences of unco-ordinated research are exemplified by a scandal in early 2005, caused by the implementation of a project by Family Health International. The project, approved by the Ministry of Health under a Protocol Agreement (PA), consisted of testing a purported HIV preventive drug known as Tenofovir at chosen sites in Cameroon on a cohort of 400 commercial sex workers. Four of the women were later found to be infected with the HIV virus. The project was run under conditions described in the findings of the Order of Physicians as 'unethical'.[88] Although the National Ethics Commission (NEC) observed that there was no proof that the seroconversion of the women was as a result of their participating in the project, NEC, however, paradoxically declared (after stating that it could not find any

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86 Morikang 'Fighting AIDS: Cameroons efforts recognised' (2003) *Cameroon Tribune* http://www.harford-hwp.com/archives/35/205.htm (accessed 11 February 2006).

87 *Cameroon Tribune* (27 February 2006) 15.

88 *'Tenofovir: l'Ordre des médecins se prononce' Cameroun Tribune* 24 February 2005 11.

express statement in the Protocol Agreement that the drug prevents HIV infection),[89] that the Protocol Agreement 'scrupulously' respected standard international norms, including those spelt out in the WHO/UNAIDS reports of 2003 and 2004, and the Helsinki Declaration.[90] NEC was therefore of the opinion that the problems generated by the project resided in its (administrative) implementation rather than in its entire propriety.[91] The divergence in points of view in the findings of NEC and the Order, the long awaited publication of the report on the findings of the *ad hoc* commission of inquiry put in place by the Minister of Health and the continued silence of the latter over the matter, speak for themselves.

Whatever the upshot of what is now commonly referred to as the Tenofovir affair, international human rights standards show that clinical trials which target a certain group of persons by virtue of their sex, such as women in the instant case, unequivocally amount to sexual discrimination and a violation of their right to health and life. This is evident from the fact that four of the women infected with HIV. Articles 2(d) and (e) of CEDAW are clear on this point. CEDAW requires state parties to refrain from engaging from any act or practice of discrimination against women by any person, organisation or enterprise, and to ensure that *public* authorities and institutions shall act in conformity with this obligation.

Traditional medicine has also been portrayed by tradi-practitioners as being instrumental in research and HIV/AIDS control. Although some tradi-practioners have made wild claims of being able to manage PLWHA and actually cure HIV/AIDS with herbal concoctions, such allegations remain scientifically unproven. However, in 2003, an international NGO, active in the field of the promotion of traditional medicine, announced a therapy for HIV/AIDS called METRAFAIDS at the 14th International AIDS Conference in Barcelona.[92] Whether the allegations are founded or not, the major handicap of traditional medicine is that its dosage, conservation and the expiration of concoctions or substances have been based on mystical and spiritual guidance or mere speculation which may lead to the aggravation of the clinical condition of PLWHA, in some cases. Yet, it is also true that traditional practices have been instrumental in the spread of the HIV virus. This is the case, for example, of healing practices that involve the cutting of the body

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89 The NEC contended amongst other things that there is presently no drug that prevents infection.

90 *'Tenofovir: le comité national d'éthiques se prononce' Cameroun Tribune* 14 March 2005 7.

91 As above.

92 'Cameroon: HIV/AIDS therapy may stem from traditional methods' *Weekly Indigenous News* http://209.200.101.189/publications/win/win-article.cmf?id=1833 (accessed 11 February 2006).

with sharp objects for the administration of potions. Also, any hospital diagnosis that does not suit a PLWHA's or relative's expectation provokes recourse to witchdoctors who offer an answer or solution or cure to any problem or illness. Some tradi-practitioners go as far as making claims that they can cure all illnesses, HIV/AIDS included. Whatever the veracity or falsity in such claims, what is certain is that tradi-practitioners have been instrumental in HIV/AIDS control. In fact, since traditional medicine is recognised fully by the state and features on the organisation chart of the Ministry of Health, tradi-practitioners serve as entry points for PLWHA into the public health care system (in that they attract PLWHA who would be subsequently conveyed to public hospitals).

Therefore, the strategy adopted by the government is not to discredit or outlaw the practice of traditional medicine, but rather to regulate it and encourage practitioners to join lawful associations. This is to separate true tradi-practitioners from charlatans. In this way, those the system can collaborate with are easily identified.

The 2001 Abuja Declaration acknowledged and gave impetus to the role and efforts of traditional medicine in HIV/AIDS control. In effect, the Heads of State and Government committed themselves[93]

> to explore and further develop the potential of traditional medicine and traditional health practitioners in the prevention, care and management of HIV/AIDS, tuberculosis and other related infectious diseases.

Even before the Abuja Declaration, traditional medicine and research were acknowledged fully in Cameroon. In a Circular Note of 10 September 1991,[94] the then Minister of Health, Joseph Mbede, drew the attention of directors of general hospitals and research centres, and provincial health delegates, to the growing importance of traditional medicine in the management of sick persons generally, as a positive cultural gain. He then exhorted them to take the necessary measures to ensure effective collaboration between public health structures and tradi-practitioners in the best interest of patients.

5.5 Management of funds and accountability

One of the most crucial aspects of HIV/AIDS control is funding and the rational use of funds. While funding by the various actors (the state, private sector and bilateral and multilateral donors) has increased and intensified over the years, doubt exists over the use of funds. It has been submitted that the health sector is prone to corruption for the following reasons: imbalance in information, uncertainty in health markets and

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93 Abuja Declaration (n 27 above) para 32.
94 Circular Note D26/NC/MSP/SG/DMPR/DAMPR/SDMR/SSCMT.

complexity of health systems.[95] The types of corruption in this sector include embezzlement and theft, corruption in procurement, corruption in payment systems, corruption in the pharmaceutical supply chain and corruption at the point of health service delivery.[96] Globally, corruption within the health sector is fanned by 'paucity in good record keeping and the difficulty in distinguishing among corruption, inefficiency and honest mistakes'.[97] Considering this vulnerability in relation to corruption, there should be a sound legal framework to combat this vice.

At the international level, there is a UN Convention against Corruption signed by Cameroon in 2003, but which it has not yet ratified. The UNAIDS Guidelines also focus on the improvement of government capacity for acknowledging the government's responsibility for multisector co-ordination and accountability.

At a regional level, Cameroon has not yet signed the AU Convention on Preventing and Combating Corruption. It is therefore doubtful whether internal measures undertaken to fight corruption can be effective. Once more, here, as in the domain of state reporting discussed above, there is no objective standard for measuring national efforts to combat corruption.

At the national level, there is an impressive arsenal of legal instruments and efforts to fight corruption, but the vice persists. For instance, there is a February 2005 Decree establishing the Rules for the Committee for the Fight against Fraud, Smuggling and Corruption, and the Procurement Contracts Code of 2004. It should be noted that there is a national corruption observatory and each ministry has its own component of this national structure. Yet, corrupt practices are far from being cured. While civil servants and high-ranking government officials such as government ministers have been sanctioned for corrupt practices and others removed from public service as 'ghost workers' over the last few years,[98] corruption continues and heavily engrained corrupt habits that die hard have taken the toll on Cameroonians.

Cameroon topped the chart of the most corrupt nations in the world for the year 1998. In 2006, there was a slight improvement as the country was ranked 23rd out of 159 countries surveyed.[99] Early in 2006, the head of state articulated a stiff political rhetoric, ensuring a merciless fight against this plight that has seriously ruined the nation. Thus, while in 2005 some officials of the NACC were sacked discreetly for misappropriation of HIV/AIDS funds, in February 2006, ministers

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95 Transparency International 'Global corruption report 2006: Special focus — Corruption and health' (2006) xvii.
96 As above, xviii.
97 As above, xvi.
98 As above, 141.
99 As above, 302.

and former directors of state-owned corporations were arrested on charges of fraud and misappropriation.[100] Corrupt practices and embezzlement of funds are daunting problems that will derail any meaningful HIV/AIDS control if left unchecked.

5.6 The new NASP 2006–2010

The 2006-2010 phase of NASP, launched on 8 March 2006,[101] marks a turning point in HIV/AIDS control in Cameroon. It is an ambitious plan. Following the relative success of the first NASP (2000-2005), the new plan aims at preserving and maximising the achievements of the first plan, while addressing its weaknesses. The central objective of this phase therefore is to reduce the proportion of infected women and men to 50% by 2010. Attainment of this objective will necessitate intervention in seven domains: counselling and voluntary screening to scale up awareness of personal serological status amongst women and men; prevention and control of STIs to reduce their prevalence; promotion of the use of condoms to 80% (from 41% for women and 54% for men); blood transmission safety; reinforcement of prevention of HIV amongst children and women; and thereduction of PMTCT among breastfeeding babies to 50%.

There are five major strands of intervention strategies under the 2006-2010 NASP aimed at correcting the shortcomings of the 2000-2005 NASP, while taking up new challenges.

5.6.1 Research and epidemiological surveillance

The 2006-2010 NASP envisages the promotion of research and the application of results, with emphasis on research on vaccines, the diffusion of research findings and ways to involve tradi-paractiners in research. On epidemiological surveillance, the major strive here is to produce viable data on HIV/AIDS, STIs and HIV opportunistic infections.

5.6.2 Involvement of all sectors

Following the success of private actors, NGOs and the civil society under the 2000-2005 NASP leading to a drastic drop in the cost of ARVs and an increase in the number of PLWHA under treatment, an increase in awareness of the pandemic and the introduction of PMTCT, the new strategic plan aims at reducing by half PLWHA in the various sectors.

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100 *Cameroon Tribune* (n 86 above) 3-5; *Situations* 5 (3 March 2006); *La Gazette* No 23 (March 2006); *The Post* 0744 (3 March 2006).

101 CNLS *'Plan stratégique de lutte contre le SIDA au Cameroun 2006-2010'* (2006) *The Post* 0744 (3 March 2006).

5.6.3 Management of children affected by HIV/AIDS

The NASP 2006-2010 also proposes the management of orphans and vulnerable children affected by HIV/AIDS, notably in terms of access to health care, education and nutrition.

5.6.4 Access to medication

The target of the precedent NASP was to reduce the cost of ARVs and to place at least 50 000 infected persons on ARVs by 2005. By the end of that phase, 75 000 were on ARVs, representing 18% of all infected persons. The new NASP aims at placing all HIV-infected children and 75% of the infected adult population on ARVs and providing free treatment to 10% to 75% of disserving cases, while ameliorating the nutritional levels of 50% PLWHA generally.[102]

5.6.5 Co-ordination, follow-up and evaluation

This is a very important arm of, and a summary of, the great challenges awaiting the new NASP as its focus transcends all HIV/AIDS control strategies and seeks to address specifically the difficulties and shortcomings of the first NASP. Concerning follow-up and evaluation, unlike the first NASP, the second seeks to cure problems of follow-up and evaluation which in some cases led to poor policy implementation and the improper handling and analysis of data. The follow-up and evaluation will therefore centre on good decision making for a better orientation of HIV/AIDS control and the judicious use of funds. There will be close monitoring of the implementation of the new NASP to identify hitches and take prompt remedial action. With regard to co-ordination, the new plan resolves to discard unco-ordinated control efforts that were a hallmark of the period of the 2000-2005 NASP, especially in relation to research. For this to be attained, there must be a synergy in the present institutional framework, running from central structures to decentralised structures and bringing together a greater part of available funding.[103]

6 Towards rethinking strategies

Never before has humankind been concerned and involved in any health crisis of the magnitude of HIV/AIDS. Indeed, the fight against this pandemic will go down in history. It is the most acute and dramatic of illnesses, perhaps equal to or second only to the Black Death that swept across 14th century Europe. It is most interesting to note that,

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102 *Cameroon Tribune* (2 March 2006) 8.
103 As above.

although the HIV/AIDS pandemic stands as the most dreadful of pandemics in modern times, it is only the world's fourth greatest cause of death, but most important in sub-Saharan Africa.[104] The fact that the pandemic accounts for the greatest mortality rate in sub-Saharan Africa, replacing malaria, is indicative of recent concerns and trends in state policies in the region to stage a stiffer resistance to the pandemic.

The HIV/AIDS control programme in Cameroon has been pragmatic in its early efforts, culminating in the setting up of the NACC and the drawing up and implementation of the NASP. Collaboration between government and actors of the private sector has been a wise step towards decentralising the control that requires the attention and assistance of all to put an end to this global health dilemma. But many challenges remain and should be addressed to ensure success of strategies to prevent its propagation. The concept of the change in behaviour of people is a strategic and central component of HIV/AIDS control, and must also be transposed to the level of management of HIV/AIDS funds and implementation of policies.

There can be no successful HIV/AIDS control programme if research strategies among major actors (public and private sectors) are isolated and diverse. The new 2006-2010 NASP outlined above proposes to put an end to this. Not only should there be harmonisation between public/private sector strategies within the framework of NASP, but it will be conducive to have the public/private partnership in HIV/AIDS control reinforced by integrating the services of private enterprises into the national structure. There is a serious lack of horizontal power at the institutional level in the practical management process of NASPs that may be hampering effective policy implementation. The problem is that the NACC is chaired by the Minister of Health who is practically on the same level of power with other ministers and cannot, politically, give them binding instructions. Rather, a typical vertical power structure should be employed to circumvent this institutional handicap. Thus, the chair should be ensured by the Prime Minister and head of government, who is in a position to give instructions to all ministries.

For effective HIV/AIDS control, legislative measures should be taken to ensure binding principles. It is important to place HIV/AIDS strategies and related issues on a statutory footing in Cameroon. Legislation should not be limited to the rights of PLWHA and persons affected by HIV/AIDS in relation to discriminatory tendencies, labour rights, care, nutrition and blood transfusion issues. The rights of PLWHA should begin with the needs and a broad-based right — the right to health — involving effective access to sufficient reasonable medical care, without which any other rights cannot be enjoyed. In the absence of a bill of

[104] In 2005, North Africa and the Middle East had between 470 000 and 730 000 cases. See n 3 above.

rights or an express constitutional recognition of the right to health in Cameroon,[105] and against the background of a legislative vacuum, the ideal solution appears to lie in the adoption of a human rights approach to HIV/AIDS.[106] This approach will empower and enable PLWHA to face the pandemic with dignity and improve their quality of life since it (HIV/AIDS) cannot be tackled through traditional public health programmes.[107] However, it is of cardinal importance (especially as endorsed by the African Charter) that the state's obligation to respect, protect, fulfil and promote the fundamental rights equally entail obligations on the part of the right bearer. Thus, any conduct amounting to the wilful transmission of HIV should be severely reprimanded. This should equally apply to non-HIV-positive offenders who either intentionally of negligently transmit or cause the transmission of the virus. The rationale in the *Noumen Théophile* case and the laws of some countries of the SADC region, such as Zimbabwe and South Africa, are inspiring here.

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105 Contrary to other rights that have specifically been spelt out in the Preamble of the 1996 Constitution, such as the right to work and the right to property.

106 S Gruskin *et al HIV/AIDS and human rights in a nutshell* (2004) 4.

107 J Mann 'Human rights and AIDS: The future of the pandemic' (1996) 30 *John Marshall Law Review* 195.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Trade and human rights: A perspective for agents of trade policy using a rights-based approach to development

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Summary

International trade is essential for economic growth. It provides opportunities for employment, income, foreign exchange and access to foreign products and technologies. In the process of achieving these gains, the possibility exists for negative and adverse socio-economic effects on groups, individuals and the environment. Presently being debated is the impact of international trade on the environment, health, labour and human rights. Various economic, social and political arguments have been made to resist addressing these issues using the international trade regime. Employing the twin concepts of a rights-based approach to development and sustainable development, this paper argues for these concerns to be made an integral part of international trade law policy design and implementation, at national and international levels. While international trade may lead to economic growth, current studies show that it may not necessarily lead to development. This is especially so if international trade rules and policies fail to focus on the central object of development, which is the human being. Trade rules should have as its ultimate and foremost aim the promotion of human welfare. Consequently, since human rights, health, the environment and labour rights impinge directly on human welfare, they must not be considered in isolation from trade.

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1 Introduction

International trade has been responsible for the economic growth of many countries.[1] The period after World War II has witnessed a massive expansion in trade, especially between developed countries. This expansion came after a period of devastating protectionism during the inter-war years.[2] In recent times, too, Asian countries such as India, Thailand, China and Malaysia have benefited greatly in terms of economic growth from increased participation in international trade. By contrast, African countries continue to experience a reduction in their share of the volume of international trade and a deterioration in their economic conditions.[3] It is estimated that Africa's share of world trade decreased from around 6% in 1980 to around 2% in 2002 and that, unless this trend is reversed, Africa will not be able to meet the Millennium Development Goals.[4]

International trade, currently being pursued under the aegis of the World Trade Organization (WTO), provides employment opportunities, foreign exchange, access to products and services that are otherwise not available, and encourages investment and the transfer of technology. All these are essential for economic growth and development. Notwithstanding these benefits, concerns have been expressed regarding the negative socio-economic effects that trade liberalisation is having on countries. These concerns, chronicled by various international bodies, including the United Nations (UN) Commission on Human Rights as well as individual researchers,[5] relate to human and labour rights abuses, increased poverty, environmental degradation and deterioration in the health conditions of individuals in these countries.[6]

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1 The link between trade and growth is not free from doubt. See Y Akyuz *Developing countries and the world trade: Performance and prospects* (2003) 3.

2 World Bank *Globalisation growth, and poverty reduction building an inclusive world economy* World Bank Policy Research Report (2002) 23-51.

3 UNCTAD *Trade and development report* (2004) 3-41.

4 *Our common interest*, Report of the Commission for Africa (2005) 248. For a discussion of the goals, see P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755.

5 See eg UN Commission on Human Rights 'Globalisation and its impact on the full enjoyment of human rights' E/CN 4/2002/54; 'The impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on human rights' E/CN 4/Sub.2/2001/13; 'Liberalisation of trade in services and human rights' E/CN 4/Sub.2/2002/9; 'Human rights, trade and investment' E/CN 4/Sub.2/2003/9. See also JE Stiglitz *Globalisation and its discontent* (2003) 59; JA Hall 'Human rights and the garment industry in contemporary Cambodia' (2000) 36 *Stanford Journal of International Law* 119; K Kolben 'Trade monitoring and the ILO: Working to improve conditions in Cambodia's garment factories' (2004) 7 *Yale Human Rights and Development Law Journal* 79.

6 For a discussion of some specific areas of conflict between human rights and WTO law, see C Dommen 'Raising human rights concerns in the World Trade Organization: Actors, processes and possible strategies' (2002) 24 *Human Rights Quarterly* 13-41.

In spite of the negative impact international trade is having in some developing countries, there has been resistance to the integration of social concerns such as human rights, environmental and health considerations into the WTO framework. Often this resistance has been couched in economic and political terms. Developing countries have been at the forefront of this resistance. Arguments such as the threat to comparative advantage and national sovereignty, the socio-economic cost of adjustment, the competence of the WTO, and the appropriateness of using the trade regime to resolve these concerns have been made.[7]

This paper argues for a shift from such arguments of resistance to an acceptance of the importance of these social concerns, using the twin concepts of a rights-based approach to development and sustainable development. It is suggested that whilst international trade and investment may lead to economic growth, unless the relevant actors in the trade arena factor these social concerns into trade policy, it may fail to benefit the ultimate end of development, that is the human being.

2 A rights-based approach

2.1 The rights-based approach, sustainable development and trade policy

Traditionally, development has been conceived of as increasing the gross domestic product (GDP) of a country. Under this conception, the basis and aim of development strategies is the maximisation of GDP. The belief was that such increases in GDP would result in increased wealth and hence the general welfare of the people. This view regarded social and human development as the derived objective of growth and almost always as functions of economic growth. Under this approach to development, the central object of any development effort, that is the human being, is given a subsidiary place in the process of formulating economic policies. Additionally, the impact of economic activity on issues such as the environment and health are considered externalities to be dealt with outside the free market.

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[7] Much has been written on this issue. A selected few are: DA Zaheer 'Breaking the deadlock: Why and how developing countries should accept labour standards in the WTO' (2003) 9 *Stanford Journal of Law Business and Finance* 90-92; LA DiMatteo 'The Doha Declaration and beyond: Giving a voice to non-trade concerns within the WTO trade regime' (2003) 36 *Vanderbilt Journal of Transnational Law* 95; K Jones *Who's afraid of the WTO?* (2004) 125-146; M Monshipouri 'Promoting universal human rights: Dilemmas of integrating developing countries' (2001) 4 *Yale Human Rights and Development Law Journal* 52; H Cullen 'The limitation of international trade mechanisms in enforcing human rights: The case of child labour' (1999) 7 *International Journal of Children's Rights* 1.

This approach to development can be criticised in many respects. First, it fails to focus on human beings as the central object of development. As a result, the rights of individuals are often sacrificed in the effort to develop. This is especially true in some developing countries where many human rights abuses happen in what is seen as a necessary prelude to development.[8] Second, economic growth resulting from such development efforts often fails to enrich the lives of people. For example, by prioritising efficiency considerations, it may lead to the uneven distribution of the gains of development, or fail to protect vulnerable groups such as children and women. Third, it may also lead to economic policies that take little account of the environmental impact. Environmental impact assessment of projects may not be mandatory, and over-exploitation of natural resources may ensue. Generally, the focus of this approach to development is narrow.

In recent times, another approach to development has been advocated. This is the rights-based approach to development.[9] It is that process of development in which all human rights and fundamental freedoms can be fully realised. According to the Office of the UN Commissioner for Human Rights:[10]

> A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. . . . [It] integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.

The Office identifies express links to rights, accountability, empowerment, participation, non-discrimination and attention to vulnerable groups as key elements of this approach. Every human being is entitled to this process of development on account of the right to development; however, the 'process' and the 'right' should not be confused.[11] This

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8 See Y Osinbajo & O Ajayi 'Human rights and development in developing countries' (1994) 28 *International Lawyer* 727.

9 For a discussion of the concept, see M Darrow & A Tomas 'Power, capture, and conflict: A call for human rights accountability in development co-operation' (2005) 27 *Human Rights Quarterly* 471.

10 http://www.unhchr.ch/development/approaches-04.html (accessed 1 March 2006).

11 See A Sengupta 'The human right to development' (2004) 32 *Oxford Development Studies* 179 181, where he notes that a process of development which is carried out in a manner consistent with human rights is rights-based. When that process can be claimed as a right, satisfying the test necessary to make that claim and entailing binding obligation on the duty holders to enable the fulfilment of the claim, then the process can be the object of the right to development. The right to development is a claim to a rights-based process of development. See also Declaration on the Rights to Development, adopted 4 December 1986, 6 A Res 41/28; A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 837; and S Marks 'The human rights framework for development: Seven approaches' FXB Center Working Paper No 18 (2003) http://www.hsph.harvard.edu/fxbcenter/research_publications.htm (accessed 1 March 2006) for other approaches to development.

rights-based approach sees the human being as the central object of development and not merely as its facilitating instrument; it treats individuals as the end and not merely the means of development. Under this approach, the design of any policy has to take account of its impact on individual freedoms and rights. Thus, for example, policies that may result in the abuse of children will not be protective of the interests of the weak and vulnerable, or that may result in adverse environmental impact, must be reassessed.

This approach to development in no way discounts the importance of economic growth. The approach does not advocate that it is possible to achieve human development only by following the rights-based approach to development and ignoring policies for economic growth.[12] Economic growth through trade and investment is essential for the realisation of human rights. Indeed, empirical studies suggest that policies that promote real income growth will tend to promote human rights across a broad range of concerns.[13] What the rights-based approach advocates is that the growth of resources through trade and investment must be realised in a manner in which all human rights are respected and promoted. Thus, for example, the approach does not advocate that developing countries should not proceed on the path of economic development until all human rights have been realised. Such thinking will be inconsistent with the approach and indeed senseless. What the approach advocates is that respect for human rights should be an essential component of all development policies, including trade.

So conceived, the approach provides a challenge to the theory that economic development in developing countries, through the vehicles of international trade and investment, must necessarily involve compromises in relation to human, labour, health and environmental rights. History provides examples of development that were initially built on human rights, labour and environmental abuses. The use of slave and child labour during the industrial revolution in Europe and later in American plantations as well as the massive exploitation of the natural resources of the colonial territories, are cases in point. These are, however, not courses that can be followed in this age. The rights-based approach makes respect for rights an indispensable part of the development process, but with a consciousness of the difficult policy choices it presents for, especially, developing countries.

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[12] Third report of the Independent Expert *The right to development* E/CN 4/2001/WG.18/2 paras14-15.

[13] AO Sykes 'International trade and human rights: An economic perspective' (June 2003) *U Chicago Law & Economics* Olin Working Paper No 188 http://ssrn.com/abstract=415802 (accessed 1 March 2006).

2.2 Sustainable development and the rights-based approach

Like the rights-based approach to development, the concept of sustainable development also focuses on the individual as the central object of development. Principle one of the Rio Declaration on Environment and Development declares that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'[14] Sustainable development has been defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[15] It thus focuses not only on the present and immediate, but also on the future.

The concept of sustainable development can be viewed as having three structural components, namely, international human rights law, international environmental law and international economic law.[16] Viewed in this light, the concept brings together three regimes that have hitherto evolved separately and in isolation from each other.[17] Sustainable development integrates all three into a single policy instrument. Integrating all three components into a single policy instrument, however, presents a challenge. For example, economic efficiency considerations may dictate the establishment of a project in a given location. The project may provide employment and income to families in the area, but can produce adverse environmental and health impacts on the population. Any decision taken must have regard, after consultation, for all the interests and rights engaged in such a situation.

An essential element of the concept of sustainable development is a commitment to integrating environmental considerations into economic and other developmental activities. However, sustainable development is not just about the environment. It is also concerned with other things people care about, such as poverty, food, health and education, all of which are essential for the well-being of the individual.[18] It provides a foundation for the appreciation of the fact that environmental protection is vital for the realisation of other human rights. As Vice-President Weeramantry of the International Court of Justice notes:[19]

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14 Rio Declaration on Environment and Development 1992 http://www.unep.org/Documents/ Default.asp?DocumentID=78&ArticleID=1163 (accessed 1 March 2006).

15 World Commission on Environment and Development *Our common future* (1987) 19.

16 D McGoldrick 'Sustainable development and human rights: An integrated conception' (1996) 45 *International and Comparative Law Quarterly* 796.

17 The foundations of the current regime on trade and human rights law date back to the early post-World War II era. International environmental law, on the other hand, started around 1972, when the first UN Conference directly concerned with environmental issues was held leading to the formation of the United Nations Environment Programme.

18 See DC Esty *Greening the GATT: Trade, environment, and the future* (1994) 183-184.

19 Separate Opinion of Vice-President Weeramantry in the case concerning the Gabcikovo-Nagymaros Project, *Hungary v Slovakia* (1997) ICJ Reports 91-92.

> The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

Under principle four of the Rio Declaration on sustainable development, environmental protection has to be an integral part of the development process and must not be considered in isolation from it.[20] All these represent an acknowledgment that environmental considerations should be a key component of any development policy. They represent a challenge to the notion of 'develop now, clean up later'.

Environmental considerations can be made part of the developmental process through, for example, the provision of information on the environment, the conduct of environmental impact assessments and 'green conditionality' for development assistance. Whilst this may entail costs in the short term, it remains true that a development policy or investment that puts priority on growth at the expense of the environment may entail higher costs in the future. Thus, environmental problems and effects must be actively managed as part of policies leading to economic growth. Environmental protection should be an essential component of any development policy. It cannot be deferred until rising incomes make more resources available for environmental protection.[21]

The notion of sustainable development adopts an integrating approach to the issue of the relationship between international trade and environmental protection. It sees trade not as an end in itself, but as a means to an end, that is sustainable development. Trade liberalisation should serve the objective of human well-being. This calls for a shift in focus from the question: Is this environmentally protective measure consistent with existing trade rules? to the question: Does this measure (be it environment or trade related) help as a means to achieving the ultimate goal of sustainable development? Sustainable development places environmental and trade concerns on an equal footing. Both are essential means to achieving, and must serve the overarching goal of sustainable development.[22]

Conceived of as above, the notion of sustainable development can indeed be deemed an aspect of the rights-based approach to development. This is because the rights-based approach envisages a kind of development in which all human rights, be they economic, social, political or cultural, are realised. Indeed, it is now generally accepted that

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[20] Rio Declaration (n 14 above).

[21] UNDP *Human Development Report* 2003 Millennium Development Goals: A compact among nations to end human poverty 123.

[22] EB Weiss 'Environment and trade as partners in sustainable development: A commentary' (1992) 86 *American Journal of International Law* 728.

sustainable development is impossible without human rights.[23] As Oloka-Onyango notes, a respect for human rights is 'the bedrock of a wholesome and integrated approach to sustainable development. An inordinate focus on one category [of rights] at the expense of another will obviously produce a truncated human reality.'[24]

Sustainable development acts both as an element of, and a restraint on, the rights-based approach to development. As an element, it calls for the protection of human rights, including the right to a healthy environment as an essential right in the process of development. It provides a redefinition of development by seeing it not only in terms of economic development, peace, security and human rights, but also in terms of the extent to which it protects and restores the environment.[25] It acts as a restraint by not only admonishing policy makers to consider the impact of their policies on the present generation, but also the future generation. This is the intergenerational aspect of sustainable development. It imposes limits on the extent to which we are able to pursue economic and other developmental activities without a concern for the legacy we pass to future generations.

2.3 The utility of the rights-based approach

The benefits of adopting this approach to development are many.[26] The approach is consistent with current opinion on the best approach to development.[27] For example, to Sen, development must be seen as an expansion of human capabilities. Development cannot be thought of merely as the provision of basic needs. It must be empowering, focusing on the individual as an end and not merely as the means to development.[28] In the field of trade, the Preamble to the Agreement Establishing the WTO declares that international trade should be pursued with the object of raising living standards and sustainable development in mind. Arguably, this provision provides a foundation for putting sustainable development and human rights at the forefront of the activities of the WTO and its members.

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23 World Bank Group *Development and human rights: The role of the World Bank* (1998).

24 J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 44.

25 JC Dernbach 'Making sustainable development happen: From Johannesburg to Albany' (2002-2004) 8 *Albany Law Environmental Outlook* 177.

26 For a critique of the approach, see Alston (n 4 above) 804-807; M Malone & D Belshaw 'The human rights-based approach to development: Overview, context and critical issues' (2003) 20 *Transformation* 86-87.

27 The Preamble to the Declaration of the Right to Development (1986) recites that development is a comprehensive economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active free and meaningful participation in development and the fair distribution of the benefits resulting therefrom.

28 A Sen *Development as freedom* (1999) 3.

The rights-based approach to development also will tend to afford greater legitimacy to development policies. Policies that have the human being as its central object are more likely to elicit human attention and participation than those that do not. The principles of non-discrimination, equality of treatment and participation, all of which are essential components of this approach to development, work to give greater legitimacy to government policies. At the same time, the approach provides a means by which one can evaluate the policies and programmes of a government to determine how consistent they are with its human rights obligations. In designing development policies under this approach, a government should have in mind its commitments under various international and domestic human rights instruments with the view to designing and implementing policies that promote and realise the rights enshrined in these instruments.

Additionally, by combining the concept of rights with the notion of development, a basis for focusing on those with a duty to ensure its realisation is provided. By seeing development and the process of development as a right, we are implicitly saying that others have a duty to ensure that this right is achieved. For example, the recognition of the process of development as a human right demands the setting aside of national and international resources to help realise this right. It obliges states and other agencies of society, such as civil society groups, corporations and indeed individuals, to implement and adhere to this approach to development. The nature and scope of such a duty may be difficult to determine and may vary with each agency, but these do not negate the existence of the duty. The approach also calls for international co-operation and assistance, both multilateral and bilateral, to ensure its realisation. In the field of trade, this may entail, among others, the supply and transfer of technology, technical assistance, improving and providing market access for developing countries, adjusting the rules of operation of the existing trading and financial institutions for the benefit of developing countries, and reforming existing laws on intellectual property to meet the health and technology needs of developing countries. [29]

Another benefit from using a human rights approach to development is that it focuses attention on those who lag behind in their enjoyment of rights, for example the poor, sick, children and women. It requires that positive action be taken on their behalf. It calls for the design of policies aimed at improving their position. The eradication of poverty is seen as especially important in this regard. As has been noted, a motivation of the human rights approach to development guides one along

[29] Fourth report of the Independent Expert *The right to development* E/CN.4/2002/WG.18/2.

the lines of protecting the worst-off, the poorest and the most vulnerable.[30]

2.4 Trade policy and the rights-based approach

The adoption of a human rights-based approach to development calls for the design of trade and investment policies aimed at achieving as its central objectives the improvement of the welfare of the individual both from the economic and human rights perspective. Such policies must have certain components. How far a country can realise these components may be context-dependent. Account should be taken of the circumstances of each country. Resources may have to be devoted to the realisation of certain rights in order to make the enjoyment of other rights meaningful. For example, the right to participate in decision making may not be truly meaningful in the absence of an educated, informed and healthy population. This may therefore call for the devotion of more resources to education, promotion of literacy and health.

Policies adopting the approach should aim ultimately at the fulfilment of all human rights: civil, political, economic and social. In the field of trade, it is likely that more can be done initially in the area of economic rights than in the area of civil and political rights. This does not, however, mean that civil and political rights have no place in the design of trade policy. For example, there must be a right to participate in the decision-making process both at the national and international levels. Indeed, a rights-based approach entails the consultation and participation of all affected parties in the design of policies. This is important so that any adverse effect of the policy will be brought to the fore and catered for. It also enriches the policy by virtue of the input from outside, and accords it greater legitimacy. Consultation and participation are also key elements of sustainable development.

It needs to be emphasised that under this approach, no right is more important than the other. In the words of the Independent Expert:[31]

> Because all human rights are inviolable and none is superior to another, the improvement of any one right cannot be set off against the deterioration of another. Thus, the requirement for improving the realisation of the right to development is the promotion or improvement in the realization of at least some human rights, whether civil, political, economic, social or cultural, while no other deteriorates.

A violation of one right is the violation of the right to development itself and is inconsistent with a rights-based approach. Thus, for example, the

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[30] A study on the current state of progress in the implementation of the right to development submitted by AK Sengupta, Independent Expert, pursuant to Commission Resolution 1998/72 and General Assembly Resolution 53/155 E/CN 4/1999/WG 18/2 para 31.

[31] n 12 above, para 10.

right to education cannot be sacrificed for the right to work. Neither can the right to health be sacrificed to the right to property. All rights must be accorded equal importance in the design of trade policies; this may call for 'human rights impact assessment' of all projects and policies.

The above views on the relationship between rights may, however, be considered the ultimate goal of this approach. In the initial stages of development, choices have to be made. These choices, however, should be made after due consultation, with the general welfare of the population in mind, and should not be discriminatory, unless the discrimination is aimed at positively improving the welfare of the underprivileged.

The eradication of poverty should also be at the heart of any trade policy based on this approach to development. As Sen notes, poverty should not be seen only as a deprivation of income, but also of capabilities.[32] Poverty reduces the capability of individuals to act for themselves, and leads to the non-realisation of other rights. It limits human freedoms and deprives a person of dignity. Taking people out of poverty and placing them on the path or ladder of development is becoming increasingly an international concern.[33] Improving access to markets, for example, is an important step that can be taken in the fight against poverty. Developed countries must open their markets to products from less developed countries to facilitate economic growth in these countries. Indeed, poverty has been shown to be the root cause of many of the ills of society; including child labour and environmental degradation:[34]

> [P]overty itself pollutes the environment . . . Those who are poor and hungry will often destroy their immediate environment in order to survive. They will cut down forests; their livestock will overgraze grasslands, they will overuse marginal land . . .

Poverty, however, may not be the sole cause of environmental problems; other challenges such as the emission of greenhouse gases, improper disposal of industrial waste and more are relevant.

Ensuring access to the basic necessities of life, such as food, health and education, should also be an essential component of trade policy under this approach to development. This is especially important from the perspective of the poor and vulnerable, such as children and women. Policies that restrict access to basic needs for such people would be inconsistent with this approach to development.[35] The approach calls not only for an economic efficiency assessment of

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[32] Sen (n 28 above) 87.
[33] J Sachs *The end of poverty* (2005).
[34] n 15 above, 7.
[35] See fourth report of the Independent Expert (n 29 above) para 20.

trade policies, but, more importantly, their equity and fairness dimensions. For developing countries, this suggests a crucial role for governments. While the market may produce efficiency, it often fails to ensure the fair and equitable distribution of gains.

Under the rights-based approach, the impact of all trade policies on human rights must also be assessed. Many countries now require environmental impact assessments for all development or investment projects. This assessment must be extended to trade policy, the impact of trade liberalisation on the economic, social and cultural rights of people will have to be assessed and taken into account in the design of trade policy. Effective assessment will require adequate information and expertise. Here, civil society groups representing affected individuals can be a valuable source of such information and expertise, but they cannot be a substitute for the views of the affected groups.

3 Ensuring the rights-based approach: The role of agents of trade policy

The adoption of a rights-based approach to development calls for an examination of the parties upon whom a duty is imposed, to ensure that such an approach to development is adopted in the design and implementations of trade policy. The notion of rights cannot be separated from the concept of duties. Where there is a right, there must be a duty.[36] The fact that the duty is not fulfilled — honoured with rhetoric rather than performance — does not negate the existence of the right.

The principal agents in ensuring that the rights-based approach is adopted and implemented in the field of international trade are states and the WTO. Corporations, civil society organisations and individuals also have a role to play.[37] The approach demands co-ordination and co-operation between these agents to ensure the realisation of the right. The extent of the duty imposed, and the modes for facilitating the realisation of the right, will vary depending on which agent is being discussed. One also has to take into account the peculiar circumstances of each agent, and the context in which performance is demanded.

3.1 Developing countries

Developing countries have a lot to gain from international trade:

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[36] See generally WN Hohfeld *Fundamental legal conception as applied in judicial reasoning* (1923).

[37] Space does not allow for a discussion of the role of all these entities. On corporations, see generally J Dine *Companies international trade and human rights* (2005) 167-221; M Monshipouri *et al* 'Multinational corporations and the ethics of global responsibility: Problems and possibilities' (2003) 25 *Human Rights Quarterly* 965; S Deva 'Human rights violations by multinational corporations and international law: Where from here?' (2003) 19 *Connecticut Journal of International Law* 1.

employment, foreign exchange, new technologies and more. However, unless the concerns demonstrated above, especially in the field of labour, human and environmental rights, are taken into account, these gains will not be sustainable in the long term, and may fail to achieve the ultimate goal of improving the welfare of their citizens. Thus, the trade policy of developing countries should be pursued within a framework of ensuring and not undermining the realisation of these rights.

The development of human capital is the key to any effort to achieve development. A well-trained and skilled population is more likely to take advantage of emerging economic opportunities than an illiterate population. The success of the East Asian economies can be partly attributed to the highly skilled labour force that existed at the time they were opening up their economies. No country can develop by relying on cheap and unskilled labour. While this reliance may present advantages, they may be short-lived. For example, advancement in technology can render unskilled labour redundant. Their level of productivity may be low. Indeed, the idea of having a comparative advantage in cheap and unskilled labour conjures up images of slavery and the notion that some are 'hewers of wood and drawers of water' consigned to the most basic forms of production and economic activity. Such neglect of human capital will not lead to sustainable development. It fails to recognise and utilise the full capabilities of the population. A rights-based approach to development requires that people should be empowered; education provides one channel for such empowerment.

Thus, developing countries should invest in the education of their people, especially women and children. They should be taken away from the 'sweatshop factories' and given education. Though this may cause problems in the short run, in the long term it will be for the benefit of these countries in terms of enhancing productivity and social stability. The hardship resulting from this can be mitigated by financial assistance to families that will be affected. This process should, however, be gradual and well-regulated to mitigate the initial hardship. This process should be complemented with policies aimed at increasing the economic opportunities for the adult family members.[38]

Equally important to enhancing the productivity of labour are favourable working conditions in the form of decent wages, job security, freedom of association in the form of trade unions, and effective retirement schemes. Ensuring this does not only demand effective legislation, but also active efforts on the part of the government to ensure compliance.

Whilst investors may be concerned about the cost implications of complying with these requirements, they are equally concerned

[38] Jones (n 7 above) 137-140.

about productivity. The cost of compliance may indeed not be excessive. In 1992, it was estimated that it cost Nike $5,60 to produce a pair of shoes in Indonesia which it sold for $45,80 in the United States.[39] Thus, increases in cost for the purpose of improving labour conditions could have been accommodated without adversely affecting the investment opportunities in Indonesia. Improved labour conditions will enhance the welfare of workers and productivity. The fear of losing investors will be minimised if there is a degree of uniformity in the standards across nations and if they are applied non-discriminatorily to all investors. Indeed, an Organisation for Economic Co-operation and Development (OECD) study found that respect for basic labour standards similar to those found in the ILO Declaration supports rather than undermines open trade-oriented growth policies in developing countries.[40]

The rights-based approach to development, and the goal of achieving sustainable development, also call for a redirection of the export promotion efforts of developing countries from primary commodities to manufactured products and services.[41] Reliance on primary commodities tends to be environmentally unfriendly, their prices fluctuate, and they create favourable conditions for struggles and instability, which are the bane of many developing countries. Citizens fight over land for cultivation and feeding their livestock, minerals, timber and other raw materials.[42]

Very few countries have developed relying on the export of primary commodities.[43] The contrast between the Asian developing economies and Africa is a case in point. Manufacturing creates multiple avenues of demand and job opportunities that exist only to a limited degree with reliance on primary production. Whilst African countries continue to rely on exports of primary commodities, the Asian economies have moved into manufacturing and services. Although export promotion is relevant for development, the kind of thing being exported is of utmost significance.[44] Indeed, the 'curse' of developing countries, especially in Africa, appears to be the abundance of natural resources.[45] By

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39 JL Johnson 'Private-public convergence: How the private actor can shape public international labor standards' (1998-1999) 24 *Brooklyn Journal of International Law* 330 n 183.

40 OECD *Trade, employment and labour standards: A study of core workers' rights and international trade* (1996).

41 *Our common interest* (n 4 above) 263-265; Akyuz (n 1 above).

42 UN Secretary-General Report to the Security Council *The causes of conflict and the promotion of durable peace and sustainable development in Africa* (1998).

43 See generally UNCTAD *Economic development in Africa trade performance and commodity dependence* (2003).

44 C Thomas 'Poverty reduction, trade and human rights' (2002-2003) 18 *American University International Law Review* 404-408.

45 *Our common interest* (n 4 above) 21.

consigning themselves to the provision of basics; cheap and unskilled labour, primary commodities and natural resources, developing countries risk being perpetually at the mercy of the developed economies.

One cannot also discount the importance of a favourable political climate. It is only in a politically favourable climate that the integration of human rights in the development process, as well as the need for accountability, will be realised and respected. Political instability results in human rights abuses. It does not make for effective long-term planning, drives away investment and generally creates an unfavourable climate for development. Political stability makes for long-term planning, while a respect for basic human rights and freedoms helps people to realise their capabilities. There is a mutually reinforcing relationship between economic and political development. As Sen notes, there is a[46]

> remarkable empirical connection that links freedoms of different kinds with one another. Political freedoms (in the form of free speech and elections) help promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities to participate in trade and production) can help to generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.

An important right that may be classified as a political right, and a key element of the rights-based approach to development, is the right of participation in decision making in general and specifically in the design of trade policy. Whilst environmental impact assessment is often done to assess the impact of development activities on the environment, no such assessment is done to know the impact of trade policy on the rights and living conditions of individuals. Trade deals are often done behind closed doors, outside the view of the public and without much input from individuals. Developing countries must offer more opportunity for citizens to debate and give input into the design and implementation of trade policy. This will allow for all affected interests to be appreciated and catered for. This is especially so under the rights-based approach where all rights are deemed equally important, interdependent, and must be accorded the needed attention in designing policies.

The above demonstrates that there exists a crucial role for the governments of developing countries to ensure that the international trade, being pursued under the auspices of the WTO, is managed and not left entirely to 'the market'. Indeed, economic theory does not teach that unfettered operation of the market is always desirable. The presence of externalities, such as environmental pollution, human and labour rights abuses, calls for governmental intervention.[47]

International trade deals and investment flows are not motivated by

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[46] Sen (n 28 above) 11.
[47] Sykes (n 13 above).

altruism, but by profit. Investors move to developing countries to access cheap labour, take advantage of low production costs, and free themselves of strict and costly environmental and labour standards. The rights-based approach requires mechanisms for ensuring that international human rights, labour and environmental standards are upheld in the drive to secure increased trade and investment. This demands governmental intervention and involvement. Reliance on market forces alone will not do. Trade and investment must be 'managed' for its full benefits to be realised. For example, governmental intervention may be necessary to protect affected groups in the transition period from a closed to a liberalised economy. As Stiglitz notes:[48]

> The most successful developing countries, those in East Asia, opened themselves to the outside world but did so slowly and in a sequenced way. Those countries took advantage of globalisation to expand their exports and grew faster as a result. But they dropped protective barriers carefully and systematically, phasing them out only when new jobs were created. They ensured that there was capital for new jobs and even took an entrepreneurial role in promoting new enterprises.

This is a worthy lesson for many African and developing economies currently pursuing trade liberalisation policies.

The governments of developing countries need to enact laws to protect the labour force from abuse, to regulate competition to mitigate its effect on individuals, to ensure sustainable exploitation of natural resources, and to promote a respect for human rights. Governments should see the call to integrate social concerns into their trading policies not as a threat to their competitiveness or development. Rather, it should be seen as an invitation to change the character of trade policies to one which places the human being at the centre of the process, takes due account of the environment, and emphasises sustainability.

3.2 Developed countries

Developed countries also have a role to play in ensuring the realisation of the benefits of the rights-based approach in the design and implementation of trade policy. In this respect, developed countries should give special attention to trade policies that can facilitate the eradication of, or at least a reduction in, the level of poverty in the developing world. The recently released Commission for Africa Report emphasised the urgent need for this.[49] As noted above, poverty implicates many of these social concerns relating to the activities of the WTO.

The provision of enhanced market access is vital in this respect. Enhanced market access by developed countries to products from

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48 Stiglitz (n 5 above) 60.

49 *Our common interest* (n 4 above); see also Sachs (n 33 above).

developing countries, such as agricultural produce, textiles and tropical products, will go a long way to improve the living conditions of people in the developing world by providing employment and income to families. It will also enhance the flow of foreign direct investment into developing countries, as investors try to take advantage of the generous market opportunities available to such countries.

Currently, developed countries, as mandated by the Enabling Clause of the WTO and through their various Generalised System of Preferences (GSP) schemes, provide enhanced market access to developing countries.[50] Access to these schemes is conditioned on the pursuit of certain social policies by the beneficiary country. For example, the EU scheme[51] makes available to the beneficiary countries five different arrangements. First, all beneficiaries enjoy the benefit of a general arrangement. Second, there is a special arrangement for the least developed countries, also known as the 'Everything But Arms Initiative', which grants duty-free access to imports of all products from such countries without quantitative restrictions, except for arms and ammunition. Third, there is a special arrangement to combat drug production and trafficking. This is intended to assist beneficiaries in their fight against drugs. There are also special arrangements for the protection of labour rights and environmental rights.

The United States scheme also conditions access on, *inter alia*, the protection of internationally recognised workers' rights, respect for human rights, the rule of law, political pluralism, the right to due process and combating bribery and corruption.[52] Thus, these GSP schemes aim not only at providing enhanced market access, but also are designed to change perceived adverse social conditions within the beneficiary countries.

Some have argued against the use of GSP schemes to promote non-trade objectives.[53] Under the text of the Enabling Clause, these preferences should be designed to 'respond positively to the development, financial and trade needs' of beneficiaries.[54] In a recent challenge by India to the Drug Arrangement under the EU GSP scheme, the Appellate Body found the inability of the EU to provide any indication as to

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50 See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) 1979.

51 Council Regulation (EC) No 2501/2001; Council Regulation 416/2001. See generally L Bartels 'The WTO Enabling Clause and positive conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507.

52 Trade Act of 1974, 19 USCA 246, Trade and Development Act 2000, 114 Stat 251.

53 See generally JL Stamberger 'The legality of conditional preferences to developing countries under the GATT Enabling Clause' (2003) 4 *Chicago Journal of International Law* 607; R Howse 'India's WTO challenge to drug enforcement conditions in the European Community generalised system of preferences: A little known case with major repercussions for 'political' conditionality in US trade policy' (2003) 4 *Chicago Journal of International Law* 385.

54 Enabling Clause (n 50 above) para 3(c).

how it would assess whether the Drug Arrangements provide an adequate and proportionate response to the needs of developing countries suffering from the drug problem fatal to the requirements of the Enabling Clause.[55] The Appellate Body noted that paragraph 3(c) of the Enabling Clause 'does not authorise any kind of response to any claimed need of developing countries'.[56] The types of needs to which a response is envisaged are limited to 'development, financial and trade needs'. The existence of these needs will have to be assessed according to an objective standard. The response of a preference-granting country must be taken with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue. A sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the identified need.[57] There is therefore a limit on the extent to which developed countries can use these schemes to promote non-trade concerns.

This limitation is important to prevent a situation where trade benefits are conditioned on the pursuit of policies that are ultimately for the benefit of the preference-granting country. For example, one may view the EU Drug Arrangement as an attempt to solve the drug problem in Europe rather than a genuine desire to assist in solving the drug problem in developing countries. Whilst this is not a defence of drug production, it serves to illustrate the potential for abuse under the GSP schemes in the absence of objective limitations on its use.

The conditioning of access to markets on respect for human, environmental and labour rights, and the consequent exclusion of countries which do not meet those criteria from enjoying the benefits of the scheme, may not be wholly facilitative of the rights-based approach to development. Aside querying the objectivity of the criteria for determining which countries benefit from the schemes, it may be argued that if development is a right, then the denial of instruments or access to policies — in this instance trade — that will enhance that right can be deemed a violation of the right.

A better approach in this instance, it is suggested, will be to provide some minimum level of access irrespective of the social conditions in a country, but to provide enhanced access in case of advancement of social conditions in the beneficiary country. Recognising the huge developmental needs of developing countries, this minimum level of access should go beyond that provided by the ordinary rules of most favoured nation and national treatment under the WTO. Those rules are only meaningful for competition among equals. Developing countries

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55 European Communities — Conditions for Granting Tariff Preferences to Developing Countries, WTO Appellate Body Report WT/DS246/AB/R 7 April 2004.

56 n 55 above, paras 163-164.

57 n 55 above, paras 162-164.

cannot effectively compete with developed countries under that regime. Some minimum level of mandatory special and differential treatment is needed. This does not deny the need for such social concerns to be given the needed attention in the domestic policies of developing countries.

There are other limitations on the utility of current schemes for developing countries. They are voluntary and hence provide no security of access; apply to only a limited number of countries; and cover only a defined category of products with stringent rules of origin. These products are often primary products that suffer from fluctuating prices and, as noted above, perpetuate a cycle of dependency on the developed world. There is also the problem of underutilisation of these schemes. This is due to a lack of knowledge on the part of exporters as to the existence of the schemes and the absence of efficient institutions to administer and promote exports under existing preferential arrangements. The implementation of these schemes is also often influenced by political consideration rather than economic need. These limitations notwithstanding, GSP schemes offer a potential for development and poverty reduction in the developing world through the provision of access to the markets of the developed world.[58] Objectively managed, it offers an avenue for linking trade policy with human rights.

Improved market access alone will, however, not be sufficient to meet all the development challenges facing the developing world. It must be coupled with financial aid and technical assistance. Such assistance should be demand-driven; aimed at meeting the needs of the receiving countries rather than offloading a surplus or the unwanted of the giver. Financial aid and technical assistance should be monitored to ensure accountability, and designed to empower especially the vulnerable. In the field of trade, they should be aimed at enhancing the capacity of developing countries to take advantage of the opportunities offered by the international trading system. Additionally, they should focus on assisting developing countries in diversifying their exports by placing greater emphasis on manufacturing and the provision of services. However, technical assistance and financial aid should not be a substitute for national initiative and decision. As Stiglitz notes, developing countries should consciously define for themselves their trading interest and have the political will to articulate and pursue it in international fora.[59]

One area where the developed world can do more is in the fight against HIV/AIDS. The links between the disease, human rights and development are too obvious to be chronicled here. The recently released report of the Commission on Africa provides grim statistics

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[58] UNCTAD *Improving market access for least developed countries* (2001).

[59] Stiglitz (n 5 above); C Michalopoulos 'Developing countries' participation in the World Trade Organization' (March 1998) World Bank Policy Research Working Paper 1906 http://ssrn.com/abstract=620518 (accessed 1 March 2006).

on the impact of the disease on sub-Saharan Africa.[60] It is estimated that the disease killed about 2,3 million people in 2004. Women and children are the most affected. Sadly, only about 8% are receiving treatment. Whilst preventive efforts are being made and indeed stressed, pharmaceutical companies through patent claims have hampered attempts at using generic drugs for treatment.[61] Providing cheap and affordable drugs, encouraging their production through technical assistance and financial aid for educational campaigns will assist in the fight. The developed world has a role to play in all these.

Developed countries should also monitor the activities of multinational companies incorporated in their jurisdiction, but operating in developing countries.[62] They should legislate for stricter standards for companies originating from their jurisdiction, but operating in the developed world. The linking of rights to the development process provides a basis for such legislation. Developed countries should also encourage strict adherence to the various voluntary codes of conduct such as the UN Global Compact of 1999 and others developed by multinationals. More importantly, there should exist in the developed countries criminal and civil liability for multinational corporations that engage in human rights violations or environmental damage. These are especially important and necessary, since developing countries do not have the economic might to 'take on' these huge multinationals that engage in rights abuses.

Notwithstanding any debate as to the propriety of its extraterritorial implications, the US Alien Torts Claim Act[63] presents an example of legislation under which a foreign corporation operating in a developing country can be held liable in the United States for human rights and environmental abuses committed there. As Abadie notes:[64]

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60 *Our common interest* (n 4 above) 194 '200.

61 South Africa was, eg, threatened with a WTO challenge that was subsequently dropped in the face of international outcry and condemnation. See generally L Ferreira 'Access to affordable HIV/AIDS drugs: The human rights obligations of multinational pharmaceutical corporations' (2002) 71 *Fordham Law Review* 1133.

62 R Klein 'Cultural relativism, economic development and international human rights in the Asian context' (2001) 9 *Touro International Law Review* 50-57. .

63 28 USC 1350. The Act provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. For a recent decision under the Act, see *Sarei v Rio Tinto* PLC 221 F Supp.2d 1116. .

64 P Abadie 'A new story of David and Goliath: The Alien Tort Claims Act gives victims of environmental injustice in the developing world a viable claim against multinational corporations' (2004) 34 *Golden Gate University Law Review* 748. See also R Shamir 'Between self-regulation and the Alien Tort Claims Act: On the contested concept of corporate social responsibility' (2004) 38 *Law and Society Review* 635; C Salazar 'Applying international human rights norms in the United States: Holding multinational corporations accountable in the United States for international human rights violations under the Alien Tort Claims Act' (2004) 19 *St John's Journal of Legal Commentary* 111.

> By providing a basis for liability, business as usual, may not always prevail. Brandishing the [Alien Torts Claim Act] as a legal weapon to break the power of impunity, lawyers with imagination and courageous judges will find a way to ensure that equal protection from risk across national boundaries can be guaranteed.

Whilst this may be an exaggerated hope in the ability of the Act to offer protection, especially on account of the significant jurisdictional hurdles a litigant has to surmount,[65] it is nonetheless true that the threat of a lawsuit with its potential monetary liability is more likely to induce compliance than mere exhortations to adhere to voluntary codes which are vague and lack enforcement mechanisms.

3.3 The World Trade Organization

The WTO also has a crucial role in integrating the rights-based approach into the design and implementation of trade policy. This role calls for a broadening in the outlook of the WTO from its narrow focus on the economics of trade liberalisation to an approach that sees trade not as an end in it self, but as a means to an end. Such an outlook entails consideration of the human rights, labour, health and environmental implications of trade policy with the WTO's framework. Indeed, such a broader outlook is mandated by the text of the Agreement Establishing the World Trade Organization, the Preamble of which contains references to the notions of 'sustainable development' and 'raising standards of living'.[66] These are concepts that cannot be truly meaningful outside the human rights framework. The WTO should therefore become more concerned about the impact of its activities on human rights, health, labour and the environment.

One forum where the impact of trade liberalisation on these social concerns can be brought to the fore and members' policy challenged is through the Trade Policy Review Mechanism.[67] Currently, the Mechanism allows for periodic review of the trade policies and practices of members to assess 'their impact on the functioning of the multilateral trading system'. There is a need to broaden the scope of the reports and the extent of review to cover the impact of trade policies and practices on human rights, labour, health and the environment. A member who is aware that its policies are going to be reviewed for such impacts will be more careful in the design and implementation of its trade policy, even if the report does not constitute the basis of any enforceable action. The publicity that comes with the review may afford enough deterrence. In case it does not, and violations are such as will

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65 Abadie (n 64 above) 759-774.

66 World Trade Organization *The legal text. The results of the Uruguay round of multilateral trade negotiation* (1999) 4.

67 n 66 above, 380.

demand action (for example sanctions, suspension of membership, denial of organisational privileges) by the WTO, such action should be a multilateral decision. Unilateral measures are susceptible to abuse.

There is also a need for greater collaboration between the WTO and other institutions that have mandates over these social concerns.[68] The WTO cannot function in isolation. A great deal of complementarities exist between the work of the WTO and other institutions, such as the UN Human Rights Council (which recently replaced the Human Rights Commission), the UN Environment Programme, the UN Economic and Social Council, the World Bank and the International Monetary Fund, to mention but a few. Indeed, the WTO agreement envisages collaborations. Article V mandates the General Council to 'make appropriate arrangements for effective collaboration with other intergovernmental organisations that have responsibilities related to those of the WTO'. The WTO can benefit from the experience and expertise of these institutions as it strives towards integrating these social concerns into trade policy. Such collaboration will ensure co-ordination of responses. This collaboration should extend to civil society groups that represent these interests and can bring area-specific knowledge to the design and implementation of trade rules.

The WTO must reorient itself and focus on development as understood from a rights perspective. The Preamble to the Marrakesh Agreement Establishing the WTO recognises 'sustainable development' as one of the key objects of the WTO. The concern of the WTO should not only be to design rules to facilitate trade, but also to ensure development in which rights are respected. The WTO should pursue trade liberalisation with the object of sustainable development in mind. There should be an appreciation that trade liberalisation will not necessarily lead to development as currently understood, but can indeed produce negative consequences for countries and individuals. Development should therefore be the overriding principle that guides the work of the WTO. It should be central in the design and implementation of trade rules.

Greater attention should also be given to the concerns of developing countries in the design of trade rules. This is especially important in the current trade round, which has appropriately been named the 'development round'.[69] Issues relating to technology transfer, technical

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[68] GP Sampson 'Is there a need for restructuring the collaboration among the WTO and UN agencies so as to harness their complementarities?' (2004) 7 *Journal of International Economic Law* 717.

[69] See generally SP Subedi 'The road from Doha: The issues for the development round of the WTO and the future of international trade' (2003) 52 *International and Comparative Law Quarterly* 425; I Haque 'Doha development agenda: Recapturing the momentum of multilateralism and developing countries' (2001-2002) 17 *American University International Law Review* 1097.

assistance, capacity building, market access, health, and special and differential treatment should be given much attention. Greater efforts in these areas will enable developing countries to take advantage of the potential that international trade has for development and poverty reduction. The ultimate aim should not merely be trade liberalisation, but, more importantly, ensuring that trade rules are just, fair and equitable for developing countries.[70]

4 Conclusion

This paper has examined the place of social concerns in the international trading system. The integration of these concerns has been met with resistance. Using the twin concepts of a rights-based approach to development and sustainable development, a case has been made for these concerns to be given greater attention, both within and without the framework of the international trade regime. The essence of the rights-based approach to development and sustainable development demands this. These approaches to development call for human rights, labour rights and environmental concerns to be at the centre of all efforts at development, including international trade. Various agents have been identified as having a crucial role to play to this end. Whilst these concerns are international, at their root are national or domestic policies that need change and modification. Action is required at both the national and international level. At the international level, emphasis needs to be placed on multilateral solutions rather than unilateral undertakings. While not discounting the role of developed countries and the WTO as an organisation, developing countries as a matter of long-term self-interest have a lot more to do in this direction.

[70] JP Trachtman 'Legal aspects of a poverty agenda at the WTO: Trade law and ''global apartheid''' (2003) 6 *Journal of International Economic Law* 3.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains

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Summary

This article analyses the impact that recent and current developments on the African continent have had, and continue to have, on the promotion and protection of human rights. Such developments include the establishment of an African Court on Human and Peoples' Rights, the formation of the African Union to replace the Organization of African Unity, democratic change in Africa and the advent of a new constitutionalism that embraces the concept of a bill of rights. An understanding of recent and current trends in the promotion and protection of human rights in Africa has to take into account the historical and international context within which the African system operates. Several challenges still inhibit the promotion and protection of human rights in Africa, including various ongoing regional and internal conflicts, the prevalence of poverty, ignorance and diseases, the predominance of political and social disharmony and the continued existence of unacceptable cultural and customary practices. The article concludes that there are still lots of pains to endure before the African system of human rights protection can favourably compare with its more advanced counterparts.

1 Introduction

For many years, the United Nations (UN) has recognised and promoted regional arrangements for the protection of human rights. At its 92nd

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plenary meeting in December 1992, the UN General Assembly reaffirmed that 'regional arrangements for the promotion and protection of human rights may make a major contribution to the effective enjoyment of human rights and fundamental freedoms . . .'[1] The following year (in June 1993), the World Conference on Human Rights (held in Vienna) also reaffirmed the fundamental role that regional and sub-regional arrangements can play in promoting and protecting human rights and stressed that such arrangements should reinforce universal human rights standards, as contained in international human rights instruments.[2] To date, there are three regional human rights systems, largely based on regional inter-governmental organisations that revolve around continental arrangements in Europe, the Americas and Africa.

Compared to other regional systems (Europe and America), the African system for the promotion and protection of human rights is the most recent, having its origins in the early 1980s. The system is based primarily on the African Charter on Human and Peoples' Rights, also known as the Banjul Charter (African Charter or Charter).[3] It was designed to function within the institutional framework of the then Organization of African Unity (OAU), a regional inter-governmental organisation that had been formed in 1963 with the aim of promoting unity and solidarity among African states. The OAU has since been replaced by the African Union (AU), but it is important to note that the new AU recognises the African Charter. Article 3(h) of the Constitutive Act of the AU provides that the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments are objectives of the AU. In that regard, therefore, the African Charter remains the primary instrument for the protection and promotion of human rights in Africa.

For various reasons, the African system and the African Charter on which the system is based have both been found wanting, at least in comparison to the other regional systems and human rights instruments. Concerns have continuously been raised about certain features of the African Charter.[4] These concerns include the equivocal way in

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1 Regional arrangements for the promotion and protection of human rights, UN General Assembly Resolution A/RES/47/125.

2 See art 37 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 http://www.ohchr.org/english/law/vienna.htm (accessed 1 March 2006).

3 OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 *International Legal Materials* 58. The Charter was adopted by the 18th Assembly of the Heads of State and Government of the Organization of African Unity on 17 June 1981 and came into force on 21 October 1986, http://www1.umn.edu/humanrts/instree/z1afchar.htm (accessed 1 March 2006).

4 See eg GJ Naldi 'Future trends in human rights in Africa' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 6.

which the substantive provisions of the Charter are phrased, the extensive use of 'claw-back' clauses,[5] the imposition of obligations upon the individual towards the state and the community, and the inclusion of provisions which are generally seen as 'problematic and could adversely affect enjoyment of the rights set forth in the Charter'.[6] Moreover, the African Commission on Human and Peoples' Rights (African Commission), which was the only institution initially mandated under the African Charter with the function of promoting and protecting the rights in the Charter, was given relatively weak powers of investigation and enforcement and has generally been seen as a failure. The lack of any formal or legal binding force of the African Commission's decisions has not helped to enhance its image. As a result of these and other shortcomings, the African human rights system has always been seen as the least developed and the least effective in comparison to its European and American counterparts.

Such unfavourable comparison might be deemed to be unfair, considering that the African Charter was drafted to take account of the unique African culture and legal philosophy and it was hence directed towards addressing particular African needs and concerns.[7] In that regard, the African Charter contains certain positive attributes that should be acclaimed.[8] One such attribute is the inclusion of second and third generation rights as legally enforceable rights. In that regard, not only does the Charter provide for the traditional individual civil and political rights, but it also seeks to promote economic, social and cultural rights and the so-called third generation rights. Accordingly, it is the first international human rights convention to guarantee all the categories of human rights in a single instrument.[9] Another constructive attribute relates to the individual communication or complaint mechanism. Under the African Charter, the *locus standi* requirements before the African Commission are relatively broad since, besides the victim, individuals and organisations can also submit complaints.[10] This procedure, as will be seen further below, has been adopted and incorporated in the Protocol to the African Charter on Human and Peoples'

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5 It is important to note that the African Commission has rejected the interpretation usually attached to the use of 'claw-back' clauses, namely that they seem to make the enforcement of certain rights dependent on municipal law. In that regard, see *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 59 & 60.

6 EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 171. See also P Amoah 'The African Charter on Human and Peoples' Rights — An effective weapon for human rights?' (1992) 4 *African Journal of International and Comparative Law* 226.

7 See S Davidson *Human rights* (1993) 152.

8 Naldi (n 4 above) 8.

9 See JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 26-27.

10 This is implied in art 55 of the African Charter. In any event, this procedure is now clearly established in the African Commission's practice.

Rights on the Establishment of an African Court on Human and Peoples' Rights.[11]

The confines and parameters of this paper do not lend themselves to a detailed discussion of all the shortcomings and positive attributes of the African Charter. Suffice here to say that, quite apart from those, several recent and current developments on the African continent have had, and continue to have, significant positive and negative implications for the promotion and protection of human rights. On the positive side, such developments include the establishment of an African Court on Human and Peoples' Rights (African Court), the formation of the AU to replace the OAU, the winds of democratic change that seem to be blowing over Africa, a renewed emphasis towards the rights of certain groups of people and the advent of a new constitutionalism that embraces the concept of a bill of rights. It is to these 'gains' that we now turn our attention.

2 Positive developments

2.1 The African Court on Human and Peoples' Rights

As mentioned earlier, the only institutional implementation mechanism established by the African Charter was the African Commission. The absence of an African Court to settle inter-state disputes and individual human rights grievances provoked considerable comment and debate. Some argued that this was in keeping with African culture and traditions, which placed considerable emphasis on reconciliation and consensus rather than arbitration and confrontation.[12] Others felt that an African human rights court was indeed desirable, a view that is reflected in the fact that the idea was mooted as early as 1961 at the Law of Lagos Conference, long before the African Charter was even drafted.

Mention was made earlier that the lack of enforcement mechanisms was largely responsible for the popular view that the African Commission has served as a limited means of control over human rights abuses.[13] Indeed, only very few of the considerable number of petitions submitted to the Commission have resulted in adverse findings, the majority having been declared inadmissible, withdrawn or concluded through a friendly settlement.[14] It is against this background and the

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11 See arts 5(1)(e) & 5(3) of the Protocol.

12 See eg K M'Baye 'Introduction to the African Charter on Human and Peoples' Rights' in K M'Baye (ed) *The African Charter on Human and Peoples' Rights: A legal analysis* (1985); UO Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 908.

13 See JC Mubangizi & A O'Shea 'An African Court of Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 257.

14 As above.

acknowledgment that the African human rights system was incomplete, that a process was formally initiated in 1994, aimed at the creation of an African Court. The result of the process was the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol),[15] which was adopted on 9 June 1998. In terms of the Preamble, the African Court was intended 'to complement and reinforce the functions of the African Commission on Human and Peoples' Rights'.[16]

According to the Protocol, the Court will consist of 11 judges,[17] nominated by the states party to the Protocol.[18] These judges will be 'elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights'.[19] They will be elected by secret ballot by the Heads of State and Government of the OAU (now AU) for a six-year term of office, renewable only once. Apart from the President of the Court, all judges are to perform their duties on a part-time basis.

In accordance with articles 3 and 4, the African Court will have both adjudicatory and advisory jurisdiction. In exercising its adjudicatory or contentions jurisdiction, the Court will decide 'disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned'.[20] In that regard, not only will the Court accept complaints lodged by the African Commission, state parties and African inter-governmental organisations, the Court will also be empowered to allow complaints lodged by non-governmental organisations (NGOs) with observer status before the Commission, individuals and groups of individuals.[21] The Court will have a discretion to accept or refuse such access. It is also important to note that, by ratifying the Protocol, state parties undertake to comply with the judgments of the Court in any cases to which they are parties and to guarantee their execution. In exercising its advisory jurisdiction, the Court will be empowered to 'provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments'.[22] The

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15 OAU/LEG/MIN/AFCHPR/pROT.1 rev 2 http://www1.umn.edu/humanrts/africa/court-protocol2004.html (accessed 1 March 2006). For more detailed discussions on the Court, see Mubangizi & O'Shea (n 13 above). See also M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342.

16 See Preamble to the Protocol.

17 Art 11(1).

18 Art 12(1).

19 Art 11(1).

20 Art 3(1).

21 Art 5(3).

22 Art 4(1).

power to request such opinions is not limited to state parties, but also extends to requests from recognised organs and organisations.

The African system for the protection of human rights will undoubtedly be strengthened by the establishment of the African Court. The Court will obviously become an invaluable addition to the African Commission's somewhat limited protective role. Nevertheless, the success and effectiveness of the Court will not only depend on the skill and clear-sightedness of the persons elected as judges, but also on the will of the states to adhere to the Protocol by respecting, honouring and executing the decisions of the Court when they are made.

Since the beginning of 2004, there have been significant developments with far-reaching implications for the future of the African Court. On 25 January 2004, the Protocol on the Establishment of an African Court on Human and Peoples' Rights came into force, 30 days after Comoros deposited the fifteenth instrument of ratification.[23] In July 2004, the Assembly of Heads of State and Government of the AU decided to merge the African Court with the African Court of Justice of the AU. At its 5th ordinary session in July 2005, the AU Assembly decided that the Court would be based in an East African country.[24] The judges were elected in January 2006 at the 6th ordinary session of the Assembly. The Registrar and the staff will be nominated by the Commission of the AU, which will also determine the budget allocated to the new body.[25]

2.2 The African Union and human rights

Of all the recent developments on the African continent, the creation of the AU is probably the most significant. Established in 2001, the AU replaced the OAU as the regional institution for the economic and political coordination of the 53 African nations. The AU was conceptualised and formed to provide a new vision that would seek to enhance the good intentions of the heavily criticised OAU. As such, it represents change and progress in critical areas of democracy, governance, human rights, the rule of law and justice for all the people of Africa.[26]

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23 As required by art 34(3) of the Protocol. At the time, the following countries had ratified the Protocol: Algeria, Burkina Faso, Burundi, Comoros, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

24 See Decision of the Assembly of the African Union Assembly/AU/Dec 83 (V). See also 'Final green light for establishment of African Human Rights Court' http://www.interights.org/ page.php?dir=News (accessed 1 March 2006).

25 As above.

26 For a further and more detailed discussion on the African Union, see NJ Udombana 'The institutional structure of the African Union: A legal analysis' (2002) 33 *California Western International Law Journal* 69. See also E Baimu 'The African Union: Hope for better protection of human rights in Africa' (2001) 1 *African Human Rights Law Journal* 299.

Some have argued that the successful enforcement of human rights in Africa will depend, in part, on the success of the newly reconstituted AU.[27] Others, however, maintain that the AU cannot be said to be radically different from the OAU, although it has a more explicit human rights focus. The Preamble to the Constitutive Act, for example, states that African leaders are 'determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law'. The objectives and principles of the AU, as defined in the Act, emphasise the promotion of peace, security and stability on the continent, democratic principles and institutions, popular participation and good governance, and the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.[28] They also encourage international co-operation, taking due account of the Charter of the UN and the Universal Declaration of Human Rights (Universal Declaration).[29]

It is also important to note that various other provisions of the AU are particularly important in fostering the ideals of constitutionalism and good governance, thereby promoting human rights. Under article 4(h), for example, one of the principles according to which the AU will function is the right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Furthermore, under article 23(2), any member state that fails to comply with the decisions and policies of the AU may be subjected to sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly. Moreover, article 30 makes it clear that governments that come to power through unconstitutional means will not be allowed to participate in the activities of the AU.

In view of the above, it is fair to say that the Constitutive Act of the AU renews a commitment to the promotion of human rights. To that end, the AU adopted a programme of development, the New Partnership for Africa's Development (NEPAD). NEPAD is a vision and strategic framework for Africa's renewal.[30] It is an African innovation practically designed to support the vision and goals of the AU and although it is an economic development programme, in many ways it continues the African insistence that human rights, peace and development are

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27 See eg Mubangizi (n 9 above) 31.
28 Arts 3(f), (g) & (h) & art 4(m).
29 Art 3(e).
30 See 'NEPAD in brief' http://www.nepad.org/2005/files/inbrief.php (accessed 1 March 2006).

interdependent matters.[31] In particular, the acknowledgment of the relationship between the right to development, the right to peace and the right to human dignity is implicit. In so doing, it recognises the complex interdependence of peace, human rights and development and makes them pillars of the African Renaissance.[32]

In July 2002, the Heads of State and Government of the member states of the AU agreed to the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance. In the particular context of human rights, paragraph 15 of the Declaration states as follows:

> To promote and protect human rights. We have agreed to:
> - facilitate the development of vibrant civil society organisations, including strengthening human rights institutions at the national, sub-regional and regional levels;
> - support the Charter, African Commission and Court on Human and Peoples' Rights as important instruments for ensuring the promotion, protection and observance of human rights;
> - strengthen co-operation with the UN High Commission for Human Rights; and
> - ensure responsible free expression, inclusive of the freedom of the press.

For the NEPAD process to achieve any reasonable measure of success, there ought to be a mechanism of review and appraisal. In recognition of this important imperative, paragraph 28 of the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance acknowledges the establishment of the African Peer Review Mechanism (APRM) on the basis of voluntary accession. The APRM seeks to promote adherence to, and fulfilment of, the commitments contained in the Declaration. The mechanism spells out the institutions and processes that will guide future peer reviews, based on mutually agreed to codes and standards of democracy, political, economic and corporate governance. To that end, peer review has been described as the systematic examination and assessment of the performance of a state by other states (peers), by designated institutions, or by a combination of states and institutions.[33]

Both NEPAD and the APRM are important juridical developments, not only for democracy, governance and economic development, but also for the promotion and protection of human rights. It must be acknowledged, however, that these important developments are not without criticism. To date, for example, only 23 of the 53 AU members have committed themselves to the review mechanism. Moreover, peer review takes time. According to NEPAd's Secretariat, reviews of the

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[31] See W Nagan 'Implementing the African Renaissance: Making human rights comprehensive for the new millennium' http://www.cha.uga.edu/CHA-CITS/Nagan_paper.pdf (accessed 1 March 2006).

[32] As above.

[33] See Economic Commission for Africa *The African Peer Review Mechanism — Some frequently asked questions* (2002) 2.

first four countries — Ghana, Kenya, Mauritius and Rwanda — are only expected to be completed by this year (2006).[34] At the time of writing, the African Peer Review Panel had finalised reviews for Ghana and Rwanda. The Country Review Reports for these two countries were presented to the Committee of Participating Heads of State and Government (APR Forum) at their last meeting held on 19 June 2005 in Abuja, Nigeria. These reports were scheduled for further discussion by the Heads of State and Government (Peer Review) at their next meeting. During that meeting, the two countries were expected to present in detail the steps they intended to take to address the shortcomings and gaps identified. While 19 more African countries are awaiting a review, the NEPAD Secretariat has yet to commence these.[35] Criticisms notwithstanding, there is no doubt that under the umbrella of the AU, through NEPAD and the APRM, African leaders have developed their own strategy for meeting the continent's pressing challenges, including extreme poverty, illiteracy, HIV/AIDS, war, environmental degradation and, most importantly, human rights abuses.

2.3 Fresh winds of democratic change

The interface between human rights and democracy is a hugely complex but very important issue. There is no doubt that human rights are a necessary component of any democratic society. The protection of human rights is therefore necessary for democracy. The traditional definition of democracy as a government of the people by the people and for the people seems to confirm this. According to Thomson, democracy literally means 'rule by the people'.[36] Simplistic as these definitions may seem, they reveal three important tenets of democracy. Firstly, democracy is a form of government in which all adult citizens have some share through their elected representatives. Secondly, democracy implies a society in which all citizens treat each other as equals without any discrimination. Most importantly, democracy brings about a form of government which encourages, allows, promotes and protects the rights of its citizens.[37] Accordingly, democracy is an ideal towards which all civilised nations are striving.

The history of post-colonial Africa is well documented. The main features of that history include military regimes, autocratic dictatorships, one-party political systems and apartheid repressions. From 1989, however, African states witnessed unprecedented demands for democracy. These demands came by way of popular political

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[34] See 'Zambia ''ready for NEPAD governance review''' http://www.afrol.com/articles/14260 (accessed 1 March 2006).

[35] As above.

[36] See A Thomson *An introduction to African politics* (2000) 216.

[37] Mubangizi (n 9 above) 7-8.

challenges from within national borders and through external agents attaching special conditions to the distribution of aid and assistance.[38] As a result, the last decade of the twentieth century brought dramatic political changes to Africa. According to one commentator:[39]

> The whole continent was swept by a wave of democratisation. From Tunisia to Mozambique, from Mauritania to Madagascar, government after government was forced to compete in multi-party elections against new or revitalised opposition movements. To use South African President Thabo Mbeki's words, the continent was experiencing a political 'renaissance'.

Let us try to put these political and democratic changes into perspective. Undemocratic governments dominated Africa's political landscape by the end of the 1980s. By the end of 1994, however, 29 countries had held a total of 54 elections, with observers hailing more than half as 'free'. Further, these elections boasted high turnouts and clear victories. Voters removed 11 sitting presidents, and three more declined to run in the elections. Between 1995 and 1997, 16 countries held second round elections, so that by 1998 only four countries in all of sub-Saharan Africa had not staged some sort of competitive contest.[40]

A 2000 Cornell University study on how leaders leave office shows that, since 1960, African leaders have mainly left office through *coups*, wars or invasions. According to the study, from 1960 to 1989, African leaders had left office 79 times due to *coups*, wars or invasions as compared to only once due to an election. The study shows, however, that while 22 leaders had left office through *coups*, wars or invasions between 1989 and 2000, another 14 had done so through elections.[41]

The above can be summarised in the following statistics: In 1988, there were only nine countries in Africa which had multi-party democracies, 29 countries had one-party systems, 10 were military oligarchies, two were monarchies and two were racial (apartheid) oligarchies. In 1999, on the other hand, there was only one one-party state (Eritrea), one 'no-party' government (Uganda), two monarchies, three military oligarchies and 45 multi-party states.[42] These figures have to be treated with caution, as some of the multi-party governments may be only virtual democracies, as will be seen further below. In the main, however, a good number of African countries, most of which tend to be in

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38 S George 'Democracy, human rights and state reform in Africa' Policy brief 28 http://www.cps.org.za/ cps%20pdf/polbrief28.pdf (accessed 1 March 2006).

39 Thomson (n 36 above) 215.

40 See M Bratton & N van de Walle *Democratic experiments in Africa: Regime transitions in comparative perspective* (1997) 21-22.

41 See AA Goldsmith 'Risk, rule and reason: Leadership in Africa' *Africa Notes*, Institute for Africa Development, Cornell University, May 2000, quoted in ER McMahon 'Assessing democratic development in Africa' Discussion paper prepared for the Development of State/NIC Conference 'Africa: What is to be done?' 11 December 2000 Washington DC 5.

42 Thomson (n 36 above) 216.

Southern Africa, have attained a generally acceptable level of democracy. Many of these countries have an active and unfettered press, vibrant civil societies and institutions that function at least relatively effectively.[43] In that regard, it can be said that the winds of democratic change that have been blowing over Africa during the last 15 years have ushered in a renewed commitment to the promotion and protection of human rights on the continent.

2.4 A new constitutionalism

One of the inevitable outcomes of democratic change in Africa is a new understanding of the notion of constitutionalism. Constitutionalism can be defined as an adherence to the letter and spirit of a constitution. As such, not only does it represent a concern with the instrumentalities of governance, but it upholds the supremacy of the constitution and requires government officials and citizens to obey and operate within the framework of the law. In that context, a constitution is usually seen as 'a document which sets out the distribution of powers between, and the principal functions of, a state's organs of government'.[44] It is therefore important that a country should not only have a good constitution, but that the principles of constitutionalism are adhered to. It is in this context that a new constitutionalism appears to be taking root in Africa. This new constitutionalism is characterised by a widespread struggle for the reform of constitutions in all parts of the continent. As such, it has become an integral part of the African political reform process.

In the context of the promotion and protection of human rights, the advent of a new constitutionalism in Africa has to be hailed. This is because constitutions and constitutionalism go hand-in-hand with human rights in the sense that most constitutions contain a list of rights, usually known as a bill of rights. The significance of the presence of a bill of rights in a constitution cannot be over-emphasised. It not only instructs and informs the state on how to use its power without violating the fundamental rights of the people, but it also imposes duties both on the state and on natural and juristic persons.[45]

It is no coincidence that the advent of a new constitutionalism in Africa coincided with a new democratic order in the early 1990s. Indeed, the 1991 Conference on Security, Stability, Development and Co-operation in Africa, held in Kampala,[46] resolved, *inter alia,* that:

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43 McMahon (n 41 above) 5.

44 See P Cumper *Constitutional and administrative law* (1996) 3.

45 See I Currie & J de Waal *The new constitutional and administrative law* (2001) 318.

46 The conference was proposed by Yoweri Museveni, then Chairperson of the OAU, and it was convened at the initiative of the Africa Leadership Forum, an NGO involving former heads of state and prominent Africans from many countries; http://www.africaaction.org/african-initi3at4ives.htm (accessed 1 March 2006).

> [e]very state should have a constitution that is promulgated after thorough national debate and adopted by an assembly of freely elected representatives of the people. Such a constitution should contain a Bill of Rights.

Several African states seem to have heeded the call. Since 1991, many African countries have adopted new constitutions with bills of rights. Examples of such countries include Angola, Ghana, Malawi, Namibia, Nigeria, South Africa and Uganda. In all these countries, the courts have a pivotal role in enforcing the rights enshrined. Some countries, such as South Africa, have taken the lead in the judicial enforcement of human rights. Although the actual enjoyment or realisation of the rights in the constitutions is another story, the fact that they are included in the various constitutions ought to be applauded as a victory for the protection of human rights.

2.5 Rights of specific groups

Apart from the African Charter and the Protocol Establishing the African Court on Human and Peoples' Rights, the only three other human rights treaties of the AU deal with specific groups of people. These treaties are:

- the Convention on Specific Aspects of the Refugee Problem in Africa (1969);
- the African Charter on the Rights and Welfare of the Child (1990); and
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (Women's Protocol).

In the particular context of women's rights, the Women's Protocol goes further than the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[47] For example, it contains provisions on marriage, the right to participate in political and decision-making processes, the protection of women in armed conflicts, and rights to education, health, employment, food security and housing. It is also important to note that the Women's Protocol prohibits all forms of female genital mutilation, an issue that will be discussed further below. On 25 November 2005, the Protocol came into force, 30 days after Togo deposited the fifteenth instrument of ratification.

In the context of children's rights, the African Charter on the Rights and Welfare of the Child (African Children's Charter)[48] is an important instrument which was adopted by the then OAU as far back as 1990. A detailed discussion of the Children's Charter falls outside the scope of

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[47] GA Res 34/180 UN Doc A/34/46 http://www1.umn.edu/humanrts/instree/e1cedaw.htm (accessed 1 March 2006).

[48] OAU Doc CAB/LEG/24.9/49 (1990) http://www1.umn.edu/humanrts/africa/afchild.htm (accessed 1 March 2006).

this paper. Suffice to mention, however, that in some important respects, the Children's Charter builds upon international standards. In that regard, the Children's Charter actually provides greater protection of some rights than does the UN Convention on the Rights of the Child.[49] An important development was the establishment of the African Committee of Experts on the Rights and Welfare of the Child. Established in July 2001, the Committee had its inaugural meeting in May 2002. It is expected to play an important role as it is empowered to receive state reports as well as communications from individuals, groups or recognised NGOs.

With regard to refugees, the African human rights system boasts the most progressive protection in the world, at least on paper. The OAU Convention Governing Specific Aspects of Refugee Problems in Africa[50] was adopted as far back as 1969, long before the African Charter was drafted. Since then there have been a number of international conferences, the most notable the 1994 OAU/UNHCR Symposium, which resulted in the Addis Ababa Document on Refugees and Forced Population Displacements in Africa.[51] The Kigali Declaration of 2003[52] is also worth mentioning. Although there has been criticism regarding the lack of clear mechanisms to deal with the issue of refugees as a whole, it is clear that the African system has paid reasonable attention to the rights of refugees.

Based on the foregoing discussion, this paper argues that the African human rights system places significant emphasis on the rights of specific groups of people; mainly, women, children and refugees.

3 Problems and challenges

In spite of the gains that have been made over the last 15 years, contemporary Africa still remains home to gross violations of human rights. As such, the promotion and protection of human rights on the continent still face many challenges. Although many of the causes of human rights abuses have their genesis in the colonial era, it is no longer acceptable to blame all African human rights problems on colonialism and apartheid. It is in this context that we proceed to highlight the problems and challenges facing human rights protection in Africa.

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49 Eg, protection of the right to life and rights during times of armed conflict.

50 1001 UNTS 45 http://www1.umn.edu/humanrts/instree/z2arcon.htm (accessed 1 March 2006).

51 Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa 8-10 September 1994 http://www1.umn.edu/humanrts/africa/REFUGEE2.htm (accessed 1 March 2006).

52 MIN/CONF/HRA/Decl 1(I) http://www.unhchr.ch/html/menu6/declaration_en.doc (accessed 1 March 2006).

3.1 Regional and internal conflicts

In Africa, as anywhere else in the world, the relationship between conflicts and human rights violations is the proverbial chicken and egg. While conflicts inevitably result in human rights violations, it has to be recognised that human rights violations are one of the main causes of conflicts in Africa. In the words of the Secretary-General of the UN, 'conflict in Africa poses a major challenge to United Nations efforts designed to ensure global peace, prosperity and human rights for all'.[53] The Report of the Secretary-General on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa further makes it clear that 'respect for human rights and the rule of law are necessary components of any effort to make peace durable'.[54] It is not surprising, then, that human rights abuses are often at the centre of wars in Africa. According to the 2005 Amnesty International Report, for example:[55]

> Armed conflicts continued to bring widespread destruction to several parts of Africa in 2004, many of them fuelled by human rights violations. Refugees and internally displaced people faced appalling conditions.

Hundreds of thousands of people have been killed in Africa in recent times from a number of conflicts and civil wars.[56] The following are but a few examples of recent or on-going conflicts in Africa:

- The recent conflict in the Democratic Republic of Congo (DRC) involves seven nations. This conflict was fuelled and supported by various national and international corporations and other regimes which had an interest in the outcome of the conflict.[57]
- Sierra Leone has seen serious and grotesque human rights violations since 1991 when the civil war erupted in that country. According to Human Rights Watch, over 50 000 people had been killed by July 1999, with over one million people having been displaced.[58]
- The conflict between Ethiopia and Eritrea has been going on for decades, sparked off by one reason or another, most recently in May 1998 over what seemed to be a minor border dispute.

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53 See Report of the Secretary-General on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa http://www.un.org/ecosocdev/geninfo/afrec/sgreport/ report.htm (accessed 1 March 2006).

54 As above.

55 See 'Amnesty International Report 2005' http://web.amnesty.org/report2005/2af-index-eng (accessed 1 March 2006).

56 See 'Conflicts in Africa' http://www.globalissues.org/Geopolitics/Africa.asp (accessed 1 March 2006).

57 See the judgment of the International Court of Justice in *Democratic Republic of the Congo v Uganda* Case Concerning Armed Activities on the Territory of the Congo, judgment of 19 December 2003 http://www.icj-cij.org (accessed 1 March 2006).

58 See Human Rights Watch 'Sierra Leone — Getting away with murder, mutilation, rape: New testimony from Sierra Leone' http://www.hrw.org/reports/1999/sierra/ (accessed 1 March 2006).

- The 1994 genocide in Rwanda will go down in African history as one of the most brutal consequences of a conflict that many people have simplistically explained in terms of ancient tribal hatred.

Other conflicts of no less significance include the recent mayhem in Darfur, Western Sudan and the never-ending war in Northern Uganda. It is too soon to say whether peace has finally returned to Burundi after years of internal conflict. The same may be said about Somalia, which recently finalised a reconciliation process to end over a decade of state collapse and factional violence by forming a new government that included the former faction leaders.

From the above discussion, it is clear that Africa is beleaguered with strife and conflicts and that the struggle for human rights remains tied up with the problems of such conflicts. Moreover, the patterns of conflict in Africa will continue to be an important impediment to the effectiveness of the AU, NEPAD and other continental and regional institutions that are meant to promote and protect human rights.

3.2 Poverty

Of all the social phenomena that have a significant impact on human rights, poverty probably ranks highest. Poverty is in itself not only a denial of human rights, but also erodes or nullifies the realisation of both socio-economic and civil and political rights.[59] There is no doubt that Africa is the globe's poorest continent. Of the estimated 700 million people who live in sub-Saharan Africa, about 315 million (one in two people) survive on less than one dollar per day.[60] According to the United Nations Development Programme, the following facts on poverty are also worth noting:

- 184 million people (33% of the African population) suffer from malnutrition.
- During the 1990s, the average income *per capita* decreased in 20 African countries.
- Less than 50% of Africa's population has access to hospitals or doctors.
- In 2000, 300 million Africans did not have access to safe water.
- The average life expectancy in Africa is 41 years.
- Only 57% of African children are enrolled in primary education, and one in three children does not complete school.

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[59] See JC Mubangizi 'Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa' (2005) 21 *South African Journal on Human Rights* 32.

[60] See UNDP 'Facts on poverty in Africa' http://www.africa2015.org/factspoverty.pdf (accessed 1 March 2006).

- One in six children dies before the age of five.

Many people see poverty in Africa as a human creation, the outcome of an uncaring international community. They argue that[61]

> the interests of the powerful have dominated discourse in a rapidly changing, globalised world, and the shift of power from the people to the market and from state to the corporation under the rubric of globalisation has resulted in unbalanced structures of international trade and investment, uneven distribution of new technologies and an unjust allocation of resources as well as employment practices that work against the interest of the poor.

Hence, it could be argued that globalisation, through its much-hyped essentials of efficiency, creativity, ability and capacity, has done nothing to preserve, protect and promote the fundamental human rights and dignity of the Africa's poor.

The problem of poverty in Africa is compounded by other factors. These include low levels of education, widespread unemployment, poor political and economic policies, natural disasters, armed conflicts and, quite significantly, pandemics such as HIV/AIDS. In the particular context of human rights, the link between poverty and HIV/AIDS cannot be overemphasised. Indeed, this paper would be incomplete without highlighting HIV/AIDS as one of the main challenges to the protection of human rights in Africa. It is to that aspect that we now turn our attention.

3.3 HIV/AIDS

HIV/AIDS has reached pandemic proportions, not only in sub-Saharan Africa but also in many parts of the world. According to the UNAIDS/WHO AIDS Epidemic Update of December 2005, sub-Saharan Africa has just over 10% of the world's population, but is home to more than 60% of all people living with HIV (25,8 million).[62] In 2005, an estimated 3,2 million people in the region became infected with HIV, while 2,4 million adults and children died of AIDS.[63] It is clear from these statistics that sub-Saharan Africa is the most affected region worldwide as the continent is home to approximately two-thirds of all the people currently living with HIV/AIDS.

HIV/AIDS has an impact not only in terms of the human toll and suffering, but also in terms of human rights and health care. Issues of human rights in general, and the right to health care specifically, have become paramount not only in trying to stem the spread of HIV/AIDS,

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61 See L Das 'The spectre of poverty in the Commonwealth: A serious violation of human rights?' http://www.jha.ac/books/br025.htm (accessed 1 March 2006).

62 See UNAIDS/WHO *AIDS epidemic update 2005* http://www.unaids.org/epi/2005 (accessed 1 March 2006).

63 As above.

but also in dealing with those who are infected or affected. Several human rights norms are relevant both in the fight against HIV/AIDS and also in the protection of the rights of people infected with the disease. Although the right to health care is the most relevant, there are other important rights such as the right to privacy, the right to human dignity, the right to life and the right not to be discriminated against.

The Secretary-General of the UN has stressed that the protection of human rights is essential to safeguard human dignity in the context of HIV/AIDS, and to ensure an effective, rights-based response to HIV/AIDS.[64] An effective response requires the implementation of all human rights, civil and political, economic, social and cultural, and fundamental freedoms of all people, in accordance with existing international human rights standards.[65] It has also been recognised that when human rights are protected, less people become infected and those living with HIV/AIDS and their families can better cope with the disease. In the African context, therefore, the challenge of HIV/AIDS to human rights protection is compounded by the sheer numbers of those infected and, conversely, the high levels of infection on the continent are aggravated by the rampant abuses of human rights caused by other factors. Moreover, in Africa, the fight against HIV/AIDS is seriously inhibited by certain unique cultural practices that are in themselves a major challenge to the promotion and protection of human rights, as the following discussion illustrates.

3.4 Cultural challenges

'Culture' has been defined as 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group'.[66] As such, there is a potential conflict between certain cultural practices and the enjoyment of cultural rights ordinarily recognised by most international human rights instruments. In Africa, there are certain cultural practices that are clearly incompatible with international human rights norms. One such practice is the custom of female circumcision, otherwise referred to as female genital mutilation (FGM). Although FGM can be found in various parts of the world, it is practised predominantly in Africa, where the practice originated. FGM is an integral part of certain communities' cultures, and 28 out of 53 countries in Africa practise it in one form or another.[67]

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64 See Second International Consultation on HIV/AIDS and Human Rights (Geneva, 23-25 September 1996), Report of the Secretary-General E/CN.4/1997/37 para 10(a) http://www1.umn.edu/humanrts/ instree/hivreport-1996.html (accessed 31 March 2006). .

65 As above.

66 World Conference on Cultural Policies (1982).

67 See 'Razor's edge — The controversy of female genital mutilation' http://www.irinnews.org/ webspecials/FGM/46008.asp (accessed 1 March 2006).

Although the details of the practice of FGM are beyond the scope of this paper, it can be said that FGM is rooted in a culture of discrimination against women. It is a human rights abuse that functions as an instrument for socialising girls into prescribed gender roles within the family and community. It is therefore closely linked to the unequal position of women in the political, social and economic structures of societies where it is practised.[68]

The main reason why FGM is a big challenge to the protection of human rights in Africa is that deep cultural importance is attached to it. As a result, not only is there a reluctance in many countries to legislate against it, but attempts at implementing such legislation are often met with firm resistance. Moreover, although the practice has been in existence for thousands of years in various parts of the world, it has only attracted the attention of the international community during the last 25 years.

Another repugnant cultural practice incompatible with international human rights norms is virginity testing. Although this practice is not as widespread in Africa as is FGM, it is nevertheless deeply imbedded in the cultures of certain African communities. For example, nearly one million South African girls in the KwaZulu-Natal province underwent virginity tests from 1993 to 2001 alone.[69] Swaziland is another country in which virginity testing is practised. Many human rights groups have condemned virginity testing as a violation of the rights of women and children, but just like FGM, it is a practice that is not likely to die soon. Other cultural practices that pose a serious challenge to the protection of human rights in Africa include polygamy and the requirement of high bride prices in many African communities.

3.5 Political challenges

It was mentioned earlier that the protection of human rights is necessary for democracy, and *vice versa*. That is, proper and effective human rights protection requires the existence of real democracy. While it was argued earlier that democratic change is sweeping over the African continent, it is also true to say that a number of African countries are not yet on a clear path towards consolidating democratic institutions. According to one commentator, 'in these countries authoritarian governments have attempted to carefully manage the democratisation process and the legitimacy of electoral processes has fallen short of

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[68] See Amnesty International USA 'Female genital mutilation: A fact sheet' http://www.amnestyusa.org/ women/violence/ female_genital_mutilation.html (accessed 1 March 2006).

[69] See B Illingworth 'The dangers of virginity tests' http://www.plannedparenthood.org (accessed 1 March 2006).

expectations'.[70] In such countries, the democratic experiment is clearly failing, resulting in what could be referred to as 'virtual democracies'.

Take Uganda, for example. Although many positive changes have taken place in that country since 1986, the National Resistance Movement government of Yoweri Museveni has stubbornly clung to power. Over the years, the main political characteristic of this government has been the 'movement' or 'no-party' system which has essentially prohibited political activity other than under the movement itself. There have been many arguments for and against this rather strange political philosophy, but it is generally agreed that any political system that restricts or prohibits political parties can only be undemocratic. Recent attempts to introduce multi-party politics have been compromised by the arrest, harassment and intimidation of opposition leaders. This has been aggravated by a flagrant violation of the Constitution. The Constitution was amended to allow Museveni a third term in the office that technically he has now occupied for 20 years. On 23 February 2006, 'multi-party' elections were held and, as expected, Museveni was voted in for his third term. The main opposition party rejected the results and it remains to be seen how the courts will deal with the inevitable challenge that will be brought by the opposition.

Zimbabwe is another example. It is undemocratic and a human rights disaster. Robert Mugabe, who has been in power since 1980, is regarded as one of the world's worst ten dictators.[71] Although elections are held regularly, they are never free and fair and the ruling ZANU/PF party is invariably returned to power.[72] Its human rights record is an embarrassment to the AU and the continent. Other 'virtual' democracies in Africa which epitomise political challenges to human rights protection include Cameroon, Gabon, Kenya and Togo. The political systems of countries such as Swaziland and Morocco are also a source of concern.

4 Conclusion

It is obviously not possible to discuss all the recent and current positive developments in the protection of human rights in Africa. It is even more difficult to analyse all the problems and challenges to be contended with. What has been attempted in this paper is a discussion of the more prominent developments and challenges. From the discussion it can be concluded that the future of human rights in Africa is

[70] McMahon (n 41 above) 7.

[71] See D Wallechinsky 'The world's ten worst dictators' http://archive.parade.com/2005/0213/0213_ dictator.html (accessed 1 March 2006).

[72] See 'Zimbabwe: Is a fair vote possible?' http://news.bbc.co.uk/2/hi/talking_point/debates/african_ debates/798820.stm (accessed 1 March 2006).

more completely in the hands of Africans than it has ever been before. The developments that are taking place are a result of African initiatives. The problems and challenges are also mainly of an African creation. Although the global community can and should play some role in addressing these problems, it is up to the people of Africa to construct their own destiny. The gains that have been made over the last few decades are a clear indication that Africa can succeed. In spite of these recent gains, however, there are still lots of pains to endure before the African system of human rights protection can compare favourably to its more advanced counterparts.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict

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Summary

Sexual violence during armed conflict is prohibited by international humanitarian law. International tribunals have held that sexual violence can constitute torture, crimes against humanity and genocide. The Protocol on the Rights of Women deals quite extensively with the protection of women in armed conflicts. However, there are no clear guidelines for states on how to implement these obligations.

1 Introduction

There is increasing evidence of a link between sexual violence against women and the process of armed conflict in Africa. These violations of women's rights are of serious concern and affect the whole continent. For example, the flow of refugees across borders affects countries whether they are part of the conflict or not.[1] Even though the international community has established two criminal tribunals to prosecute these crimes in Africa — the International Criminal Tribunal for Rwanda

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1 See the Preamble of the Protocol relating to the Establishment of the Peace and Security Council of the African Union (adopted in Durban, South Africa, July 2002 and entered into force in December 2003), where member states are concerned 'by the fact that conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope' (PSC Protocol).

(ICTR)[2] and the Special Court for Sierra Leone (SCSL)[3] — there still is no change in the situation regarding armed conflicts in Africa. There are continuing reports of sexual violence against women in the ongoing armed conflicts in Burundi,[4] the Democratic Republic of Congo,[5] Sudan[6] and Uganda.[7] The question to be asked, is: Can the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)[8] change the situation?

Against the background of the relationship between sexual violence during armed conflict and international humanitarian law, this article analyses the Women's Protocol.

The next section analyses the relationship between sexual violence against women during armed conflict and international humanitarian law. The basic presumption is that sexual violence constitutes a crime against humanity, war crimes and genocide under international humanitarian law.

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[2] The International Criminal Tribunal for Rwanda (ICTR) was established for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other Violations in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, SC Res 955 (8 November 1994). The Statute of the ICTR is attached to SC Res 955 as an annexure. The ICTR has convicted perpetrators of sexual violence during the genocide in Rwanda. See eg *Prosecutor v Akayesu* judgment 2 September 1998, Case ICTR-96-4; *Prosecutor v Musema* judgment 27 January 2000, Case ICTR-96-13.

[3] The Special Court for Sierra Leone was created as a result of an Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002). It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. It is reported that throughout the ten-year civil war, thousands of Sierra Leonean women were subjected to widespread and systematic sexual violence, including rape and sexual slavery. Human Rights Watch '"We'll kill you if you cry": Sexual violence in the Sierra Leone conflict' (2003) 15 *Human Rights Watch* 25.

[4] See Human Rights Watch 'Everyday victims: Civilians in the Burundian war' (2005) 15 *Human Rights Watch* http://www.hrw.org/reports/2003/burundi1203/burundi1203.pdf (accessed 1 March 2006).

[5] See Human Rights Watch 'Seeking justice: The prosecution of sexual violence in the Congo war' (2005) 17 *Human Rights Watch* http://www.hrw.org/reports/2005/drc0305/drc0305text.pdf (accessed 1 March 2006).

[6] See Human Rights Watch 'Sexual violence and its consequences among displaced persons in Darfur and Chad' (2005) *Human Rights Watch* Briefing Paper, 12 April 2005.

[7] See R Logh & E Denholm 'Violence against women in Northern Uganda' (2005) Amnesty International Index AFR 59/001/2005, 17 July 2005.

[8] See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo in July 2003, and entered into force on 25 November 2005 after 15 ratifications.

2 The relationship between sexual violence against women during armed conflict and international humanitarian law

2.1 Sexual violence as a crime against humanity

The Nuremberg Charter[9] marks the beginning of the modern notion of crimes against humanity.[10] The rationale for crimes against humanity was to ensure that the types of acts amounting to war crimes could also be punished when the nationality of the victim and the perpetrator are the same.[11] However, rape and other forms of sexual violence were not listed as 'crimes against humanity' in article 6(c)[12] of the London Charter, nor in article 5(c)[13] of the Tokyo Charter.[14] Only Control Council Law 10 expressly referred to rape in its provisions.[15] However, both Charters contained the term 'other inhumane acts', affording protection to women from sexual violence during armed conflict.[16] This has been affirmed by the European Commission on Human Rights in

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9 Annex to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), London, 8 August 1945, 82 UNTS 279, 59 Stat 1544, EAS 472 Reprinted in (1945) 39 *American Journal of International Law* 257 (Supp) (Nuremberg Charter or London Charter).

10 See KD Askin *War crimes against women: Prosecution in international war crimes tribunals* (1997) 140; MC Bassiouni *Crimes against humanity in international criminal law* (1999) 1.

11 See JG Gardam & MJ Jarvis *Women, armed conflict and international law* (2001) 197.

12 Art 6(c) of the Nuremberg Charter defines crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.

13 Art 5(c) of the Tokyo Charter defines crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'. Charter of the International Military Tribunals for the Far East, 19 January 1946 TIAS 1589 (Tokyo Charter).

14 As above.

15 See art 2(c) of the Allied Control Council Law 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, 20 December 1945, Official Gazette of the Control Council for Germany 3, Berlin, 31 January 1946, which defines crimes against humanity as '[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated' (Control Council Law 10) (my emphasis).

16 See Y Kushalani *Dignity and honour of women as basic and fundamental human rights* (1982) 20, arguing that 'the civilised nations of the world' would have no difficulty in recognising rape as an 'inhumane act'. Also see Bassiouni (n 10 above) 344; Askin (n 10 above) 180; Gardam & Jarvis (n 11 above) 198.

Cyprus v Turkey,[17] which held that widespread rape (in an international conflict between Turkey allied with Turkish Cypriots and Greek Cypriots) constituted torture and inhuman treatment under article 3 of the European Human Rights Convention.[18] Furthermore, the Secretary-General's commentary on the conflict in the former Yugoslavia stated that[19]

> crimes against humanity refer to inhumane acts of a very serious nature, such as . . . rape committed as part of a widespread, or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds . . . such inhumane acts have taken the form of the so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

Rape is included as a crime against humanity in the Statutes[20] of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[21] and the ICTR.[22] Hence, in *Furundzija*, the ICTY Trial Chamber classified 'serious sexual assault' as a crime against humanity by way of inhumane acts.[23] Further, the ICTR Trial Chamber found in *Akayesu* that forced public nudity constituted a crime against humanity by way of other inhumane acts.[24] However, the Statutes of these Tribunals only refer to the term 'rape' as a crime against humanity without defining it or referring to other forms of sexual violence. This raises questions as to whether 'other forms of sexual violence' constitute 'crimes against humanity'.

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17 See *Cyprus v Turkey*, App Nos 6780/74, 6780/75, decision of 17 July 1976, 4 *European Human Rights Reports* 482, paras 358-74 (1982).

18 Art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

19 See United Nations Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia, UN Doc S/25704 (1993), reprinted in (1993) 32 *International Legal Materials* 1159 para 48.

20 See art 5 of the ICTY Statute where it states that the ICTY 'shall have the power to prosecute persons responsible for . . . crimes . . . committed in armed conflict, whether international or internal in character, and directed against any civilian population: . . . (g) rape'. Also, art 3 of the ICTR Statute stipulates that 'the [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of the widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: . . . (g) rape'. It should be noted that the ICTR Statute does not require the existence of an armed conflict for the prosecution of crimes against humanity.

21 The ICTY was established to prosecute 'Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' SC Res 827 (25 May 1993). The Statute of the ICTY is contained in UN Doc S/25704 Annex (3 May 1993).

22 n 2 above.

23 See *Prosecutor v Furundzija* Case No IT-95-17/1, judgment of 10 December 1998 para 175.

24 Akayesu (n 2 above) para 697.

The Rome Statute of the International Criminal Court contains a much broader definition of crimes against humanity than those in the Statutes of the Tribunals. Article 7 states that[25]

> [a] 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack: . . . (g) rape, sexual slavery, enforced prostitution, forced pregnancy,[26] enforced sterilisation, or any other form of sexual violence of comparable gravity . . .

Hence, there is no doubt that 'crimes against humanity' also include rape and other forms of sexual violence when committed as part of a 'widespread' or 'systematic attack' against women during armed conflict.[27]

The term 'widespread' was defined in the *Akayesu* judgment to mean 'massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against the multiplicity of victims'.[28] This means that a single isolated act of sexual violence during armed conflict may not be considered as a crime against humanity, as it will not satisfy the requirement of 'widespread' or 'systematic'.[29] Both tribunals have found that sexual violence can constitute torture and slavery as crimes against humanity.[30]

2.2 Sexual violence as a war crime

2.2.1 The Hague Conventions

Although rape has long been considered a war crime under customary international law, the 1899[31] and 1907[32] Hague Conventions did not

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25 Art 7(g) of Rome Statute.

26 Art 7(2)(f) of the Rome Statute defines the term 'forced pregnancy' to mean 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.

27 It should be noted, however, that crimes against humanity may be committed during peace time. See *Prosecutor v Tadic,* Interlocutory Appeal Decision on Jurisdiction, 2 October 1995, IT-94-1-AR72 para 141, where the Appeals Chamber affirmed that crimes against humanity no longer require a nexus with armed conflict (*Tadic* judgment on jurisdiction).

28 *Akayesu* (n 2 above) para 580.

29 See *Prosecutor v Tadic* Case IT-94-1, opinion and judgment (7 May 1997) paras 646-647.

30 See *Akayesu* (n 2 above) para 597 (rape as a form of torture); *Furundzija* (n 23 above) para 163 (rape as a form of torture); and *Prosecutor v Kunarac, Kovac, and Vukovic* Case IT-96-23 (*Foca* case) 22 February 2001, para 542 (sexual violence as a form of slavery), where the Trial Chamber states that 'it is now well established that the requirement that the acts be directed against a civilian ''population'' can be fulfilled if the acts occur in either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts.'.

31 Convention with Respect to the Laws and Customs of War on Land, Annex of Regulations, 29 July 1899.

32 Convention Respecting the Laws and Customs of War on Land, Annex of Regulations, 18 October 1907 (1907 Hague Convention).

explicitly list rape and sexual violence as war crimes. However, the protection of women from sexual violence during armed conflict is subsumed in article 46 of the 1907 Hague Convention.[33] This article states that 'family honour and rights, the lives of persons . . . must be respected'.[34] Kushalani[35] explains that the protection of 'family honour and rights' is a 'euphemism' of the time, which encompasses a prohibition of rape and sexual assault, and this provision is mandatory.[36] Therefore, this article affords protection to women during armed conflict.

However, the notion of a link between rape and honour has been criticised by advocates of women's rights. Copelon[37] argues that the concept of rape as a crime against dignity and honour as opposed to a crime of violence is a core problem. She maintains that where rape is treated as a crime against honour, the honour of women is called into question and virginity or chastity is often a precondition.[38] She further argues that honour reinforces the social view that the raped woman is dishonourable.[39] In addition, Niarchos[40] lists the pitfalls in linking rape and honour as follows:[41]

> First, reality and the woman's true injury are sacrificed: rape begins to look like seduction with 'just a little persuading' rather than a massive and brutal assault on the body and psyche . . . by presenting honour as the interest to be protected, the injury is defined from society's viewpoint, and the notion that the raped woman is soiled or disgraced is resurrected . . . on the scale of wartime violence, rape as a mere injury to honor or reputation appears less worthy of prosecution than injuries to the person.

It is submitted that because violence against women was largely ignored during that time, the provisions of the Hague Convention are of significance. In addition to article 46, the Preamble of the 1907 Hague Convention states that where people are not protected by the Hague Convention, they remain under the protection of customary

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33 Bassiouni explains that the general nature of the article should not be taken to mean that it does not prohibit acts of sexual violence, especially in light of the 1907 Hague Convention's governing principles of the 'laws of humanity' and 'dictates of the public conscience'. See Bassiouni (n 10 above) 348.

34 Art 46 1907 Hague Convention (n 32 above).

35 Kushalani (n 16 above).

36 n 35 above, 10-11.

37 See R Copelon 'Gendered war crimes: Reconceptualising rape in time of war' in A Stiglmayer (ed) *Mass rape: The war against women in Bosnia-Herzegovina* (1994) 197 200.

38 As above.

39 As above.

40 See CN Niarchos 'Women, war, and rape: Challenges facing the International Criminal Tribunal for the Former Yugoslavia' (1995) 17 *Human Rights Quarterly* 649 674.

41 As above.

international law,[42] thus emphasising and affirming pre-existing customary international law, which was general and prohibited sexual violence.[43] Hence, this Convention is of significance because it protects women in its provisions and it also extends the protection to customary international law.

2.2.2 The Geneva Conventions and Additional Protocols

In their provisions, the Geneva Conventions[44] and their Additional Protocols[45] distinguish between international and non-international armed conflict.[46] The need to differentiate between the two categories is due to the regulations afforded to them by international law. International humanitarian law applies different rules depending on the nature of the armed conflict.[47] Therefore, the protection afforded to those affected by international armed conflict differs from the protection afforded to those affected by internal armed conflict. The distinction is based on the premise that non-international armed conflict raises questions of sovereign governance and not international regulation.[48]

Of significance is the striking difference in the application of international humanitarian law between the two categories. In an international

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42 The Preamble states that '[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'; Hague Convention (1907) (n 32 above).

43 As above.

44 The Conventions (Geneva Conventions) signed at Geneva on 12 August 1949, consist of the following: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, including Annex I, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Convention (III) Relative to the Treatment of Prisoners of War, including Annexes I-IV, 75 UNTS 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, including Annexes I-III, 75 UNTS 287.

45 Protocol [I] Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978; Protocol [II] Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 1977, 1125 UNTS 609, entered into force 7 December 1978.

46 Wars between two or more states are considered to be international armed conflicts and war-like clashes occurring on the territory of a single state are non-international armed conflicts. See H Glasser *International humanitarian law: An introduction* (1993) 21.

47 See JG Stewart 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict' (2003) 85 *International Review of the Red Cross* 313.

48 Stewart (n 47 above) 320.

armed conflict, the 'grave breaches'[49] of the Geneva Conventions become applicable, in addition to other provisions of international humanitarian law applying to such armed conflicts.[50] Only article 3 common to the Geneva Conventions and Additional Protocol II apply to non-international armed conflict.

There is an argument that suggests correctly that customary international law has developed to a point where the gap between the two regimes is less marked. For example, the then President of the ICTY, Cassese, argued that 'there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts . . .'[51] It is submitted that the harm felt by women who have been sexually assaulted during internal armed conflict is no different from those assaulted during an international armed conflict.

It is therefore necessary to evaluate the protection afforded to women from sexual violence by the Geneva Conventions and Additional Protocols during international and non-international armed conflict.

The protection of women from sexual violence during international armed conflicts

Under the Geneva Conventions, only 'grave breaches' explicitly incorporate penal sanctions.[52] Rape and other forms of sexual violence are not explicitly identified by the Geneva Conventions as a class of 'grave breaches', but they are subsumed in offences that are explicitly identified as 'grave breaches'.[53] Article 147 of the Geneva Convention IV provides that[54]

> [g]rave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health . . . not justified by military necessity and carried out unlawfully and wantonly.

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49 The grave breaches are the principal crimes under the Geneva Conventions. See See T Meron *War crimes law comes of age* (1998) 289.

50 Meron (n 49 above) 286.

51 See the 'Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court' in L Moir *The law of internal armed conflict* (2000) 51. Also see K Parker 'Human rights of women during armed conflict' in KD Askin & DM Koenig (eds) *Women and international human rights law* (1999) 283 290.

52 Meron (n 49 above) 350.

53 See JG Gardam 'Gender and non-combatant immunity' (1993) 3 *Transnational Law and Contemporary Problems* 360 361. Also see Bassiouni (n 10 above) 350; NNR Quénivet *Sexual offences in armed conflict and international law* (2005) 100.

54 Art 147 Geneva Convention IV.

The Geneva Conventions neither define rape and sexual violence nor do they identify their elements. However, the Commentary of the Geneva Convention IV[55] provides a broad interpretation of inhuman treatment. It provides that '[t]he aim of the Convention is certainly to grant civilians in the enemy hands a protection which will preserve their human dignity, and prevent them being brought down to the level of animals'.[56] Further, the Commentary stipulates that a conclusion is that 'by 'inhuman treatment' the Convention does not mean only physical injury or injury to health'.[57] More specifically, the Commentary defines 'inhuman treatment' as treatment contrary to article 27 of the Geneva Convention IV,[58] which provides that 'women shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.[59] Consequently, sexual violence is incorporated by reference under 'inhuman treatment' and therefore constitutes a 'grave breach' of the Geneva Conventions.[60]

In addition, sexual violence at times amounts to an act of torture as provided by section 147 of the Geneva Convention.[61] The ICTY Trial Chamber held in *Celebici*[62] that[63]

> [r]ape causes severe pain and suffering both physical and psychological . . . it is difficult to envisage circumstances where in which rape by, or at the instigation of a public official . . . could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.

Accordingly, the Trial Chamber held that 'whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria'.[64]

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55 See J Pictet (ed) *International Committee of the Red Cross, Commentary: IV Geneva Convention* (Geneva Convention IV Commentary).

56 n 55 above, 598.

57 As above.

58 As above.

59 Art 27 Geneva Convention IV.

60 See *Cyprus v Turkey* (n 17 above).

61 Art 147 Geneva Convention IV. On torture, see eg MacKinnon contending that while men are tortured in a particular way, women suffer rape as a method of torture. She notes that torture is widely recognised as a core violation of human rights. See CA MacKinnon 'On torture: A feminist perspective on human rights' in KE Mahoney & P Mahoney (eds) *Human rights in the 21st century: A global challenge* Part 1 21; B Stephens 'Humanitarian law and gender violence: An end to centuries of neglect?' (1999) 3 *Hofstra Law and Policy Symposium* 87 95, arguing that rape entails the intentional infliction of severe physical and mental pain and suffering.

62 See *Prosecutor v Delalic & Others* judgment of 16 November 1998, Case IT-96-21 (*Celebici*).

63 n 62 above, para 495.

64 n 62 above, para 496.

In addition, the Commentary to article 147 of the Geneva Convention (IV) stipulates that torture is 'more than a mere assault on the physical or moral integrity of a person'.[65] It notes that torture is defined as 'the infliction of suffering on a person to obtain from that person, or from another person, confessions or information. What is important is not so much the pain itself as the purpose behind its infliction.'[66] Further, according to the *Aide-mémoire* of the International Committee of the Red Cross (ICRC), 'willfully causing great suffering' means 'suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other purpose, even pure sadism.'[67] Rape and sexual violence are certainly attacks upon physical integrity, health and human dignity.[68] Thus, sexual violence which amounts to torture also constitutes a grave breach of the Geneva Convention IV.

In addition to article 147 of the Geneva Convention IV, articles 11 and 85 of the Additional Protocol I expand the definition of 'grave breaches'. Article 11 states that[69]

> [t]he physical or mental health and integrity of persons who are in the power of the adverse party or who are interned, detained or otherwise deprived of liberty . . . shall not be endangered by any unjustified act or omission.

Further, article 11(4) defines 'grave breaches' of Additional Protocol I as[70]

> [a]ny wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a party other than the one on which he depends and which . . . violates any of the prohibitions in paragraphs 1 and 2 . . . shall be a grave breach of this Protocol.

In addition, article 85 of Additional Protocol I states that grave breaches are, in addition to those listed in article 11, certain acts which are 'committed willfully . . . and causing . . . serious injury to body or health'[71] as well as 'other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimina-

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65 See Geneva Convention IV Commentary (n 53 above) 598.

66 As above. See also KD Askin 'Women and international human rights law' in Askin & Koenig (n 51 above) 41 80, where she argues that torture is not limited to physical torture in cases of sexual violence; Stephens (n 61 above), arguing that the view that rape be coupled with violent injury reflects the failure to understand the violent nature of rape and the physical and mental injury it inflicts.

67 See (1992) ICRC, *Aide-mémoire* quoted in Bassiouni (n 10 above) 353; T Meron 'Rape as a crime under international humanitarian law' (1993) 87 *American Journal of International Law* 426.

68 See Quénivet (n 53 above) 100; Gardam & Jarvis (n 11 above) 201.

69 Art 11 Additional Protocol I.

70 Art 11(4) Additional Protocol I.

71 Art 85(3) Additional Protocol I.

tion'.[72] These provisions therefore expand the scope of 'grave breaches'.[73] Hence, sexual violence is considered a grave breach and should be prosecuted as such.

A more specific prohibition against rape and sexual violence of civilians can be found in article 76 of Additional Protocol I. Article 76 states that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.[74] The Commentary on article 76 stipulates that this provision is largely a repetition of paragraph 2(b) of article 75 of the Additional Protocol I (which provides for fundamental guarantees), with the addition of a reference to rape.[75] It proceeds to state that the provision 'applies both to women affected by the armed conflict and to others; to women protected by the Fourth Convention and to those who are not'.[76] This provision is significant because it affords protection to all women,[77] rather than protecting only women 'in international armed conflicts in enemy hands, or in the hands of a party of which they are not national'.[78] Thus, this Convention has been viewed as not applicable when a warring party violates the rights of its citizens.[79]

The protection of women from sexual violence during non-international armed conflicts

Article 3 common to the Geneva Conventions does not mention rape and other forms of sexual violence.[80] It mentions 'outrages upon personal dignity, in particular humiliating and degrading treatment'.[81] The

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72 Art 85(4)(c) Additional Protocol I.

73 The Commentary on the Additional Protocols declares that '[t]he qualification of grave breaches is extended to acts defined as such in the Conventions'. See Y Sandoz *et al Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 992 para 3468 (Commentary to the Additional Protocols).

74 Art 76(1) Additional Protocol I.

75 See Commentary to the Additional Protocols (n 73 above) 892 para 3150.

76 n 73 above para 3151.

77 Also see art 75(1) of Additional Protocol I, which states that '[i]n so far as they are affected by a situation referred to in article 1 of this Protocol, persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each party shall respect the person, honour, convictions and religious practices of all such persons.'

78 Many provisions, including the provisions for humane treatment set out in art 27 of Geneva Convention IV, apply only to persons.

79 Bassiouni (n 10 above) 360.

80 Art 3(1) of the Geneva Conventions prohibits '(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . (c) outrages upon personal dignity, in particular humiliating and degrading treatment'.

81 Art 3(1)(c) Geneva Conventions.

Commentary on article 3 is also silent on whether these crimes fall under either of the provisions in the Geneva Conventions. However, the Commentary acknowledges the fact that[82]

> it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete the list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and at the same time precise.

In the light of the identical terms used in other provisions of the Geneva Conventions and the Additional Protocol I, it is argued that the act of sexual violence clearly violates article 3 common to the Geneva Conventions.[83]

Further, common article 3 includes sexual violence as a grave breach by reference to article 27, in the same way article 147 of the Geneva Convention IV 'grave breaches' provision does.[84] The Commentary on common article 3 specifies that article 27 of the Geneva Convention IV is applicable. For that reason rape and sexual violence fall under the 'grave breaches' of the Geneva Conventions.[85]

In addition, articles 4 and 13 of Additional Protocol II expand the authority of common article 3. Article 4 of Additional Protocol II provides that civilians 'are entitled to respect for their person, honour and convictions . . .' and that they shall be treated humanely in all circumstances. Article 4(2)(e) states that 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' are prohibited at any time and at any place.[86] Further, article 13(2) provides that

> [t]he civilian population as such, as well as individual civilians shall not be the object of the attack. Acts or threats of violence the primary of which is to spread terror among the civilian population are prohibited.

Hence, the protection provided under these articles corresponds to the protection offered by article 27 of the Geneva Convention IV,[87] and therefore constitutes grave breaches.[88]

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82 See Geneva IV Commentary (n 55 above) 38-39.

83 Bassiouni (n 10 above) 359.

84 n 83 above, 359-60.

85 The Commentary to Geneva Convention IV states that it should be noted that the acts prohibited items (a) to (d) are also prohibited under other articles of . . . Geneva Convention [IV], in particular articles 27, 31 to 34, and 64 to 77. See Geneva IV Commentary (n 55 above) 40.

86 Art 4(2)(e) Additional Protocol II. Also see Kushalani (n 16 above) 153, where she asserts that outrages upon the dignity and honour of women during armed conflict are grave breaches of humanitarian law, war crimes, and violations of a peremptory norm of international law.

87 As above.

88 Bassiouni (n 10 above) 360.

2.2.3 The International Criminal Tribunals and the International Criminal Court

The statutes of the International Criminal Tribunals for the Former Yugoslavia[89] and Rwanda[90] have provisions of a similar nature as the Geneva Conventions and the Additional Protocols on the protection of women from sexual violence during armed conflict.

Article 8(2)(b)(xxii) of the Rome Statute provides that individuals can be prosecuted for

> committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

Furthermore, article 8(2)(e)(vi), which concerns internal armed conflict, uses terms that are identical to the terms used in article 8(2)(b)(xxii) as serious violations of article 3 common to the Geneva Conventions. Hence, sexual violence against women during armed conflict constitutes a grave breach of the Geneva Conventions.[91]

2.3 Sexual violence as genocide

Following the conflicts in the former Yugoslavia[92] and Rwanda,[93] for the first time consideration was given to the relationship between sexual violence and genocide, with significant support that sexual violence could constitute genocide if the other elements of the crime are

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89 See art 2 of the ICTY Statute: 'grave breaches of the Geneva Conventions' and art 3 'violations of the laws or customs of war'.

90 See art 4 of the ICTR Statute: 'violations of common article 3 of the Geneva Conventions and Additional Protocol II'.

91 See WA Schabas *An introduction to the International Criminal Court* (2004) 63. Also see Quénivet (n 53 above) 101; Gardam & Jarvis (n 11 above) 203.

92 About 20 000 women in the former Yugoslavia are victims of rape. These women were raped by the Serbian, Croatian and Muslim military groups, although most perpetrators were Serbian. In these instances, rape was seen as a weapon of war to fulfil the policy of ethnic cleansing. See European Community Investigative Mission into the Treatment of Muslim Women in the former Yugoslavia, para 14 http://www.womenaid.org/press/info/humanrights/warburtonfull.htm (accessed 31 March 2006).

93 During the Rwandan genocide, rape and other forms of sexual violence were directed primarily against Tutsi women as a direct result of both their gender and ethnicity. The sexual violence perpetrated against these women by the Hutu extremists was used as means to dehumanise and subjugate all Tutsi. In some instances, even Hutu women were targeted for their affiliation with the political opposition, marriage to Tutsi men or perceived protection of Tutsi. See Human Rights Watch 'Shattered lives: Sexual violence during the Rwandan genocide and its aftermath' *Human Rights Watch Women's Rights Project* 22 http://www.hrw.org/reports/1996Rwanda.htm (accessed 1 March 2006).

present.[94] In the former Yugoslavia and Rwanda, sexual violence against women was used to[95]

> humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group.

On rape as genocide, MacKinnon argues that[96]

> it is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape not to be seen and heard and be watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.

The Women's Protocol is the only treaty that criminalises sexual violence as genocide.[97] The reason for the lack of treaties criminalising sexual violence as such is because sexual violence in this instance is not considered as an attack directed at a woman alone, but against the ethnicity group to which the woman belongs.[98] Therefore, the

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94 On rape as genocide, see J Webb 'Genocide treaty cleansing: Substantive and procedural hurdles in application of the Genocide Convention to the alleged crimes in the former Yugoslavia' (1993) 23 *Georgia Journal of International & Comparative Law* 377 392; C Chinkin 'Rape and sexual abuse of women in international law' (1994) 5 *European Journal of International Law* 326; K Fitzgerald 'Problems of prosecution and adjudication of rape and other sexual assaults under international law' (1997) 8 *European Journal of International Law* 638; P Goldberg & N Kelly 'International human rights and violence against women' (1993) 6 *Harvard Human Rights Journal* 195; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), UN SCOR, Annex 134-46, UN Doc S/1994/1405 (1994) relating to the 1994 conflict in Rwanda and stating that in some instances, sexual violence can constitute genocide; also Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674/Add 2 (28 December 1994), relating to the former Yugoslavia, and stating that the Genocide Convention covers rape and sexual assault. .

95 See J Campanaro 'Women, war, and international law: The historical treatment of gender-based war crimes' (2001) 89 *Georgia Law Journal* 2557 2570.

96 CA MacKinnon 'Rape, genocide and women's human rights' in Stiglmayer (n 37 above) 184 190.

97 Art 11 Women's Protocol.

98 The Draft Code of Crimes against Peace and Security of Mankind of the International Law Commission states that the intention must be to destroy the group and not merely one or more individuals who are coincidentally members of a particular group. The prohibition must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime genocide. The group itself is the ultimate target of this type of massive criminal conduct. However, the Draft Code does not mention rape as genocide; it maintains that the bodily harm or the mental harm inflicted must be of such a serious nature as to threaten the destruction of the group in whole or in part. The phrase 'imposing measures' is used to indicate the necessity of an element of coercion. See para 17 of the Draft Code of Crimes against Peace and Security of Mankind of the International Law Commission http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf (accessed 1 March 2006).

woman is afforded protection as a member of a group. Article 2 of the Genocide Convention[99] comprises the list constituting the crime of genocide as:[100]

> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

The first jurisprudence on the issue of sexual violence constituting genocide came from the ICTR, where the Trial Chamber in the *Akayesu* judgment held that sexual violence may constitute genocide on both a physical and mental level.[101] The Trial Chamber found that '[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole'.[102] It went further and held that '[s]exual violence was a step in the process of destruction of the Tutsi group — destruction of the spirit, of the will to live, and of life itself'.[103] According to the Trial Chamber in *Akayesu*, causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.[104]

Hence, there is no doubt that rape and other forms of sexual violence can constitute the crime of genocide if the required elements of genocide are satisfied.

3 The Women's Protocol and sexual violence during armed conflict

3.1 The provisions of the Women's Protocol

The Women's Protocol defines the term 'violence against women' to mean[105]

> all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and *during situations of armed conflicts or of war*.

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[99] Convention on the Prevention and Punishment of the Crimes of Genocide, GA Res 260 A(III) (9 December 1948), entered into force 12 January 1951 (Genocide Convention).

[100] Art 2(a) to (e) Genocide Convention.

[101] *Akayesu* (n 2 above) paras 731-734.

[102] *Akayesu* (n 2 above) para 731.

[103] *Akayesu* (n 2 above) para 732.

[104] *Akayesu* (n 2 above) para 502.

[105] Art 1 Women's Protocol (my emphasis).

Further, article 11(3) stipulates that state parties undertake[106]

> to protect asylum seeking women, refugees, returnees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity.

It is, however, unclear whether this protection is also afforded to women who do not fall under this provision. An inference can, nevertheless, be drawn from the provisions of article 11(2), which provides that state parties shall 'protect civilians including women, irrespective of the population to which they belong'. Hence, it is argued that these provisions include the protection of all women from sexual violence during armed conflict and such crimes can be considered to constitute war crimes, genocide and/or crimes against humanity.

However, the Women's Protocol does not define these crimes. By virtue of the provisions of article 11(2), which provides that state parties will act 'in accordance with the obligations incumbent upon them under the international humanitarian law', it is assumed that the definition of such crimes is that which is accorded by international humanitarian law.[107]

3.2 Obligations of states under the Women's Protocol

War crimes, genocide and crimes against humanity constitute peremptory norms (*jus cogens)* of international law from which no state can derogate.[108] Since sexual violence during armed conflict constitutes

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106 Art 11(2) Women's Protocol.

107 See K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97 108, where he is of the view that it may be difficult to develop other definitions, since these terms have already been defined in the Statute of the International Criminal Court.

108 See MC Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42 *Virginia Journal of International Law* 81 108, where he lists the *jus cogens* international crimes as piracy, slavery, war crimes, crimes against humanity, genocide, apartheid and torture. Also see MC Bassiouni & EM Wise *Aut Dedere Aut Judicare: The duty to extradite or prosecute under international law* (1995) 52, where they argue that a number of rules prohibiting international offences such as aggression, genocide and serious breaches of international humanitarian law are widely held to constitute rules of *jus cogens*; Bassiouni (n 10 above) 217, where he argues that since World War II a number of international and regional instruments along with numerous UN resolutions reaffirm and provide support for the assertion that the protected interests whose violations are criminalised in crimes against humanity have become *jus cogens*; and Meron (n 49 above) 233, where he argues that the core prohibitions of crimes against humanity and the crime of genocide constitute *jus cogens* norms; MC Bassiouni 'Accountability for international crime and serious violations of fundamental human rights: Searching for peace and achieving justice: The need for accountability' (1996) *59 Law and Contemporary Law Problems* 9 17, where he contends that crimes against humanity, genocide, war crimes and torture are international crimes that have risen to the level of *jus cogens*.

crimes against humanity, war crimes and genocide, it is therefore argued that these crimes have the status of *jus cogens*. Crimes that have acquired such status give rise to obligations *erga omnes*.[109] amongst states. Simply stated, where there are gross human rights violations in a state, if such violations include any of these crimes, the whole international community is affected and is obliged to act.[110] Furthermore, these crimes have acquired the status of customary law,[111] which means that even in the absence of a treaty agreement states are still bound by the provisions of the treaty prohibiting such crimes. The obligations of the treaty only bind the non-contracting state in so far as the provisions of the treaty are considered to have become customary international law. Therefore, states do not have the right to provide blanket amnesty to transgressors of *jus cogens* international crimes,[112] particularly leaders and senior executors.[113] Instead, they have an obligation to see to it that all the legal consequences pertaining to these crimes are carried out in good faith.[114]

Article 11(1) of the Women's Protocol provides that state parties undertake 'to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women'. Furthermore, the Women's Protocol provides that state parties undertake to 'protect ... women, irrespective of the population to which they belong, in the event of armed

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109 The doctrine of obligations *erga omnes* was introduced in the *obiter dictum* of the International Court of Justice (ICJ) in the *Barcelona Traction* case. The ICJ held: 'An essential distinction should be drawn between the obligations of a state towards as international community as a whole, and those arising *vis-à-vis* another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.' See *Barcelona Traction Light and Power Co Ltd (Belgium v Spain),* 1970 ICJ Rep 3, 32 judgment of 5 February.

110 Bassiouni (n 10 above) 212, where he says that the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the Court, 'the obligations of a state towards the international community as a whole'. Meron argues that when a state breaches an obligation *erga omnes*, it injures every state including those not specially affected. See T Meron *Human rights and humanitarian norms as customary law* (1989) 191. Hence, if a state fails to adhere to its duties under international law, to prevent or to prosecute crimes that have acquired the *jus cogens* status or to extradite the perpetrators, for example, will constitute a breach of obligations *erga omnes*.

111 Meron (n 110 above) 3.

112 Crimes against humanity, genocide, war crimes and torture are international crimes that have risen to the level of *jus cogens*. See Bassiouni (1996) (n 108 above) 9 17.

113 Bassiouni is of the view that there must be prosecution for at least the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture as there can be no impunity for such crimes. See n 112 above 20; also see N Roht-Arriaza 'State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 *California Law Review* 449 475 n 137.

114 Art 26 Vienna Convention on the Law of Treaties of 1969, 1155 UNTS 331.

conflict'.[115] The state parties will do so 'in accordance with the obligations incumbent upon them under the international humanitarian law'.[116] Under international humanitarian law, war crimes, genocide and crimes against humanity give rise, for example, to universal jurisdiction,[117] the obligations of states to prosecute or extradite,[118] and the right to compensation.[119]

3.3 Implementation of the Women's Protocol

Article 26 of the Women's Protocol provides that state parties shall

> ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with article 62 of the African Charter on Human and Peoples' Rights, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised

and that state parties undertake to 'adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of this Protocol'. Article 62 of the African Charter on Human and Peoples' Rights (African Charter) provides that[120]

> each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.

This article is silent on the issue of who is to receive and review the report. However, subsequent to the African Commission on Human and Peoples' Rights' (African Commission) recommendation to be

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115 Art 11(2) Women's Protocol.

116 As above.

117 Art 49 of Geneva Convention I, art 50 of Geneva Convention II, art 129 of Geneva Convention III, and art 146 of Geneva Convention IV establish that 'persons alleged to have committed or to have ordered to be committed grave breaches are subject to the jurisdiction of all the state parties'. On universal jurisdiction, see generally G Bottini 'Universal jurisdiction after the creation of the International Criminal Court' (2004) 36 *New York University Journal of International Law and Politics* 503; T Meron 'Internationalisation of internal atrocities' (1995) 89 *American Journal of International Law* 554; M Scharf 'Universal jurisdiction: Myths, realities and prospects: Application of treaty-based universal jurisdiction to nationals of non-party states' (2001) 35 *New England Law Review* 377.

118 Art 49 Geneva Convention I, art 50 Geneva Convention II, art 129 Geneva Convention III, and art 146 Geneva Convention IV; art 88 Additional Protocol I. Also see generally Bassiouni & Wise (n 108 above).

119 Art 3 of the Hague Convention IV of 1907 states that '[a] belligerent [p]arty which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.

120 See art 62 of the African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity in Nairobi, Kenya, in June 1981 and entered into force in October 1986.

mandated to receive such reports,[121] the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) entrusted the African Commission with not only such a mandate, but also with the responsibility for preparing guidelines on the form and content of the periodic reports.[122] From this provision, it seems that the reports on women's issues will form part of the reports that member states are obliged to submit to the African Commission. However, these measures are viable for the prevention of sexual violence against women or for the after effects of sexual violence. It is unrealistic to expect a state involved in armed conflict to comply with such an obligation.

Article 27 of the Women's Protocol provides that '[t]he African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol'. It is not clear what 'matters of interpretation' entails. In the case of sexual violence against women during armed conflict constituting international crimes, it is assumed that 'matters of interpretation' means that the African Court on Human and Peoples' Rights in Africa[123] is empowered legally to condemn states for violations of international humanitarian law as provided by the Geneva Conventions and Additional Protocols and the Genocide Convention.[124]

Further, the Protocol establishing the African Court empowers the Court to grant remedies, including payment of fair compensation or reparation, where it finds a violation of a human and peoples' right.[125] The Court may also take provisional measures in cases of extreme gravity or urgency to avoid irreparable harm.[126] Furthermore, the Protocol provides that the execution of the orders of the Court shall be monitored by the Council of Ministers.[127] The African Charter did not grant these powers to the African Commission, which undermined the effective operation of the human rights system under the African Charter. It

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121 See Recommendation on Periodic Reports, First Annual Activity Report of the African Commission on Human and Peoples' Rights, 1987-1988, ACHPR/RPT/1st, Annex IX, in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 168.

122 See the 24th ordinary session of the Assembly of Heads of States and Governments of the OAU.

123 The African Court is established by the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), which came into force on 25 January 2004. The judges of the Court have been appointed. See the Assembly of AU 6th ordinary session held on 23-24 January 2006, in Khartoum, Sudan, Assembly/AU/Dec 100(VI) (African Court Protocol).

124 See AP van der Mei 'The new African Court on Human and Peoples' Rights: Towards an effective human rights protection mechanism for Africa?' (2005) 18 *Leiden Journal of International Law* 113 119.

125 Art 27 African Court Protocol.

126 As above.

127 Art 29 African Court Protocol.

is argued that, by vesting the powers of interpretation in the African Court, the Women's Protocol intends that this Court should exercise all these powers.

4 International crimes and the African Union

The African Commission functions within the political framework of the African Union (AU). The African community has demonstrated that it takes international crimes seriously, as it has introduced the right of the AU to exercise humanitarian intervention in states in whose territory such crimes are committed.[128] Article 4(h) of the Constitutive Act of the AU[129] provides, as one of the principles of the AU, 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. The Constitutive Act does not define these crimes, but article 3(h) of the Constitutive Act provides that one of the objectives of the AU shall be to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. It is assumed that 'other relevant human rights instruments' include international treaties and instruments. Hence, the definition of these crimes is to be in accordance with international law.[130]

The right to humanitarian intervention is not defined in the Constitutive Act, but the Peace and Security Council (PSC) Protocol provides clarification. The PSC was established by the AU because the Heads of States were[131]

> concerned about the continued prevalence of armed conflict in Africa and the fact that no internal factor has contributed more to . . . the suffering of civilian population than the scourge of conflicts within and between our states.

One of the principles guiding the PSC is the 'right of the Union to intervene in a member state . . . in accordance with article 4(h) of the Constitutive Act'.[132] Its powers include making recommendations to the Assembly 'pursuant to article 4(h) of the Constitutive Act . . . in respect of grave circumstances, namely war crimes, genocide and crimes against humanity as defined in international conventions and instruments'.[133] Article 13(1) provides that 'in order to enable the

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128 Art 4(h) Constitutive Act of the African Union.
129 See the Constitutive Act of the African Union, adopted in Lome, Togo, July 2002 and entered into force in May 2001.
130 These crimes have already been dealt with in part 3 of this article.
131 See the Preamble of the PSC Protocol (n 1 above).
132 Art 4(j) PSC Protocol.
133 Art 7(e) PSC Protocol.

[PSC] to perform its responsibilities with respect to . . . [an] intervention pursuant to article 4(h) . . . of the Constitutive Act, an African Standby Force shall be established'.[134] This provision clarifies any doubts on whether or not the right to humanitarian intervention includes the use of force.

Furthermore, article 4(j) of the Constitutive Act provides for the 'right of the member states to request intervention from the Union in order to restore peace and security'.[135] This means that the Constitutive Act does not restrict the right to request humanitarian intervention of the AU to the member state concerned.[136] The Constitutive Act is the first international instrument to provide for a right to humanitarian intervention.[137]

However, it is unclear whether the AU is prepared to exercise the right to humanitarian intervention based purely on sexual violence against women during armed conflict. It is argued that the law is clear that the AU may exercise the right to humanitarian intervention in cases of war crimes, genocide and crimes against humanity. Sexual violence during armed conflict constitutes such crimes.

5 Conclusion

The Women's Protocol is clear on the law that sexual violence against women during armed conflict will not be tolerated. The act of sexual violence during armed conflict is a violation of international humanitarian law and may constitute international crimes as it has been shown above. Perpetrators of such crimes have been prosecuted and convicted by the international criminal tribunals. Would-be-perpetrators of such crimes in Africa know exactly what they will be getting themselves into should they commit such crimes. The Women's Protocol is therefore of significance to Africa.

The Women's Protocol recognises that sexual violence against women during armed conflict can constitute war crimes, crimes against humanity and genocide. Such crimes, as *jus cogens*, are considered to be of concern to the international community as a whole. States owe it

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134 Art 13(1) PSC Protocol.

135 Art 4(j) Constitutive Act.

136 See B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 807 817.

137 On the African Union's right to humanitarian intervention, see NJ Udombana 'When neutrality is a sin: The Darfur crisis and the crisis of humanitarian intervention in Sudan' (2005) 27 *Human Rights Quarterly* 1149 1175; Kioko (n 136 above); Kindiki (n 107 above); A Abass & M Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review* 1.

to their nationals as well as to the whole community to protect women from sexual violence during armed conflict, including exercising the right to humanitarian intervention in a state where such crimes are being committed. The Women's Protocol, however, does not give clear guidelines as to how the obligations of the state have to be implemented. How this issue is to be resolved with the coming into operation of the African Court remains to be seen.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa

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Summary

This article examines the challenges women face in accessing HIV/AIDS treatment in Africa and the need to ensure equality in access to treatment. It argues that, in accordance with the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), there is a need for states to adopt affirmative action in order to improve access to HIV treatment for women in Africa. Although the article briefly discusses access to Nevirapine to prevent mother-to-child-transmission of HIV/AIDS, the focus is on women's needs and not the needs of the child. Factors limiting women's rights to access to HIV treatment, such as discrimination, poverty and inadequate spending on the health care, are considered. The article discusses the role state parties to the Women's Protocol can play in ensuring equity in access to treatment for women in their territories.

1 Introduction

The HIV/AIDS pandemic, now in its second decade, has continued to claim lives all over the world. However, the devastating effect of the pandemic is felt most in sub-Saharan Africa. While it is estimated that about 40 million people are living with HIV/AIDS worldwide at the end of 2005, the largest share of this figure is borne by Africa, accounting for about 70% of the total number.[1] Yet, sub-Saharan Africa is home to

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[1] UNAIDS/WHO *AIDS epidemic update* (2005) 17.

just 10% of the world's population. Approximately 25 million people are living with the epidemic in Africa.[2] Of this figure, women constitute about 13,5 million, that is, about 57% of the total number of people infected with HIV in this region.[3] This is a rise of about 400 000 from the prevalence rate in 2003. In 2005 alone, not less than 3 million people worldwide (of which 2 million are from Africa) lost their lives to HIV/AIDS-related complications.[4]

In countries such as Kenya, Uganda and Zimbabwe there were reports of a lower prevalence rate, while others, such as South Africa, Swaziland, Tanzania and Zambia recorded a high prevalence rate. The situation in Swaziland is of particular interest as recent figures of pregnant women attending antenatal programmes show that close to 43% of them are infected with HIV/AIDS.[5] In the same vein, about 3,2 million people were newly infected on the continent at the end of 2005. Several years of gains in the area of economic and social development are being reversed. A report has shown a correlation between poor development and HIV/AIDS, in many very poor countries.[6] In many African countries, life expectancies have fallen considerably, mainly due to HIV/AIDS. For instance, it is estimated that the life expectancy in Botswana will fall from 70 years to 40 years by 2010.[7]

Although there exists no cure for HIV/AIDS, anti-retroviral drugs have been developed. These are useful in prolonging the lives of infected persons, thereby transforming HIV/AIDS from a death sentence into a manageable chronic disease. However, the hope of accessing treatment for persons infected by HIV in Africa is slim. Many people in dire need of treatment for HIV/AIDS are not getting it. Of the six million people in the world in need of anti-retroviral drugs, only about 440 000 have access.[8] The situation is worse in Africa than in any other region. It is estimated that just 3% of people in need of treatment currently have access. [9] For countries such as South Africa, it is estimated that at least 85% of those requiring anti-retroviral drugs were not receiving them by mid-2005.[10] In countries such as Ethiopia, Ghana and Nigeria, the figure of those without treatment is about 90%.[11]

Worst affected by this predicament are the women in the region. In 2003, it was estimated that testing and treatment of HIV/AIDS was available only to 1% of pregnant women in the countries where the

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2 As above.
3 As above
4 As above.
5 As above.
6 UNDP *Human development report* (2003) 2.
7 US Bureau of Census *World population report* (2000).
8 UNAIDS/WHO *AIDS epidemic update* (2004).
9 As above.
10 UNAIDS/WHO (n 1 above) 30.
11 As above.

pandemic had struck the hardest.[12] As will be demonstrated below, a lack of access to treatment amounts to a violation of recognised rights in international and regional human rights instruments.

This article examines the challenges women face in accessing treatment in Africa for HIV/AIDS and the need to ensure equality in access to treatment. It further argues that, in accordance with the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol),[13] there is a need for states to adopt affirmative action in order to improve access to HIV treatment for women in Africa. The focus of this article is on ensuring equity in access to anti-retroviral drugs for women. Although the article briefly discusses access to Nevirapine to prevent mother-to-child-transmission of HIV, this discussion will be general, as the focus is on women's needs and not the needs of the child. Factors limiting women's rights to access to HIV treatment, such as discrimination, poverty and inadequate spending in the health care sector, will be considered. The article discusses the role state parties to the Women's Protocol can play in ensuring equity in access to treatment for women.

2 Philosophical basis of equity and access to treatment

Before examining the human rights implications of ensuring gender equity in access to HIV treatment, it is important to understand the philosophical discussion on equity and access to treatment. Such discussion will enable us to appreciate better the reasons why equity must be achieved by states in providing treatment to their citizens.

Ensuring access to treatment for people living with HIV/AIDS (PLWHA) remains an important way of mitigating the impact of HIV on the lives of persons who are infected or affected. However, for many people, especially vulnerable and marginalised groups in society, the notion of access to treatment may be unrealisable unless equity is obtained in providing treatment. The concept of equity entails achieving justice and equality in society. It does not have one single meaning, rather it depends on the ideological leaning of the interpreter.[14] Equity

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[12] UNIFEM *Facts and figures on HIV/AIDS* http://www.unifem.org/gender_issues/hiv_aids/ facts_figures.php (accessed 10 April 2006).

[13] The Protocol of African Charter on Human and Peoples' Rights on the Rights of Women in Africa approved by African Union governments in Maputo, 2003; entered into force on 25 November 2005 after Togo became the 15th country to ratify the Protocol.

[14] C Ngwena 'The historical development of the modern South African health-care system: From privilege to egalitarianism' (2004) 37 *De Jure* 290.

entails the just distribution of resources in a society or fairness in provision of health care services. There are two main schools of thought on the concept of equity — libertarianism and egalitarianism.[15] Ngwena has observed that, while these schools of thought agree on the need to achieve justice and a coherent view of life, they differ sharply in their conception of justice and the parameters of state *vis-à-vis* private sector provision of health.

The libertarian school of thought holds the view that equal access to health care implies treating people equally without discriminating arbitrarily on the basis of 'irrelevant' grounds such as race, gender or sexual orientation.[16] Under this 'neutral' notion of justice, equity does not aim at guaranteeing access to health on the basis of need or requiring the state to take positive steps in the provision of health care for all. A shortcoming of this school is that it may be blind or insensitive to the position of vulnerable or marginalised groups in society. For instance, a strict adherence to this concept in relation to access to HIV treatment in Africa may suggest that as long as PLWHA are getting treatment, regardless of the ratio of men to women, all is well and that the state has done its bit. However, a critical examination of the ratio between the two groups may reveal a great disparity and thus, injustice.

The egalitarian notion of equity in health care goes beyond merely achieving minimal justice in the provision of health care. It aims at more than just avoiding unfair discrimination or allowing for choice in health care.[17] At the very minimum, the state must develop a health care system which meets the needs of everyone and is not dependent on the ability to pay.[18] This requires extensive intervention by the state in the provision of health care services. The egalitarians reason that access to health should be viewed as a communal or social good, which should be determined by need rather than life's arbitrary lottery of birth, natural endowment, socio-economic status or historical circumstances.[19]

It is important to note here that the underlining principle of equity is not to remove differences, since differences are bound to occur in every society. Rather, it is to ensure that everyone has a fair opportunity to access one of the determinants of health as part of the enjoyment of equality, freedom and human dignity in a democratic and caring

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15 As above.

16 D Feldman *Civil liberties and human rights in England and Wales* (1993) 901-902; HT Engelhardt 'Rights to health care: A critical appraisal' (1979) 4 *Journal of Medicine and Philosophy* 113, cited in Ngwena (n 14 above).

17 Ngwena (n 14 above) 292.

18 HCJ van Rensburg *et al Health care in South Africa: Structure and dynamics* (1992) 364-370.

19 Ngwena (n 14 above) 292.

society. As Landman correctly argues, without access to health care one cannot effectively make autonomous choices, including realising one's potential in a free society.[20]

Beauchamp and Childress[21] have identified three forms of justice – compensatory justice, distributive justice and liberal justice. Compensatory justice shows the reasons why certain people have to be compensated for wrongs they suffered in the past. It often requires proof of past discrimination. However, it has been observed that compensatory justice is not suitable for health care services 'since mandating fair treatment for those who have suffered historical wrongs will not be compensation for them, but only the fair enforcement of nondiscriminatory health policies to which they are properly entitled'.[22] Distributive justice aims at ensuring equitable availability of health resources to subgroups at abnormally high levels of risk. This may involve the adoption of the utilitarian approach which seeks to improve the welfare and capacities of the female half of society in order to increase overall social satisfaction and productivity. This rationale might justify programmes to promote equality in availability of services to ensure that women's distinctive health needs are satisfied, such as maternity care. The liberal theory of justice accords women the autonomy, as rational beings, to make decisions with regard to their clinical care and to remove barriers such as the need for their husbands' consent before medical treatment. This theory is faulted on the ground that it places emphasis on the abstract notion of autonomy without recognising women's peculiar situation in society and the determinants of health, such as the impact of society's structure on women's reproductive roles which tend to hinder their access to health care services.[23]

3 Access to treatment as a fundamental right

Access to treatment constitutes an integral part of the right to health and a denial of the right to treatment to PLWHA amounts to a violation of their fundamental human rights.[24] The UN General Assembly in its Declaration of Commitment on HIV/AIDS observed that '[a]ccess to medication is a fundamental element for achieving progressively the right of everyone to the highest attainable standard of physical and

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20 W Landman 'Appropriate health care as a human right' in A van Niekerk (ed) *Health care as human right* (1993) 37-40.

21 TL Beauchamp & FJ Childress *Principles of biomedical ethics* (2001).

22 RJ Cook 'Exploring fairness in health care reform' (2004) 29 *Journal of Juridical Science* 1.

23 As above.

24 E Durojaye & O Ayankogbe 'A rights-based approach to access to HIV treatment in Nigeria' (2005) 5 *African Human Rights Law Journal* 287-307.

mental wellbeing'.[25] The right to health is guaranteed in numerous international and regional human rights instruments.

However, the most authoritative provision on this is article 12 of the International Covenant on Economic, Social and Cultural Rights (CESCR).[26] It provides that state parties to the Covenant shall 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. It further stipulates the determinants essential for the enjoyment of the right to health. The Committee responsible for the implementation of the Covenant in its General Comment No 14 has noted that the right to health is connected to other rights such as the right to life, non-discrimination, dignity, equality and liberty.[27] It further observes that health care services should be guaranteed for all on a non-discriminatory basis, taking into account the situation of vulnerable and marginalised members of society, such as women and people living with HIV/AIDS.[28] According to the Committee, good quality health care services should be made available, accessible and acceptable to all. It states further:[29]

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

The Committee has emphasised the need for equity in the provision of health care services. It notes that poor households should not be unduly burdened with payment for health care services.[30]

Apart from the provision in CESCR, article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[31] guarantees the right to access to health care for women on an equal basis with men. The Convention additionally guarantees women's right to 'appropriate services in connection with pregnancy'.[32] The CEDAW Committee in its General Recommendation No 24 on Women and Health[33] noted that states are under an obligation to ensure that policies and laws facilitate equal access to health care for

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25 UN General Assembly Special Session on HIV/AIDS Resolution A/S-26/L2 June 2001 para 15.

26 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

27 The Right to the Highest Attainable Standard of Health; UN Committee on ESCR General Comment No 14, UN Doc E/C/12/2000/4 para 3.

28 n 27 above, para 12.

29 n 27 above, para 9.

30 As above.

31 Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34th Session Supp 46 UN Doc A/34/46 1980.

32 As above.

33 General Recommendation No 24 of CEDAW on Women and Health UN GAOR, 1999, Doc A/54/38 Rev 1.

women in a non-discriminatory manner. According to the Committee, health care services must be gender sensitive and take into account the peculiar needs of women.

Similarly, the revised Guideline 6 to the International Guidelines on HIV/AIDS and Human Rights enjoins states to take necessary measures in ensuring equity in the availability and accessibility of quality goods, services and HIV/AIDS prevention and treatment, including access to anti-retroviral drugs for all persons.[34]

At the regional level, the right to health is guaranteed under article 16 of the African Charter on Human and Peoples' Rights (African Charter).[35] Article 16 states that everyone has the right to enjoy the best attainable state of physical and mental health. The African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[36] held that a violation of the right to health may lead to a violation of other rights such as life, human dignity and to a clean and healthy environment. The Women's Protocol in article 14 contains important provisions relevant in advancing the sexual and reproductive health of women. Under article 14, states are required to 'ensure that the right to health of women, including the sexual and reproductive health of women, is respected and promoted'. In addition, states should respect and promote:

(a) the right to control their fertility;
(b) the right to decide whether to have children, the number of children and the spacing of children;
(c) the right to choose any method of contraception;
(d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
(e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
(f) the right to have family planning education.

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[34] Adopted at the third International Consultation on HIV/AIDS and Human Rights (Geneva 25 July 2002), organised by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

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

[36] (2001) AHRLR 60 (ACHPR 2001).

Similarly, state parties are expected to take appropriate measures to*:*

(a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women, especially those in rural areas;
(b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.

By including these elaborate provisions on the right to health and sexual and reproductive health, the Women's Protocol is the first international instrument to expressly articulate women's reproductive rights as human rights, and to expressly guarantee a woman's right to control her fertility.[37] The Women's Protocol clearly articulates women's rights to reproductive choice and autonomy and clarifies African states' duties in relation to women's sexual and reproductive health.[38] The Women's Protocol is the only human rights instrument that specifically protects women's rights in relation to the HIV/AIDS pandemic and to identify protection from HIV/AIDS as a key component of women's sexual and reproductive rights. Added to these, the Women's Protocol guarantees women's rights to adequate affordable and accessible health services. International and regional human rights treaties previously lacked specific provisions on HIV/AIDS. Rather, provisions on the right to health, life, human dignity and others were invoked indirectly to apply to rights in the context of HIV/AIDS.[39] The approach followed in the Women's Protocol is commendable and radical in nature. The drafters of the Women's Protocol seem to recognise the grave impact of the pandemic on the people in the region, particularly women.

Significantly, however, despite these copious provisions on the right to health in international and regional human rights instruments, the right to health has been described as being vague and because it intersects with other rights, its enforceability is difficult.[40] Furthermore, the right to health, being a socio-economic right, is subject to the debate of non-justiciability. Evans observes as follows:[41]

> Liberal arguments against accepting a right to health as a human right rest upon the presumption that civil and politic al rights are qualitatively and significantly different from socio-economic rights.

Such distinction is rooted in the classification of civil and political rights as negative rights and social and economic rights as positive rights.

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37 See art 14 of the Women's Protocol.
38 Center for Reproductive Rights *Briefing paper: The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights* (2005).
39 Eg, in *D v United Kingdom* (1997) 24 EHRR 423, the European Court on Human rights held a violation of the right to human dignity a purported deportation of an HIV-positive immigrant to his country of origin where treatment could not be guaranteed.
40 DP Fidler *International law and infectious diseases* (1999).
41 T Evans 'A human right to health?' (2002) 23 *Third World Quarterly* 200.

Simply put, the protection of negative rights demands not more than forbearance, while the protection of positive rights demands a redistribution of resources.[42]

4 Factors affecting women's access to HIV treatment

Many factors have been attributed to the inability of women to enjoy equal access to HIV treatment in Africa. These include discrimination, poverty, the denial of property rights, poor transportation system and the unwillingness on the part of governments to make money available. This article only considers the following problems: discrimination, poverty and inadequate funding of the health sector. The implications of these factors for equal access for HIV treatment for women are discussed below.

4.1 Discrimination

The essence of discrimination is to treat a person differently in an unfair way. In many African societies, women encounter discriminatory attitudes, often perpetuated by patriarchal tradition. Discriminatory attitudes against women often serve as barriers to the enjoyment of equal access to HIV treatment. Experience has shown that in many households in Africa where resources are limited, families prefer to pay for medication for men rather than for women.[43]

Furthermore, many women today still require the authorisation of the husbands before seeking medical treatment, including HIV/AIDS treatment.[44] The implication of this is that, even in situations where treatment is free, fewer women than men may be accessing treatment. For example, a study in Zambia has shown that, despite the drastic reduction in the cost of ARV from about US $64 to about US $8 per month, an insignificant number of women were receiving treatment.[45] In a town of about 40 people receiving treatment, only three are women.[46] It is to be noted that, of the about 900 000 Zambians living with HIV/AIDS, about 70% are women. In other cases, young women face great difficulty in seeking treatment because of the fear that their sexual and reproductive health will not be respected.

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42 As above.

43 Centre for Health and Gender Equity *Gender, AIDS, and ARV therapies: Ensuring that women gain equitable access to drugs within US funded treatment initiatives* (2004).

44 As above.

45 UNAIDS, UNFPA, UNIFEM *Women and HIV/AIDS: Confronting the crisis* (2004).

46 n 45 above, 24.

Discrimination is a violation of recognised human rights under international human rights law. Under article 1, CEDAW enjoins states to take steps and measures to eliminate discrimination against women within their territories.

Reaffirming the language of CEDAW, the Women's Protocol requires states to eliminate practices that discriminate against women and urges state parties to take all appropriate steps to eliminate social and cultural patterns and practices that are discriminatory to women.[47] Shalev argues that equality implies non-discrimination, and that therefore discrimination will amount to a violation of the right to equality.[48] A wide range of gender inequalities entrenched in social, economic, political and cultural structures often renders the situation threatening to women. When women are deprived of educational opportunities, their ability to care for their health and that of their children is greatly impaired.

During the International Conference on Population and Development (ICPD)[49] and the Fourth World Conference on Women, it was agreed that the human rights of women include rights to have control over their sexuality, including their sexual and reproductive health, free from discrimination, coercion and violence.[50] One of the important goals of the UN Millennium Declaration and the Millennium Development Goals (MDGs) is to promote gender equality and empower women.[51] With regard to access to health care, the CEDAW Committee notes that states are required to take appropriate steps and measures, including legislative, judicial, administrative and budgetary, to ensure access to health care for women on an equal basis with men.[52] While it is admitted that not all discrimination amounts to a violation of rights, it is not in contention that adverse discrimination which promotes women's subordination to men will result in a violation of human rights. Cook[53] rightly observes as follows:

> If health care facilities, personnel and resources are to be accessible, governments must do more than simply provide them as bulk services. Accessibility requires that the delivery and administration of health care is organised in a fair, non-discriminatory manner, with special attention to the most vulnerable and marginalised.

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47 See art 12 of the Women's Protocol, which drew its inspiration from art 2 of CEDAW.

48 C Shalev 'Rights to sexual and reproductive health: The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women' (2000) 4 *Health and Human Rights* 39.

49 International Conference on Population and Development (ICPD) UN A/CONF.171 (13) 18 October 1994.

50 Fourth World Conference on Women, Beijing held on 15 September 1995 A/CONF.177/20.

51 UN Millennium Declaration and Millennium Development Goals launched in 2000.

52 General Recommendation No 24 (n 33 above).

53 Cook (n 22 above).

The Canadian Supreme Court in *Eldridge v British Columbia (Attorney-General)*[54] has held that failure to make money available for sign language interpretation that would equip hearing-impaired patients to communicate with health services providers in the same way as unimpaired patients can constitute discrimination in violation of the Canadian Charter on Rights and Freedoms. This decision of the Court is relevant in ensuring equality for all and in particular for people with disabilities in accessing treatment. The reasoning of the Court in this case can also be relied upon to demand equity in access to HIV treatment for women in Africa. The decision also confirms the fact that courts have an important role to play in holding governments accountable for failing to ensure equity in the provision of medical care.

It should be observed that stigma and discrimination associated with HIV/AIDS tend to further exacerbate the condition of women in most African countries. The popular belief that HIV infection is linked to promiscuity creates more barriers for women than for men with respect to seeking treatment. In most cases, women are the ones who first find out their status during antenatal care. Experience has shown that in such situations, treatment may not be available for these women, nor are they referred to places where they can get treatment. Many of the existing family planning clinics and reproductive health centres do not integrate HIV/AIDS treatment into their services. Worse still, in the few hospitals or centres where treatment is provided, the focus often is on the unborn baby and not on the mother. The treatment programme for pregnant women known as prevention of mother-to-child-transmission (PMTCT) summarises the exclusion of women from benefiting from HIV/AIDS treatment. This arguably results in discrimination against women.

At the Beijing Conference, governments of the world agreed to 'increase women's access throughout the life cycle to appropriate, affordable and quality health care, information and related services'.[55] Similarly, the Action for the Further Implementation of the ICPD observes as follows:[56]

> Governments should ensure that prevention and services for STDs and HIV/AIDS are an integral component of reproductive and sexual health programmes at the primary health-care level. Gender, age-based and other differences in vulnerability to HIV infection should be addressed in prevention and education programmes and services.

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54 (1977) 151 DLR (4th) 577.

55 Fourth World Conference on Women Programme of Action Strategic Objective C1 (n 50 above).

56 UN follow-up meeting of the ICPD held in New York between March and June 1999, para 68.

There is no doubt that African governments are legally bound to promote equality in access to HIV treatment by removing obstacles to the treatment of women.

4.2 Poverty

The inability of women to pay for treatment is one of the reasons many are not receiving treatment. More women than men are unable to afford to pay for their monthly medication. While sub-Saharan Africa is regarded as a poor region, women remain the poorest of the poor. Many women are economically dependent on their husbands, thus making it difficult to get treatment, especially if husbands disapprove or refuse to support such treatment. Added to this is the fact that many women in Africa are denied inheritance rights, cannot own property and even lack access to financial resources. For instance, according to the customary law of the Igbo people of Eastern Nigeria, a female child is not regarded as a member of the family and so is unable to inherit any property from her father.[57] While denial of inheritance rights is a problem for all women, it is more debilitating for women living with HIV/AIDS. For such women, feeding, caring for their children or paying for their treatment could pose serious problems. A study carried out in Uganda among HIV-positive widows showed that about 90% of widows interviewed encounter difficulties with their in-laws over property and about 88% of those in rural areas were unable to meet their household needs or may have to lose everything that belongs to them.[58]

In some communities in Africa, women are allowed the right of inheritance only if they agree to the cultural practice of 'widow cleansing'. This often involves a widow having sexual relations with an appointed village cleanser or with a relative of her late husband. Many women refuse to partake in this act. The fact remains that some of these women do not have an alternative source of income. This has become a big problem for many women and in particular HIV-infected women, leading to most of them 'ending up homeless or living in slums, begging for food and water and unable to afford health care or school fees for their children'.[59] Harmful cultural practices such as

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[57] This customary practice was held as discriminatory and a violation of women's rights contrary to CEDAW by the Court of Appeal in *Mojekwu & Others v Ejikeme & Others* (2000) 5 NWLR 402. See also *Mojekwu v Mojekwu* (1997) 7 NWLR 283 on the same issue.

[58] Global Coalition on Women and AIDS *Media backgrounder: AIDS and female property inheritance rights* (2004).

[59] Human Rights Watch 'Fact sheet: HIV/ADS and women's property rights in Africa' http://www.hrw.org/ campaigns/women/property/aidsfachsheet.htm (accessed 1 March 2006).

widow cleansing not only constitute a threat to women's rights, but may also amount to violence against women. The Women's Protocol in article 1 defines violence against women to include 'physical, sexual, psychological and economic harm' to women. It recognises that such practices may impact negatively on women's rights to health, life and human dignity. Thus, it urges state parties to take adequate steps and measures to eliminate such harmful cultural or traditional practices.

Women's poverty may be described as a two-edged sword, in the sense that poverty not only renders women vulnerable to HIV infection, but also makes it almost impossible for them to get treatment. Furthermore, when women are poor, even in cases where treatment is provided free of charge, compliance with treatment may still be difficult due to the fact that money to buy food may not be available. Because women more often than not engage in menial jobs, they are paid poorly and are therefore unable to afford even vitamins, fruits or antibiotics. The above scenarios may be even more precarious for women in rural areas who might need to travel some distance to get treatment. For such women, access to treatment remains a pipe-dream. A UNIFEM regional adviser for HIV/AIDS in Brazil comments as follows on this situation:[60]

> There are a few clinics in the rural areas, but it is hard for women to leave their families to travel by bus to a place with a clinic. In rural areas, women do not have the same mobility as men. In some states, 90% of pregnant women do not go for prenatal care because it is far off. So you are not bringing women into prenatal care and therefore, you are not testing them and introducing them into HIV programmes.

The comments above represent the challenges to the Brazilian HIV treatment programmes, but it also captures the problems of many African countries. Realising the challenge poverty may pose to women's health, it was agreed at the Beijing Conference that it was necessary to 'promote women's economic rights and independence, including access to employment, appropriate working conditions and control over economic resources'.[61] In addition, the UN Millennium Declaration emphasises the importance of promoting gender equality and women's empowerment as an effective pathway to combat poverty, hunger and disease and to stimulate truly sustainable development.[62] It has been observed that the powerlessness of women — political and economic — renders them vulnerable to human rights violations.[63]

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60 An interview with Bant Astrid, UNIFEM regional adviser for HIV/AIDS in Brazil held on 3 February 2004 cited in UNAIDS, UNFPA, UNIFEM *Women and HIV/AIDS; Confronting the crisis* A Joint Report (2004).

61 Fourth World Conference on Women Strategic Objective F1 (n 50 above).

62 UN Millennium Declaration and Millennium Goals (n 51 above).

63 R Cook *et al Reproductive health and human rights: Integrating medicines, ethics and law* (2003).

The ESCR Committee has explained that accessibility to health care involves both physical accessibility and economic affordability. In other words, any barrier (such as setting up a health care institution far away from people) which makes it difficult for people to physically get health care services, amounts to a violation of the right to health. In the same manner, high medical fees or the high cost of drugs that are beyond the reach of vulnerable and marginalised groups in the society may lead to a violation of their rights to health and life. As noted earlier, the ESCR Committee warns that indigent members of the society should not be unfairly burdened with the high cost of medical services.[64] The CEDAW Committee in its General Recommendation No 24 has reaffirmed this position.[65]

4.3 Inadequate funding of health services

The health care sector remains a very important aspect of society. The amount of money spent on this sector may determine the quality of health of the citizens. It is being estimated that about US $2 985 billion or almost 8% of the world's gross domestic product was expended on this sector in 1997.[66] It is no longer doubted that many African countries spend far less on health care services for their citizens than is expected. For instance, while it is estimated that in 1990, developed economies accounted for about 86% of all health spending, sub-Saharan Africa merely accounted for 1% of such spending.[67] In the era of the HIV pandemic, this inadequate spending has further implications for the health sector as essential infrastructures are lacking in most hospitals or health clinics. Economic restructuring programmes in the 1980s and the huge debt of African governments have translated to a shrinking health sector.

The area most affected by this development is reproductive health services. Aside from these problems, many governments in Africa are reluctant to provide health care services for all as a matter of state duty. Rather, governments often cite a lack of resources as an excuse for an inability to guarantee health care for the populace. This unwillingness on the part of most African governments is founded on the arguments of some legal philosophers. Notably among these philosophers is Fuller,[68] who argues that social and economic rights, including the right to health, are generally polycentric in nature. According to him,

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64 General Comment No 14 (n 27 above).

65 General Recommendation No 24 (n 33 above).

66 World Health Report (2000); International Federation of Gynaecology and Obstetrics (FIGO), FIGO Resolution on Women's Rights Related to Reproductive and Sexual Health (London FIGO 2000).

67 WHO Evaluation, cited in Cook *et al* (n 63 above).

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

this polycentrism renders social and economic rights not easily amenable to adjudication before a court of law.[69]

Governments can be held accountable for their refusal or unwillingness to provide a special kind of health care service for targeted members of society. In such a situation, governments will not be allowed to 'toll the bell of a lack of resources'.[70] The ESCR Committee in its General Comment No 3 notes that a lack of resources should not always be cited by governments as an excuse for not meeting their obligations under the Covenant.[71] It admitted that resource constraints is a crucial issue, but for a state to rely on this to excuse its inability to meet its obligation under the Covenant, such a state 'must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[72]

The Venezuela Supreme Court, in rejecting the government's claim of a lack of resources, held that the country's Ministry of Health is legally bound to provide anti-retroviral drugs for people living with HIV/AIDS at no cost as the failure to do so may impair the right to life of those affected and infected with HIV/AIDS in the country.[73]

Similarly, the South African Constitutional Court in *Minister of Health v Treatment Action Campaign and Others*[74] held that failure on the part of the South African government to make available Nevirapine, an anti-retroviral essential in preventing mother-to-child-transmission of HIV, amounts to a breach of the section 27 obligation under the Constitution. In this case, the South African government argued that providing Nevirapine in public hospitals to prevent transmission of HIV from pregnant women to their children was too expensive and that there was no medical proof guaranteeing the safety and efficacy of the drug. In its judgment, the Court found that the refusal on the part of the South African government to make the drugs available at public health institutions contravened the right to health guaranteed under section 27 of the Constitution. The Court further noted that the inability of children to access Nevirapine due to the government's refusal to make it available in the public health care sector compromises the rights of children guaranteed in section 28 of the Constitution. It rejected as untenable the government's excuse of a lack of resources. Instead, the Court ordered the government to roll out plans on how Nevirapine would

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69 As above.

70 This phrase was adopted in the English case of *R v Cambridge Health Authority (ex p B)* (QBD) 25 BMLR 5 17 *per* Laws J.

71 The Nature of States Parties' Obligations UN Comm on Economic, Social and Cultural Rights General Comment No 3, 5th session UN doc E/1991/23, Annex III.

72 n 71 above, para 10.

73 *Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social* (MSAS) No 15789 1999.

74 2002 10 BCLR 1033 (CC).

be made available in public hospitals. It described the existing policy that excluded 90% of pregnant women with HIV/AIDS from Nevirapine as being unreasonable and incapable of meeting the needs of those who deserve urgent attention.

It is instructive to note that the decision in the *Treatment Action Campaign* case drew its inspiration form an earlier decision of the Constitutional Court in the *Grootboom* case.[75] In that case, the Court adopted the reasonability test in finding the government's policy and programmes on housing unreasonable and not meeting the needs of those most urgently in need.

This decision is no doubt a model for holding African governments accountable for their failure or unwillingness to provide comprehensive treatment programmes for HIV/AIDS. Ngwena described it as a bold decision in that it 'countermanded government policy and effectively prescribed what it deemed to be equitable health policy'.[76] However, a major shortcoming of this decision was the fact that the Court failed to address the gender issues raised by this case. Rather, its focus was on the rights of children. Commentators have criticised this gender-neutral approach by the Court. Cook,[77] for instance, argues that the Court failed to consider whether neglecting the need of pregnant women who are HIV positive constitutes discrimination on the enumerated grounds of sex, race or disability under the equality clause in section 9 of the Constitution. She explains further:

> Had the Court taken a more contextual approach to constitutional interpretation, it could have built upon its article 9 jurisprudence on substantive equality, and in so doing applied the norms of the Women's Convention, which South Africa has ratified.

The Constitutional Court in the *Treatment Action Campaign* case should have been bold enough to call a spade a spade by telling government officials that the policy of non-provision of Nevirapine in public hospitals constituted a clear manifestation of discrimination against women. It has been argued that, if only the Court had addressed its mind to[78]

> the barriers that women face in accessing health care in the way they addressed the 'most urgent' needs of children in accessing Nevirapine, they could have signalled that governments have obligations to accommodate women's particular needs.

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[75] *Government of the Republic of South Africa v Grootboom* 2000 3 BCLR 227 (CC).

[76] C Ngwena 'Access to anti-retroviral therapy to prevent mother-to-child transmission of HIV as a socio-economic right: An application of section 27 of the Constitution' (2003) 18 *South African Public Law* 83.

[77] Cook (n 22 above) 18.

[78] Cook (n 22 above) 19.

Notwithstanding this, the *Treatment Action Campaign* case remains a landmark decision in advancing the right to health and access to treatment worldwide.

5 Relevance of affirmative action in ensuring equity in access to HIV treatment

The principle of substantive equality, of which affirmative action is a by-product, determines that people must be treated equally, paying attention to their social and economic disparities. Unlike formal equality where all persons are treated in the same manner regardless of the differences that exist among them, substantive equality aims at correcting injustice in society. It seeks to provide justice for vulnerable and marginalised groups in society who have been historically disadvantaged.

For instance, if pupils with mental disabilities undergo the same training with healthy children, they may end up disadvantaged since the training may not meet their peculiar needs. In order to realise the right to equality of mentally disabled pupils, they may have to be treated differently from others, bearing in mind their differences. This analogy is applicable to the position of women in society. Aside from the biological differences between the two sexes, women are regarded as vulnerable members of society who deserve special treatment and care with a view to uplifting their social status and upholding their human dignity. The South African Constitutional Court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*[79] observed that the rationale behind substantive equality is the respect for human dignity. It is generally accepted that in certain situations, measures may be taken with a view to correcting past injustices meted out to some groups in society. Such measures may include the adoption of affirmative action. This is often seen as a remedial measure, which does not violate the human right to non-discrimination. It is necessary to adopt affirmative measures with regard to HIV treatment in order to advance fairness and substantive equality in health care reform. The notion of affirmative action is based on adopting temporary positive measures intended to increase opportunities for the advancement of the health of historically and systemically disadvantaged groups.[80] It is a policy or a programme that seeks to redress past discrimination through active measures to ensure equal opportunity, such as in education, employment and health care.

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[79] 1999 1 SA 6 (CC).
[80] As above.

Article 2 of the Women's Protocol captures the notion of affirmative action. It provides as follows:

> State Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
> (a) include in their national constitution and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
> . . .
> (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and all other spheres of life;
> (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.

There is no doubt that this provision imposes an obligation on African countries to ensure equity in providing access to HIV treatment in their countries. This will involve paying particular attention to the needs of women in providing health care services.

A similar provision exists in article 4 of CEDAW. The CEDAW Committee in its General Recommendation No 25 notes that article 4(1) of CEDAW distinguishes between permissible temporary measures, aimed at achieving *de facto* or substantive equality, from otherwise discriminatory measures.[81] The Committee reasons that these temporary corrective measures will not amount to discrimination if:[82]

> (i) they accelerate equality as a matter of fact;
> (ii) they are devoid of maintenance of unequal or separate standards;
> (iii) they cease to exist the moment the objectives of equality of opportunity and treatment have been achieved.

An example of such temporary measures may include programmes that facilitate the access of high-risk groups to necessary health services until such time as those groups are at no more than the ordinary risk in the general population. It was noted that the more targeted and robust the measures are, the more controversial they become.[83] Article 12 of CEDAW requires courts to consider that temporary measures are required when such measures are the most pertinent in eliminating discrimination against women in the field of health care.

It must be pointed out, however, that it may prove difficult when determining the success of affirmative action in health care services, since the issue is not only 'treating equal eligibility equally, but also of reacting appropriately to biological and physiological differences

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[81] Committee on CEDAW General Recommendation No 25, on art 4(1) of CEDAW, on temporary special measures, CEDAW/C/2004/I/WP 1/Rev 1, 30 January 2004, CEDAW, para 18.

[82] n 81 above, paras 18-24.

[83] Cook (n 22 above) 23.

between the sexes and the underlying social conditions that affect the sexes differently'.[84] The adoption of such measures must aim at ensuring general equality in access to specific therapeutic drugs and services such as HIV treatment for women. The existing lopsidedness in access to HIV treatment between men and women in Africa calls for the implementation of corrective temporary measures to eliminate discrimination against women.

In order for affirmative action to be adopted successfully with regard to HIV treatment, there is a need for a formidable and proactive court. Courts play an important role in holding governments accountable for their failure to adopt measures that will guarantee equal access to HIV treatment for women. The court of law is often referred to as the last hope of common men and women when there have been human rights violations. Because of the controversial nature of affirmative action, courts must be willing and ready to apply this measure to correct the inequities that exist in governments' ARV treatment programmes. Courts may invoke the principle of non-discrimination contained in several international and regional human rights instruments to justify the necessity for affirmative action with regard to ensuring equal access to HIV treatment for women.

Aside from the role of courts, the creation of a favourable political environment, strong institutions and open participatory processes are also essential for the realisation of human rights, including the adoption of affirmative action.[85] Institutions such as the national human rights commission can similarly ensure that a government addresses inequity in the provision of health care services within its territory. The South African Human Rights Commission, for example, is constitutionally empowered under section 184(3) of the Constitution[86] to request information from relevant organs of state on the steps that they have taken to respect, protect, promote and fulfil socio-economic rights in South Africa. This provides a crucial avenue for the monitoring and implementation of these rights in the country.

At the regional level, the African Commission, charged with the implementation of the Women's Protocol, can play a similar role. This can be done through the decisions of the Commission or its powers to examine state reports. The Commission may raise questions based on reports submitted as to why women are not given special attention with regard to access to HIV treatment in a particular country.

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84 As above.

85 See S Liebenberg 'Socio-economic rights and the Constitution', paper delivered at a workshop on Monitoring Socio-Economic Rights in South Africa: The Role of the SA Human Rights Commission held on 30 June to 1 July 1997 in Johannesburg.

86 Constitution of Republic of South Africa Act 108 of 1996.

6 Conclusion

African countries need to do more to improve access to treatment for women within their territories. African governments need to take urgent steps to address discrimination against women, which have often impeded access to HIV treatment in many countries. Moreover, it is imperative that the position of women is improved in society. Unless women's economic status is improved, their ability to access HIV treatment may remain a challenge. The time is now for African countries to live up to their commitment at international and regional meetings and conferences to elevate the position of women in their countries. Also, African governments need to exhibit the political will to ensure that resources are made available in the health care sector, particularly for reproductive health services.

At the Abuja Summit on HIV/AIDS,[87] African leaders agreed to commit at least 15% of their annual budgetary expenses to the health sector. Five years after this commitment, many African states are failing to meet this target. In order to correct the existing inequality in access to HIV treatment in the region, governments must do more than merely providing treatment for all, they must give special attention to the needs of women. This is not a matter of choice, but rather an obligation now imposed by the Women's Protocol.

[87] Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases by African leaders, April 2001 OAU/SPS/ABUJA/3.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Reconciling the need for advancing women's rights in Africa and the dictates of international trade norms: The position of the Protocol on the Rights of Women in Africa

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Summary

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Women's Protocol) is unique in that it acknowledges that the implementation of trade rules may adversely impact on the human rights of women and attempts to find a solution for this dilemma. This article examines the basis and essence of this novel approach, its significance and its efficacy in addressing the challenge that international trade obligations pose to achieve gender equality, particularly in countries of Africa where women are highly marginalised and discriminated against in almost all spheres of life.

1 Introduction

The atrocities committed during World Wars I and II triggered the development of two fields of international law, international human rights law and international trade law. Trade was seen as a potential solution to deter human rights violations in the future, and it was not envisaged at the time that trade would come in the way of the protection and promotion of human rights. With the proliferation of trade rules and the increase in the volume of trade, there is growing concern that trade rules may come in the way of the protection, realisation and defence of human rights in general. The situation is worse when it comes to the human rights of women.

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The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) is the first human rights instrument on women to recognise the adverse impact that the implementation of trade rules may have on the rights of women. It is also the first instrument to attempt a solution to address this problem, by requiring state parties to take all appropriate measures to reduce to the minimum the adverse impact of trade rules on women.[1]

The first section of this paper briefly sketches the manner of development of the two fields of international law, human rights and trade. The second section looks into current developments that have brought about a close interaction between the two fields of international law. The third section examines the importance of women's rights and places the emphasis on the Women's Protocol. Section four discusses the adverse impact of trade rules on the human rights of women with reference to particular sectors that are significant to the lives of women in Africa: agriculture, services and intellectual property. The way forward in the face of the tension or contradiction between norms of human rights and trade law is discussed in section five. The novel approach employed by the Women's Protocol in this regard is explored in this section. Conclusions are included in the last section of the paper.

2 International human rights and trade law

International human rights law and international trade law[2] enjoy what can be said to be a common foundation. They are regarded as important instruments for ensuring peace and stabilising relations between states.[3] Both are by and large the fruits of the post-World War II period. The international protection of human rights emerged as a response to the gross violations of human rights committed during the two world wars, in particular during World War II,[4] and the cause of this same event was primarily attributed to economic motivations.[5]

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1 Art 19 of the Protocol reads: 'Women shall have the right to fully enjoy their right to sustainable development. In this connection, the State Parties shall take all appropriate measures to: . . . (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.' No comparable provision is found, eg, in the Convention on the Elimination of All forms of Discrimination Against Women.

2 International trade law as used in this paper mainly refers to multilateral trade rules or laws as administered by the World Trade Organization.

3 T Cottier 'Trade and human rights: A relationship to discover' (2002) 5 *Journal of International Economic Law* 116.

4 K Drzewicki 'Internationalisation of human rights and their juridisation' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights* (1999) 31.

5 According to Jackson, the primary and often overlooked objective of the Bretton Woods Conference (which later led to GATT) was the prevention of another world war, impliedly underlying the economic reasons behind the war. See JH Jackson 'The perils of globalisation and the world trading system' (2000) 24 *Fordham International Law Journal* 371.

The period between the two world wars saw the erection of protectionist trade policies in the international trade relations of states. These policies were followed by high economic and political costs at the global level. Protectionist measures led to retaliatory measures by trading partners, which in turn harmed exports greatly.[6] Politically, state relations were adversely influenced by exporting industries, which played an important role in determining state trade and foreign policies.[7] Hawkins recognises:[8] 'Trade conflicts breed non-co-operation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends for so long.' Hence, protectionist policies are regarded as the main reason for World War II. The devastating effects of World War II underlined the need for economic co-operation among states, not only for the purpose of economic gains, but also for world peace.

Economic co-operation was reflected mainly in the commitment of major political leaders to the establishment of international economic institutions. This initiative saw three processes: a multilateral negotiation on tariff reduction, a clause on general obligations to tariff reductions (General Agreement on Tariff and Trade (GATT)) and the establishment of the International Trade Organisation (ITO). GATT was completed in 1947. ITO, which was supposed to serve as an umbrella institution, did not come into being. As a result, GATT came to be used as a forum to handle problems concerning trading relationships among signatory countries.[9] In 1995, GATT was replaced by the World Trade Organization (WTO). With the emergence of the WTO, the reach of international trade rules was expanded as new disciplines were incorporated into the international trade regime.[10] Of particular significance under the WTO is the establishment of a strong enforcement mechanism in the form of the dispute settlement body.[11]

On the human rights front, too, it was only with the end of World War II that attempts in articulating standards on international human rights got underway. Indeed, 'international protection of human rights

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6 AM Ezrahi 'Opting out of opt-out clauses: Removing obstacles to international trade and international peace' (1999) 31 *Law and Policy in International Business* 123.

7 Ezrahi (n 6 above) 3.

8 Quoted in JH Jackson *World trade and law of GATT* (1969) 38, as quoted in Cottier (n 3 above) 116.

9 See JH Jackson *The World Trade Organization, constitution and jurisprudence* (1998).

10 Trade in services, agricultural product trade and the protection of intellectual property rights are among the new disciplines that came into the picture with the birth of the WTO.

11 Of the four major differences between the WTO and its predecessor, GATT, the dispute settlement system under the WTO is one. See 'WTO vs GATT: Main differences' http://www.wto.org/english/ thewto_e/whatis_e/eol/e/wto01/wto1_8.htm (accessed 4 April 2006). See also World Trade Organization *A handbook on the WTO dispute settlement system* (2004).

. . . arose as a reaction to the atrocities of the Second World War'.[12] For many, the United Nations (UN) Charter of 1945 accorded 'implicit recognition [to] the principle of international respect for human rights [which] established a framework for the progressive development and codification of human rights'.[13] The UN Charter recognises the importance of realising human rights and fundamental freedoms to the maintenance of international peace and security.[14]

Within this framework, human rights standard setting and the establishment of monitoring institutions followed. The Universal Declaration of Human Rights of 1948 (Universal Declaration) marked the first step in the formulation of international human rights law. The Universal Declaration encompassed the whole range of political, economic, social and cultural rights. Instruments that gave these rights binding force of law came into being in 1966 with the adoption of the two UN Covenants: the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (CCPR), and the Optional Protocol to the Covenant on Civil and Political rights (OP).[15] Specialised conventions dealing with specific categories of people such as women, children and specific issues such as education, forced labour, employment and such, marked the development of this field of international law.

Despite a common foundation, the development of these two fields of international law is characterised by 'splendid isolation'.[16] The isolation is seen on many fronts. Institutionally, while human rights law has primarily been the domain of the UN, trade rules have been administered by GATT and later on by the WTO. This division is still maintained. On another front, while human rights law received a relatively comprehensive scope of coverage from the outset, it is rather through progressive negotiations that trade rules have come to be what they are now. Hence, top-down and bottom-up approaches of development characterise human rights and trade laws respectively.[17]

The substantive contents of the rules or laws differ widely. The fields have developed without any consideration whatsoever as to the possible interaction or relationship between the two. 'Human rights . . . did not attempt to conceptually integrate trade regulation.'[18] Likewise, the WTO has been insistent in its position that the human rights issue is not a trade agenda and that it certainly is not a matter for consideration

12 Drezwicki (n 4 above) 31.
13 Drzewicki (n 4 above) 32.
14 See Preamble to the UN Charter.
15 These three instruments, CESCR, CCPR and OP, together with the Universal Declaration, make up the International Bill of Human Rights.
16 Cottier (n 3 above) 112.
17 Cottier (n 3 above) 119.
18 Cottier (n 3 above) 112.

within a WTO framework.[19] This steadfast belief has meant that in the event of interaction, especially one in which the implementation of trade rules tamper with the requirements of human rights law and *vice versa*, a mechanism for the resolution of such tension is lacking in both fields of international law.

2.1 Interaction between the two fields of international law

2.1.1 Factual issues

Different factors have contributed to bringing to the forefront the link between human rights and trade. The inclusion of new disciplines, namely trade in services and intellectual property protection, to the international trading system that came with the birth of the WTO 'extended [international trade] into the areas of domestic regulatory standards as opposed to the traditional realm of foreign policy'.[20] As a result, domestic regulation became a matter not only of government discretion, but also the concern of the international trading system.

The emergence of problems at the global level in the form of the HIV/AIDS epidemic is another important factor.[21] The demand to access medicine (either through the production of generic medicine locally or parallel importation) came to clash with the patent protection accorded to pharmaceutical companies under the Trade Related Intellectual Property Rights (TRIPS) Agreement of the WTO. Thus, trade came to be seen as a threat to an important human right, that of the right to health. Last, but not least, the appearance of actors other than states, in particular non-governmental organisations (NGOs) in international fora significantly contributed to put the relationship of trade regulation and the protection of human rights on the agenda in various international fora.[22] All these and other related factors raised the concern that 'WTO rules, supported by its enforcement mechanism, elevate free trade over and above human rights protection and promotion, leaving legitimate concerns without adequate protection and consideration'.[23]

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[19] The WTO hosts discussions on issues other than these agreements using various special committees and working groups set up for this very purpose. Issues such as the environment, investment and competition are examples in this regard. The closest human rights concerns have come to such a status is through what are called 'core labour standards'. However, the WTO has declared in unequivocal terms that this is neither a matter currently of importance within the WTO, nor is it a matter for future consideration.

[20] M Williams *Gender mainstreaming in the multilateral trading system. A handbook for policy makers and other stakeholders* (2003) 4.

[21] T Cottier *et al* 'Linking trade regulation and human rights in international law: An overview' in T Cottier *et al* (eds) *Human rights and international trade* (2005) 2.

[22] Cottier (n 3 above) 111.

[23] Cottier (n 21 above) 3.

2.1.2 Legal issues

International human rights and trade law equip states with a different set of mandates and impose complex and perhaps potentially contradictory obligations. A combination of these is partly responsible for the downside of the relationship between the two fields of international law.

Originally, international trade rules were designed to address protectionist policies of states. To this end, the emphasis was on negative integration.[24] Negative integration is the imposition of negative obligations on states, obligations that require states to refrain from engaging in certain activities or behaviours. The principle of non-discrimination,[25] made up of most favoured nations and national treatment, which is the underlying tenet of the international trading system, is a good example in this regard. Most favoured nation treatment obliges a state not to accord a lesser treatment to a trading partner than it accords another partner. Similarly, national treatment requires a state not to discriminate between a foreign and a national trader. The ban on quantitative restrictions,[26] such as quotas, except in emergency situations, is another example.

In the latter days of its development, in particular under the WTO, the manner of regulation in international trade law changed. The birth of the WTO marked an important expansion, not only in the international trade regime, but also in the reach of trade laws in domestic regulation. This is particularly true of the new disciplines — trade in services and protection of intellectual property rights — which came with the WTO. Unlike trade in goods, trade in services is physically carried out within the national boundaries of a state. The state traditionally enjoyed the freedom to determine the terms and conditions of service delivery. This is particularly true for essential services. The regulation of the services sector through the international trade regime meant the definition of domestic regulation for states by this regime.[27]

In the field of protection of intellectual property rights, domestic laws are the main implementing instruments for the TRIPS Agreement. Patents, trademarks, trade secrets and copyrights are increasingly being shaped by the dictates of the TRIPS Agreement.[28] These developments in international trade law indicate a move towards positive integration, where states are required to take positive action mainly in

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24 Cottier (n 3 above) 117.
25 As above.
26 As above.
27 Cottier (n 3 above) 118.
28 Z Randriamaro *Gender and trade: Overview report* (2006) 23 http://www.bridge.ids.ac.uk/reports/ CEP-Trade-OR.pdf (accessed 31 March 2006).

the form of rule or law making.[29] This trend has caused trade rules to transgress purely international transactions and to define domestic law.[30] The implication is a serious limitation on the domestic regulatory capacity of states.

International human rights law, on the other hand, started from the outset with a combination of both negative and positive obligations on states, even though historically the two sets of obligations have not received similar attention. 'The cold war era . . . [witnessed] an ideological split between negative and positive [obligations] . . .'[31] in which the importance of civil and political rights was emphasised over economic, social and cultural rights. Of these two sets, categories of rights that impose positive obligations on states are relevant for the discussion at hand:[32]

> The human rights framework places the onus on the state to be responsible for the promotion and protection of human rights . . . [however] progressive bargaining away of state sovereignty under international trade [law] . . . [limits] the state's capacity to proactively fulfil its human rights obligations . . .

This is particularly true of economic, social and cultural rights, which by and large require positive action on the part of states for their realisation. This is where the contradiction between the demands of international human rights law and international trade law becomes evident. While the former requires states to take measures, the latter requires states to refrain from taking measures, including the ones that the former mandates. And it is usually the case that human rights measures such as subsidies, affirmative measures and, in general, social protection programmes are found to be trade restrictive. The tension is acute when it comes to the human rights of women.

3 Women's human rights and the Women's Protocol

3.1 Women's human rights

The equality of women and men is a guiding principle recognised in the Charter of the UN. Subsequent human rights instruments, such as the Universal Declaration and the two UN Covenants, have also reaffirmed the principle of equal rights of the sexes. This principle laid an important foundation for the recognition of the rights of women in the field

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29 Cottier (n 3 above) 117.
30 Cottier (n 3 above) 118.
31 Cottier (n 3 above) 117.
32 International NGO Committee on Human Rights in Trade and Investment Policy Statement *Investment, trade and finance: The human rights framework: Focusing on the Multilateral Agreement on Investment (MAI)* (1998) 3.

of human rights. Nevertheless, the recognition of equality of the sexes and the corresponding principle of non-discrimination has not been instrumental in improving the situation of women in all walks of life.

From its inception, international human rights law was concerned with the relations between a state and its subjects, whereby the state guaranteed the rights of subjects against the state. As a result, the protection of human rights in the public domain has received more attention than is the case with the private domain. This (perhaps unintended) divide between the public and the private domain has undermined the practical relevance of the principle of equal rights as a confirmation of women's rights as human rights. The inequality and discrimination that women experience in the private domain necessitated the need for the adoption of human rights standards that specifically address this problem. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) manages to cater for this particular need and elevate it to the standard of human rights. CEDAW identifies important areas of the private realms of women's lives and subjects them to state protection. Cultural and customary practices and marriage and family relations are important in this regard. These are the areas of private life where women mostly experience discrimination. The various provisions of CEDAW require of state parties either to modify or eliminate discriminatory practices in these areas. For instance, article 16 of CEDAW is fundamental in that it requires states to take measures to ensure equality between women and men in the family (which includes equal rights of women and men to choose spouses, to enter into marriage, during and at the time of dissolution of the marriage), an institution which has served to maintain discrimination against women without any intervention of protection from the state.

However, the historical step towards the affirmation of women's rights as human rights was made at the 1993 World Conference on Human Rights in Vienna, where it was declared that '[t]he human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights'. This view was emphasised again at the Beijing Conference on Women in 1995.

3.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Women's Protocol is not any different in its articulation from the development of the human rights of women at the international level. In fact, it is a continuation of the process aimed at asserting the importance of the recognition of the rights of women in the public as well as private domains. According to the background document to the draft Protocol, the Women's Protocol came as a result of the recognition of

the importance of the place of the rights of women in socio-political priorities of Africa.[33]

The Women's Protocol addresses within a human rights framework experiences that are mostly peculiar to women. Issues such as harmful practices, health and reproductive rights, cultural issues, widows' rights and rights to inheritance are concerns that affect women disproportionately. These concerns often occur within the private realm, but are reinforced in the public realm, which fails to outlaw customary practices that perpetuate violations of the human rights of women.

The Women's Protocol has also adopted gender mainstreaming to promote gender equality and empower the women of Africa. Gender mainstreaming as a strategy helps to address both woman and gender-specific concerns in the private and public realm. The provision of the Women's Protocol under consideration in this paper, article 19(f), is under the heading 'right to sustainable development'. This article is generally influenced by the Beijing Platform for Action,[34] which has brought about a conceptual shift in the understanding of gender issues by requiring the assessment of policies from a gender perspective from inception to implementation. In this regard, the article requires an account of women and their concerns in development planning at all levels. By so doing, it incorporates matters previously considered gender-neutral to be inspected and assessed from a gender perspective.

4 Trade rules and their adverse impact on the human rights of women

There are two points of analysis to assess the adverse impact of international trade law on the human rights of women: an analysis based on the content of the rules themselves, and an analysis that examines any possible tension between the rules and the commitment of a state towards improving the situation of women.[35] These two sets share similarities in analysis.

4.1 Analysis based on the content of a trade rule

To start with the first set, the very content of trade rules is at times found to be biased against women. There are various programmes that

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[33] Background: Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66 6 1.

[34] Eg, arts 19(a) and (d) are inspired by the Beijing Platform for Action, Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 6 January 2003 Markup from the meeting convened on 4-5 January 2003 in Addis Ababa by the Africa Regional Office and the Law project of Equality Now 17 CAB/LEG/66.6?Rev 1.

[35] S Gammage *et al Trade impact review* (2002) 23 http://www.womensedge.org/documents/ tradeimpactreviewfinal.pdf (accessed 31 March 2006).

governments have undertaken to improve the lives of women in their respective countries. These programmes range from reform in the legal or regulatory system to conform with international standards on the rights of women, to special support programmes aimed at improving the conditions of women. Training, low-cost loans, tax breaks and subsidies for woman-owned businesses or those that predominantly employ women are examples falling under the latter category of support programmes.[36]

However, the multilateral Agreement on Subsidies and Countervailing Measures (ASCM) entitles states to grant subsidies without fear of repercussions on a limited number of grounds, namely narrowly defined research and development programmes, environmental aid subsidies to disadvantaged regions (the last set expired in December 1999).[37] Therefore, by excluding other grounds for support, such as economic or historical disadvantage (within which women as a group can be accommodated), it excludes government support programmes for women perpetuating the disadvantaged position of women in society.[38]

4.2 Analysis based on the interaction of trade rules with other rules on women

The second analysis tries to examine a potential conflict between the trade commitment of a state and its various international commitments that are relevant to women.[39] As trade commitments are made by various sectors, the rights affected also differ from one sector to the other. Agricultural, services and intellectual property rights protection are sectors under consideration for this analysis.

Agriculture is the sector where the structural inequality between women and men is most evident. This is particularly true in the case of Africa. There is a marked division of labour in Africa, and women dominate subsistence farming aimed at household consumption and production for the local market, while men concentrate on cash crop production.[40] Women do not have control over and access to productive resources such as land and production inputs such as fertilizers and extension services. Agricultural trade liberalisation opens up local markets to cheap subsidised imports which displace the home-grown

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36 As above.
37 As above.
38 As above.
39 Gammage *et al* (n 35 above) 26.
40 According to FAO, the division of labour varies from region to region and from one community to the other, but generally women tend to take care of the household food production, while men concentrate on large-scale cash cropping. The involvement of women outside of subsistence farming is limited to small-scale production aimed at the local market.

products of women.[41] Furthermore, liberalisation in the agricultural sector encourages the production of export crops. The prioritising of export has diminished the land used by women subsistence farmers. Such a take-over is encouraged by government policies.[42] The provision of production inputs, such as extension services and credit schemes, no doubt follows the prioritised areas.

What is the net effect of these on women? Primarily it is food security that is compromised: no land, no production and hence no food for household consumption. Again, with no income from the sale of agricultural products, women cannot sustain their families; they are forced to look for other possible sources of income. Jobs on large export farms and off-farm jobs are the likely options. Such jobs usually come with low wages and poor working conditions. Both scenarios add to the burden of women.

The services sector is another sector which is feared to threaten important human rights of women, such as the rights to health, education and generally to an adequate standard of living. Access is the main issue in relation to trade in the services sector. The liberalisation of services opens up basic services to private ownership, leading to privatisation. Experience in a number of countries has shown that this in turn leads to the introduction of user fees[43] and prohibitive prices.[44] Services of both infrastructural nature[45] and natural resources[46] have a direct bearing on the reproductive roles of women. As a result, any shortfall experienced due to problems of access typically falls on the shoulders of women.[47]

Similarly, in the field of intellectual property, gender concerns arise. Access to medicine, in particular those related to reproductive health, the protection of traditional knowledge and food security, are important in this regard.[48]

What are the human rights implications of trade rules for women? The rules affect various sets of rights guaranteed under a number of human rights instruments, including those on women. The rights to food, life, health, education and affirmative measures are among the range of human rights affected by international trade rules.

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41 H Rupp *Gender and agricultural trade* (2004) 3 http://www.glow-boell.de/media/de/txt-rubrik_ 5/SuS_Rupp.pdf (accessed 31 March 2006).

42 Z Garcia *Impact of agricultural trade on gender equity and rural women's position in developing countries* (2004) 3 http://www.glow-boell.de/media/de/txt_rubrik_5/Sus_Garcia.pdf (accessed 31 March 2006).

43 S Walker 'Human rights, gender and trade' in A Tran-Nguyen & A B Zampetti (eds) *Trade and gender: Opportunities and challenges for developing countries* (2004) 332.

44 A B Zampetti 'The impact of WTO rules on the pursuit of gender equality' in Tran-Nguyen & Zampetti (n 43 above) 311.

45 Such as health care and education.

46 Eg water and energy.

47 Randraimaro (n 28 above) 27.

48 Randraimaro (n 28 above) 23.

5 Article 19(f) of the Women's Protocol as a solution to the adverse impact of trade on women

5.1 Conflict resolution at the international level

When a contradiction or conflict between the demands of trade rules and human rights provisions arise, how should one go about resolving this conflict? Should trade rules take precedence over human rights provisions? Or should trade rules give way to human rights provisions? On what possible legal ground(s)? Is there any other mechanism of resolution? What mechanisms does international law provide in this regard?

Lawyers in both fields give different opinions with regard to how a conflict between the two fields should be resolved. Among the diverse views, two are worthy of consideration here. One view, mostly emphasised and favoured by human rights lawyers, stresses the primacy of human rights law over trade rules. There are some legal provisions as well as scholarly opinions that are cited in support of this view. Article 103 of the UN Charter affirms the pre-eminence of the obligations of states to respect human rights. Howse and Mutua, writing on the issue, have argued that the 'reference to human rights in the UN Charter are sparse and erratic'.[49] A broad reading of the Charter would 'place obligations on member states to promote and protect human rights'[50] elaborated in specific human rights treaties. Therefore, the two scholars argue that in case of conflict between the obligation to protect human rights and other obligations, the former obligation prevails over the other.

An indisputable claim, even among trade lawyers, is to the primacy of human rights of a peremptory nature and that have attained the status of *jus cogens* over all rules of international law, including trade rules.[51] However, the list of peremptory norms is limited to quite a few norms or human rights,[52] and as it stands now, it certainly does not include the human rights of women. To the extent that the list of *jus cogens* equally applies to women, women enjoy protection. However, the harms from which women most need protection[53] are not incorporated within the

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[49] R Howse & M Mutua 'Protecting human rights in a global economy: Challenges for the World Trade Organization' (2000) 'http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRights Glob.html (accessed 14 February 2006).

[50] As above.

[51] G Marceau 'WTO dispute settlement and human rights' (2002) 13 *European Journal of International Law* 69 http://ejil.org/forum_tradehumanrights (accessed 31 March 2006).

[52] Crimes against humanity, torture, genocide, slavery, racial discrimination and prohibition against aggression are within the accepted list of peremptory norms.

[53] H Charlesworh & C Chinkin 'The gender of *jus cogens*' (1993) 15 *Human Rights Quarterly* 69-71.

list of those norms that have attained the status of *jus cogens*. The non-appearance of sex discrimination, which affects the lives of half of the world's population and from which women need most protection, within the list of *jus cogens*, leads one to correctly assume that the manner in which *jus cogens* have been constructed obscures the most pervasive harms suffered by women.[54]

In all other cases, the view of human rights lawyers is that human rights norms should also receive primacy. Article 103 of the UN Charter stipulates that respect for human rights is an all-time obligation which supersedes any other obligation of states that may come under any other international law. Article 103 of the UN Charter reads:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This view is further strengthened by the 1993 Vienna Declaration and Programme of Action which reaffirmed that 'human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of governments'.[55]

On the other hand, trade lawyers argue that there is no legal ground giving human rights primacy over trade rules. Human rights are not of a higher rank than other sources of treaty law.[56] The implication is therefore that human rights do not prevail over other rules of international law.[57]

The issue seems far from settled. Even the International Law Commission, assigned the task of codification and progressive development of international law, agrees. The Commission underlines the problem faced by judges and practitioners emanating from the diversification of international law. The need for further study was underscored in its report of 2002, where it recommended 'hierarchy in international law: *jus cogens*, obligations *erga omnes*, article 103 of the Charter of the United Nations, as conflict rule was identified for further study'.[58]

The lack of absolute direction in this regard is attributed to the 'splendid isolation'[59] that the two fields of international law have enjoyed, despite a common foundation. An inquiry into possible directions to resolve the contradiction will bear no fruit when neither field has shown

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54 As above.
55 The Vienna Declaration and Programme of Action on Human Rights (1993) para 1.
56 Cottier (n 3 above) 114.
57 As above.
58 International Law Commission Report of the work of its 54th session (29 April to 7 June and 22 July to 16 August 2002) General Assembly Official Records 57th session Supplement No 10 (A/57/10) 241 http://untreaty.un.org/ilc/reports/2002/2002report.htm (accessed 1 March 2006).
59 Cottier (n 3 above) 112.

a willingness to recognise the possibility of one coming in the way of the realisation of the other. Therefore, any attempt at a compromise should start with such recognition. The steps taken by the Women's Protocol are a good start in this regard.

5.2 Article 19(f) of the Women's Protocol and its relevance

Article 19(f) of the Women's Protocol reads as follows:

> Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:
>
> . . .
>
> (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

The Women's Protocol acknowledges that the implementation of trade rules may adversely impact on the human rights of women. Though the provision speaks in general terms of the negative impact of globalisation, trade and economic policies and programmes, international trade rules are important determinants of the process of globalisation in general, and of economic policies and programmes of states in particular. This is because, although globalisation is a multidimensional process with political, economic, social and cultural aspects, it is first and foremost an economic process.[60] Economic liberalisation, spearheaded by multilateral trade rules constituting measures targeted at removing barriers to the free flow of goods and services across borders, is a characteristic feature of the economic aspect of globalisation. Even other aspects of globalisation, such as the political aspect, are tuned to the rhythm of economic liberalisation. Neo-liberal thinking which assigns primacy to market economy by limiting the regulatory power of the state and its advocacy for privatisation and commercialisation[61] is but one illustration of this fact.

The recognition of this adverse impact is commendable as it is a recognition made in a human rights instrument on women. Where the mainstream human rights discourse has failed, an instrument dealing with the human rights of women has attempted to fill the gap. One argument made in support of women's human rights is the view that there are experiences or needs peculiar to women worthy of protection and recognition as human rights of women. Apart from the obvious sex-based or biological needs which have resulted in a defined category of reproductive rights of women, similar needs or experiences arise

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60 R McCorquodale & R Fairbrother 'Globalization and human rights' (1999) 21 *Human Rights Quarterly* 737.

61 Williams (n 20 above) 8.

when a seemingly neutral policy or rule disporportionately disadvantages women. The disproportionate impact then becomes a concern for women worthy of recognition, which is precisely what this provision has attempted to do.

The highlighting of the provision is its attempt to give direction to resolving tensions between the two fields of international law. It is the first human rights instrument on women to do so. However, the attempt is not without shortcomings. The provision obliges state parties to take all appropriate measures to reduce to the minimum the adverse impact of trade rules on women. However, the formulation 'reduced to the minimum' makes the stand of the provision imprecise. This formulation is not a common standard in human rights discourse. In human rights discourse, states' obligations are often formulated in a way that gives reasonable, if not absolute, guidance as to what is expected of states. States' obligations are ordinarily framed either negatively or positively. When framed negatively, state parties are required to abstain from certain acts. When framed positively, the state is expected to take certain positive actions to fulfil its obligations, although the exact scope of such state action cannot be mathematically ascertained. In this formulation, however, it is not clear how to determine the nature and extent of state obligation. The meaning is therefore subject to interpretation.

Earlier versions of the draft of the Women's Protocol advocated absolute preference to the protection of human rights of women. Article 20 of the Draft Protocol[62] reads as follows:

> With reference to articles 21, 22 and 24 of the African Charter on Human and Peoples' Rights, women have the right to fully enjoy their right to development. State parties shall take all measures to . . . avoid the negative impacts of commercial and economic policies, such as structural adjustment policies, which accentuate the impoverishment of women.

The formulation 'to avoid the negative impacts' was the standard employed. This standard, though not a common language in the human rights discourse, is clear in its stand. If a conflict arises where a trade rule is found to negatively affect the rights of women, the trade rule would be set aside in favour of women's rights. That way, the negative effect of the trade rule on women will be avoided.

What then are the policy implications of article 19(f)? The formulation 'are reduced to the minimum' gives an indication that alternative measures that would have the effect of reducing the negative effect of trade rules on women, to the minimum, should be sought. Therefore, before

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[62] Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Experts Meeting on the Preparation of The Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, International Commission of Jurists CAB/LEG/66.6 Vol I 8.

embarking on the implementation of a trade measure, there are certain considerations. These include:

- Does the trade measure in question have an overt adverse impact on women?
- Is the trade measure in question gender-neutral but has an indirect adverse impact on women when implemented?
- What possible measures can be implemented to reduce the adverse impact on women to the minimum?

These considerations are important, because policies and programmes of states, especially as they relate to economics, finance and generally trade, are considered gender-neutral. This is true both at national and international levels. As a result, starting from inception until actual implementation on the ground, the possibility that such policies may have a differential impact on men and women is not analysed. The questions as outlined above can help governments to assess policies. This provision can thus serve as controlling or monitoring mechanism.

To the extent that alternative measures to reduce the adverse impact to the minimum exist, this provision ensures their consideration and implementation. However, in the absence of such alternatives, setting aside the trade rule or measure in favour of the rights of women does not seem to be an option. Therefore, reducing to the minimum, as the words rightly suggest, does not mean wiping out the negative impact. The implication is that there will be times when the human rights of women would be violated by the dictates of trade rules.

This takes us to the next question: What then is the measuring gauge for a positive or a negative finding of the implementation of this provision? When is a state said to have done enough to reduce to the minimum the adverse impact of trade rules on women? What is the minimum? What kinds of measures may be envisaged as legitimate measures for operationalising this provision? Would compensatory measures come under consideration in this regard? These are some of the issues that deserve further examination to ensure the effectiveness of the provision.

Apart from its imprecise standard, the provision is short-sighted in its attempt at ensuring the protection of human rights of women. It could have gone further in its assertion of protecting the human rights of women. There have been higher standards adopted in political documents such as the Beijing Declaration and Platform for Action of 1995. With regard to women and the economy, the Platform, in its paragraph 165(k), calls on governments to 'ensure that national policies related to international trade agreements do not have an adverse impact on women's new and traditional economic activities'.

This paragraph carves out for protection women's traditional and new activities. However, its application may be extended to the whole range of women's human rights. The most important point to

be underlined is the extent to which it has gone to protect women from the adverse impact of trade rules. The formulation 'ensure that . . . do not have an adverse impact' sets a higher standard of protecting the rights of women. Priority goes to protecting the rights of women rather than to implementing trade rules.

Adopting such a higher standard would have made the provision in the Women's Protocol more meaningful. It would also have made the commitment that African states have undertaken in the Beijing Conference meaningful. Failure to reflect and incorporate such commitment in legal instruments makes one question the value of committing in the first place. The stand taken in the Women's Protocol can perhaps be explained by the pressure of states — particularly African states — find themselves experiencing in the globalised economic order where African states do not have the upper hand in negotiations. It is indeed true that 'globalisation [trade rules] can restrict the choices open to governments and people, particularly in the human rights area . . .'[63] The issue therefore becomes more of a policy choice than a legal one.

6 Conclusion

The Women's Protocol is an important instrument, which has attempted to address the concerns of women both in the public and private realms. It provides concrete measures aimed at advancing the human rights of women on all fronts. However, its birth and implementation are in an era in which human rights are faced with other competing claims for their realisation, among which trade is the forerunner. The Women's Protocol recognises these competing claims and goes a step further in providing a mechanism to resolve such tension. Before embarking on the implementation of a trade measure, it demands of states to consider the gender implications, if any, of a trade measure. Further it requires of states to minimise any adverse gender implications. However, the lack of adequate guidelines on how to go about giving effect to the provision is worrying.

[63] McCorquodale & Fairbrother (n 60 above) 747.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The 38th ordinary session of the African Commission on Human and Peoples' Rights, November 2005, Banjul, The Gambia

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1 Introduction

Every six months, the African Commission on Human and Peoples' Rights (African Commission) holds an ordinary session in one of its member states. This session provides a platform for dialogue and debate concerning matters of mutual interest to the African Commission as the pre-eminent African treaty-monitoring body, as well as state parties and national human rights institutions (NHRIs) and non-governmental organisations (NGOs) who wish to highlight particular developments and regressions in the human rights situation in Africa.

In terms of rule 1 of the Rules of Procedure of the African Commission, the Commission holds these sessions in order to enable it to carry out its functions in conformity with the African Charter on Human and Peoples' Rights (African Charter). The 38th ordinary session was held from 21 November to 5 December 2005 in Banjul, The Gambia.[1] Two hundred and eighty-two participants, representing 22 state parties to the African Charter, nine NHRIs, six inter-governmental organisations and 135 African and international NGOs attended the session. At the

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[1] The commissioners who participated in the African Commission session were the following: Amb (Ms) Salamata Sawadogo (Burkina Faso) (Chairperson); Mr Yaser Sid Ahmad El-Hassan (Sudan) (Vice-Chairperson); Mr Kamel Rezag-Bara (Algeria); Dr Angela Melo (Mozambique); Mr Bahame Tom Mukirya Nyanduga (Tanzania); Ms Sanji Mmasenono Monageng (Botswana); Mrs Reine Alapini-Gansou (Benin); Mr Musa Ngary Bitaye (The Gambia); Adv (Ms) Faith Pansy Tlakula (South Africa); and Mr Mumba Malila (Zambia).

start of this session, four new commissioners were sworn in and the incumbent Chairperson and Vice-Chairperson were elected for a further two-year period.

The session marked the end of the 12 years of office by the outgoing Secretary, Mr Germain Baricako, who has been transferred by the African Union (AU) to Sudan. Ms Adwoa Coleman replaced Mr Baricako at the Secretariat. The session will also be remembered for the fact that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa entered into force during the session, on 25 November 2005.

Some of the positive developments that have been taking place with regard to the promotion and protection of human rights across the continent over the preceding six months were highlighted at the beginning of the session. The Chairperson further highlighted the alarming increase in the number of African immigrants who are crossing into Europe from Morocco, due to factors such as extreme poverty and globalisation. She declared that the African Commission deplored the unnecessary casualties associated with this process. The Chairperson urged all AU member states to ratify international and regional human rights instruments and to give concrete effect to the rights enumerated therein.

The most egregious institutional weakness of the African Commission is often said to relate to funding. As Commissioner Monageng put it during the session, 'funding problems are an embarrassment to the Commission'. A voluntary fund to support the Commission has yet to be established, and *ad hoc* financial contributions from partners continue to support much of the work. To date, the Commission has been unable to secure representation at the AU meetings at which the Commission's budget is set. Because of insufficient funding, commissioners cannot undertake promotional missions and research the human rights situation in the countries to which they are assigned. A secondary institutional weakness is that the personnel of the Secretariat generally have no security of tenure as they work on a contractual basis.

2 Consideration of communications

The Commission's mandate is two-fold, and consists of protecting and promoting the rights in the African Charter. As far as the protective mandate is concerned, the African Commission considers complaints related to alleged violations of human and peoples' rights within the various state parties to the African Charter and makes appropriate recommendations where it is found that violations are perpetrated. During the 38th ordinary session, the African Commission considered 54 communications, including 13 decisions on seizure and four deci-

sions on admissibility. It decided to remove two communications from its list of communications.

While the consideration of communications is a time-consuming and responsible task, the African Commission has in the past too easily deferred the consideration on merits of a number of high-profile and sometimes urgent matters. By way of illustration, throughout 2005, only one single decision was taken on merits, on a communication against Swaziland during the 37th ordinary session. It would potentially be defeating the object of its very existence If the African Commission were to continue to defer communications, because a huge backlog is developing which is tantamount to negligence on the part of the Commission.

As the Commission considers individual communications during private sessions, this aspect is not discussed here any further. Instead, this report focuses on the Commission's fulfilment of its promotional mandate, which mainly takes the form of the examination of state reports.

3 State reporting

States ratifying the African Charter must every two years submit a report on the legislative and other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed in the African Charter.[2] By the end of the 38th session, a mere 12 states had submitted and presented all relevant reports, while 18 have never presented a single report, and 21 have submitted one or more reports but are still not complying fully with their obligations.[3]

On the issue of the Seychelles report, which was submitted in September 1994 but not yet considered because of the absence of state representatives, a decision was taken that the procedure followed in the United Nations (UN) system should be applied and that the report will be examined at the 39th ordinary session, regardless of whether or not Seychelles mandates a delegation to present the report to the Commission.

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2 Art 62 African Charter.

3 This situation should be considered in the context of the continuous urging by the African Commission, even at the level of the Assembly of Heads of State and Government, for states to comply with their obligations under art 62 and to accordingly submit the relevant reports. Further, it should be recalled that the African Commission has also granted permission to states to combine overdue reports into single reports covering that period of time, thus facilitating the state reporting procedure as well as potentially lightening the financial and personnel burden on member states.

3.1 Presentation of the second periodic state report of the Republic of South Africa

South Africa's initial report, submitted in 1998, was examined in 1999, at the African Commission's 25th session. Having submitted its second periodic report earlier in 2005, the Republic of South Africa presented its report at this session. The Minister of Justice and Constitutional Development, Ms Brigitte Mabandla, presented the report which concerned the period from 1999 to 2001, and was due in 2001.[4] Mindful of her government's failure to conform to the African Charter's requirement of submitting a report every two years, the Minister stated at the outset that, following the recent accession to numerous international treaties in combination with restructuring and capacity building at government level, it is anticipated that future reports to the various treaty-monitoring bodies will be presented on time.

Due to its volume, the report was assigned to two rapporteurs: Commissioner Rezag-Bara and Commissioner Monageng. They assessed South Africa's compliance with the provisions of the African Charter from the perspective of civil and political rights, and economic, social and cultural rights.

Commissioner Rezag-Bara concerned himself with issues such as the status of the Commission for the Protection of the Rights of Cultural, Linguistic and Religious Communities. He further requested to know how the executive level of government is implementing the decisions of the Constitutional Court.[5] The commissioner stated that the prisons were overpopulated and that the conditions were deplorable, requesting statistics and a demographic breakdown of the prison population in South Africa.[6] He also raised matters of particular importance, such as the implementation of legislation governing the elimination of discrimination, racism and apartheid. In relation to the family, he noted that the Domestic Violence Act had come into force, but requested more information on how the police, judiciary and social welfare agencies address domestic violence. Commissioner Rezag-Bara explicitly mentioned the issue of domestic security and anti-terrorism activity in light of the formulation of anti-terrorism laws, which potentially violate basic human rights standards.

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[4] The full text of the 2nd Periodic Report of the Republic of South Africa as well as the NGO Shadow Report to the South African State Report are available on the website of the Centre for Human Rights, University of Pretoria, http://www.chr.up.ac.za (accessed 28 February 2006).

[5] Specific mention was made of the 211 prisoners who had been given the death penalty. Subsequent to the abolition of the death penalty in South Africa, alternative sentences were not initially conveyed to the prisoners and this was deemed a violation of their fundamental rights.

[6] An elucidation of the stage of implementation of the 2004 mission report by the Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa was asked of the Minister.

For her part, Commissioner Monageng declared that the Commission would have preferred more contemporary statistics and gender-disaggregated information. In particular, she addressed the rights to education,[7] training and employment,[8] social security, housing[9] and health care.[10] In light of the HIV/AIDS pandemic, Commissioner Monageng asked the Minister what programmes South Africa had initiated to deal with the consequences of HIV/AIDS,[11] and whether South Africa had engaged in parallel-importing or licensing of high-cost medicines and anti-retroviral drugs.

South Africa was congratulated for ratifying the Protocol on the Rights of Women, but asked why article 16 of the Protocol had been reserved and whether there was a possibility of reversing this reservation. Similarly, South Africa was congratulated for ratifying the Protocol Establishing the African Court of Human and Peoples' Rights, while noting that the Commission hoped for a reversal of the decision not to make the article 34(6) declaration giving individuals and NGOs direct access to the Court.

After the two rapporteurs had posed their questions and made comments, other commissioners raised some further concerns. Commissioner Melo highlighted the need to focus on women's employment in the informal sector while addressing the high unemployment rate. She also asked for evidence of concrete measures to ensure judicial independence, to act as a reference point for the rest of Africa. Finally, she asked whether South African women could rightfully own land, and whether women in the agricultural and industrial sectors could benefit from poverty alleviation programmes.

Commissioner Malila expressed his concern about the insecurity caused by the inability of the Department of Home Affairs to process asylum applications, and asked what the government was doing to

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7 Steps taken by government to ensure that poor families are not educationally disadvantaged and the success of the national primary school nutrition programme were specifically addressed by Commissioner Monageng.

8 Commissioner Gansou noted her alarm at the high rate of unemployment and requested to know why the level of unemployment had become so high. She also wished to know what steps the government was taking to address the very difficult problem of unemployment.

9 A request for further particulars on the steps taken by the government to actualise court orders relating to the delivery of socio-economic rights, such as *Government of RSA v Grootboom & Others* 2000 1 SA 46 (CC) and *City of Cape Town v Rudolph* 2004 5 SA 39 (CC), received much attention from the Commission.

10 Problems relating to mental health care were raised, especially in respect to the measures taken by government to ensure the monitoring and improvement of conditions in psychiatric hospitals.

11 The focus on HIV/AIDS was echoed by many other commissioners who wished to know whether the government's plans addressed gender inequalities, such as the inability of many women to negotiate effectively in their sexual relations because of the male dominated society.

verify the status of asylum seekers and illegal immigrants who have been arrested and detained. Updated and specific information was also requested by the commissioners on the issue of Islamic marriages, sexual offences and the plight of the indigenous San population.[12] Both Commissioners Malila and Alapini-Gansou noted the lack of continuity between the initial state report and the present report and therefore requested to know to what extent the recommendations made after the presentation of the initial report had been implemented.

Commissioner El Hassan requested information concerning the so-called 'brain drain' experienced by South Africa and then enquired into whether the post-apartheid policies for promoting disadvantaged groups had proven successful. In the context of equality, Commissioner El Hassan commented on the case brought by the National Coalition for Gay and Lesbian Equality and enquired as to whether same-sex marriages were permissible in South Africa.[13]

The Chairperson commenced by asking for clarification on the national drug policy.[14] She then went on to highlight the innovative one-stop child justice centres and asked whether these centres could potentially be emulated in other African countries. In general, the Chairperson raised her concern about the rights of children, especially relating to child labour.

In response to the contributions from commissioners, the Minister stated that it was important for state parties to subject themselves to peer review. She conceded that state reporting is a daunting challenge for many African countries. The Minister pledged to provide full answers to all of the commissioners' questions upon her return to South Africa. She confirmed that civil society experts and NGOs contributed to the preparation of the South African state report. However, the Minister queried whether participation by NGOs in drafting the report itself would not undermine their role as impartial watchdogs.[15] However, she affirmed that all the departments of the South African government invariably worked with NGO networks to deliver services.

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[12] Commissioner Malila wanted to know what measures South Africa had taken to implement the recommendations of the UN Special Rapporteur on Indigenous Peoples in their report to the South African government earlier in 2005.

[13] Having asked this question, Commissioner El Hassan then reflected on South Africa's position with reference to the provisions of art 18 of the African Charter which stipulates that the family is the custodian of morality and values. Commissioner El Hassan's concern was whether same-sex marriages were compatible with South Africa's obligations under the African Charter.

[14] Her concern was whether access to basic medication was guaranteed and whether or not it was made available free of charge to the indigent members of the population.

[15] The Minister contended that that the proper role of NGOs was to critique their governments and contribute towards policy making.

Regarding the Commission on Cultural, Religious and Linguistic Communities, the Minister stated that it was presently developing its programme of work in the context of a state with 11 official languages and has thus far established a pan-South African language board which is a constitutionally-assigned body. According to the Minister, the South African government is mindful of the marginalisation of indigenous peoples, who suffered greatly under apartheid. The Minister categorically stated that the Koi and the San are not discriminated against. They have freedom of movement and benefit from social programmes, with money that has been budgeted for them within the Department of Agriculture. In addition, she stated that indigenous groups have had the benefit of land restitution. Indigenous peoples have their own radio station and can access health and education services.

On the subject of the judiciary, the Minister stated that a Superior Courts Bill would reconfigure the South African court system to bring justice closer to the people. There has been significant debate about the independence of the judiciary, which the Minister stated constituted a healthy dialogue. The magistracy in South Africa is now representative of the population, but there is a need to expand the number of female judges.[16]

With regard to the right to sexual orientation, the Minister stated that the recognition of such rights in South Africa goes to the very principle of equality. She expressed her belief that this recognition does not constitute any derogation from the African Charter.

The Minister stated that the Constitution requires the government to deliver on socio-economic rights on a progressively realisable basis and that the government is actively working on developing its housing policy in order to improve the quality of life of all South Africans. In terms of the right to safe, clean water, the Minister confirmed that access to water remains a major challenge in South Africa. Note was made of the dramatic increase in access to safe water from 61% in 1994 to 91% in 2005.

Significantly, in relation to HIV/AIDS, the Minister cited the resources spent by the South African government, increasing from R342 million in 2001/2002 to R3,6 billion in 2005/2006, including allocations for treatment. She acknowledged the constant encouragement by NGOs in South Africa for the government to do more in this area.

In relation to the prominent role played by NGOs in securing respect for human rights, the Minister stated that NGOs focusing on disabled people remain the most active and vocal, thus being responsible for their own empowerment. The Minister noted that as a direct result of the commitment by disabled peoples' groups, the Presidency had

[16] In 1994 there was only one female judge, but at present there are at least 30.

established an Office on Disability. Furthermore, the government's public works policy requires all state buildings to have ramps, and that sign language is being introduced in public agencies. Additionally, there is a new Braille library, with imported materials, including important works on HIV/AIDS.

The Minister indicated that the issue of child justice remains challenging in South Africa. There are concerns about the numbers of young persons in prison, and officials are working hard to introduce realisable programmes. Following small-scale piloting of child justice centres, this will also feed into a parallel national criminal justice review. The Minister concluded her response with reference to innovative new programmes on child maintenance, on affirmative action to attract black women into business and to address the needs of those in the second economy.

3.2 Statements by NGOs concerning state reports

The Centre for Human Rights made an appeal to the Commission concerning the necessity for the Commission to adopt concluding observations after the presentation of state reports under article 62 of the African Charter. Specifically, the issue centres on the publication and accessibility of these concluding observations in order to assist state parties in the drafting process, but also to inform NGOs about which areas require more attention and ways in which to undertake an assessment of the performance of the state in terms of its obligations. It was contended that, by allowing the concluding observations to enter into the public domain, civil society would be able to participate actively. An important consideration is that publication of the concluding observations will ensure continuity of dialogue between the state and the Commission and thereby strengthen the institutional memory of the Commission.

4 Other promotional activities

4.1 Forum for discussions and interventions

State parties are routinely given the opportunity at Commission sessions to make representations concerning the measures taken towards implementing human rights in their respective countries. National human rights institutions and NGOs are also given an opportunity to make pertinent observations regarding the situation of human rights enforcement in Africa. The African Commission's sessions thus provide a forum for state parties to justify their policies and practices within the rubric of the human rights situation in Africa.

Active collaboration takes place between the African Commission and NHRIs affiliated to the Commission. Commissioner Rezag-Bara revealed that out of a total of 53 state parties to the African Charter, 36 have

established NHRIs. A total of 25 of these NHRIs engage themselves meaningfully with the Commission, but only 17 NHRIs have affiliate status with the Commission.[17]

Fourteen NGOs applied for observer status with the African Commission during the 38th session, of which 12 were successful.[18] This brings the total number of NGOs granted observer status by the African Commission to 344. Many of these NGOs made presentations during the 38th ordinary session.

4.2 Organisation of conferences and seminars

In terms of article 45(1)(a) of the African Charter, the Commission may 'organise seminars, symposia and conferences' under its promotional mandate. It was agreed that during 2006, seminars would be held on the following themes: terrorism and human rights; Islam and human rights; contemporary forms of slavery; and refugees and internally displaced persons in Africa.

4.3 Promotional activities by commissioners

During the inter-session period, the commissioners are actively involved in human rights activities across the continent and internationally.

The members of the African Commission adopted the reports of promotional missions to Botswana, Central African Republic, Guinea Bissau, Mauritania, São Tomé and Principe and Seychelles. In addition, the reports of the missions of the Special Rapporteur on the Rights of Women in Africa to Djibouti and Sudan, the report of the mission of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa to Senegal, as well as the reports of the missions of the Working Group on the Indigenous Populations/Communities to Botswana and Namibia were adopted.

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[17] Disappointingly, despite the Resolution on the Granting of Affiliate Status to NHRIs which stipulates the duties of NHRIs who have obtained affiliate status, only two NHRIs have complied with the duty to submit reports detailing their activities towards the promotion and protection of human rights in their respective countries.

[18] The 12 NGOs granted observer status during the 38th ordinary session are: Association of Women Heads of Family (Mauritania); Community Law Centre, University of the Western Cape (South Africa); Mbororo Social and Cultural Development Association (Cameroon); Civic Aid International Organisation (United Kingdom); Burkinabé Association for Childhood Survival (Burkina Faso); Congolese Association for the Control of Violence Against Women and Girls (Democratic Republic of the Congo); Kataliko Action for Africa (Democratic Republic of the Congo); Franciscans International (Switzerland); Access to Justice (Nigeria); Association for the Reconstruction and Development of Moko-oh Peoples (Cameroon); Global Network for Good Governance (Cameroon); Sudan Organisation Against Torture (United Kingdom).

4.4 The entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol on the Rights of Women in Africa obtained legal status within the African regional system on 25 November 2005.[19] The African Commission, in collaboration with civil society organisations, held a special congratulatory celebration to commemorate this significant day.

4.5 Resolutions within the African regional system: Opportunity for political reform?

During the 38th ordinary session, the African Commission adopted a total of 17 resolutions. These dealt with the renewal of the term of the Special Rapporteur on the Rights of Women in Africa (Commissioner Melo); the composition and operationalisation of the Working Group on the Death Penalty (Commissioner El Hassan as Chairperson),[20] the renewal of the mandate and composition of the Working Group on Specific Issues relative to the work of the African Commission, where Commissioner Tlakula was designated as a new member; the composition and extension of the mandate of the Working Group on Indigenous Populations/Communities in Africa, with Commissioner Rezag-Bara being designated as Chairperson, while Commissioner Bitaye was designated as a new member; the nomination of Commissioner Malila as Special Rapporteur on Prisons and Conditions of Detention; the nomination of Commissioner Alapini-Gansou as Special Rapporteur on Human Rights Defenders in Africa; and the nomination of Commissioner Tlakula as Special Rapporteur on Freedom of Expression in Africa.

In addition to these, the African Commission adopted resolutions to facilitate the establishment of structures and mechanisms, which will invariably complement the work of the Commission. These resolutions are: the status of women in Africa and the entry into force of the Protocol to the African Charter on the Rights of Women in Africa; the operation of an independent and effective African Court on Human and Peoples' Rights; ending impunity in Africa; on the domestication and implementation of the Rome Statute of the International Criminal Court; and the protection of human rights and the rule of law while countering terrorism.

Country-specific resolutions were also adopted on the human rights situation in Darfur, the Democratic Republic of the Congo, Eritrea, Ethiopia, Uganda and Zimbabwe.

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[19] The 25th instrument of ratification was deposited on 26 October 2005, ensuring the smooth entry into force of the Protocol on the Rights of Women at relatively groundbreaking speed.

[20] Commissioner Bahame Tom Nyanduga along with five experts representing the different regions of the continent were designated as members.

The African Commission's resolution on Zimbabwe revealed the Commission's condemnation for

> the continuing violations and the deterioration of the human rights situation in Zimbabwe, the lack of respect for the rule of law and the growing culture of impunity the number of internally displaced persons and the violations of fundamental individual and collective rights resulting from the forced evictions being carried out by the government of Zimbabwe.

Simultaneously with the African Commission's resolution, human rights NGOs such as Zimbabwe Lawyers for Human Rights and Amnesty International, amongst others, issued a petition to prominent African Heads of State, including Presidents Mbeki and Obasanjo, as well as to the Chairperson of the African Union Commission, His Excellency Alpha Omar Konare, stressing that the human rights situation in Zimbabwe is deteriorating at an alarming rate and that political and diplomatic interventions are desperately needed. The cumulative effect of the resolution and NGO-exerted pressure is that Africans and African institutions are holding their leaders accountable in the true spirit of peer review.[21]

The African Commission adopted a resolution in which compliance by Eritrea with the provisions of the African Charter is implored. The illegal and arbitrary detention of numerous human rights defenders in Eritrea has formed the basis of at least two communications submitted to the African Commission,[22] but the recommendations have gone entirely unheeded. Furthermore, the UN Security Council approved a diplomatic mission by the United States Assistant Secretary of State for African Affairs, but the Eritrean foreign minister said he doubted the 'legality' and 'political relevance' of the mission, thus the mission was prematurely concluded.[23]

Similar resolutions were passed relating to Darfur, the Democratic Republic of Congo and Uganda. As is noted in the editorial comments at the outset of this volume,[24] the AU Assembly refused the publication of the Activity Report of the African Commission because of these resolutions.

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21 See further A Meldrum 'African leaders break silence over Mugabe's human rights abuses' *The Guardian* 4 January 2006 http://www.guardian.co.uk/zimbabwe/article/0,2763,1677460,00.html (accessed 4 January 2006). However, as is mentioned in the editorial comments (vi above), the AU Assembly did not allow the Report to be published because of this and other resolutions.

22 Communication No 250/2002, *Liesbeth Zegveld & Mussie Ephrem v Eritrea* & Communication No 275/2003, *Article 19 v Eritrea*.

23 'US ''shortens'' Eritrea mission' *News 24* 19 January 2006 http://www.news24.com/News24/Africa/ News/0,,2-11-1447_1865655,00.html (accessed 19 January 2006).

24 vi.

5 Conclusion

A press conference was held immediately after the closing ceremony on the final day of the session. Various members of the press and civil society were present to obtain some insight into the opinion of the African Commission concerning issues such as the human rights situation in Darfur, Mauritania and Sudan. A question was also posed concerning the fact that The Gambia is behind schedule relating to her obligation to submit periodic state reports. Questions posed also dealt with the mechanism which the African Commission makes use of in order to assess violations of human rights and the non-binding nature of the decisions and recommendations of the African Commission.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights

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1 Introduction

Over the last six decades, the international human rights discourse shifted from celebrating ever-expanding substantive normative frameworks to questioning the inadequacies in the implementation and enforcement of these norms. Concomitant with this development came greater interest in human rights treaty bodies and human rights courts, leading to more attention being paid to election processes and an increased awareness of the role played by the individual members of these bodies. In this contribution, the focus falls on the four new members of the African Commission on Human and Peoples' Rights (African Commission), who took their seats at the Commission's 38th ordinary session, held from 21 November to 5 December 2005, in Banjul, The Gambia. Departing from the premise that an institution is its people, and that it is instructive to get to know these four new commissioners, I conducted interviews with each of the four new commissioners during that session.

The process leading to the election of the four new members was set in motion by a *note verbale* from the African Union (AU) Commission, in which state parties were requested to submit nominations that set out the 'complete information indicating judicial, practical, academic, activist, professional and other relevant experience in the field of human and peoples' rights' of the candidates.[1] However, this information is not

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1 AU Doc BC/OLC/66/Vol XVIII, dated 5 April 2005. In crucial aspects, this *note verbale* mirrors the one issued in 2004 in respect of the nomination of judges to the African Court on Human and Peoples' Rights (AU Doc BC/OLC/66 5/8/Vol V).

publicly accessible. This contribution aims to fill this void on the basis of the interviews conducted. Evidently, they are all quite new to their roles, and their answers should be understood as an initial reaction and a reflection on the possibilities of their roles.

The newly elected commissioners are Ms Reine Alapini-Gansou (a national of Benin), Mr Musa Ngary Bitaye (a Gambian national), Advocate Faith Pansy Tlakula (a South African national) and Mr Mumba Malila (a Zambian national). They replace Commissioners Chigovera, Chirwa, Dankwa and Johm, from Zimbabwe, Malawi, Ghana and The Gambia, respectively, whose terms expired in 2005.[2]

As three of the four outgoing commissioners also served as Special Rapporteurs of the African Commission, their positions became vacant. By opting not to appoint 'outside experts' (non-commissioners) to these positions, the newly constituted Commission stuck to the approach followed by the African Commission in the past. These positions are filled as follows:[3] Commissioner Malila replaces Commissioner Chirwa as Special Rapporteur on Prisons and Conditions of Detention in Africa; Commissioner Alapini-Gansou becomes Special Rapporteur on Human Rights Defenders in Africa in the place of Commissioner Johm; and Commissioner Tlakula follows Commissioner Chigovera as Special Rapporteur on Freedom of Expression in Africa. Commissioner Rezag-Bara takes over as Chairperson of the Working Group on Indigenous Populations/Communities in Africa, while Commissioner Bitaye is appointed a member of that Working Group. Commissioner Tlakula is also a member of the Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights.

Commissioners serve in their personal capacities and do not represent their countries.[4] Although the African Charter on Human and Peoples' Rights (African Charter) does not prescribe a particular geographical representation, it is important that the five regions of the AU should be represented in the institutional membership so as to ensure continent-wide involvement.[5] After the election of the four new commissioners, the regions of Africa are represented as follows: three form West Africa; two from North Africa; two from East Africa; none from Central Africa; two from East Africa and four from Southern

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2 For their contact details, and those of other commissioners, see the Commission's website http://www.achpr.org (accessed 28 February 2006).

3 See the final communiqué that the Commission issued at the end of the 38th session, http://www.achpr.org (accessed 28 February 2006).

4 Art 31(2) of the African Charter provides that commissioners serve in their personal capacity.

5 See, by way of contrast, art 14(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which requires that the elected judges have to represent 'the main regions of Africa' and its 'particular legal traditions'.

Africa. This means that one region, Central Africa, is not represented, and that Southern Africa is over-represented.

The official languages of the AU are Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language.[6] In practice, the working languages of the African Commission are mainly English and French. At its sessions, interpretation is available in Arabic, English and French. Of the four new commissioners, one is francophone (Ms Alapini-Gansou), able to read and speak English; one is bilingual (Mr Bitaye), and two anglophone (Adv Tlakula and Mr Malila).

Commissioners serve terms of six years, and may be re-elected indefinitely.[7] Aged mostly below 50,[8] the arrival of the newly elected commissioners has significantly reduced the average age of the Commission.

2 Commissioners' professional background

A recurring problem of the African Commission is the close ties between some commissioners and the executives of their countries. Some served at ministerial or ambassadorial levels at the time of their election.[9] Non-governmental organisations (NGOs) have in the past raised concerns about their lack of independence. Eventually accepting the validity of and acting on these concerns, the 2005 AU Commission *note verbale* calls on states to nominate persons independent from government.[10] This *note verbale* seems to have had a positive effect. At the time they were nominated and elected, all the new members complied with the directive of the *note verbale*.[11] Mr Bitaye is a lawyer who has his own practice, and is Chairperson of the Gambian Bar Association. Ms Alapini-Gansou is a practising lawyer, having been admitted as an

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6 Art 11 of the 2003 Protocol on Amendments to the Constitutive Act of the African Union.

7 Art 36 African Charter.

8 Their ages range between 61 (Bitaye), Alapini-Gansou (49), Tlakula (48) and Malila (40).

9 At its first session, in 1987, the membership of the African Commission included a Minister of the Interior of Congo (Commissioner Gabou) and a civil servant from Zambia (Chipoya), as well as three persons holding high judicial office. At the moment, the Chairperson of the Commission (Commissioner Sawadogo) is an ambassador, and Commissioner Babana holds high government office.

10 The *note verbale* (n 1 above) cites the following from a 1920 opinion of the Advisory Committee of Jurists concerning the eligibility criteria for appointment to the Permanent Court of International Justice: '[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 advisor to a foreign office . . . are certainly not eligible for appointment as judges upon our Court.'

11 This leads to an anomaly: Some of the serving commissioners fall foul of the eligibility criteria that guided the most recent elections.

advocate at the Benin Bar in 1986. She also teaches criminal law and labour law part-time at the Université Nationale du Benin. Adv Tlakula is the Chief Electoral Officer of the South African Independent Electoral Commission (IEC). Mr Malila is a lecturer at the Law School of the University of Zambia and, since April 2004, the Chairperson of the Zambian Human Rights Commission. If one looks back further in time, the picture alters slightly. Mr Bitaye was once — albeit briefly, in 1995 — the Attorney-General (Minister of Justice) of The Gambia. However, the short duration of his affiliation with the government and the time lapse minimise any concerns about a possible lack of independence.

Although the African Charter only requires that 'particular consideration' be given to 'persons having legal experience',[12] a formal legal qualification has become accepted as a minimum prerequisite for election. All four are lawyers, and hold basic and further law degrees. Commissioner Alapini-Gansou holds a *Maîtrise* in law from the Université Nationale du Benin and a *Diplome d'Etudes Approfondies* (*DEA*) in environmental law from the Université de Lomé, Togo. Commissioner Bitaye was awarded a first degree in the liberal arts in 1973, with sociology, education and French as majors, and studied law in England. In 1978 he was called to the bar, practised for a short while in the UK, then in The Gambia. Commissioner Tlakula holds the degrees LLM (North), LLB (Witwatersrand) and LLM in International Human Rights Law and Human Rights Advocacy (Harvard). Commissioner Malila obtained his first law degree from the University of Zambia in 1987, followed by an LLM, which he completed in 1989 at Cambridge University. They all are also admitted to legal practice. Two (Alapini-Gansou and Bitaye) are still practising.

3 Human rights background and experience

In line with the *note verbale*, the new commissioners all have some human rights experience. It is, however, clear that they generally lack prior in-depth training on and involvement in the African regional human rights system.

Commissioner Alapini-Gansou has been actively involved in human rights since 1990, especially in women's rights. She is the executive secretary of WILDAF Benin. Her work evolved more broadly into the sub-region, as she became a member of the co-ordinating committee of WIPNET (Women in Peace Building Network) Benin, which is part of the West African Network for Peace Building (WANEP). WIPNET works for increased involvement of women activism in peace building. She

[12] Art 31(1) African Charter.

obtained a certificate at the Strasbourg Institute for Human Rights and also trained at the African Centre for Democracy and Human Rights Studies, and the Institute for Human Rights and Development in Africa, both based in Banjul.

While at Cambridge, Mumba Malila studied Civil Liberties (essentially dealing with human rights) and International Law. When he returned to the University of Zambia, he taught international law, but not human rights. Like Commissioner Alapini-Gansou, he also attended the Strasbourg International Human Rights Institute, where he did a two-month course on the teaching of international human rights. A founder and current member of the Legal Resources Foundation, he served as the Vice-Chairperson of the Human Rights Association of Zambia until 2004, and as Secretary of the Law Association of Zambia, where he was part of a team running the legal aid programme.

After being admitted to practice, Pansy Tlakula went to teach at what is now the University of the North West. She then became law advisor in the Department of Justice of the erstwhile Bophuthatswana. Later she joined the Black Lawyers Association (BLA), and became its National Director. She was appointed to the first South African Human Rights Commission, on which she served from 1995 to 2002.

Musa Bitaye's practice was not a human rights practice as such, but in several instances he 'litigated cases linked to human rights in the Gambian Constitution', mostly dealing with the right to due process, such as the right of an accused or detained person to be informed of the charge against him or her.

4 Domestic process of nomination and election

Apart from stipulating that state parties 'may not nominate more than two candidates',[13] the African Charter does not prescribe the domestic procedure for nomination. In the 2005 *note verbale* of the AU Commission, state parties are invited to consider the following three guidelines:

1 The procedure for nomination should, 'at the minimum', be 'that for appointment to the highest judicial office' in a particular country.
2 States should encourage civil society participation in the domestic selection process.
3 The domestic nomination process should be 'transparent and impartial' . . . 'in order to create public trust in the integrity' in that process.

It is therefore interesting to get some insight into how this process played out in fact. Although their routes to the nomination process

[13] Art 34 African Charter.

differ markedly, all four the interviewees were eventually nominated by the Department of Foreign Affairs of their country.

Ms Alapini-Gansou was actively involved in her own nomination and election process. After being exposed to the African Charter and Commission at various training sessions, and specifically after perusing materials provided as part of a course organised by the Institute for Human Rights and Development in Africa, in Banjul in 2002, she discovered that many AU members, including Benin, had never been represented in the African Commission. On her return, she approached the authorities with the evidence and argued that Benin should address this situation. She was duly nominated, but due to an administrative delay, her nomination did not 'go forward'. When vacancies arose again in 2005, her candidacy was renewed. This time, she went personally to the AU Assembly meeting, held in Sirte, where she successfully lobbied for her election.

The other three new members were somewhat less involved in the process that led to their election. Commissioner Bitaye does not know of any set procedure for nomination in The Gambia. The Permanent Secretary of the Ministry of State for Foreign Affairs approached him with a request to submit a *curriculum vitae*. In South Africa, the process is not very clearly defined, but seems to be based on a recommendation by the Department of Justice. In Zambia, a special *ad hoc* panel makes nominations. While judicial appointments usually take place through the Judicial Services Commission, appointments to international positions are made by an *ad hoc* 'National Group'. This panel consists of the Attorney-General, the Deputy Chief Justice, the Chairperson of the Law Association, the Dean of the School of Law and one other person.

The interviews reveal that the nominating states have not followed the advice of the AU Commission to ensure transparency and to involve civil society in the national nomination process. Only one state, Zambia, abided by the 'minimum' requirement of applying the usual process of appointment to the highest judicial office also in respect of nominees to the African Commission.

5 What do the new commissioners bring to the Commission?

Emphasising matters related to their personalities and professional experience, the commissioners were quite clear about what they are bringing into the African Commission. Here, they express themselves in their own words:

Commissioner Alapini-Gansou: 'I have a strong belief in what I do. I am also willing to learn, and to assist in improving the Commission.' Commissioner Bitaye: 'What I bring to the Commission is my formal, legalistic training, my aptitude for engaging people in promotional

matters, as well as my aptitude for organisational structures, and, of course, an interest in the field of human rights.' Commissioner Malila: 'I am focused and am scared of failure. I am goal-oriented. I therefore bring a little more focus to the Commission. I am keen to see the Commission improve its image, its respectability and its visibility.' Commissioner Tlakula: 'What I bring to the Commission is the similar experience I have gained working as a member of the South African Human Rights Commission. In addition, I bring experience on government. I not only served in elected posts, but also in administration, thus achieving a holistic perspective on the functioning of government. As head of a government institution, the IEC, I also bring the quality of leadership to the Commission.'

6 Perceptions about the Commission

With the exception of Ms Alapini-Gansou, who attended two sessions as representative of NGOs before she became a member, and Mr Malila, who attended one session as Chairperson of the Zambian Human Rights Commission, the commissioners were not well informed about the African Commission as an institution at the time of their election. For the most part, they relied on information acquired as part of formal or informal studies as source of knowledge on the Commission. Most of their studies did not deal in any depth with the Commission, or viewed its work relatively negatively. As a consequence, they either lacked information about the Commission or had a relatively negative view of the body.

7 What do the new commissioners consider to be the main human rights challenges facing Africa, and the role of the African Commission in addressing them?

Commissioner Alapini-Gansou identified poverty, refugees, threats to democracy and globalisation as some of the major challenges in Africa today. Commissioner Bitaye focused on what he termed the 'cultural rights challenge': 'What stands out for me, given my short experience, is the cultural rights challenge. This seems to be divisive, or contradictory, in the sense that, on the one hand, you have claims and a desire for modernity, and at the same time, there is a premium placed on cultural rights.'

Commissioners Malila and Tlakula both stressed the importance of socio-economic rights, and focused on the need to make these rights justiciable. Malila added: 'The African Commission can play a role if it shifted its emphasis, which has so far principally been on civil and political rights. The Commission should in future attach equal weight

to these rights, especially as the African Charter recognises them as equal. The Commission should sensitise governments to address these rights as species of rights that are indivisible and justiciable.' Tlakula expressed the opinion that 'the African Commission can play a role if a number of countries entrench these rights in their Constitutions. This can contribute to the eradication of poverty.'

8 Role of NGOs in the African regional system

NGOs have played a significant role in the activities of the African Commission. Two contributions are highlighted here: By submitting communications and by presenting arguments about substantive rights in the African Charter, they have assisted in the elaboration of the Commission's jurisprudence. By lobbying for the establishment of an African Court on Human and Peoples' Rights (African Court) and a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), they have contributed greatly to the normative expansion of the African human rights system.

Two interviewees were unequivocal about the importance they attach to the role of NGOs in the African regional human rights system. Coming from an NGO environment herself, Commissioner Reine Alapini-Gansou regards NGOs as crucial to the African Commission. Without NGOs, she observes, the Commission would not have evolved as it did. NGOs assisted the Commission in overcoming numerous problems. She views her previous involvement with NGOs as a strength, and as a factor that would make it easier for her to promote and defend human rights in Africa. Mr Mumba Malila also considers NGOs to be very important allies in the work of the Commission. They are the ones who first and foremost work in communities, monitoring governments. As most violations are perpetrated by governments, local NGOs are in the best position to bring human rights violations that occur to the attention of government.

Mr Musa Bitaye expressed a guarded view about the role of NGOs in the African human rights system. 'Within limits', he noted, 'the type of peer pressure that they bring about is very positive'. However, he pointed out that 'from a formally legalistic perspective, some of the interventions during the public session would be ''inadmissible'', if they were part of an official communication'. It is up to the Commission to 'sift the grain from the chaff'. The bottom line remains that NGOs are important in bringing pressure to bear on states. For Adv Pantsy Tlakula, the relationship between the Commission and NGOs is one of complementarity. It will be to the benefit of both the Commission and NGOs if their respective roles are kept distinct and separate. Their roles are different and they have to keep to their respective roles. This distinction

should be kept in mind at all times; one should not confuse the separate roles the two institutions play.

9 The relationship between the Commission and the African Court on Human and Peoples' Rights

The new commissioners take their seats at a time when the African Court is in the process of being established. Belatedly following the entry into force of the Protocol to the African Charter Establishing an African Court in January 2004, the AU Assembly confirmed the election of 11 judges in January 2006, and a seat should be assigned at the Assembly meeting in June 2006.[14]

Commissioner Alapini-Gansou sees the African Commission as a filter that will ensure that only those cases that need to go to the African Court will reach the Court. To her, the Court is the logical end result of the Commission: While the Commission can only give recommendations, and can try to persuade states to follow them, the Court will be able to give binding judgments.

To Commissioner Bitaye, the coexistence of the African Commission and the African Court seems — at least superficially — like a duplication of efforts. For the time being, this may be a good arrangement. The jurisprudence of the Commission can, for example, be of assistance to the Court. In the structure of the Court itself, it seems the Commission has the right to appear, and this seems to be a duplication. In the long term, he would like to see the two institutions being fused into a single institution.

By contrast, Commissioner Malila is of the view that the African Court will not — and should not — replace the African Commission. While it is true that some things are better done by a judicial institution, a court is unable to do many other things. The Commission is much more flexible, and can, for example, engage in promotion and sensitisation much more effectively than a court.

Commissioner Tlakula emphasises that the African Commission is not a court of law, and should never aspire to take that role. Having said that, it still is an open question whether the Court will consider the Commission's recommendations, or whether it will hear a matter *de novo*. In other words, it is not clear whether the Court will be guided by the Commission's findings when it arrives at its decisions.

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[14] Assembly/AU/Dec 100 (VI) http://www.africa-union.org (accessed 28 February 2006).

10 A role in their own countries?

It was pointed out earlier that commissioners do not 'represent' their countries of origin. When the African Commission considers communications, the practice has developed that a commissioner from a particular country does not participate in the deliberation.[15] As far as the division of countries among commissioners for promotional activities is concerned, commissioners are usually not assigned their 'own' countries. In respect of the examination of the reports of state reports, the established practice is that a commissioner from a particular country does not participate in the examination of a state report from that state. Despite these constraints, three of the new commissioners attached some importance to their domestic role.

Commissioner Alapini-Gansou has some definite ideals in respect of her role in Benin. She is concerned that Benin has only once submitted a report under the African Charter. By reporting and making recommendations to the Ministries of Foreign Affairs and of Justice, she would like to see that Benin have prepared its overdue reports by the next session. She intends to supplement the activities of the commissioner who has Benin as part of his or her promotional mandate. She also wants to work with partners in Benin to ensure the promotion of domestic and international rights in Benin. Commissioner Malila would like to see that his presence at the African Commission brings about the following results: There should be an increase in the visibility of the African Commission. As member of the African Commission and as Chairperson of the Zambian National Human Rights Commission, he wishes to ensure that Zambia submits all overdue reports to the African Commission. Through his membership of the African Commission, he would like to ensure that more attention is paid to the African human rights protection mechanism than so far has been the case. Commissioner Tlakula proposes to try to get the South African government to commit itself to supporting the Commission. She also sees herself working closely with government and civil society to get other states to join South Africa in supporting the African Commission.

Commissioner Bitaye expresses himself in the following words: 'Whatever ideals I have for The Gambia, I would like to see this come through someone who has no emotional attachment to The Gambia, someone who is really independent and objective about the situation here.'

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[15] Rules 109 and 110 of the 1995 Rules of Procedure on 'incompatibilities' and 'withdrawal' do not require the recusal under such circumstances.

11 At the end of six years . . .

The new commissioners have high ideals, all expressing the desire to leave a concrete legacy after their six year terms.[16] Each commissioner received an opportunity to state their ideals for their terms, providing a yardstick against which to assess their work at the conclusion of their terms.

Ms Alapini-Gansou: 'I would like to contribute effectively to the promotion and protection of human rights in Africa, to attain a sustainable level of development. In particular, I would like to make a contribution towards improving the position of human rights defenders in Africa.'

Mr Bitaye: 'I would like to look back and point to some concrete achievement, something that has become a reality, in one of the fields of interest to the African Commission, in terms of its promotional or protective mandate.'

Mr Malila: 'If I have to look back at my term after six years, I will consider myself to have failed if people of the continent have never heard of the African Commission. People need not necessarily know the procedures of the Commission, but should have heard about the Commission. In short, the African Commission should after six years be more visible than it is today. At the very least, those that are educated, and who are not lawyers, should know about it. This can be accomplished through a vigorous campaign for the inclusion of the African Charter in teaching at school level and an increase in public debate and discussion, using the media, seminars, etc. Above all, closer strategic alliances must be forged with national NGOs who have a closer reach that the African Commission. Curricula, from those directed at children of an early age up to the graduate level, have to focus on Africa beyond the national borders.'

Adv Tlakula: 'I would feel I have accomplished my mission if I have brought something new to the Commission, some tangible output. I want to accomplish something, even if it is relatively small. I would also work towards the improvement of the Commission's efficiency and effectiveness.'

12 Conclusion

With the establishment of the African Court, the African Commission needs to demonstrate that it has the capacity to accomplish its mandate. The Commission has made some significant advances in the fulfilment of both its promotional and protective mandate, but progress has

[16] Art 36 African Charter.

not been consistent. With matters so delicately poised, the energy and talents of the four new commissioners are important in realising the promise and potential of the African Commission. All four new commissioners have, in these interviews, committed themselves to playing a positive role and to making a difference.

It transpires from the nominations practice revealed here that state parties need to develop transparent domestic procedures, involving civil society, for the nomination of members to the African Commission. At the level of the AU itself, nomination and election should also be more transparent, allowing broader and more inclusive scrutiny involving civil society and the press. A leaf could be taken from the Council of Europe, where the Council's Parliamentary Assembly elects the judges of the European Court of Human Rights on the recommendation of a sub-committee of the Parliamentary Assembly.[17] The sub-committee's recommendations are based on reviews of every *curriculum vitae* and interviews with judicial nominees.[18] The Pan-African Parliament seems well positioned to perform a similar advisory function to guide the AU Assembly in the election of judges to the African Court.

[17] See Interights *Judicial independence: Law and practice of appointments to the European Court of Human Rights* (2003).

[18] See Resolution 1082 (1996), Recommendation 1295 (1996) and Resolution 1200 (1999).

Recent Publications

Fareda Banda *Women, law and human rights: An African perspective*

Hart Publishing (2005) 407 pages

Martin Nsibirwa

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Fareda Banda's book, *Women, law and human rights: An African perspective*, deals with a contemporary human rights issue — the rights of women in Africa. It consists of eight chapters. Chapter one is introductory and looks at the impact of culture on human rights and feminist debates on the subject. Chapter two gives a general overview of how customary laws developed in Africa since the colonial era. This chapter also looks at the conflict of laws that exists between customary laws and other laws. It considers constitutional protection of women in Africa. The author uses domestic court decisions to illustrate these tensions. Banda highlights the conflicts of laws that exist and how these can be a cause for failure to realise the rights of women.

Chapter three explores the feminist view of human rights and how, until recently, Africa has been excluded from making a contribution to the development of human rights norms. Furthermore, the chapter looks at both the African human rights system and the regional initiatives that have been developed to deal with gender discrimination. The chapter analyses some of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and also discusses the issue of reservations and how this relates to CEDAW. The history and drafting process of the recently adopted Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women' Protocol) is traced. The author then gives an overview of the Women's Protocol. This chapter addresses a number of issues. The level of detail to which the author has gone in examining the history and drafting process of the Women's Protocol is commendable, especially as not much has been documented on this process.

In chapter four, family law, gender equality and human rights are the focus areas. Feminist perspectives of the family are discussed, with marriage as the main focus. The conflict created by legal pluralism is analysed. Other issues that receive attention in this chapter include bride wealth, children of the marriage, and divorce and its consequences. Even though there are many issues that have been dealt with in this chapter, the author explains them in some depth.

Chapter five combines the issues of violence against women and reproductive rights. It analyses international and national developments in relation to violence against women. It also explains the different forms that violence against women can take. Reproductive health rights for women receive attention and health as a human right is also analysed. A criticism of this chapter could be that it combines two very important issues and it is therefore too loaded and could have been more analytical if it dealt with them separately.

In chapter six, female genital cutting (FGC) is the focus and the author starts by explaining what the practice involves and the difficulties of terminology. The chapter also analyses how the practice affects children's rights and then looks at national legislation dealing with this matter and civil society's contribution in addressing the problem. The subject of FGC has been researched quite extensively, but it would have been a major omission to discuss women's rights in Africa without discussing this subject.

Chapter seven covers culture, development and participation of women in governance. This chapter deals with culture and its impact on human rights. The chapter proceeds to look at women's involvement in development. It goes on to deal with the subject of women and political participation and the work of non-governmental organisations. Perhaps parts of this chapter could have been discussed earlier, especially the subject of culture. This is because the two areas on which Banda has focused throughout the book are culture and feminists' views. It would have been ideal to try and discuss the issue of culture more extensively at an earlier stage of the book, because culture affects all women's rights.

In its conclusion, the book looks at an overview of the development of human rights, weaknesses of African states, culture, the need to democratise the family and expanding the feminist project in Africa.

The publication is timely, especially in view of the recent entry into force of the Women's Protocol. Banda in some instances uses her personal experiences as a woman to illustrate some of the issues affecting women's rights in Africa. The book is well researched and written in plain language. Experts and lay persons in the field of human rights would be able to easily grasp the issues she raises. The book has a very practical approach to issues of women's rights in Africa. Decisions of

domestic courts are used to show how courts have addressed the issue of women's rights.

Researching about a continent which is not monolithic is not an easy task, but Banda has been able to draw examples from across the continent and uses them to illustrate her points. In a number of instances, Banda appears to put the emphasis on examples from Zimbabwe at the exclusion of other African countries. Her use of authority is elaborate and hence the book is a good resource for further research. Another positive aspect of the book is that it manages to integrate the Women's Protocol, which entered into force recently.

The book further helps in the clarification of some common terms used when dealing with women's rights. In many instances it brings to the fore the different points of view that exist on terminology.

Banda has been able to address the debates that are raised by feminists from the developed and developing countries. She has also been able to bring to the fore the issue of how culture can affect the realisation of women's rights in virtually every sphere of their lives.

The book can be criticised for dealing with too many issues, in some instances leading to a general overview of the matter rather than thorough analysis. This means that in some aspects it lacks depth.

This is a book that deals with contemporary issues in the field of women's rights and it is recommended reading for anyone who is keen to learn more about or to reflect on women's rights in Africa.

Linda C Reif (ed) *The International Ombudsman Yearbook*

Volume 7 2003 Martinus Nijhoff Publishers (2005) 174 pages

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The first parliamentary ombudsman was elected by the Swedish parliament nearly 200 years ago. Over the last few decades, the number of ombudsman institutions around the world has increased to the extent that by the end of 2004, the International Ombudsman Institute (IOI), based in Canada, has 130 ombudsman institutions as members. *The International Ombudsman Yearbook*, published by the IOI since 1981 (before 1995 under the title *The International Ombudsman Journal*), fills an important role for ombudsmen from around the world to exchange experiences.

The volume here under review begins with a foreword with informa-

tion on the IOI, followed by a welcoming speech by the Governor-General of Canada to the IOI conference held in Canada in September 2004 with the theme 'Balancing the obligations of citizenship with the recognition of individual rights and responsibilities — The role of the ombudsman'. Many of the papers in this volume were first presented at this conference, which is held every four years.

In his contribution, Louis LeBel, judge of the Supreme Court of Canada, discusses the relationship between democracy and cultural diversity. There are two different approaches to this issue. In the USA and France, democracy is seen as a tool for assimilation, while for example Canada, Belgium, India, South Africa and Switzerland seek to accommodate cultural diversity, though all groups must share some fundamental values. Judge LeBel favours the latter approach and finishes his contribution by pointing out the important role ombudsmen should play in accommodating cultural diversity.

The 1996 IOI conference set out four criteria to be fulfilled by ombudsman institutions: independence, accessibility, credibility and flexibility. In her chapter, Kerstin André, one of the four parliamentary ombudsmen of Sweden, discusses the importance for the ombudsman institution of flexibility in order to meet the changing needs facing societies over time. She also acknowledges that ombudsman institutions around the world cannot function according to one model, but that 'we, in our eagerness to adapt to the circumstances, must not forget about the significance of the role that we as ombudsmen are playing as supervisors of public governance and as guardians of fundamental human rights' (p 46).

Emily O'Reilly, ombudsman of Ireland, focuses on the need to adapt, in particular in the face of globalisation with its effect on privatisation, measures taken in the fight against terrorism and immigration. She argues that ombudsmen should give more focus to international human rights law in discharging their functions, whether they retain the traditional ombudsman role of dealing with maladministration, or whether they have a more human rights-focused mandate, as many newer ombudsman offices have.

Howard Kushner, ombudsman of British Columbia, Canada, addresses the question: 'How do you know you are doing a good job? Strategic plans, performance measures and surveys.' The issue of credibility is also addressed in an article by André Martin, ombudsman of Ontario, Canada, entitled 'Demonstrating your value'.

Some countries have established issue-specific ombudsmen, for example dealing with the rights of children and minorities. Jenö Kaltenbach, Parliamentary Commissioner for the Rights of National and Ethnic Minorities in Hungary, discusses the mandate and activities of this institution, which during its nine years in existence has received over 4 000

complaints. A contribution by Lisa Statt Foy deals with efforts to create an ombudsman for indigenous peoples ('first nations') in Canada.

The final contribution in the volume by Catarina Sampaio Ventura and Joo Zenha Martins deals with the Charter of Fundamental Rights of the European Union, adopted jointly by the EU Council, Parliament and Commission in 2000. The authors discuss the added value of the Charter in the European legal order and the role the EU ombudsman and the ombudsmen of the individual member countries can play in realising the rights contained in the Charter.

Many of the articles in the *Yearbook* are written by people with practical experience as ombudsmen. None of the contributions in the current volume deals with Africa, where an increasing number of states now have ombudsman institutions. However, an index of articles published in the *Yearbook*, and the *Journal* that preceded it, shows that a number of articles in past volumes have dealt with ombudsman institutions in Africa. Hopefully ombudsmen from around the African continent will reflect on the lessons from other parts of the world that the contributions to the *Yearbook* provide and share their own experiences in future volumes of the *Yearbook*.

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- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½ spacing.
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The following general style pointers should be followed:

- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.

- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
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  1
  2
  3.1
  3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used 'Constitution'.
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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2005
Compiled by: I de Meyer
Source: http://www.africa-union.org (accessed 3 April 2006)

	African Charter on Human and Peoples Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	
Angola	02/03/90	30/04/81	11/04/92		
Benin	20/01/86	26/02/73	17/04/97		30/09/05
Botswana	17/07/86	04/05/95	10/07/01		
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	
Burundi	28/07/89	31/10/75	28/06/04	02/04/03	
Cameroon	20/06/89	07/09/85	05/09/97		
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05
Central African Republic	26/04/86	23/07/70			
Chad	09/10/86	12/08/81	30/03/00		
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04
Congo	09/12/82	16/01/71			
Côte dIvoire	06/01/92	26/02/98		07/01/03	
Democratic Republic of Congo	20/07/87	14/02/73			
Djibouti	11/11/91				02/02/05
Egypt	20/03/84	12/06/80	09/05/01		
Equatorial Guinea	07/04/86	08/09/80	20/12/02		
Eritrea	14/01/99		22/12/99		
Ethiopia	15/06/98	15/10/73	02/10/02		
Gabon	20/02/86	21/03/86		14/08/00	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05
Ghana	24/01/89	19/06/75	10/06/05	25/08/04	
Guinea	16/02/82	18/10/72	27/05/99		
Guinea-Bissau	04/12/85	27/06/89			

* Additional declaration under article 34(6)

	African Charter on Human and Peoples Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Kenya	23/01/92	23/06/92	25/07/00	04/02/04	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04
Liberia	04/08/82	01/10/71			
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04
Madagascar	09/03/92		30/03/05		
Malawi	17/11/89	04/11/87	16/09/99		20/05/05
Mali	21/12/81	10/10/81	03/06/98	10/05/00	13/01/05
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05
Mauritius	19/06/92		14/02/92	03/03/03	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05
Namibia	30/07/92		23/07/04		11/08/04
Niger	15/07/86	16/09/71	11/12/99	17/05/04	
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04
Sahrawi Arab Democratic Rep.	02/05/86				
São Tomé and Príncipe	23/05/86				
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04
Seychelles	13/04/92	11/09/80	13/02/92		
Sierra Leone	21/09/83	28/12/87	13/05/02		
Somalia	31/07/85				
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04
Sudan	18/02/86	24/12/72			
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	12/10/05
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 STATES	**53**	**45**	**38**	**22**	**17**