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## Editorial

On 21 October 1986, the African Charter on Human and Peoples' Rights (African Charter) entered into force. This day has subsequently officially been remembered by the OAU and the AU as 'African Human Rights Day'. This issue of the *Journal*, appearing as the 20th anniversary of the Charter is celebrated, is an extended commemoration of the life of the African Charter. It has been 25 years since the Charter's adoption (on 21 June 1981), and 19 years since the inauguration of the African Commission on Human and Peoples' Rights (African Commission) (on 2 November 1987).

Although the African human rights system has undergone normative expansion with the adoption and entry into force of the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on the Rights of Women in Africa, the African Charter remains the core instrument. This core was also elaborated upon in resolutions adopted by the African Commission. Amounting to 'General Comments', these resolutions deal with issues such as the right to a fair trial (the Dakar Declaration on the Right to a Fair Trial, 1999 and the Principles and Guidelines on the Right to a Fair Trial, 2003), freedom of expression (Principles on Freedom of Expression, 2002) and torture (the Robben Island Guidelines on Torture, 2002). All these instruments and resolutions are contained in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (Pretoria: PULP, 2006).

While some of the contributions to this issue provide a general overview of the African human rights system (Nyanduga and Boukongou), others discuss developments with regard to particular rights and also procedural aspects. Most of the individual communications decided by the African Commission so far deal with fair trial rights. Udombana canvasses these findings. Related to the right to a fair trial is the right not to be subjected to torture or other forms of cruel, inhuman or degrading treatment and punishment. Mujuzi provides an overview of relevant standards and case law.

Some of the major normative advances during the 20-year period under review occurred in respect of socio-economic rights and the rights of indigenous peoples. These aspects relate to two features that

have often been described as uniquely 'African' characteristics of the African Charter: the inclusion of socio-economic rights as binding guarantees alongside 'civil and political' rights in one treaty; and the provision in the Charter for 'peoples' rights'. In their contributions, Mbazira, and Bojosi and Wachira discuss the content given to these rights in more detail. In Dersso's article, the jurisprudence of the African Commission dealing with peoples' rights is explored more fully.

Despite the lack of a clear articulation of such a procedure under the Charter, the Commission developed a system for dealing with individual complaints (or 'communications'). One of its prominent features, which enhanced the submission of complaints, is the broad standing requirement. The rationale and some of the adverse consequences of the provisions on standing in the Charter are taken under review in Pedersen's contribution.

Over the last few years, international human rights law increasingly occupied itself with the effective implementation of normative standards. Although the findings of the African Commission are formally only recommendatory in nature, arguments have been advanced that they have a binding effect. These propositions are assessed in the contribution by Wachira and Ayinla. Musila examines the effectiveness of remedies provided under the African Charter.

The editors thank the following people who have acted as referees during the period since the publication of the previous issue of the *Journal*: Gina Bekker, Danny Bradlow, Danie Brand, Lilian Chenwi, John Dugard, Jean Desiré Ingange wa Ingange, Waruguru Kaguongo, Magnus Killander, Abdul Koroma, Lirette Louw, Mwiza Nkatha, Marius Pieterse, Dinah Shelton, Karen Stefiszyn and Tharien van der Walt.





# 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.<sup>1</sup> 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.<sup>2</sup> It is becoming increasingly common for peace agreements to include processes that help societies account for past abuse.<sup>3</sup> 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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<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> 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?<sup>4</sup>

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.<sup>5</sup> For rural survivors of abuse, judicial trials of military leaders in

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<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

### 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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<sup>6</sup> See generally P Hayner *Unspeakable truths. Facing the challenges of truth commissions* (2002).

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

<sup>8</sup> 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).

<sup>9</sup> 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](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.<sup>10</sup> This

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<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

### 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

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<sup>11</sup> As above.

<sup>12</sup> Adebajo (n 10 above) 98.

<sup>13</sup> Personal interview with UN official (1) NY January 2006.

<sup>14</sup> As above.

signing of the present Agreement'.<sup>15</sup> Indeed, the pardon was enormously controversial, resulting in outrage on the part of Sierra Leonean citizens and human rights activists.<sup>16</sup> 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.<sup>17</sup> 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*.<sup>18</sup> 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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<sup>15</sup> 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.

<sup>16</sup> 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).

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

<sup>18</sup> Arusha Peace and Reconciliation Agreement 28 August 2000, Burundi Protocol III art 26(I). 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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'.<sup>22</sup> 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.<sup>23</sup>

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'.<sup>24</sup> 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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<sup>19</sup> F Reyntjens 'Burundi: A peaceful transition after a decade of war?' (2006) 105 *African Affairs* 117.

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

<sup>21</sup> Reyntjens (n 19 above).

<sup>22</sup> n 18 above, Protocol I, ch 2, art 6 para 11.

<sup>23</sup> Reyntjens (n 19 above).

<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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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<sup>25</sup> 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 VIDI 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.

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

### 3.3 Truth-telling

Truth-telling<sup>30</sup> 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.<sup>31</sup> 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.

<sup>27</sup> Agence France-Presse *DR Congo Pres declares amnesty for acts of war, political crimes* 17 April 2003 <http://www.reliefweb.int/w/Rwb.nsf/0/6b2e254cbd80-faf5c1256d0b0055ce64?OpenDocument> (accessed 28 February 2006).

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

<sup>29</sup> 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).

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

<sup>31</sup> 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'.<sup>32</sup> Its most restrictive provision requires that the Commission be established within 90 days of signing the agreement in July 1999.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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

<sup>32</sup> Lomé Peace Agreement (n 15 above) art XXVI sec 3.

<sup>33</sup> 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.

<sup>34</sup> Arusha Peace and Reconciliation Agreement (n 18 above) Protocol I, ch 2, art 8.

<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> It has the power to award a limited amnesty<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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<sup>36</sup> 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 Réconciliation*. 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.

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

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

<sup>39</sup> n 37 above, para 5.

<sup>40</sup> 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.<sup>41</sup>

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

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<sup>41</sup> '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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup>

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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<sup>42</sup> 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).

<sup>43</sup> 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.*

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

<sup>45</sup> 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'.<sup>46</sup> The Arusha Accord also requires that the first transitional President and Vice-President be of different ethnicities and represent different political parties.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

### 3.5 Reparations

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

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

<sup>47</sup> 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).

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

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

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

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

'medical and psychological care, as well as legal and social services';<sup>52</sup> *compensate* victims for physical or mental harm, lost opportunities, and material damages;<sup>53</sup> and provide *restitution* to victims through restoring their legal rights, employment and property, for example.<sup>54</sup> 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.<sup>55</sup> 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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<sup>52</sup> 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).

<sup>53</sup> n 52 above, para 22.

<sup>54</sup> n 52 above, para 21.

<sup>55</sup> 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.<sup>56</sup> Compensation is also addressed, though only as it applies to property that was plundered and cannot be restored to its original owner (ie restitution).<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup> 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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<sup>56</sup> Arusha Peace and Reconciliation Agreement (n 18 above) Protocol 1 ch 2 art 7 & Protocol IV ch 1 art 9.

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

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

<sup>59</sup> 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.

<sup>60</sup> 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.<sup>61</sup> 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

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<sup>61</sup> 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.<sup>62</sup> 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

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<sup>62</sup> 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.<sup>63</sup> 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<sup>64</sup> — 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’.<sup>65</sup> 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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<sup>63</sup> The *Commission Vérité et Réconciliation* (Truth and Reconciliation Commission) includes: (1) Président (Forces Vives) Jean Luc Kuye Ndongu; (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](http://www.monuc.org/downloads/Transitional_Government_DRC_July_2004.pdf) (accessed 28 February 2006).

<sup>64</sup> 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).

<sup>65</sup> 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.<sup>66</sup> 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).<sup>67</sup> 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.<sup>68</sup>

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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<sup>66</sup> 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?OpenDocument> (accessed 28 February 2006).

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

<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> Neither process can be imposed externally and still be effective.<sup>71</sup> 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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<sup>69</sup> 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).

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

<sup>71</sup> As above.

lay the foundation for a 'social contract', which is an essential component of state building.<sup>72</sup>

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<sup>73</sup>

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.<sup>74</sup> 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',<sup>75</sup>

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<sup>72</sup> 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).

<sup>73</sup> 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.

<sup>74</sup> Personal interview, UN Official (2) NY January 2006.

<sup>75</sup> 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,<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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

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<sup>76</sup> 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.scs-sl.org/summary-SCSL-04-15-PT-060.html> (accessed 28 February 2006).

<sup>77</sup> 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.

<sup>78</sup> 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 coordination among external parties in defining the problem, establishing legitimacy for the strategy and applying the strategy'. See S] Stedman 'Spoiler problems in peace processes' (1997) 22 *International Security* 52.

<sup>79</sup> 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.<sup>80</sup> 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.

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<sup>80</sup> 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.

# 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.<sup>1</sup>

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

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<sup>1</sup> 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<sup>2</sup> until 1993, when the UN Security Council established the UN International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>3</sup> 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.<sup>4</sup> 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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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> These goals also encompass the detection of crime, the enforcement of court orders, such as collecting fines and supervising community and custodial punishment.<sup>6</sup> 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.<sup>7</sup> 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),<sup>8</sup> the

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<sup>5</sup> See generally 'The criminal justice system (CJS) of England and Wales — Dispensing justice fairly and efficiently' [http://www.cjsonline.gov.uk/the\\_cjs/aims\\_and\\_objectives/index.html](http://www.cjsonline.gov.uk/the_cjs/aims_and_objectives/index.html) (accessed 28 February 2006).

<sup>6</sup> As above.

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

<sup>8</sup> 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)<sup>9</sup> 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.<sup>10</sup>

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'.<sup>11</sup> The ICTR 'will have little, if any, effect on human rights violations of such enormous barbarity'.<sup>12</sup> 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 . . .'.<sup>13</sup>

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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<sup>9</sup> 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.

<sup>10</sup> See below.

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

<sup>12</sup> As above.

<sup>13</sup> 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.<sup>14</sup> 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'.<sup>15</sup> 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*.<sup>16</sup> In that case, the judges ordered the release of a defendant because of 'egregious'<sup>17</sup> delays in indicting and bringing him to justice following his arrest and detention, emphasising that:<sup>18</sup>

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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<sup>14</sup> 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.

<sup>15</sup> n 14 above, 546.

<sup>16</sup> *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.

<sup>17</sup> n 16 above, para 109.

<sup>18</sup> 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 cooperation 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.<sup>19</sup> 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.<sup>20</sup> The ICC, an organ of global jurisdictional reach,<sup>21</sup> 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.<sup>22</sup>

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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<sup>19</sup> 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).

<sup>20</sup> 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.

<sup>21</sup> Cassese (n 4 above) 341.

<sup>22</sup> 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,<sup>23</sup> 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.<sup>24</sup> 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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<sup>23</sup> 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).

<sup>24</sup> 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.<sup>25</sup> 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.

<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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'.<sup>29</sup>

In order to ensure the above, the ICTR prosecutor may send observers to monitor proceedings in the courts of the state concerned.<sup>30</sup>

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<sup>26</sup> Art 58 ICTR Statute.

<sup>27</sup> See eg Rule 66(C) ICTR Rules of Procedure and Evidence.

<sup>28</sup> 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.

<sup>29</sup> 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.

<sup>30</sup> 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.<sup>31</sup> The state shall comply with such revocation in line with article 28 of the Statute which obligates states to co-operate with the ICTR.<sup>32</sup>

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*.<sup>33</sup> 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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<sup>31</sup> Rule 11 *bis* (F).

<sup>32</sup> Rule 11 *bis* (G).

<sup>33</sup> 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.'<sup>34</sup>

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

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*<sup>36</sup> (for the ICTR), and *Prosecutor v Tadic*<sup>37</sup> (for the ICTY).

<sup>34</sup> 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.ictcr.org/about.htm> (accessed 28 February 2006).

<sup>35</sup> UN Doc A/RES/58/234, Plen 39(b), 23 December 2003.

<sup>36</sup> *Prosecutor v Kanyabashi* ICTR-96-15, decision on the Defence Motion on Jurisdiction, 18 June 1997.

<sup>37</sup> *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<sup>38</sup> affords the UN Security Council a margin of discretion 'in deciding when and where there exists a threat to international peace'.<sup>39</sup> 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<sup>40</sup>

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:<sup>41</sup>

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.<sup>42</sup>

Concerning Kanyabashi's contention that the establishment of a

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<sup>38</sup> 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'.

<sup>39</sup> n 36 above, para 20.

<sup>40</sup> n 36 above, para 21.

<sup>41</sup> As above.

<sup>42</sup> 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'.<sup>43</sup> 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,<sup>44</sup> but that the Council<sup>45</sup>

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).<sup>46</sup> The measures set out in article 41<sup>47</sup>

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,<sup>48</sup>

<sup>43</sup> *Kanyabashi* (n 36 above) para 27.

<sup>44</sup> *Tadic* (n 37 above) para 29.

<sup>45</sup> n 37 above, para 32.

<sup>46</sup> n 37 above, paras 34-36.

<sup>47</sup> n 37 above, para 35 (my emphasis).

<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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'.<sup>51</sup> 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.<sup>52</sup> 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,<sup>53</sup>

[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,<sup>54</sup> and must ensure the guarantee of a fair trial highlighted above. As shown below, the ICTR and ICTY are established as independent

<sup>49</sup> 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.

<sup>50</sup> n 37 above, para 43.

<sup>51</sup> n 37 above, para 44.

<sup>52</sup> As above.

<sup>53</sup> n 37 above, para 45.

<sup>54</sup> *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* appeals 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.<sup>55</sup>

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.<sup>56</sup> This approach is pertinent in guiding

<sup>55</sup> n 37 above, para 43.

<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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*<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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

<sup>57</sup> 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](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).

<sup>58</sup> *Tadic Appeals Decision* (n 37 above) para 45.

<sup>59</sup> 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.

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

<sup>61</sup> 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.<sup>62</sup> 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 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'.<sup>63</sup> Challenges against the independence of the IMT included, first, that the 'victorious' states established the IMT and appointed their nationals as judges.<sup>64</sup> Secondly, 'these judges oversaw the collection of evidence, [and] participated in selecting the defendants and in the drafting of the indictments'.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

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<sup>62</sup> 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.

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

<sup>64</sup> As above.

<sup>65</sup> As above.

<sup>66</sup> As above.

<sup>67</sup> As above.

<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup>

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

<sup>70</sup> 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.

<sup>71</sup> Art 89(B) Statute of the ICTR.

the judges in criminal law, international law, including international humanitarian law, and human rights law.<sup>72</sup> 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.<sup>73</sup> 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*,<sup>74</sup> 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.<sup>75</sup> He further claimed that the Tribunal was under pressure from Rwanda to 'systematically [deliver] verdicts against one ethnic group'.<sup>76</sup> Furthermore, the appellant contended that<sup>77</sup>

<sup>72</sup> Art 12 Statute of the ICTR.

<sup>73</sup> Eg, in appointing the 11 permanent members of the Tribunal, pursuant to an invitation for nomination of judges by the UN Secretary-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.

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

<sup>75</sup> n 74 above, paras 52-53.

<sup>76</sup> n 74 above, para 53.

<sup>77</sup> 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),<sup>78</sup> or irrelevant to the independence and impartiality of the Tribunal (for example the alleged involvement of the UN in the Rwanda events),<sup>79</sup> 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.<sup>80</sup> As an independent entity,<sup>81</sup>

[the Tribunal] is not in place to interpret the actions of the United Nations in general, and . . . as an *ad hoc* United 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'.<sup>82</sup>

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

<sup>78</sup> n 74 above, para 61.

<sup>79</sup> n 74 above, para 59.

<sup>80</sup> n 74 above, para 55.

<sup>81</sup> n 74 above, para 56.

<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> Moreover, a judge may put questions to a witness at any stage of his or her testimony.<sup>85</sup>

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*,<sup>86</sup> 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<sup>87</sup>

[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.

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

<sup>84</sup> Rule 90(F) ICTR Rules of Procedure and Evidence.

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

<sup>86</sup> n 83 above.

<sup>87</sup> 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<sup>88</sup>

... 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<sup>89</sup>

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.

<sup>88</sup> n 87 above, para 40.

<sup>89</sup> 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.<sup>90</sup> In international law, war crimes are laid down in the four Geneva Conventions of 1949, which establish rules applicable to international conflicts.<sup>91</sup> 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.<sup>92</sup> Protocol II to the Conventions also relates to non-international conflicts, and will come into play for states parties to it.<sup>93</sup> 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.<sup>94</sup>

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

<sup>90</sup> Art 4 Statute of the ICTR.

<sup>91</sup> See generally T Buergerthal *International human rights law in a nutshell* (1995) 248-255.

<sup>92</sup> n 91 above, 256-257.

<sup>93</sup> n 91 above, 262-265.

<sup>94</sup> 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.<sup>95</sup> The Tribunal has clarified that, contrary to popular belief, 'the crime of genocide does not imply the *actual extermination* of group (*sic*).'<sup>96</sup> 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.<sup>97</sup>

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*'.<sup>98</sup> 'Specific intent', which has also been defined as the 'surplus of intent',<sup>99</sup> or 'an aggravating criminal intention',<sup>100</sup> 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,<sup>101</sup>

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.

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

<sup>96</sup> n 95 above, para 497 (my emphasis).

<sup>97</sup> 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.

<sup>98</sup> S Emanuel (ed) *Criminal law* (1992-93) 13.

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

<sup>100</sup> Cassese (n 4 above) 103.

<sup>101</sup> *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<sup>102</sup>

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:<sup>103</sup>

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:<sup>104</sup>

[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.

<sup>102</sup> *Akayesu* (n 95 above) para 731. See also *Prosecutor v Kayishema & Rutaganda* (TC), ICTR-95-1 para 95.

<sup>103</sup> n 102 above, para 507.

<sup>104</sup> 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.<sup>105</sup> 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'.<sup>106</sup> It thus concludes that:<sup>107</sup>

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:<sup>108</sup>

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'.<sup>109</sup> The approaches of the ICTR and ICTY are correct and may enrich national systems, many of which are yet to embrace such approaches.<sup>110</sup> A

<sup>105</sup> n 102 above, para 596.

<sup>106</sup> n 102 above, para 597.

<sup>107</sup> n 102 above, para 598.

<sup>108</sup> n 102 above, para 688 (my emphasis).

<sup>109</sup> *Prosecutor v Kunarac et al* Trial Chamber Judgment para 460. This position was upheld by the Appeals Chamber. See *Prosecutor v Kunarac et al* Appeals Chamber Judgment paras 127-129.

<sup>110</sup> It appears that only a few legal systems have yet embraced such an approach. See generally *Prosecutor 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.<sup>111</sup> Prior sexual conduct of the victim shall not be admitted in evidence or as defence.<sup>112</sup>

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<sup>113</sup>

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'.<sup>114</sup> Does this mean that the ICTR violates the principle of legality?

<sup>111</sup> Rule 96(iii) Rules of Procedure and Evidence of the ICTR.

<sup>112</sup> n 111 above, rule 96(iv).

<sup>113</sup> 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.

<sup>114</sup> 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.<sup>115</sup> 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,<sup>116</sup> 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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<sup>115</sup> 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.

<sup>116</sup> 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 spirit and general principles of law'.<sup>117</sup> 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',<sup>118</sup> 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:<sup>119</sup>

[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 is not inadmissible *per se*, even when it is not corroborated by direct evidence'.<sup>120</sup> In practice, depending on all the

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

<sup>118</sup> *Prosecutor v Musema* (TC) ICTR-96-13 para 34.

<sup>119</sup> 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.

<sup>120</sup> *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.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> 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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<sup>121</sup> n 120 above, para 97.

<sup>122</sup> 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.

<sup>123</sup> 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.

<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup>

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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<sup>125</sup> n 124 above, rule 66(B) & 67(C).

<sup>126</sup> As above.

<sup>127</sup> n 124 above, rule 67(A)(i).

<sup>128</sup> n 124 above, rule 67(A)(ii).

<sup>129</sup> *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*.<sup>130</sup>

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

[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*,<sup>133</sup> 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,

<sup>130</sup> My emphasis.

<sup>131</sup> *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.

<sup>132</sup> 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.

<sup>133</sup> *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.<sup>134</sup>

#### 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.<sup>135</sup> More needs to be done, however, to publicise the Tribunal's work.

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<sup>134</sup> *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.

<sup>135</sup> <http://www.ictr.org>.

Unfortunately, the international media has not given the ICTR the same coverage as that afforded the ICTY.<sup>136</sup> This needs to change.

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<sup>136</sup> 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).

# 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<sup>1</sup> — seized power in September 1974. In the same year, the Derg suspended the Constitution and established a military government.<sup>2</sup> The Derg soon established itself as a 'permanent and irrevocable self-perpetuating group', rejecting all calls for civilian rule.<sup>3</sup> In November 1974, the Derg executed 60 officials of the former imperial government without a court hearing.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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<sup>1</sup> '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.

<sup>2</sup> 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.

<sup>3</sup> F Halliday & M Molyneux *The Ethiopian revolution* (1981) 87.

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

<sup>5</sup> Haile-Mariam (n 2 above) 677.

<sup>6</sup> Engelschin (n 4 above) 43.

<sup>7</sup> As above.

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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’.<sup>11</sup> The Red Terror in Ethiopia was the largest and best-known campaign of official violations of human rights perpetrated by the Derg.<sup>12</sup> The Red Terror Massacre was officially launched in November 1977 and lasted until 1980.<sup>13</sup>

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:<sup>14</sup>

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.<sup>15</sup> 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.’<sup>16</sup> 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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<sup>9</sup> As above.

<sup>10</sup> Engelschin (n 4 above) 43.

<sup>11</sup> Haile-Mariam (n 2 above) 677.

<sup>12</sup> Engelschin (n 4 above) 43.

<sup>13</sup> As above.

<sup>14</sup> Haile-Mariam (n 2 above) 678.

<sup>15</sup> As above.

<sup>16</sup> Haile (n 8 above) 13.

arbitrary arrest and detention, disappearance, unlawful dispossession of property and forced settlement.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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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<sup>17</sup> 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.

<sup>18</sup> 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.

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

<sup>20</sup> For some details, see part 4 below.

<sup>21</sup> 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'.<sup>22</sup> 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:<sup>23</sup>

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.

<sup>22</sup> 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.

<sup>23</sup> 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'.<sup>24</sup>

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:<sup>25</sup>

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'.<sup>26</sup> 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.<sup>27</sup> 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<sup>28</sup> and in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>29</sup> 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

<sup>24</sup> 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.

<sup>25</sup> 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).

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

<sup>27</sup> M Minow *Between vengeance and forgiveness* (1998) 105.

<sup>28</sup> General Assembly Resolution 260 A (III) art VI.

<sup>29</sup> 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'.<sup>30</sup> The UN Human Rights Committee also expressed its opinion that states are obliged to investigate and prosecute cases involving arbitrary executions and disappearances.<sup>31</sup> In the case *Bautista de Arellana v Colombia*, the UN Human Rights Committee found further that<sup>32</sup>

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.<sup>33</sup> 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<sup>34</sup>

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.<sup>35</sup> The document also

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<sup>30</sup> D Shelton *Remedies in international human rights law* (1999) 324.

<sup>31</sup> As above.

<sup>32</sup> As above.

<sup>33</sup> Orentlicher (n 24 above) 396.

<sup>34</sup> Case 10.843, Report 36/96, cited in Shelton (n 30 above) 324.

<sup>35</sup> 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.<sup>36</sup>

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'.<sup>37</sup> 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.<sup>38</sup>

### 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',<sup>39</sup> 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'.<sup>40</sup> 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.<sup>41</sup> Reconciliation is a process that is based on forgiveness on the part of victims of human

<sup>36</sup> n 35 above, art 6.

<sup>37</sup> Ardiles (n 26 above) 105.

<sup>38</sup> Shelton (n 30 above) 326.

<sup>39</sup> PR Baeza 'Breaking the human link: The medico-psychiatric view of impunity' in Harper (n 26 above) 73.

<sup>40</sup> C Harper 'From impunity to reconciliation' in Harper (n 26 above) ix.

<sup>41</sup> 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.<sup>42</sup> 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'.<sup>43</sup> 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.<sup>44</sup> 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'.<sup>45</sup> 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.'<sup>46</sup>

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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<sup>42</sup> n 41 above, 23.

<sup>43</sup> As above.

<sup>44</sup> Orentlicher (n 24 above) 376.

<sup>45</sup> T Rosenberg 'Reconciliation and amnesty' in A Boraine *et al* (eds) *Dealing with the past: Truth and reconciliation in South Africa* (1997) 66.

<sup>46</sup> n 46 above, 68.



and efficient prosecutors, this is not always the case in many prosecutions of past human rights violations.<sup>47</sup>

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.<sup>48</sup>

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<sup>49</sup>

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.<sup>50</sup>

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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<sup>47</sup> 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.

<sup>48</sup> See the rationale behind the establishment of the International Courts for the former Yugoslavia and Rwanda.

<sup>49</sup> 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.

<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

## 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.<sup>53</sup> 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.<sup>54</sup>

The principle of equal protection of the law requires the uniform application of existing laws of the country.<sup>55</sup> The obligation assumed

<sup>51</sup> Roht-Arriaza (n 49 above) 288.

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

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

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

<sup>55</sup> 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.<sup>56</sup> What is more, many of the crimes alleged to have been committed during the Red Terror are described in international customary law.<sup>57</sup> 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:<sup>58</sup>

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

<sup>56</sup> Genocide Convention (n 28 above) art IV.

<sup>57</sup> n 53 above.

<sup>58</sup> 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.<sup>59</sup> In February 1993, the SPO received about 1 900 detainees from the police commission, a month after it officially began to perform its functions.<sup>60</sup> 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:<sup>61</sup>

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'.<sup>62</sup> 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*.<sup>63</sup> The defendants are classified into three main categories by the SPO:<sup>64</sup>

*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.<sup>65</sup> The main charge against the top officials of the Derg regime is the crime of genocide. The SPO charged the former officials with committing

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

<sup>60</sup> Trial Observation and Information Project (n 18 above).

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

<sup>62</sup> 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.

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

<sup>64</sup> Trial Observation and Information Project (n 18 above) 5 (my emphasis).

<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

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<sup>68</sup>

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.<sup>69</sup>

#### 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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<sup>66</sup> n 53 above, 3.

<sup>67</sup> See part 1 above for some of the atrocities.

<sup>68</sup> Preamble Proclamation 40/92 (n 19 above).

<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup> The judges also conduct their own research without any assistants.<sup>73</sup> 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.<sup>74</sup> 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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<sup>70</sup> Mayfield (n 61 above) 590.

<sup>71</sup> As above.

<sup>72</sup> M Redae 'The Ethiopian genocide trial' (2000) 1 *Ethiopian Law Review* 1 7.

<sup>73</sup> As above.

<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> 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.<sup>79</sup> Thus, the lack of institutionalised public defence experience in the country and the lack of skilled

<sup>75</sup> n 18 above, 11.

<sup>76</sup> Art 20 Proclamation 1/1995 (n 54 above).

<sup>77</sup> Trial Observation and Information Project (n 18 above ) 10.

<sup>78</sup> As above.

<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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 Haile-mariam. 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.<sup>82</sup> The governments of the USA and Zimbabwe also refused to extradite the most wanted former Derg officials to face trials in Ethiopia.<sup>83</sup>

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. Kelbesa is now facing deportation proceedings in the United States.<sup>84</sup> The SPO is reported to be in favour of

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<sup>80</sup> Arts 281, 282 & 522 Ethiopian Penal Code 1957.

<sup>81</sup> 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 Woldeleslasie, 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).

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

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

<sup>84</sup> 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.<sup>85</sup>

## 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:<sup>86</sup>

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:<sup>87</sup>

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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<sup>85</sup> 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.

<sup>86</sup> n 21 above.

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

Apology can be made for different tactical reasons.<sup>88</sup> 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.<sup>89</sup> Compensation, restitution and rehabilitation

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<sup>88</sup> 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.

<sup>89</sup> 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 Malanczuk *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:<sup>90</sup>

- 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.<sup>91</sup>

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.<sup>92</sup>

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

<sup>90</sup> Basic Principles (n 35 above) art 22.

<sup>91</sup> Proclamation No 1/1995 (n 54 above) art 28.

<sup>92</sup> PB Hayner *Unspeakeable 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 manpower, 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.

# 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'.<sup>1</sup>

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<sup>1</sup> *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.<sup>2</sup>

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.<sup>3</sup> 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'.<sup>4</sup>

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'.<sup>5</sup> 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.<sup>6</sup> 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'.<sup>7</sup>

<sup>2</sup> *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)).

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

<sup>4</sup> n 1 above, para 1.

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

<sup>6</sup> See S Gumede '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.

<sup>7</sup> 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.<sup>8</sup> 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,<sup>9</sup> the seroprevalence rose from 0,5% to 7,2% in the general population.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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,<sup>13</sup> 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%).<sup>14</sup> Other communities with a high infection rate include those living along major highways and populations along the Chad-Cameroon pipeline.<sup>15</sup> On the

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

<sup>9</sup> 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.

<sup>10</sup> 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.

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

<sup>12</sup> 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).

<sup>13</sup> PNLCS (n 8 above) 5.

<sup>14</sup> As above.

<sup>15</sup> CNLS (n 12 above) 8.

whole, women are more vulnerable, with statistics showing three infected women for every two infected men.<sup>16</sup> 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,<sup>17</sup> 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 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

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<sup>16</sup> As above.

<sup>17</sup> 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 CESC, 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'.<sup>18</sup> 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:<sup>19</sup>

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

<sup>18</sup> Art 45 1996 Constitution.

<sup>19</sup> 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.<sup>20</sup> 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 CESC, 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 CESC).

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)<sup>21</sup> during a joint consultative meeting of these organs. The Guidelines focus on three crucial areas, including the protection of public health.<sup>22</sup> 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.

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

<sup>21</sup> 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.

<sup>22</sup> 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*,<sup>23</sup> 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.<sup>24</sup>

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'.<sup>25</sup>

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<sup>26</sup> 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

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

<sup>24</sup> See para 84 of the decision.

<sup>25</sup> Att6/Decl.1 (XXX) para II(1).

<sup>26</sup> [http://www.un.org/ga/aids/pdf/abuja\\_declaration.pdf](http://www.un.org/ga/aids/pdf/abuja_declaration.pdf) (accessed 17 February 2006).

Declaration.<sup>27</sup> 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.<sup>28</sup>

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'.<sup>29</sup> 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.<sup>30</sup>

#### 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.<sup>31</sup> 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.

<sup>27</sup> 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).

<sup>28</sup> Abuja Declaration (n 27 above) para 26.

<sup>29</sup> n 27 above, para 22.

<sup>30</sup> n 27 above, para 23.

<sup>31</sup> 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,<sup>32</sup> 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

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<sup>32</sup> 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*.<sup>33</sup>

In this case, the respondent, Miss Kinding, a nurse and ex-mistress 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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<sup>33</sup> *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 empoisonnement' (2005) 60 *Juridique 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<sup>34</sup> 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*.<sup>35</sup> 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

<sup>34</sup> *Cambridge advanced learners dictionary* (2003).

<sup>35</sup> 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.<sup>36</sup> 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

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<sup>36</sup> 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 conference 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,<sup>37</sup> 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.<sup>38</sup>

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

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<sup>37</sup> Such as in the areas of criminal law and procedure, labour law, family law, land law, company law, commercial law, public law, etc.

<sup>38</sup> 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.<sup>39</sup> 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*.<sup>40</sup> 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 tortious 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

<sup>39</sup> Case ch civ 13 January 1923, DP 1923, 1, 52.

<sup>40</sup> (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),<sup>41</sup> 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,<sup>42</sup> 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.<sup>43</sup> The 2002 Decree

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<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>

### **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

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<sup>44</sup> 2002 Decree (n 43 above), art 34(2).

<sup>45</sup> n 43 above, art 37(1).

<sup>46</sup> 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.<sup>47</sup>

#### 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.<sup>48</sup>

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.<sup>49</sup> The following are the strategies elaborated to attain those objectives. These strategies may be examined under two heads, namely control strategies and control components.

<sup>47</sup> CNLS (n 11 above) 11.

<sup>48</sup> See PNLCS (n 8 above) 11.

<sup>49</sup> 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:<sup>50</sup>

- (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

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<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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

<sup>51</sup> 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.

<sup>52</sup> CNLS (n 11 above) 12.

<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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'.<sup>56</sup> Unlike other dreadful diseases,

<sup>54</sup> 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.

<sup>55</sup> See CNLS (n 11 above) 13.

<sup>56</sup> 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.<sup>57</sup>

<sup>57</sup> 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.<sup>58</sup>

#### *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

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<sup>58</sup> As above.

reduction of its impact by developing prevention action plans<sup>59</sup> 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.<sup>60</sup> 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<sup>61</sup> 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.<sup>62</sup> 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

<sup>59</sup> 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.

<sup>60</sup> As above.

<sup>61</sup> 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.

<sup>62</sup> 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.<sup>63</sup>

#### *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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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

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<sup>63</sup> As above, 15.

<sup>64</sup> Para 23.

<sup>65</sup> 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.

<sup>66</sup> 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).<sup>67</sup>

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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<sup>67</sup> 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 CESC. 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 CESC, 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, CESC did not provide for the creation of such a committee. CESC 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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,<sup>71</sup> 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.<sup>72</sup>

At the regional level, the supervisory mechanism under the African

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<sup>68</sup> Art 16(1).

<sup>69</sup> Art 16(2)(a).

<sup>70</sup> Res 1985/17 of 28 May 1985. The peculiarity of the CESC 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.

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

<sup>72</sup> 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 CESC. 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 policies 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<sup>73</sup> and their right to health.<sup>74</sup> 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.<sup>75</sup>

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

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

<sup>74</sup> 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.

<sup>75</sup> 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.<sup>76</sup>

A few South African cases may be helpful in identifying some specific rights that HIV/AIDS PLWHA may benefit from.<sup>77</sup> The first is the case of *Joy Mining Machinery Division of Harnischfeger SA Pty Ltd v National Union of Metal Workers of South Africa*.<sup>78</sup> 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*,<sup>79</sup> 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*,<sup>80</sup> 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.

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

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

<sup>78</sup> J158-2002; (2002) 23 ILJ 391 (LC).

<sup>79</sup> J1916/99.

<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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'.<sup>83</sup>

<sup>81</sup> National HIV/AIDS Strategic Framework 2000-2004 39.

<sup>82</sup> <http://allafrica.com/stories/200411150553.html> (accessed 31 March 2006).

<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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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<sup>84</sup> PNLs (n 8 above) 18.

<sup>85</sup> [http://www.healthlink.org.uk/world/sipaa\\_01.html](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 eminent 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.<sup>86</sup> 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 breast-feeding. The Centre's immediate goal is to develop paediatric vaccine trial protocols by 2006 and 2007.<sup>87</sup>

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'.<sup>88</sup> 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

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

<sup>87</sup> *Cameroon Tribune* (27 February 2006) 15.

<sup>88</sup> 'Tenofovir: l'Ordre des médecins se prononce' *Cameroon Tribune* 24 February 2005 11.

express statement in the Protocol Agreement that the drug prevents HIV infection),<sup>89</sup> 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.<sup>90</sup> NEC was therefore of the opinion that the problems generated by the project resided in its (administrative) implementation rather than in its entire propriety.<sup>91</sup> 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.<sup>92</sup> 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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<sup>89</sup> The NEC contended amongst other things that there is presently no drug that prevents infection.

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

<sup>91</sup> As above.

<sup>92</sup> '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<sup>93</sup>

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,<sup>94</sup> 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

<sup>93</sup> Abuja Declaration (n 27 above) para 32.

<sup>94</sup> Circular Note D26/NC/MSP/SG/DMPR/DAMPR/SDMR/SSCMT.

complexity of health systems.<sup>95</sup> 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.<sup>96</sup> 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'.<sup>97</sup> 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 multi-sector 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,<sup>98</sup> 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.<sup>99</sup> 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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<sup>95</sup> Transparency International 'Global corruption report 2006: Special focus — Corruption and health' (2006) xvii.

<sup>96</sup> As above, xviii.

<sup>97</sup> As above, xvi.

<sup>98</sup> As above, 141.

<sup>99</sup> As above, 302.

and former directors of state-owned corporations were arrested on charges of fraud and misappropriation.<sup>100</sup> 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,<sup>101</sup> 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 the reduction 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.

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

<sup>101</sup> 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.<sup>102</sup>

### 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.<sup>103</sup>

## 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,

<sup>102</sup> *Cameroon Tribune* (2 March 2006) 8.

<sup>103</sup> 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.<sup>104</sup> 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

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<sup>104</sup> 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,<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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 or 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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<sup>105</sup> 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.

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

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

# 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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,<sup>5</sup> relate to human and labour rights abuses, increased poverty, environmental degradation and deterioration in the health conditions of individuals in these countries.<sup>6</sup>

<sup>1</sup> 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.

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

<sup>3</sup> UNCTAD *Trade and development report* (2004) 3-41.

<sup>4</sup> *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.

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup>

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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<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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:<sup>10</sup>

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.<sup>11</sup> This

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

<sup>9</sup> 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.

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

<sup>11</sup> 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/xfbcenter/research\\_publications.htm](http://www.hsph.harvard.edu/xfbcenter/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.<sup>12</sup> 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.<sup>13</sup> 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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<sup>12</sup> Third report of the Independent Expert *The right to development* E/CN.4/2001/WG.18/2 paras 14-15.

<sup>13</sup> 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.'<sup>14</sup> 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'.<sup>15</sup> 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.<sup>16</sup> Viewed in this light, the concept brings together three regimes that have hitherto evolved separately and in isolation from each other.<sup>17</sup> 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.<sup>18</sup> 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:<sup>19</sup>

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

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

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

<sup>17</sup> 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.

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

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

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

<sup>20</sup> Rio Declaration (n 14 above).

<sup>21</sup> UNDP *Human Development Report 2003 Millennium Development Goals: A compact among nations to end human poverty* 123.

<sup>22</sup> 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.<sup>23</sup> 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.'<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> The approach is consistent with current opinion on the best approach to development.<sup>27</sup> 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.<sup>28</sup> 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.

<sup>23</sup> World Bank Group *Development and human rights: The role of the World Bank* (1998).

<sup>24</sup> 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.

<sup>25</sup> JC Dernbach 'Making sustainable development happen: From Johannesburg to Albany' (2002-2004) 8 *Albany Law Environmental Outlook* 177.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> 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.<sup>29</sup>

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

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<sup>29</sup> 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.<sup>30</sup>

#### 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:<sup>31</sup>

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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<sup>30</sup> 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.

<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

[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.<sup>35</sup> The approach calls not only for an economic efficiency assessment of

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<sup>32</sup> Sen (n 28 above) 87.

<sup>33</sup> J Sachs *The end of poverty* (2005).

<sup>34</sup> n 15 above, 7.

<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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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<sup>36</sup> See generally WN Hohfeld *Fundamental legal conception as applied in judicial reasoning* (1923).

<sup>37</sup> 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.<sup>38</sup>

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

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<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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.<sup>42</sup>

Very few countries have developed relying on the export of primary commodities.<sup>43</sup> 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.<sup>44</sup> Indeed, the 'curse' of developing countries, especially in Africa, appears to be the abundance of natural resources.<sup>45</sup> By

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<sup>39</sup> J.L. 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.

<sup>40</sup> OECD *Trade, employment and labour standards: A study of core workers' rights and international trade* (1996).

<sup>41</sup> *Our common interest* (n 4 above) 263-265; Akyuz (n 1 above).

<sup>42</sup> UN Secretary-General Report to the Security Council *The causes of conflict and the promotion of durable peace and sustainable development in Africa* (1998).

<sup>43</sup> See generally UNCTAD *Economic development in Africa trade performance and commodity dependence* (2003).

<sup>44</sup> C Thomas 'Poverty reduction, trade and human rights' (2002-2003) 18 *American University International Law Review* 404-408.

<sup>45</sup> *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<sup>46</sup>

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.<sup>47</sup>

International trade deals and investment flows are not motivated by

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<sup>46</sup> Sen (n 28 above) 11.

<sup>47</sup> 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:<sup>48</sup>

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.<sup>49</sup> 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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<sup>48</sup> Stiglitz (n 5 above) 60.

<sup>49</sup> *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.<sup>50</sup> Access to these schemes is conditioned on the pursuit of certain social policies by the beneficiary country. For example, the EU scheme<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> Under the text of the Enabling Clause, these preferences should be designed to 'respond positively to the development, financial and trade needs' of beneficiaries.<sup>54</sup> 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

<sup>50</sup> See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) 1979.

<sup>51</sup> 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.

<sup>52</sup> Trade Act of 1974, 19 USCA 246, Trade and Development Act 2000, 114 Stat 251.

<sup>53</sup> 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.

<sup>54</sup> 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.<sup>55</sup> 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'.<sup>56</sup> 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.<sup>57</sup> 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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<sup>55</sup> European Communities — Conditions for Granting Tariff Preferences to Developing Countries, WTO Appellate Body Report WT/DS246/AB/R 7 April 2004.

<sup>56</sup> n 55 above, paras 163-164.

<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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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<sup>58</sup> UNCTAD *Improving market access for least developed countries* (2001).

<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> 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<sup>63</sup> 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:<sup>64</sup>

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<sup>60</sup> *Our common interest* (n 4 above) 194 '200.

<sup>61</sup> 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.

<sup>62</sup> R Klein 'Cultural relativism, economic development and international human rights in the Asian context' (2001) 9 *Touro International Law Review* 50-57. .

<sup>63</sup> 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. .

<sup>64</sup> 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,<sup>65</sup> 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 itself, 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'.<sup>66</sup> 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.<sup>67</sup> 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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<sup>65</sup> Abadie (n 64 above) 759-774.

<sup>66</sup> World Trade Organization *The legal text. The results of the Uruguay round of multilateral trade negotiation* (1999) 4.

<sup>67</sup> 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.<sup>68</sup> 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'.<sup>69</sup> Issues relating to technology transfer, technical

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<sup>68</sup> 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.

<sup>69</sup> 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.<sup>70</sup>

#### 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.

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<sup>70</sup> JP Trachtman 'Legal aspects of a poverty agenda at the WTO: Trade law and "global apartheid"' (2003) 6 *Journal of International Economic Law* 3.

# 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 ...'<sup>1</sup> 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.<sup>2</sup> 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).<sup>3</sup> 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.<sup>4</sup> These concerns include the equivocal way in

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<sup>1</sup> Regional arrangements for the promotion and protection of human rights, UN General Assembly Resolution A/RES/47/125.

<sup>2</sup> 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).

<sup>3</sup> 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/instreet/z1afchar.htm> (accessed 1 March 2006).

<sup>4</sup> 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,<sup>5</sup> 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'.<sup>6</sup> 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.<sup>7</sup> In that regard, the African Charter contains certain positive attributes that should be acclaimed.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> This procedure, as will be seen further below, has been adopted and incorporated in the Protocol to the African Charter on Human and Peoples'

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> See S Davidson *Human rights* (1993) 152.

<sup>8</sup> Naldi (n 4 above) 8.

<sup>9</sup> See JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 26-27.

<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> It is against this background and the

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<sup>11</sup> See arts 5(1)(e) & 5(3) of the Protocol.

<sup>12</sup> 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 Umzurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 908.

<sup>13</sup> See JC Mubangizi & A O'Shea 'An African Court of Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 257.

<sup>14</sup> 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),<sup>15</sup> 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'.<sup>16</sup>

According to the Protocol, the Court will consist of 11 judges,<sup>17</sup> nominated by the states party to the Protocol.<sup>18</sup> 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'.<sup>19</sup> 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'.<sup>20</sup> 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.<sup>21</sup> 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'.<sup>22</sup> The

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<sup>15</sup> 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.

<sup>16</sup> See Preamble to the Protocol.

<sup>17</sup> Art 11(1).

<sup>18</sup> Art 12(1).

<sup>19</sup> Art 11(1).

<sup>20</sup> Art 3(1).

<sup>21</sup> Art 5(3).

<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

## 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.<sup>26</sup>

<sup>23</sup> 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.

<sup>24</sup> 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).

<sup>25</sup> As above.

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> They also encourage international co-operation, taking due account of the Charter of the UN and the Universal Declaration of Human Rights (Universal Declaration).<sup>29</sup>

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.<sup>30</sup> 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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<sup>27</sup> See eg Mubangizi (n 9 above) 31.

<sup>28</sup> Arts 3(f), (g) & (h) & art 4(m).

<sup>29</sup> Art 3(e).

<sup>30</sup> See 'NEPAD in brief' <http://www.nepad.org/2005/files/inbrief.php> (accessed 1 March 2006).



interdependent matters.<sup>31</sup> 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.<sup>32</sup>

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 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.<sup>33</sup>

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

<sup>31</sup> 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](http://www.cha.uga.edu/CHA-CITS/Nagan_paper.pdf) (accessed 1 March 2006).

<sup>32</sup> As above.

<sup>33</sup> 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).<sup>34</sup> 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.<sup>35</sup> 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'.<sup>36</sup> 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.<sup>37</sup> 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

<sup>34</sup> See 'Zambia "ready for NEPAD governance review"' <http://www.afrol.com/articles/14260> (accessed 1 March 2006).

<sup>35</sup> As above.

<sup>36</sup> See A Thomson *An introduction to African politics* (2000) 216.

<sup>37</sup> 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.<sup>38</sup> As a result, the last decade of the twentieth century brought dramatic political changes to Africa. According to one commentator:<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup>

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.<sup>42</sup> 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

<sup>38</sup> 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).

<sup>39</sup> Thomson (n 36 above) 215.

<sup>40</sup> See M Bratton & N van de Walle *Democratic experiments in Africa: Regime transitions in comparative perspective* (1997) 21-22.

<sup>41</sup> 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.

<sup>42</sup> 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.<sup>43</sup> 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'.<sup>44</sup> 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.<sup>45</sup>

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,<sup>46</sup> resolved, *inter alia*, that:

<sup>43</sup> McMahon (n 41 above) 5.

<sup>44</sup> See P Cumper *Constitutional and administrative law* (1996) 3.

<sup>45</sup> See I Currie & J de Waal *The new constitutional and administrative law* (2001) 318.

<sup>46</sup> 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).<sup>47</sup> 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)<sup>48</sup> 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

<sup>47</sup> GA Res 34/180 UN Doc A/34/46 <http://www1.umn.edu/humanrts/instree/e1cedaw.htm> (accessed 1 March 2006).

<sup>48</sup> OAU Doc CAB/LEG/24.9/49 (1990) <http://www1.umn.edu/humanrts/africa/af-child.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.<sup>49</sup> 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<sup>50</sup> 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.<sup>51</sup> The Kigali Declaration of 2003<sup>52</sup> 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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<sup>49</sup> Eg, protection of the right to life and rights during times of armed conflict.

<sup>50</sup> 1001 UNTS 45 <http://www1.umn.edu/humanrts/instree/z2arcon.htm> (accessed 1 March 2006).

<sup>51</sup> 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).

<sup>52</sup> MIN/CONF/HRA/Decl 1(I) [http://www.unhcr.ch/html/menu6/declaration\\_en.doc](http://www.unhcr.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'.<sup>53</sup> 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'.<sup>54</sup> 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:<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup>
- 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.<sup>58</sup>
- 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.

<sup>53</sup> 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).

<sup>54</sup> As above.

<sup>55</sup> See 'Amnesty International Report 2005' <http://web.amnesty.org/report2005/2af-index-eng> (accessed 1 March 2006).

<sup>56</sup> See 'Conflicts in Africa' <http://www.globalissues.org/Geopolitics/Africa.asp> (accessed 1 March 2006).

<sup>57</sup> 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).

<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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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<sup>59</sup> 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.

<sup>60</sup> 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<sup>61</sup>

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).<sup>62</sup> 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.<sup>63</sup> 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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<sup>61</sup> 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).

<sup>62</sup> See UNAIDS/WHO *AIDS epidemic update 2005* <http://www.unaids.org/epi/2005> (accessed 1 March 2006).

<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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'.<sup>66</sup> 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.<sup>67</sup>

<sup>64</sup> 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/instreet/hivreport-1996.html> (accessed 31 March 2006).

<sup>65</sup> As above.

<sup>66</sup> World Conference on Cultural Policies (1982).

<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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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<sup>68</sup> See Amnesty International USA 'Female genital mutilation: A fact sheet' [http://www.amnestyusa.org/women/violence/female\\_genital\\_mutilation.html](http://www.amnestyusa.org/women/violence/female_genital_mutilation.html) (accessed 1 March 2006).

<sup>69</sup> See B Illingworth 'The dangers of virginity tests' <http://www.plannedparenthood.org> (accessed 1 March 2006).

expectations'.<sup>70</sup> 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.<sup>71</sup> Although elections are held regularly, they are never free and fair and the ruling ZANU/PF party is invariably returned to power.<sup>72</sup> 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

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<sup>70</sup> McMahon (n 41 above) 7.

<sup>71</sup> See D Wallechinsky 'The world's ten worst dictators' [http://archive.parade.com/2005/0213/0213\\_dictator.html](http://archive.parade.com/2005/0213/0213_dictator.html) (accessed 1 March 2006).

<sup>72</sup> See 'Zimbabwe: Is a fair vote possible?' [http://news.bbc.co.uk/2/hi/talking\\_point/debates/african\\_debates/798820.stm](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.

# 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.<sup>1</sup> 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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<sup>1</sup> 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)<sup>2</sup> and the Special Court for Sierra Leone (SCSL)<sup>3</sup> — 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,<sup>4</sup> the Democratic Republic of Congo,<sup>5</sup> Sudan<sup>6</sup> and Uganda.<sup>7</sup> 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)<sup>8</sup> 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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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> 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.

<sup>7</sup> See R Logh & E Denholm 'Violence against women in Northern Uganda' (2005) Amnesty International Index AFR 59/001/2005, 17 July 2005.

<sup>8</sup> 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<sup>9</sup> marks the beginning of the modern notion of crimes against humanity.<sup>10</sup> 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.<sup>11</sup> However, rape and other forms of sexual violence were not listed as 'crimes against humanity' in article 6(c)<sup>12</sup> of the London Charter, nor in article 5(c)<sup>13</sup> of the Tokyo Charter.<sup>14</sup> Only Control Council Law 10 expressly referred to rape in its provisions.<sup>15</sup> However, both Charters contained the term 'other inhumane acts', affording protection to women from sexual violence during armed conflict.<sup>16</sup> This has been affirmed by the European Commission on Human Rights in

<sup>9</sup> 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).

<sup>10</sup> 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.

<sup>11</sup> See JG Gardam & MJ Jarvis *Women, armed conflict and international law* (2001) 197.

<sup>12</sup> 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'.

<sup>13</sup> 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).

<sup>14</sup> As above.

<sup>15</sup> 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).

<sup>16</sup> 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*,<sup>17</sup> 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.<sup>18</sup> Furthermore, the Secretary-General's commentary on the conflict in the former Yugoslavia stated that<sup>19</sup>

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<sup>20</sup> of the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>21</sup> and the ICTR.<sup>22</sup> Hence, in *Furundzija*, the ICTY Trial Chamber classified 'serious sexual assault' as a crime against humanity by way of inhumane acts.<sup>23</sup> Further, the ICTR Trial Chamber found in *Akayesu* that forced public nudity constituted a crime against humanity by way of other inhumane acts.<sup>24</sup> 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'.

<sup>17</sup> 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).

<sup>18</sup> 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'.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> 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).

<sup>22</sup> n 2 above.

<sup>23</sup> See *Prosecutor v Furundzija* Case No IT-95-17/1, judgment of 10 December 1998 para 175.

<sup>24</sup> *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<sup>25</sup>

[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,<sup>26</sup> 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.<sup>27</sup>

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'.<sup>28</sup> 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'.<sup>29</sup> Both tribunals have found that sexual violence can constitute torture and slavery as crimes against humanity.<sup>30</sup>

## 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<sup>31</sup> and 1907<sup>32</sup> Hague Conventions did not

<sup>25</sup> Art 7(g) of Rome Statute.

<sup>26</sup> 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'.

<sup>27</sup> 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).

<sup>28</sup> *Akayesu* (n 2 above) para 580.

<sup>29</sup> See *Prosecutor v Tadic* Case IT-94-1, opinion and judgment (7 May 1997) paras 646-647.

<sup>30</sup> 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.'

<sup>31</sup> Convention with Respect to the Laws and Customs of War on Land, Annex of Regulations, 29 July 1899.

<sup>32</sup> 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.<sup>33</sup> This article states that 'family honour and rights, the lives of persons . . . must be respected'.<sup>34</sup> Kushalani<sup>35</sup> 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.<sup>36</sup> 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<sup>37</sup> 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.<sup>38</sup> She further argues that honour reinforces the social view that the raped woman is dishonourable.<sup>39</sup> In addition, Niarchos<sup>40</sup> lists the pitfalls in linking rape and honour as follows:<sup>41</sup>

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

<sup>33</sup> 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.

<sup>34</sup> Art 46 1907 Hague Convention (n 32 above).

<sup>35</sup> Kushalani (n 16 above).

<sup>36</sup> n 35 above, 10-11.

<sup>37</sup> See R Copelon 'Gendered war crimes: Reconceptualising rape in time of war' in A Stiglmeier (ed) *Mass rape: The war against women in Bosnia-Herzegovina* (1994) 197 200.

<sup>38</sup> As above.

<sup>39</sup> As above.

<sup>40</sup> See CN Niarchos 'Women, war, and rape: Challenges facing the International Criminal Tribunal for the Former Yugoslavia' (1995) 17 *Human Rights Quarterly* 649 674.

<sup>41</sup> As above.

international law,<sup>42</sup> thus emphasising and affirming pre-existing customary international law, which was general and prohibited sexual violence.<sup>43</sup> 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<sup>44</sup> and their Additional Protocols<sup>45</sup> distinguish between international and non-international armed conflict.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

Of significance is the striking difference in the application of international humanitarian law between the two categories. In an international

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<sup>42</sup> 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).

<sup>43</sup> As above.

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> 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.

<sup>47</sup> 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.

<sup>48</sup> Stewart (n 47 above) 320.

armed conflict, the 'grave breaches'<sup>49</sup> of the Geneva Conventions become applicable, in addition to other provisions of international humanitarian law applying to such armed conflicts.<sup>50</sup> 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 . . .'<sup>51</sup> 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.<sup>52</sup> 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'.<sup>53</sup> Article 147 of the Geneva Convention IV provides that<sup>54</sup>

[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.

<sup>49</sup> The grave breaches are the principal crimes under the Geneva Conventions. See T Meron *War crimes law comes of age* (1998) 289.

<sup>50</sup> Meron (n 49 above) 286.

<sup>51</sup> 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.

<sup>52</sup> Meron (n 49 above) 350.

<sup>53</sup> 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 Quéniwet *Sexual offences in armed conflict and international law* (2005) 100.

<sup>54</sup> 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<sup>55</sup> 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'.<sup>56</sup> Further, the Commentary stipulates that a conclusion is that 'by 'inhuman treatment' the Convention does not mean only physical injury or injury to health'.<sup>57</sup> More specifically, the Commentary defines 'inhuman treatment' as treatment contrary to article 27 of the Geneva Convention IV,<sup>58</sup> 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'.<sup>59</sup> Consequently, sexual violence is incorporated by reference under 'inhuman treatment' and therefore constitutes a 'grave breach' of the Geneva Conventions.<sup>60</sup>

In addition, sexual violence at times amounts to an act of torture as provided by section 147 of the Geneva Convention.<sup>61</sup> The ICTY Trial Chamber held in *Celebici*<sup>62</sup> that<sup>63</sup>

[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'.<sup>64</sup>

<sup>55</sup> See J Pictet (ed) *International Committee of the Red Cross, Commentary: IV Geneva Convention* (Geneva Convention IV Commentary).

<sup>56</sup> n 55 above, 598.

<sup>57</sup> As above.

<sup>58</sup> As above.

<sup>59</sup> Art 27 Geneva Convention IV.

<sup>60</sup> See *Cyprus v Turkey* (n 17 above).

<sup>61</sup> 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.

<sup>62</sup> See *Prosecutor v Delalic & Others* judgment of 16 November 1998, Case IT-96-21 (*Celebici*).

<sup>63</sup> n 62 above, para 495.

<sup>64</sup> 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'.<sup>65</sup> 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.'<sup>66</sup> 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.'<sup>67</sup> Rape and sexual violence are certainly attacks upon physical integrity, health and human dignity.<sup>68</sup> 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<sup>69</sup>

[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<sup>70</sup>

[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'<sup>71</sup> as well as 'other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimina-

<sup>65</sup> See Geneva Convention IV Commentary (n 53 above) 598.

<sup>66</sup> 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.

<sup>67</sup> 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.

<sup>68</sup> See Quéniwet (n 53 above) 100; Gardam & Jarvis (n 11 above) 201.

<sup>69</sup> Art 11 Additional Protocol I.

<sup>70</sup> Art 11(4) Additional Protocol I.

<sup>71</sup> Art 85(3) Additional Protocol I.

tion'.<sup>72</sup> These provisions therefore expand the scope of 'grave breaches'.<sup>73</sup> 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'.<sup>74</sup> 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.<sup>75</sup> 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'.<sup>76</sup> This provision is significant because it affords protection to all women,<sup>77</sup> 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'.<sup>78</sup> Thus, this Convention has been viewed as not applicable when a warring party violates the rights of its citizens.<sup>79</sup>

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Article 3 common to the Geneva Conventions does not mention rape and other forms of sexual violence.<sup>80</sup> It mentions 'outrages upon personal dignity, in particular humiliating and degrading treatment'.<sup>81</sup> The

<sup>72</sup> Art 85(4)(c) Additional Protocol I.

<sup>73</sup> 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).

<sup>74</sup> Art 76(1) Additional Protocol I.

<sup>75</sup> See Commentary to the Additional Protocols (n 73 above) 892 para 3150.

<sup>76</sup> n 73 above para 3151.

<sup>77</sup> 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.'

<sup>78</sup> Many provisions, including the provisions for humane treatment set out in art 27 of Geneva Convention IV, apply only to persons.

<sup>79</sup> Bassiouni (n 10 above) 360.

<sup>80</sup> 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'.

<sup>81</sup> 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<sup>82</sup>

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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup> 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,<sup>87</sup> and therefore constitutes grave breaches.<sup>88</sup>

<sup>82</sup> See Geneva IV Commentary (n 55 above) 38-39.

<sup>83</sup> Bassiouni (n 10 above) 359.

<sup>84</sup> n 83 above, 359-60.

<sup>85</sup> 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.

<sup>86</sup> 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.

<sup>87</sup> As above.

<sup>88</sup> 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<sup>89</sup> and Rwanda<sup>90</sup> 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.<sup>91</sup>

### 2.3 Sexual violence as genocide

Following the conflicts in the former Yugoslavia<sup>92</sup> and Rwanda,<sup>93</sup> 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

<sup>89</sup> See art 2 of the ICTY Statute: 'grave breaches of the Geneva Conventions' and art 3 'violations of the laws or customs of war'.

<sup>90</sup> See art 4 of the ICTR Statute: 'violations of common article 3 of the Geneva Conventions and Additional Protocol II'.

<sup>91</sup> See WA Schabas *An introduction to the International Criminal Court* (2004) 63. Also see Quéniwet (n 53 above) 101; Gardam & Jarvis (n 11 above) 203.

<sup>92</sup> 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).

<sup>93</sup> 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.<sup>94</sup> In the former Yugoslavia and Rwanda, sexual violence against women was used to<sup>95</sup>

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<sup>96</sup>

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.<sup>97</sup> 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.<sup>98</sup> Therefore, the

<sup>94</sup> 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. .

<sup>95</sup> See J Campanaro 'Women, war, and international law: The historical treatment of gender-based war crimes' (2001) 89 *Georgia Law Journal* 2557 2570.

<sup>96</sup> CA MacKinnon 'Rape, genocide and women's human rights' in Stiglmeier (n 37 above) 184 190.

<sup>97</sup> Art 11 Women's Protocol.

<sup>98</sup> 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](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<sup>99</sup> comprises the list constituting the crime of genocide as:<sup>100</sup>

- (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.<sup>101</sup> 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'.<sup>102</sup> 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'.<sup>103</sup> 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.<sup>104</sup>

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<sup>105</sup>

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*.

<sup>99</sup> 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).

<sup>100</sup> Art 2(a) to (e) Genocide Convention.

<sup>101</sup> *Akayesu* (n 2 above) paras 731-734.

<sup>102</sup> *Akayesu* (n 2 above) para 731.

<sup>103</sup> *Akayesu* (n 2 above) para 732.

<sup>104</sup> *Akayesu* (n 2 above) para 502.

<sup>105</sup> Art 1 Women's Protocol (my emphasis).

Further, article 11(3) stipulates that state parties undertake<sup>106</sup>

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.<sup>107</sup>

### 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.<sup>108</sup> Since sexual violence during armed conflict constitutes

<sup>106</sup> Art 11(2) Women's Protocol.

<sup>107</sup> 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.

<sup>108</sup> 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*.<sup>109</sup> 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.<sup>110</sup> Furthermore, these crimes have acquired the status of customary law,<sup>111</sup> 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,<sup>112</sup> particularly leaders and senior executors.<sup>113</sup> Instead, they have an obligation to see to it that all the legal consequences pertaining to these crimes are carried out in good faith.<sup>114</sup>

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

<sup>109</sup> 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.

<sup>110</sup> 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*.

<sup>111</sup> Meron (n 110 above) 3.

<sup>112</sup> 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.

<sup>113</sup> 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.

<sup>114</sup> Art 26 Vienna Convention on the Law of Treaties of 1969, 1155 UNTS 331.

conflict'.<sup>115</sup> The state parties will do so 'in accordance with the obligations incumbent upon them under the international humanitarian law'.<sup>116</sup> Under international humanitarian law, war crimes, genocide and crimes against humanity give rise, for example, to universal jurisdiction,<sup>117</sup> the obligations of states to prosecute or extradite,<sup>118</sup> and the right to compensation.<sup>119</sup>

### 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<sup>120</sup>

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

<sup>115</sup> Art 11(2) Women's Protocol.

<sup>116</sup> As above.

<sup>117</sup> 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.

<sup>118</sup> 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).

<sup>119</sup> 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'.

<sup>120</sup> 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,<sup>121</sup> 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.<sup>122</sup> 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<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> The Court may also take provisional measures in cases of extreme gravity or urgency to avoid irreparable harm.<sup>126</sup> Furthermore, the Protocol provides that the execution of the orders of the Court shall be monitored by the Council of Ministers.<sup>127</sup> 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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<sup>121</sup> 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.

<sup>122</sup> See the 24th ordinary session of the Assembly of Heads of States and Governments of the OAU.

<sup>123</sup> 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).

<sup>124</sup> 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.

<sup>125</sup> Art 27 African Court Protocol.

<sup>126</sup> As above.

<sup>127</sup> 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.<sup>128</sup> Article 4(h) of the Constitutive Act of the AU<sup>129</sup> 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.<sup>130</sup>

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<sup>131</sup>

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'.<sup>132</sup> 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'.<sup>133</sup> Article 13(1) provides that 'in order to enable the

<sup>128</sup> Art 4(h) Constitutive Act of the African Union.

<sup>129</sup> See the Constitutive Act of the African Union, adopted in Lome, Togo, July 2002 and entered into force in May 2001.

<sup>130</sup> These crimes have already been dealt with in part 3 of this article.

<sup>131</sup> See the Preamble of the PSC Protocol (n 1 above).

<sup>132</sup> Art 4(j) PSC Protocol.

<sup>133</sup> 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'.<sup>134</sup> 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'.<sup>135</sup> This means that the Constitutive Act does not restrict the right to request humanitarian intervention of the AU to the member state concerned.<sup>136</sup> The Constitutive Act is the first international instrument to provide for a right to humanitarian intervention.<sup>137</sup>

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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<sup>134</sup> Art 13(1) PSC Protocol.

<sup>135</sup> Art 4(j) Constitutive Act.

<sup>136</sup> 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.

<sup>137</sup> 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.

# 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 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.<sup>1</sup> Yet, sub-Saharan Africa is home to

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> In countries such as Ethiopia, Ghana and Nigeria, the figure of those without treatment is about 90%.<sup>11</sup>

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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<sup>2</sup> As above.

<sup>3</sup> As above.

<sup>4</sup> As above.

<sup>5</sup> As above.

<sup>6</sup> UNDP *Human development report* (2003) 2.

<sup>7</sup> US Bureau of Census *World population report* (2000).

<sup>8</sup> UNAIDS/WHO *AIDS epidemic update* (2004).

<sup>9</sup> As above.

<sup>10</sup> UNAIDS/WHO (n 1 above) 30.

<sup>11</sup> As above.

pandemic had struck the hardest.<sup>12</sup> 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),<sup>13</sup> 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.<sup>14</sup> Equity

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<sup>12</sup> UNIFEM *Facts and figures on HIV/AIDS* [http://www.unifem.org/gender\\_issues/hiv\\_aids/facts\\_figures.php](http://www.unifem.org/gender_issues/hiv_aids/facts_figures.php) (accessed 10 April 2006).

<sup>13</sup> 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.

<sup>14</sup> C Ngwenya '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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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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<sup>15</sup> As above.

<sup>16</sup> 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).

<sup>17</sup> Ngwena (n 14 above) 292.

<sup>18</sup> HCJ van Rensburg *et al Health care in South Africa: Structure and dynamics* (1992) 364-370.

<sup>19</sup> 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.<sup>20</sup>

Beauchamp and Childress<sup>21</sup> 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'.<sup>22</sup> 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.<sup>23</sup>

### 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.<sup>24</sup> 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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<sup>20</sup> W Landman 'Appropriate health care as a human right' in A van Niekerk (ed) *Health care as human right* (1993) 37-40.

<sup>21</sup> TL Beauchamp & FJ Childress *Principles of biomedical ethics* (2001).

<sup>22</sup> RJ Cook 'Exploring fairness in health care reform' (2004) 29 *Journal of Juridical Science* 1.

<sup>23</sup> As above.

<sup>24</sup> 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'.<sup>25</sup> 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).<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> According to the Committee, good quality health care services should be made available, accessible and acceptable to all. It states further:<sup>29</sup>

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.<sup>30</sup>

Apart from the provision in CESCR, article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>31</sup> 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'.<sup>32</sup> The CEDAW Committee in its General Recommendation No 24 on Women and Health<sup>33</sup> noted that states are under an obligation to ensure that policies and laws facilitate equal access to health care for

<sup>25</sup> UN General Assembly Special Session on HIV/AIDS Resolution A/S-26/L2 June 2001 para 15.

<sup>26</sup> 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).

<sup>27</sup> 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.

<sup>28</sup> n 27 above, para 12.

<sup>29</sup> n 27 above, para 9.

<sup>30</sup> As above.

<sup>31</sup> 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.

<sup>32</sup> As above.

<sup>33</sup> 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.<sup>34</sup>

At the regional level, the right to health is guaranteed under article 16 of the African Charter on Human and Peoples' Rights (African Charter).<sup>35</sup> 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*<sup>36</sup> 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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<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> (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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> Furthermore, the right to health, being a socio-economic right, is subject to the debate of non-justiciability. Evans observes as follows:<sup>41</sup>

Liberal arguments against accepting a right to health as a human right rest upon the presumption that civil and political 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.

<sup>37</sup> See art 14 of the Women's Protocol.

<sup>38</sup> Center for Reproductive Rights *Briefing paper: The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights* (2005).

<sup>39</sup> 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.

<sup>40</sup> DP Fidler *International law and infectious diseases* (1999).

<sup>41</sup> 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.<sup>42</sup>

## 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.<sup>43</sup>

Furthermore, many women today still require the authorisation of the husbands before seeking medical treatment, including HIV/AIDS treatment.<sup>44</sup> 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.<sup>45</sup> In a town of about 40 people receiving treatment, only three are women.<sup>46</sup> 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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<sup>42</sup> As above.

<sup>43</sup> 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).

<sup>44</sup> As above.

<sup>45</sup> UNAIDS, UNFPA, UNIFEM *Women and HIV/AIDS: Confronting the crisis* (2004).

<sup>46</sup> 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.<sup>47</sup> Shalev argues that equality implies non-discrimination, and that therefore discrimination will amount to a violation of the right to equality.<sup>48</sup> 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)<sup>49</sup> 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.<sup>50</sup> One of the important goals of the UN Millennium Declaration and the Millennium Development Goals (MDGs) is to promote gender equality and empower women.<sup>51</sup> 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.<sup>52</sup> 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<sup>53</sup> 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.

<sup>47</sup> See art 12 of the Women's Protocol, which drew its inspiration from art 2 of CEDAW.

<sup>48</sup> 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.

<sup>49</sup> International Conference on Population and Development (ICPD) UN A/CONF.171 (13) 18 October 1994.

<sup>50</sup> Fourth World Conference on Women, Beijing held on 15 September 1995 A/CONF.177/20.

<sup>51</sup> UN Millennium Declaration and Millennium Development Goals launched in 2000.

<sup>52</sup> General Recommendation No 24 (n 33 above).

<sup>53</sup> Cook (n 22 above).

The Canadian Supreme Court in *Eldridge v British Columbia (Attorney-General)*<sup>54</sup> 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'.<sup>55</sup> Similarly, the Action for the Further Implementation of the ICPD observes as follows:<sup>56</sup>

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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<sup>54</sup> (1977) 151 DLR (4th) 577.

<sup>55</sup> Fourth World Conference on Women Programme of Action Strategic Objective C1 (n 50 above).

<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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'.<sup>59</sup> Harmful cultural practices such as

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<sup>57</sup> 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.

<sup>58</sup> Global Coalition on Women and AIDS *Media backgrounder: AIDS and female property inheritance rights* (2004).

<sup>59</sup> Human Rights Watch 'Fact sheet: HIV/AIDS and women's property rights in Africa' <http://www.hrw.org/campaigns/women/property/aidsfactsheet.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:<sup>60</sup>

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'.<sup>61</sup> 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.<sup>62</sup> It has been observed that the powerlessness of women — political and economic — renders them vulnerable to human rights violations.<sup>63</sup>

<sup>60</sup> 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).

<sup>61</sup> Fourth World Conference on Women Strategic Objective F1 (n 50 above).

<sup>62</sup> UN Millennium Declaration and Millennium Goals (n 51 above).

<sup>63</sup> 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.<sup>64</sup> The CEDAW Committee in its General Recommendation No 24 has reaffirmed this position.<sup>65</sup>

### 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.<sup>66</sup> 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.<sup>67</sup> 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,<sup>68</sup> who argues that social and economic rights, including the right to health, are generally polycentric in nature. According to him,

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<sup>64</sup> General Comment No 14 (n 27 above).

<sup>65</sup> General Recommendation No 24 (n 33 above).

<sup>66</sup> 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).

<sup>67</sup> WHO Evaluation, cited in Cook *et al* (n 63 above).

<sup>68</sup> 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.<sup>69</sup>

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'.<sup>70</sup> 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.<sup>71</sup> 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'.<sup>72</sup>

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.<sup>73</sup>

Similarly, the South African Constitutional Court in *Minister of Health v Treatment Action Campaign and Others*<sup>74</sup> 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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<sup>69</sup> As above.

<sup>70</sup> 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.

<sup>71</sup> 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.

<sup>72</sup> n 71 above, para 10.

<sup>73</sup> *Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social* (MSAS) No 15789 1999.

<sup>74</sup> 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 from an earlier decision of the Constitutional Court in the *Grootboom* case.<sup>75</sup> 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'.<sup>76</sup> 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,<sup>77</sup> 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<sup>78</sup>

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.

<sup>75</sup> *Government of the Republic of South Africa v Grootboom* 2000 3 BCLR 227 (CC).

<sup>76</sup> 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.

<sup>77</sup> Cook (n 22 above) 18.

<sup>78</sup> 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*<sup>79</sup> 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.<sup>80</sup> 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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<sup>79</sup> 1999 1 SA 6 (CC).

<sup>80</sup> 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.<sup>81</sup> The Committee reasons that these temporary corrective measures will not amount to discrimination if:<sup>82</sup>

- (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.<sup>83</sup> 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

<sup>81</sup> 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.

<sup>82</sup> n 81 above, paras 18-24.

<sup>83</sup> Cook (n 22 above) 23.

between the sexes and the underlying social conditions that affect the sexes differently'.<sup>84</sup> 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.<sup>85</sup> 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<sup>86</sup> 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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<sup>84</sup> As above.

<sup>85</sup> 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.

<sup>86</sup> 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,<sup>87</sup> 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.

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<sup>87</sup> Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases by African leaders, April 2001 OAU/SPS/ABUJA/3.

# 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.<sup>1</sup>

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<sup>2</sup> enjoy what can be said to be a common foundation. They are regarded as important instruments for ensuring peace and stabilising relations between states.<sup>3</sup> 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,<sup>4</sup> and the cause of this same event was primarily attributed to economic motivations.<sup>5</sup>

<sup>1</sup> 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.

<sup>2</sup> International trade law as used in this paper mainly refers to multilateral trade rules or laws as administered by the World Trade Organization.

<sup>3</sup> T Cottier 'Trade and human rights: A relationship to discover' (2002) 5 *Journal of International Economic Law* 116.

<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup> Politically, state relations were adversely influenced by exporting industries, which played an important role in determining state trade and foreign policies.<sup>7</sup> Hawkins recognises:<sup>8</sup> '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.<sup>9</sup> 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.<sup>10</sup> Of particular significance under the WTO is the establishment of a strong enforcement mechanism in the form of the dispute settlement body.<sup>11</sup>

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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<sup>6</sup> 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.

<sup>7</sup> Ezrahi (n 6 above) 3.

<sup>8</sup> Quoted in JH Jackson *World trade and law of GATT* (1969) 38, as quoted in Cottier (n 3 above) 116.

<sup>9</sup> See JH Jackson *The World Trade Organization, constitution and jurisprudence* (1998).

<sup>10</sup> 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.

<sup>11</sup> 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](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'.<sup>12</sup> 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'.<sup>13</sup> The UN Charter recognises the importance of realising human rights and fundamental freedoms to the maintenance of international peace and security.<sup>14</sup>

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).<sup>15</sup> 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'.<sup>16</sup> 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.<sup>17</sup>

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.'<sup>18</sup> 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

<sup>12</sup> Drzewicki (n 4 above) 31.

<sup>13</sup> Drzewicki (n 4 above) 32.

<sup>14</sup> See Preamble to the UN Charter.

<sup>15</sup> These three instruments, CESCR, CCPR and OP, together with the Universal Declaration, make up the International Bill of Human Rights.

<sup>16</sup> Cottier (n 3 above) 112.

<sup>17</sup> Cottier (n 3 above) 119.

<sup>18</sup> Cottier (n 3 above) 112.

within a WTO framework.<sup>19</sup> 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'.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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'.<sup>23</sup>

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<sup>19</sup> 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.

<sup>20</sup> M Williams *Gender mainstreaming in the multilateral trading system. A handbook for policy makers and other stakeholders* (2003) 4.

<sup>21</sup> 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.

<sup>22</sup> Cottier (n 3 above) 111.

<sup>23</sup> 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.<sup>24</sup> 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,<sup>25</sup> 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,<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> These developments in international trade law indicate a move towards positive integration, where states are required to take positive action mainly in

<sup>24</sup> Cottier (n 3 above) 117.

<sup>25</sup> As above.

<sup>26</sup> As above.

<sup>27</sup> Cottier (n 3 above) 118.

<sup>28</sup> 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.<sup>29</sup> This trend has caused trade rules to transgress purely international transactions and to define domestic law.<sup>30</sup> 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] . . .'<sup>31</sup> 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:<sup>32</sup>

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

<sup>29</sup> Cottier (n 3 above) 117.

<sup>30</sup> Cottier (n 3 above) 118.

<sup>31</sup> Cottier (n 3 above) 117.

<sup>32</sup> 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.<sup>33</sup>

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,<sup>34</sup> 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.<sup>35</sup> 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

<sup>33</sup> Background: Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66.6.1.

<sup>34</sup> 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.

<sup>35</sup> 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.<sup>36</sup>

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).<sup>37</sup> 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.<sup>38</sup>

#### **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.<sup>39</sup> 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.<sup>40</sup> 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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<sup>36</sup> As above.

<sup>37</sup> As above.

<sup>38</sup> As above.

<sup>39</sup> Gammage *et al* (n 35 above) 26.

<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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<sup>43</sup> and prohibitive prices.<sup>44</sup> Services of both infrastructural nature<sup>45</sup> and natural resources<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup>

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.

<sup>41</sup> H Rupp *Gender and agricultural trade* (2004) 3 [http://www.glow-boell.de/media/de/txt-rubrik\\_5/SuS\\_Rupp.pdf](http://www.glow-boell.de/media/de/txt-rubrik_5/SuS_Rupp.pdf) (accessed 31 March 2006).

<sup>42</sup> 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](http://www.glow-boell.de/media/de/txt_rubrik_5/Sus_Garcia.pdf) (accessed 31 March 2006).

<sup>43</sup> 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.

<sup>44</sup> A B Zampetti 'The impact of WTO rules on the pursuit of gender equality' in Tran-Nguyen & Zampetti (n 43 above) 311.

<sup>45</sup> Such as health care and education.

<sup>46</sup> Eg water and energy.

<sup>47</sup> Randrimaro (n 28 above) 27.

<sup>48</sup> Randrimaro (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'.<sup>49</sup> A broad reading of the Charter would 'place obligations on member states to promote and protect human rights'<sup>50</sup> 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.<sup>51</sup> However, the list of peremptory norms is limited to quite a few norms or human rights,<sup>52</sup> 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<sup>53</sup> are not incorporated within the

<sup>49</sup> 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/wtoRightsGlob.html> (accessed 14 February 2006).

<sup>50</sup> As above.

<sup>51</sup> G Marceau 'WTO dispute settlement and human rights' (2002) 13 *European Journal of International Law* 69 [http://ejil.org/forum\\_tradehumanrights](http://ejil.org/forum_tradehumanrights) (accessed 31 March 2006).

<sup>52</sup> Crimes against humanity, torture, genocide, slavery, racial discrimination and prohibition against aggression are within the accepted list of peremptory norms.

<sup>53</sup> H Charlesworth & 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.<sup>54</sup>

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'.<sup>55</sup>

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.<sup>56</sup> The implication is therefore that human rights do not prevail over other rules of international law.<sup>57</sup>

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'.<sup>58</sup>

The lack of absolute direction in this regard is attributed to the 'splendid isolation'<sup>59</sup> 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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<sup>54</sup> As above.

<sup>55</sup> The Vienna Declaration and Programme of Action on Human Rights (1993) para 1.

<sup>56</sup> Cottier (n 3 above) 114.

<sup>57</sup> As above.

<sup>58</sup> 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).

<sup>59</sup> 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.<sup>60</sup> 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<sup>61</sup> 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

<sup>60</sup> R McCorquodale & R Fairbrother 'Globalization and human rights' (1999) 21 *Human Rights Quarterly* 737.

<sup>61</sup> Williams (n 20 above) 8.

when a seemingly neutral policy or rule disproportionately 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<sup>62</sup> 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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<sup>62</sup> 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 ...'<sup>63</sup> 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.

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<sup>63</sup> McCorquodale & Fairbrother (n 60 above) 747.



# 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.<sup>1</sup> 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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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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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<sup>2</sup> Art 62 African Charter.

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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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<sup>4</sup> 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).

<sup>5</sup> 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.

<sup>6</sup> 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,<sup>7</sup> training and employment,<sup>8</sup> social security, housing<sup>9</sup> and health care.<sup>10</sup> 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,<sup>11</sup> 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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<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

The Chairperson commenced by asking for clarification on the national drug policy.<sup>14</sup> 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.<sup>15</sup> However, she affirmed that all the departments of the South African government invariably worked with NGO networks to deliver services.

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<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> 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.<sup>16</sup>

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

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<sup>16</sup> 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.<sup>17</sup>

Fourteen NGOs applied for observer status with the African Commission during the 38th session, of which 12 were successful.<sup>18</sup> 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 Príncipe 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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<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup> 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),<sup>20</sup> 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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<sup>19</sup> 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 ground-breaking speed.

<sup>20</sup> 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.<sup>21</sup>

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,<sup>22</sup> 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.<sup>23</sup>

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,<sup>24</sup> the AU Assembly refused the publication of the Activity Report of the African Commission because of these resolutions.

<sup>21</sup> 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 (v above), the AU Assembly did not allow the Report to be published because of this and other resolutions.

<sup>22</sup> Communication No 250/2002, *Liesbeth Zegveld & Mussie Ephrem v Eritrea* & Communication No 275/2003, *Article 19 v Eritrea*.

<sup>23</sup> 'US "shortens" Eritrea mission' *News 24* 19 January 2006 [http://www.news24.com/News24/Africa/News/0,,2-11-1447\\_1865655,00.html](http://www.news24.com/News24/Africa/News/0,,2-11-1447_1865655,00.html) (accessed 19 January 2006).

<sup>24</sup> v.

## 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.

# 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.<sup>1</sup> However, this information is not

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<sup>1</sup> 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.<sup>2</sup>

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:<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> After the election of the four new commissioners, the regions of Africa are represented as follows: three from 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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<sup>2</sup> For their contact details, and those of other commissioners, see the Commission's website <http://www.achpr.org> (accessed 28 February 2006).

<sup>3</sup> See the final communiqué that the Commission issued at the end of the 38th session, <http://www.achpr.org> (accessed 28 February 2006).

<sup>4</sup> Art 31(2) of the African Charter provides that commissioners serve in their personal capacity.

<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> Aged mostly below 50,<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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*.<sup>11</sup> 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

<sup>6</sup> Art 11 of the 2003 Protocol on Amendments to the Constitutive Act of the African Union.

<sup>7</sup> Art 36 African Charter.

<sup>8</sup> Their ages range between 61 (Bitaye), Alapini-Gansou (49), Tlakula (48) and Malila (40).

<sup>9</sup> 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.

<sup>10</sup> 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.'

<sup>11</sup> 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’,<sup>12</sup> 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 LL.M (North), LL.B (Witwatersrand) and LL.M 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 LL.M, 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

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<sup>12</sup> 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',<sup>13</sup> 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

<sup>13</sup> 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 Pansy 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.<sup>14</sup>

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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<sup>14</sup> 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.<sup>15</sup> 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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<sup>15</sup> 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.<sup>16</sup> 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 than 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

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<sup>16</sup> 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.<sup>17</sup> The sub-committee's recommendations are based on reviews of every *curriculum vitae* and interviews with judicial nominees.<sup>18</sup> 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.

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<sup>17</sup> See Interights *Judicial independence: Law and practice of appointments to the European Court of Human Rights* (2003).

<sup>18</sup> 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

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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*.



# Conference paper: Perspectives on the African Commission on Human and Peoples' Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples' Rights

*Bahame Tom Nyanduga\**

Member of the African Commission on Human and Peoples' Rights

## Summary

*In this contribution, which was delivered as a speech to the participants of the 15th African Human Rights Moot Court Competition, one of the members of the African Commission, Commissioner Nyanduga, provides an overview of the major successes, challenges and prospects of the African Commission. After providing a historical background, Commissioner Nyanduga highlights the SERAC case as one of the Commission's significant successes. He concludes that, although the Commission remains hampered by numerous constraints, such as limited resources and poor state reporting, the establishment of an African Court, in particular, holds the prospect of improved enforcement of human rights on the African continent.*

## 1 Introduction

The struggle for the realisation of basic rights and fundamental freedoms for the peoples of Africa is chronicled by the struggles for

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independence and freedom waged during the second half of the 20th century. These struggles marked a watershed in the assertion by the African peoples of their right to equality, dignity, the right to self-determination, and the right to live in peace and freedom, as enjoyed by other peoples and nationalities throughout the world.

The end of World War II saw the establishment of the United Nations (UN) in 1945 and the subsequent adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948. These momentous events did not immediately usher in liberty, freedom and dignity for the African peoples. Many African states remained under colonial and racist domination. Colonialism, apartheid and racial discrimination were, by their very nature, an antithesis to the core principles, objectives and values enshrined in the Charter of the UN and the Universal Declaration.

The decolonisation process and the wars of liberation waged by African peoples across the continent during the four decades starting from the late 1950s, led to the granting of independence to colonial territories in Africa. The defeat of racist regimes in the mid-1970s and 1980s resulted in the establishment of majority governments in Southern Africa. The installation of a democratic government in South Africa in 1994 marked the end of the struggle against foreign domination and began political self-determination on the African continent.<sup>1</sup> Thence, the destiny and the struggle for the realisation of basic rights and fundamental freedoms for the peoples of Africa lay squarely in their own hands.

## **2 Lack of post-independence human rights enforcement**

Attaining political self-determination for the peoples of Africa has always been considered an important milestone in the struggle for the full realisation of basic rights and fundamental freedoms. At independence, many African states adopted independence constitutions which contained bills of rights. These states also acceded to various international human rights instruments and a number of regional instruments, proclaiming and guaranteeing their citizens basic rights and fundamental freedoms.

These independence constitutions did not survive long in many African states. Many governments were overthrown through military

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<sup>1</sup> Western Sahara, which proclaimed independence after the departure of the Spanish colonial power, is occupied by Morocco, hence leading to the withdrawal of Morocco from the OAU.



*coups d'état*.<sup>2</sup> The independence constitutions, which had guaranteed multi-party democracy and the enjoyment of basic rights and fundamental freedoms, were suspended or abolished, and replaced by governance through military decrees. In other African states, multi-party democratic governments were replaced by one-party 'democracies'. Botswana and Senegal were the exceptions to these forms of governance.

Military governments and one-party 'democracies' exercised a monopoly of political power, varying in degree from outright dictatorships to those which exercised varying degrees of political tolerance. The Cold War politics exacerbated the political hegemony by the military and one-party regimes, which in turn curtailed the enjoyment of basic civil and political rights of their people. Some of these regimes unleashed human rights violations on a massive scale. Civil wars became the order of the day, as marginalised ethnic groups and political movements fought for their share of the national cake of governance. The collapse of the Berlin wall at the turn of the 1990s and the changed dynamics of the international political order following the end of the Cold War, necessitated political transformation in a number of African states. They became multiparty democracies.

Notwithstanding the existence of political and military dictatorships and the regression in the human rights situation during the 1970s and 1980s, the African Charter on Human and Peoples' Rights (African Charter) was adopted by member states of the Organization of African Unity (OAU) in 1981. As if to highlight the ironic human rights situation in Africa, a military *coup* overthrew the democratic government of Liberia, where the 1979 OAU Summit had adopted a resolution on the preparations of a draft for the African Charter.<sup>3</sup> Subsequently Liberia experienced massive violations of human rights, culminating in two decades of misrule and a brutal civil war.

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<sup>2</sup> During its 16th ordinary session, the African Commission adopted a Resolution on the Military, which stated the following: '... Recalling the intervention in African states by the military during the past three decades, and the fact that only very few states have escaped this phenomenon; Affirming that the best government is one elected by, and accountable to, the people; Aware that the trend world-wide and in Africa in particular is to condemn military takeovers and the intervention by military in politics... 1 Calls upon African military regimes to respect fundamental rights; ... 4 Encourages states to relegate the era of military interventions in government to the past in the interest of the African image, progress and development, and for the creation of an environment in which human rights values may flourish.' Arts 4(m) and (p) of the Constitutive Act of the African Union, adopted in July 2000, state some of the principles in accordance with which the AU shall function. These require the AU to respect democratic principles, human rights and good governance, and to condemn and reject unconstitutional changes of government.

<sup>3</sup> Decision 115(XVI) of the 16th ordinary session of the Assembly of the OAU, 17 to 20 July 1979. See para 2 of the Preamble to the African Charter on Human and Peoples' Rights.

Yet, the protection of human and peoples' rights in Africa was professed as a priority by each and every state, and by the continental organisation, the OAU (now the African Union (AU)).<sup>4</sup> The declarations about Africa's commitment to democratic governance and human rights were tempered by the scourges of ethnic clashes, civil wars and conflict, leading to a wave of refugees and the internal displacement of millions of people in all the regions of the continent. The genocide in Rwanda in 1994 marked the lowest point in human rights on the continent and the gravest violation of human rights in an independent African state. Conflicts continue on the continent, in the Darfur region of Sudan, in some parts of the DRC and in Northern Uganda, as well as in Somalia. These conflicts are responsible for the dire situation of human rights in Africa. Twenty years after the entry into force of the African Charter, the reality is a far cry from the ideal foreseen by those African jurists who drafted the African Charter.<sup>5</sup>

Whether or not African states individually, or collectively through the continental organisation, have fulfilled their commitments and the objectives of the OAU Charter, or the African Charter, the Constitutive Act of the AU and other human rights instruments, remains one of the major challenges in ensuring the respect, promotion and protection of human and peoples' rights on the continent. It is my expectation that the democratisation process currently underway on the continent will underpin a climate for the better enjoyment of human and peoples' rights on the continent.

The human rights discourse in Africa, therefore, can only be appreciated within the historical context of the continent, as well as the individual country-specific experiences.

### 3 The African Commission on Human and Peoples' Rights

The African Charter was adopted in 1981 by member states of the OAU

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<sup>4</sup> The Principles and Objectives of the OAU Charter alluded to the Universal Declaration of Human Rights, while the Constitutive Act of the African Union has gone further by clearly stating as one of its objectives under art 3(h) that '[t]he objectives of the African Union 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'.

<sup>5</sup> At the time of writing, the second round of elections in the DRC was scheduled to take place in October 2006 after the 31 July 2006 DRC presidential elections did not produce an outright winner. At the same time, for the first time in 20 years, a truce brokered by the SPLA government of Southern Sudan, between the government of Uganda and the LRA rebel group, responsible for massive human rights violations in Northern Uganda, is likely to bring a lasting solution to Northern Uganda. Somalia is far from stability, following the failed attempt by the Transitional National Government to exercise its control throughout the territory and the increasing influence and control by Islamic courts.

during a time when African states were in the forefront of fighting against colonial and foreign domination. The entry into force of the African Charter and the establishment of the African Commission on Human and Peoples' Rights (African Commission) did not eliminate violations of human and peoples' rights from the African political scene. In other words, no overnight change happened in the way in which fundamental rights and freedoms in Africa were respected. The African Commission was established in 1987<sup>6</sup> (upon the entry into force of the African Charter on 21 October 1986) as a mechanism to inquire into the human rights situation of the state parties to the Charter. This was done by means of communications or complaints in respect of alleged violations against the African Charter, as well as through the examination of state reports<sup>7</sup> and through other methods of investigation.<sup>8</sup>

The African Charter gives the African Commission a mandate to promote and protect human and peoples' rights in Africa.<sup>9</sup> In order to carry out this mandate, the Commission adopted a number of mechanisms and methods. The Commission from time to time also conducts missions of a promotional nature to state parties, and in a number of cases it has carried out missions to investigate situations of serious human rights violations.

The African Commission holds two ordinary sessions a year, each lasting two weeks. During these sessions, it hears communications and carries out some of its promotional functions.<sup>10</sup> Over the years it has become quite clear that the four weeks during which the Commission meets in any particular year are not adequate for the Commission to discharge its mandate. The Commission is composed of 11 members from different corners of this vast continent. The members are supported by a skeleton staff of between five to eight legal officers, the majority of whom are on short-term donor-funded contracts. Members of the Commission serve a six-year tenure on a part-time basis.

Considering the scale and enormity of the human rights problems facing the continent, and the resource constraints facing the African Commission, it is important to reflect on how the Commission's role can be enhanced as it celebrates its 20th year of existence.

The African Commission has over the years heard communications submitted on behalf of individuals against state parties, which are alleged to have violated rights enshrined under the African Charter. The decisions adopted by the Commission in respect of these commu-

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<sup>6</sup> The first session of the African Commission met on 2 November 1987 in Addis Ababa. See First Annual Activity Report of the African Commission.

<sup>7</sup> Art 62 African Charter.

<sup>8</sup> Art 46 African Charter.

<sup>9</sup> Art 45 African Charter.

<sup>10</sup> See rules 1 and 2 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, 1995 version.

nications have established a body of human rights jurisprudence in Africa.

#### 4 Special mechanisms

Under the protection mandate, the African Commission has established special mechanisms which have enabled it to undertake investigations and protection in a number of thematic areas. The mechanisms currently operational are:

- the Special Rapporteur on the Rights of Women in Africa;
- the Special Rapporteur on Freedom of Expression in Africa;
- the Special Rapporteur on Human Rights Defenders;
- the Special Rapporteur on Detention and Prison Conditions in Africa; and
- the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa.

The African Commission has also established a number of working groups which conduct, or have conducted, important studies on a number of thematic human rights issues, such as freedom of expression,<sup>11</sup> and promoting the Robben Island Guidelines against Torture in Africa.<sup>12</sup> The Working Group on Minorities and Indigenous Populations in Africa has played a pioneering and significant role in highlighting the plight of marginalised populations in a number of African countries. The work of this Working Group is a major contribution to defining the human rights of marginalised minority indigenous groups, who deserve equal and non-discriminatory protection by African states. The report of the Working Group published by the Commission in collaboration with the International Working Group on Indigenous Issues, IWGIA, is a major contribution to better understand the human and collective rights of indigenous populations and communities in Africa under the African Charter.<sup>13</sup>

The mechanisms of the African Commission are crucial in the attainment of its mandate. The Commission benefits from the flexibility of

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<sup>11</sup> The 32nd ordinary session of the African Commission adopted a Declaration of Principles on Freedom of Expression in Africa, which it recommended to African states for their adoption, bearing in mind the fact that it further expounded and elaborated the right to freedom of expression provided for under art 9 of the African Charter.

<sup>12</sup> The 32nd ordinary session adopted a Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, otherwise known as the Robben Island Guidelines. These guidelines are recommended for implementation by African states.

<sup>13</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with Resolution on the Rights of Indigenous Populations/Communities in Africa, adopted at the 28th ordinary session ACHPR/IWGIA 2005.

these mechanisms. A Special Rapporteur can organise his or her work, undertake missions to state parties and report to the Commission. The reports by the Special Rapporteurs and the Working Groups are adopted as Commission reports, and they play a part in the evolving role the Commission plays in filling the gaps and the progressive development of the African Charter.

## 5 Challenges to the African Commission

There are a number of challenges facing the African Commission in the discharge of its mandate. Foremost is the problem of resources. Article 41 of the African Charter obliges the Secretary-General of the OAU (the Chairperson of the AU Commission) to ensure that the African Commission is provided with all the necessary resources to enable it to discharge its functions effectively. Resources enable it to conduct its statutory annual sessions and a handful of promotional missions only. The Commission cannot conduct any urgent mission it considers appropriate, whatever the gravity of the situation, unless extra-budgetary resources are made available by the AU Commission.

Special mechanisms are barely functional, due to predominantly donor funding. This situation indirectly impacts on the independence and impartiality of the Commission. Articles 31 and 38 emphasise the impartiality of the members of the Commission in the discharge of their duties. In order for the Commission to discharge its mandate effectively, the problem of resource constraint has to be addressed urgently and immediately. These resource constraints impact on the quality and caliber of the staff at the disposal of the Commission.

The AU Assembly has adopted a number of decisions which call on the AU Commission to ensure that the African Commission is provided with adequate resources in order to discharge its mandate.

The second challenge to the African Commission — and a daunting challenge for that matter — is the lack of enforceability of its decisions. The lack of enforceability arises from the fact that the African Charter does not provide for a specific provision or mechanism to ensure that Commission's decisions are binding. Article 52, which relates to the inter-state communication procedure, requires the Commission to try all appropriate means to reach an amicable solution, failing which it is required to prepare a report and communicate it to the AU Assembly with such recommendations as it deems useful.

The African Commission submits a report of its activities, under article 54, to every ordinary session of the AU Assembly of Heads of State and Government. Decisions on communications which arise from complaints by individuals, are also included in the report submitted to the Assembly. Decisions of the Commission are also sent to the state party involved as recommendations. In the case of recommendations made pursuant to in-depth studies of special cases revealing massive viola-

tions of human rights,<sup>14</sup> the measures remain confidential until publication is authorised by the Assembly.

State parties are obliged under article 1 to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the African Charter, and therefore have an obligation to enforce the decisions of the African Commission. However, this notwithstanding, decisions of the Commission are not fully implemented in most cases. After having considered a communication, the Commission has to make findings on whether a state party has violated the Charter provisions or not. If a state is found to have violated any right under the Charter, article 1 obliges that state party to recognise the right which is said to be violated and act in accordance with the Commission's recommendations.

To highlight the problem regarding the lack of enforceability of the Commission's decisions, when submitting its instrument of accession to the AU, the Republic of South Africa stated the following:<sup>15</sup>

[W]hile acceding to the African Charter on Human and Peoples' Rights, it is the view of the Republic of South Africa that there should be consultation between state parties to the Charter, *inter alia*, to:

- (i) consider the possible measures to strengthen the enforcement mechanisms of the Charter;
- (ii) clarify the criteria for restrictions of rights and freedoms recognised and guaranteed in the Charter;

...

I am not aware whether this very important proposal, aimed at enhancing the enforceability of the African Commission's decisions, was ever followed up on by the South African government in any of the AU political organs.

It is expected that the dilemma faced by the Commission on the unenforceability of its decisions will be remedied through the establishment of the African Court on Human and Peoples' Rights (African Court), pursuant to the entry into force of the Protocol to the African Charter on the Establishment of the Court, and its subsequent operationalisation. The election of judges during the Khartoum AU Summit, and their swearing in during the Banjul Summit, are important milestones in the realisation of an effective remedy for the violation of human and peoples' rights in Africa.

Article 27(1) of the Protocol states as follows:

If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

The mandatory language used in the Protocol is significant. Article 29 of the Protocol states further that the judgment shall be notified to the

<sup>14</sup> Art 58 African Charter.

<sup>15</sup> C Heyns (ed) *Human rights law in Africa* (2004) 109.

parties, and that the Council of Ministers shall monitor its execution on behalf of the Assembly. Article 30 obliges state parties to undertake to comply with the judgment within the time stipulated by the African Court and to guarantee its execution.

Article 31 requires the Court to submit a report to each regular session of the Assembly and the report shall, among other things, specify in particular the cases in which the state party has not complied with the Court's judgment. It is my expectation that the Protocol will be respected, thereby ensuring that the decisions of the Court are not routinely ignored, as are the recommendations of the Commission.

The African Commission continues to experience problems regarding non-compliance with its recommendations and decisions, either completely or partially.

A Working Group of the Commission has been established to look into, among other things, the question of follow-up on the Commission's decisions, and to ensure that the recommendations made by the Commission and adopted by the Assembly, which become, constructively, part of the decisions of the Assembly, can be implemented as such.

Article 23(2) of the Constitutive Act of the AU states:

[A]ny member state that fails to comply with the decisions and policies of the Union may be subjected to other 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.

It is my humble view that the new architecture of the AU, which is anchored in a respect for democratic good governance, a respect for human and peoples' rights and the rule of law, should compel the AU and its member states to practise what they preach.

## 6 Deterrence or tolerance

The publication of the Annual Activity Reports of the African Commission, which include decisions, recommendations and resolutions commenting on the situation of human rights in member states, has not been a very successful deterrent to human rights violations. The dramatic increase in the number of communications received by the Commission from member states where violations allegedly occur, to a certain extent betrays the fact that the mechanisms of the African Commission are not very effective as a deterrent, and as a corollary, the respect of the African Charter by the specific governments concerned is questionable.

This analysis is backed by, for example, the number of communications received from non-governmental organisations (NGOs) during the Abacha regime in Nigeria. The large number of submissions of communications by NGOs to the African Commission also reflects the

strength of civil society in many African states from which communications are submitted. The role of NGOs in the protection of human rights in Africa has over the first 20-year period become a very important factor in the work of the African Commission. The working relationship between the Commission and the NGOs is reflected in a resolution granting observer status to NGOs, which enables them to interact with the Commission in a number of its activities.<sup>16</sup>

## **7 State reporting**

The state reporting mechanism enables the African Commission to maintain dialogue with state parties under the terms of article 62. It requires every state party to submit periodic reports on legislative, administrative and other measures taken, to give effect to the rights and freedoms recognised by the African Charter, as well as stating any problems encountered in its implementation. State parties have not submitted their reports on a timely basis as provided for under the Charter. Up until the time of the submission of the Nineteenth Activity Report at the June 2006 AU Summit, 16 out of the 52 AU state parties to the African Charter had not submitted a single report since the entry into force of the Charter.

A substantial number of states have submitted their state reports once or twice, while a few have reported three times. The problem is not confined to the African Charter. Their heavy reporting obligations to other supervisory bodies under various international human rights instruments are onerous to many African states because of inadequate capacity. The African Commission has engaged in dialogue with various stakeholders to see how these obligations can be met.

## **8 The challenge of guaranteeing economic, social and cultural rights**

The African Commission is faced with a major challenge in ensuring that state parties accord equal respect to promoting, respecting and guaranteeing economic, social and cultural rights, as that which they give with regard to civil and political rights. The Commission has over the last two decades entertained numerous communications alleging violations of civil and political rights under the African Charter. The main body of jurisprudence of the Commission has been developed based predominantly on these rights.

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<sup>16</sup> Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights, adopted at the 25th ordinary session held in Bujumbura, Burundi, 26 April to 5 May 1999.



The adoption by the African Commission of the landmark decision in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,<sup>17</sup> which addressed violations of several group rights such as the right to property,<sup>18</sup> the right to protection of the family unit,<sup>19</sup> the collective right to free disposal of natural resources,<sup>20</sup> and the right to a satisfactory environment<sup>21</sup> showed the comprehensive nature of the African Charter.

Briefly, the facts of the case involved the suppression of the Ogoni people, a minority group living in the Niger Delta, by the use of the military during the Abacha regime, which constituted violations of a number of provisions of the African Charter. A number of observations and lessons may be drawn from this decision.

While a number of African states have enacted constitutional exclusion clauses, making economic and social rights non-justiciable, it is worth noting that Nigeria enacted the African Charter in its domestic legislation, hence economic and social rights can be adjudicated before the Nigerian courts. Secondly, during the determination of the Ogoni communication, the African Commission waived the exhaustion of local remedies rule, because the Nigerian government had not responded to numerous correspondences concerning the communication. The Commission was forced to decide on the facts as presented by the complainants. Further, it was also established that the Nigerian military government had enacted various decrees which ousted the jurisdiction of local courts, hence depriving the people the right to seek redress through the domestic remedies.

The African Commission found that the Nigerian government had violated a number of rights under the African Charter, including the right to housing or shelter, even though it was not explicitly provided for under the Charter. That notwithstanding, it found that the right to shelter had been violated through a combined reading of a number of rights provided for under the Charter, in particular the right to property, the right to enjoy the best attainable state of mental and physical health and the right to the protection of the family.

In terms of the violation of article 21, which provides for the right to freely dispose of natural resources and the duty imposed on state parties to 'undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources', the Commission stated:<sup>22</sup>

Governments have a duty to protect their citizens, not only through appro-

<sup>17</sup> (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case).

<sup>18</sup> Art 14 African Charter.

<sup>19</sup> Art 18(1) African Charter.

<sup>20</sup> Art 21 African Charter.

<sup>21</sup> Art 24 African Charter.

<sup>22</sup> n 17 above, para 57 (footnotes omitted).

appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríguez v Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the state is further emphasised in the practice of the European Court of Human Rights, in *X and Y v Netherlands*. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

The allegations concerning a violation of the right to benefit from the operations of oil companies made by the Ogoni during the Abacha regime are not very much different from those made by the Movement for the Emancipation of the Niger Delta, which has in recent days been responsible for abduction of oil company employees.

Of note in the handling of this problem is the fact that the democratic government of Nigeria has not applied the heavy-handed tactics employed by its predecessor in trying to resolve the problems in the Niger Delta. This confirms the view that human rights benefit from democratic governance.

With regard to the *SERAC* case, the Commission also found violations of the right to adequate housing, the right to protection against eviction and the right to food, which it found to be inseparably linked to the right to dignity of the human being. The Commission stated that the right to food was 'therefore essential for the enjoyment and fulfilment of such other things as health, education, work and political participation'.<sup>23</sup>

In one of its concluding observations, the Commission states the following:<sup>24</sup>

The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to the African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make it clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian government did not live to the minimum expectations of the African Charter.

The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the

<sup>23</sup> n 17 above, para 65.

<sup>24</sup> n 17 above, paras 68 & 69.

Commission, a reconsideration of the government's attitude to the allegations contained in the instant communication.

## 9 Conclusion

Let me conclude by pointing to what the African Commission has been able to achieve in the last 20 years in its findings and conclusions based on the facts submitted to it by the individuals against whom violations were committed. I must pay tribute to the NGO community for ensuring that the communications procedure became operational. The NGO community in Africa and beyond has become a major stakeholder in the work of the African Commission. NGOs have contributed towards the recognition of the rights enshrined in the African Charter. The development of the African Commission's jurisprudence would not have been possible without the proactive role played by NGOs in ensuring that communications alleging violations were submitted to the Commission, in most cases on behalf of individuals and groups of peoples who on their own could not reach the Commission.

It is imperative that, notwithstanding the operationalisation of the African Court, the African Commission continues to discharge its mandate under the African Charter. The challenges highlighted above need to be addressed by the state parties to the African Charter, the AU and the African Commission itself. The African Charter remains unknown to many people on the continent, let alone policy makers in governments. The promotional mission of the Commission therefore remains very important to ensure that the people of Africa are aware of the rights guaranteed under the African Charter. State parties need to live up to their commitments under the Charter.

The rights guaranteed under the African Charter will be realised only if concerted efforts are made at every level to disseminate the Charter through schools and academic institutions, conferences and symposia. This will ensure that the African Charter and other human rights instruments are known and respected by citizens and government officials alike. This can only happen if state parties and the AU Commission ensure that the necessary resources are made available for human rights education, and if state parties and the African Commission conscientiously discharge their responsibilities and obligations under the African Charter.

It is my hope that these challenges will be addressed so that 20 years on, the human and peoples' rights on the continent will be respected and guaranteed for every individual in Africa, as envisaged under the African Charter.

## The appeal of the African system for protecting human rights

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### Summary

*Twenty years after the African Charter on Human and Peoples' Rights came into force and with the advent of an African Court on Human and Peoples' Rights, it is legitimate and appropriate to ask questions about the appeal of the African system for protecting human rights. Are the way it functions and its results effective in attracting a large number of complaints and, in the face of competition from the universal system, is it preferred by the victims of violations against human rights in Africa? Does this system merely exist or does it contribute to a substantial improvement in good state practices, reinforcing democracy, good governance and human security in Africa? According to an evaluation that has been made, the functioning of the system remains hampered by numerous obstacles and challenges. The limits and imperfections of the African system can be surmounted with the real will of the member states of the African Union. The arguments previously evoked about African cultures should be abandoned, as the universality of human rights is not an obstacle to the diversity of cultures. The appeal of the African procedures of human rights is marked by the debate on the pertinence of the fusion between the African Court and the Court of Justice of the AU. While a normative clean-up of the African Charter seems necessary in so far as duties are concerned, all the more so as doctrine indicates that it is no longer truly valid in the present context of democratic renewal, it equally seems imperative, at the institutional level, that if the AU wants to improve the system, it would be better to go beyond the idea of a fusion of the two organs to enlarge the field of competence and action of the African system of protecting human rights, by including a competence in criminal matters.*

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## 1 Introduction

The international proliferation of protection mechanisms for human rights forms part of the construction of a new 'world order of human rights',<sup>1</sup> the procedures and norms of which are weighed up and compared by legal professionals. The African regional system of human rights is often described by its normative poverty and its institutional ineffectiveness. Some authors have felt obliged to make it longer and denser by adding other supplementary mechanisms, such as the New Partnership for Africa's Development (NEPAD), sub-regional organisations or the International Criminal Tribunal for Rwanda (ICTR).<sup>2</sup> Such a presentation would not only make the African system even heavier and vaguer, but what is more, those under its jurisdiction will only reject it even further. I therefore think that the African Charter on Human and Peoples' Rights (African Charter) is the main instrument for protecting human rights in Africa,<sup>3</sup> even if the African system for protecting human rights is based, according to articles 60 and 61 of the African Charter, on the application of international law concerning human rights, which refers to international instruments duly ratified by African states and to other regional African texts. According to its 'founding fathers', the African system for protecting human rights should not only be in accord with its political and socio-cultural environment, but should also have a legal coherence derived from a 'globalising conception of human rights',<sup>4</sup> stipulating the balance between rights and duties on the one hand, and the individual and the community on the other. Moreover, they thought — wrongly — that Africa should favour conciliation rather than contention concerning human rights on the grounds that, in African thinking, 'conflicts are settled not by litigation, but by conciliation ... which reaches consensus without creating a winner or a loser'.<sup>5</sup> Perceived in the beginning as 'a new regional humanitarian order in Africa'<sup>6</sup> rather than as a legal system, is the African system attractive enough for those whose rights are regularly violated and whose internal mechanisms are neither effective, nor available or impartial?

<sup>1</sup> 'Ordre mondial des droits de l'homme' J Mourgeon 'Développement et droits de l'homme' in Y Daudet (ed) *Aspects du système des Nations Unies dans le cadre de l'idée d'un nouvel ordre mondial* (1992) 188.

<sup>2</sup> M Mubiala *Le système régional Africain de protection des droits de l'homme* (2005).

<sup>3</sup> P Tavernier (ed) *Recueil juridique des droits de l'homme en Afrique (1996-2000)* (2002).

<sup>4</sup> 'Conception globalisante des droits de l'homme', V Eteka-Yemet *La Charte africaine des droits de l'homme et des peuples* (1996) 370.

<sup>5</sup> 'Les conflits sont tranchés non pas par une procédure contentieuse mais par la conciliation ... qui aboutit à un consensus et qui ne fait ni vainqueur ni vaincu', K M'baye *Les droits de l'homme en Afrique* (2002) 28.

<sup>6</sup> 'Un nouvel ordre humanitaire régional en Afrique', F Ouguerouz *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité* (1993) 393.

Twenty years after the African Charter came into force and with the advent of an African Court, it is legitimate and appropriate to ask questions about the appeal of the African system for protecting human rights.<sup>7</sup> Are the way it functions and its results effective in attracting a large number of complaints and, in the face of competition from the universal system (Human Rights Committee, Committee against Torture, etc), is it preferable to the victims of violations against human rights in Africa? Does this system merely exist or does it contribute to a substantial improvement in good state practices, reinforcing democracy, good governance and human security in Africa?

## 2 The material appeal of the African system of protecting human rights

A regional system for protecting human rights is of interest only if it ensures human rights more effectively than existing universal mechanisms, as well as offers a wider guarantee. The African Charter is not exempt from this logic of maximising law. The fact remains that one should inquire whether its unique conception and its promotional vocation are able to offer real protection of human rights on the grounds that the normative cross-fertilisation on which it is based is in accord with its socio-cultural milieu.

### 2.1 The promotional mandate of the African system of protecting human rights

Asking questions about the appeal of the African system would certainly provoke negative responses if one were limited to an assessment of what is practised in central African states.<sup>8</sup> Judges, lawyers and defendants prefer to trust in better-known internal instruments, the law being so very uncertain in Africa regarding practices of corruption, venality and ignorance of 'modern' rules compared to 'traditional' practices.<sup>9</sup>

<sup>7</sup> S Kaba *L'avenir des droits de l'homme en Afrique au XXI<sup>e</sup> siècle* (1996); CM Eya Nchama *Développement et droits de l'homme en Afrique* (1991); TM Kabangu 'Les droits de l'homme en Afrique: énoncé, garanties et obligations' in *Les droits de l'homme à l'aube du XXI<sup>e</sup> siècle* Karel Vasak Amicorum Liber (1999) 633-654; R Degni-Segui *Les droits de l'homme en Afrique francophone. Théories et réalités* (2001); E Kodjo 'La Charte africaine des droits de l'homme et des peuples' (1989) 1 *Revue Universelle des Droits de l'Homme* 29-34; J Fierens 'La Charte africaine des droits de l'homme et des peuples' (1999) 1 *Revue trimestrielle des droits de l'homme* 235-248.

<sup>8</sup> JD Boukongou 'L'application de la Charte africaine des droits de l'homme et des peuples par les autorités nationales en Afrique centrale' in JF Flauss & E Lambert-Abdelgawad (eds) *L'application nationale de la Charte africaine des droits de l'Homme et des peuples* (2004) 123-160.

<sup>9</sup> JD Boukongou 'Vie familiale comme lieu d'exercice des droits fondamentaux: Lecture des pratiques africaines' in G Otis & JY Morin (eds) *Le défi des droits fondamentaux* (2000).

However, it should be noted that, apart from this region, more than half of the 53 African states who are members of the African Union (AU) have not yet submitted all their reports as required under article 62 of the African Charter. One does not have to be reminded that<sup>10</sup>

by ratifying the Charter without taking appropriate steps to bring its laws in line with the same, the African Commission is of the opinion that the state has not complied with its obligations under article 1 of the Charter.

Moreover, the operational budget of the African Commission on Human and Peoples' Rights (African Commission) is small and human resources are limited in comparison with similar international institutions. According to an evaluation that has been made, the functioning of the system remains hampered by numerous obstacles and challenges.<sup>11</sup> What is more, the member states of the AU want to reform the system by a merger whereby the African Court on Human and Peoples' Rights (African Court) would be absorbed by the Court of Justice of the AU, with a consequent reduction in regional influence.

Very often, analysts go no further than a glowing description of the normative and institutional scene without really questioning its appeal. As Olinga has emphasised:<sup>12</sup>

It is difficult today not to be redundant, even boring, on the subject of the African Charter on Human and Peoples' Rights or, more broadly, on African regionalism as far as the protection of fundamental rights are concerned.

In his work on the African system of protecting human rights, Mubiala presents a detailed summary of the norms and various African mechanisms, concluding that there is 'an operational weakness in the African regional system'.<sup>13</sup> However, analysts have not hesitated to attribute certain magical virtues to the African system of protecting human rights, so strong was their need to see instituted in Africa a political order that respects human dignity. The consensus that emerged when it was adopted did not lead to a practice in states that are wary of the constraints imposed by international law on their jealously guarded sovereignty.<sup>14</sup> The African Charter is perceived as 'a mere window dressing' in order to accede to 'international civilisation'.<sup>15</sup>

<sup>10</sup> Communication 251/2002, *Lawyers for Human Rights v Swaziland*, Eighteenth Activity Report para 61.

<sup>11</sup> F Viljoen & S Yonaba 'Review of the procedures of the African Commission on Human and Peoples' Rights' (2002) (unpublished).

<sup>12</sup> 'Il est difficile aujourd'hui de ne pas être redondant, voire ennuyeux, au sujet de la Charte africaine des droits de l'homme et des peuples ou, plus globalement, du régionalisme africain en matière de protection des droits fondamentaux.' AD Olinga 'L'effectivité de la Charte africaine des droits de l'homme et des peuples' (2000) *Revue Afrique* 171.

<sup>13</sup> 'Une faiblesse opérationnelle du système régional africain', Mubiala (n 2 above).

<sup>14</sup> G Cohen-Jonathan 'L'évolution du droit international des droits de l'homme' in *Mélanges Offertes à Hubert Thierry, L'évolution du droit international* (1998) 107-125.

<sup>15</sup> 'simple habit de gala', 'civilisation internationale', L Sindjoun 'La civilisation internationale des murs : éléments pour une sociologie de l'idéalisme structurel dans les relations internationales' (1996) 27 *Etudes internationales* 848.

However, the African system offers not only real possibilities of condemning states whose behaviour violates human dignity, but it also contributes to furthering a real integration of African states through the law of human rights on the basis of universal values shared by the international community.

The African Charter allows for an African Commission that reports to the Assembly of Heads of State and Government of the AU.<sup>16</sup> The African Commission's missions are the promotion and protection of human rights. It can serve as a mediatory body to settle certain cases or to propose appropriate solutions to African governments. Ankumah, however, emphasises the little interest accorded by analysts to the work of the African Commission and the importance of its decisions.<sup>17</sup>

African states may no longer hide behind their so-called sovereignty and violate human rights with impunity:<sup>18</sup>

Once ratified, states parties to the Charter are legally bound by its provisions. A state not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must.

Every state party to the African Charter should accept its responsibilities without evasion:<sup>19</sup>

The Commission has argued forcefully that no state party to the Charter should avoid its responsibilities by recourse to the limitations and 'claw-back' clauses in the Charter. It was stated, following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections thereof. The Charter must be interpreted holistically and all clauses must reinforce each other.

The African Commission feels that it must not do the work of domestic courts: 'The responsibility of the Commission is to examine the compatibility of domestic law and practice with the Charter.'<sup>20</sup>

The African Commission is not restricted to evoking the rights consecrated by the African Charter. It interprets the state's notion of commitment widely. In the case of *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi*, the Commission stressed that 'the court ignored the obligation of courts and tribunals to conform to international standards of ensuring fair trial to all'.<sup>21</sup> This position of principle

<sup>16</sup> PG Pougoué 'La Commission africaine des droits de l'homme et des peuples entre son passé et son avenir' in *L'effectivité des droits fondamentaux dans les pays de la communauté francophone* (1994) 529-532.

<sup>17</sup> E Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996).

<sup>18</sup> *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 116.

<sup>19</sup> *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70.

<sup>20</sup> n 19 above, para 68.

<sup>21</sup> (2000) AHRLR 48 (ACHPR 2000) para 31.



has also been reaffirmed in the case of *Legal Resources Foundation v Zambia*, in which it concluded that in interpreting the Charter<sup>22</sup>

the Commission is enjoined by articles 60 and 61 to 'draw inspiration from international law on human and peoples' rights' as reflected in the instruments of the OAU and the UN as well as other international standard setting principles (article 60). The Commission is also required to take into consideration other international conventions and African practices consistent with international norms, etc.

On the other hand, in Communication 218/98, relating to the Nigerian soldiers condemned to death by the regime of Sani Abacha for an attempted *coup d'état*, the African Commission clearly expressed its position by emphasising that:<sup>23</sup>

In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly 15 years. The Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the UN treaty bodies (article 60). It may also have regard to principles laid down by states parties to the Charter and African practices consistent with international human rights norms and standards (article 61).

However, can these declarations of principle alone guarantee the appeal of the African system? Moreover, the incorporation of other international instruments by the African Charter is not always received well by certain states that accuse the African Commission of extrapolating on their actual commitments:<sup>24</sup>

The Commission must therefore take care not to transform radically, under cover of interpretation, the obligations assumed by the states party to the Charter on the basis of the African Charter.

## 2.2 The normative cross-fertilisation of the African system of protecting human rights

The African Charter protects both persons and peoples while instituting, in an original way, duties towards the community. An analysis of the rights of persons protected by the African Charter reveals no originality when compared to the classical instruments like the Universal Declaration of Human Rights (Universal Declaration) of 1948 and the international covenants of 1966.<sup>25</sup> In this sense, Ouguergouz concludes

<sup>22</sup> n 19 above, para 58.

<sup>23</sup> *Civil Liberties Organisation and Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) para 24.

<sup>24</sup> 'La Commission doit donc veiller à ne pas transformer radicalement, sous couvert d'interprétation, les obligations assumées par les Etats parties sur la base de la Charte africaine'. Ouguergouz (n 6 above) 390.

<sup>25</sup> N Valticos emphasises that the African Charter consecrates rights that other conventions ignore: 'Universalité et relativité des droits de l'homme' in *Mélanges en hommage à Louis Edmond Pettiti* (1998) 745.

that 'the points of convergence between them [the Charter and the Universal Declaration] are indeed definitely greater than their differences'.<sup>26</sup> This opinion is shared by Eteka-Yemet, who stresses that 'the majority of the norms of the African Charter on Human and Peoples' Rights are repeated in other universal and regional instruments of human rights'.<sup>27</sup> However, certain rights do not feature in it. Thus, there is, for example, nothing on the protection of family life and the ban on forced or compulsory labour.

Although the notion of 'peoples' rights' was not defined in the African Charter, it refers to the rights of a community to determine the way in which it must be governed, how its economy and culture must be developed and what part it must legitimately play in the management of the public affairs of the state in which it must achieve its ultimate fulfilment. 'Peoples' rights' include rights such as the right to peace and security and the right to a healthy environment.<sup>28</sup> Declaring peoples' rights constitutes a 'normative originality' based mainly on the equality of peoples and their right to exist or to be free. Virally considers 'peoples' rights' as part of positive international law.<sup>29</sup> There is no doubt that for several decades, United Nations (UN) resolutions have pronounced numerous international recommendations for the preservation of peoples against the scourges of war, pollution and poverty. It is, however, not certain that all these extremely interesting proposals have acquired the status of 'law'. Valticos is of the opinion that<sup>30</sup>

it could be objected that affirming a peoples' right is risky as this could, in certain respects, result at the very least in weakening the rights of the individual human person.

However, under this much vaunted originality smoulders a powder keg that can be used for purposes of secession or rebellion, for the adjective 'oppressed' mentioned in article 20 of the African Charter can serve as a launch-pad for small secessionist groups. According to N'gom, 'the only justification for the presence of the notion of 'peoples' rights' in the African Charter is linked to the existence of the last bastions of

<sup>26</sup> 'Les points de convergence entre celles-ci l'emportent en effet nettement sur leurs différences' Ougergouz (n 6 above) 67.

<sup>27</sup> 'La majorité des normes de la charte africaine des droits de l'homme et des peuples est reprise des autres instruments universels et régionaux des droits de l'homme', Eteka-Yemet (n 4 above) 44.

<sup>28</sup> F Rigaux 'La place de la Charte africaine des droits de l'homme et des peuples dans la reconnaissance des droits des peuples' (1989) 1 *African Journal of International and Comparative Law* 584-594.

<sup>29</sup> M Virally 'Panorama du droit international contemporain' Cours général de droit international public'; 1983 (183-V) *Recueil des cours de l'Académie de droit international* tome 60.

<sup>30</sup> 'Le risque de l'affirmation d'un droit des peuples serait, à certains égards, a-t-on pu objecter, d'entraîner pour le moins l'affaiblissement des droits de la personne humaine' Valticos (n 25 above) 749.

colonialism',<sup>31</sup> in particular, apartheid South Africa before Mandela was freed. Any other interpretation can only give rise to consequences particularly serious for the respect of the rights of citizens that the African Charter wants to protect, because of the instability that could follow from a weakening of post-colonial national sovereignties. The African Commission confirmed this opinion in the cases of *Katanga* and *Cabinda*.

A case was brought before the African Commission on 2 April 1988 by the *Union Nationale de Libération du Cabinda*, requesting the condemnation of Angola for depriving the 'people of Cabinda' of their right to self-determination. Since Angola's independence, numerous secessionist movements in Cabinda have demanded the enclave's detachment from this state. The African Commission confined itself to stating that the request could not be considered, in accordance with article 101 of its Rules of Procedure, as Angola was not a party to the African Charter.<sup>32</sup> It finally had the opportunity to interpret article 20 in the case of the independence of Katanga.<sup>33</sup> The claimant was the *Congrès du Peuple Katangais*. The latter asked the African Commission to recognise the organisation as a liberation movement, to recognise the independence of Katanga and to help it obtain the evacuation of Zaire from the territory of Katanga. In rejecting the request of the *Congrès du Peuple Katangais*, the African Commission first of all pointed out that, even if Katanga was made up of one or several ethnic groups, the question would have no bearing on the examination of the request. Next, it formulated the different ways in which self-determination could operate:<sup>34</sup>

Independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people, but is fully cognisant of other recognised principles such as sovereignty and territorial integrity.

Finally, it concluded that<sup>35</sup>

in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise

<sup>31</sup> 'La seule justification de la présence de la notion de "droits des peuples" dans la Charte africaine est liée à l'existence des derniers bastions coloniaux', B N'gom 'Charte africaine des droits de l'homme et des peuples — Présentation' in A Fenet (ed) *Droits de l'homme — Droits des peuples* (1982) 207.

<sup>32</sup> Communication 24/89, *Union National de Liberation de Cabinda v Angola* Seventh Annual Activity Report.

<sup>33</sup> *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

<sup>34</sup> n 33 above, para 4.

<sup>35</sup> n 33 above, para 6.

a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

One can deduce from the above that the African Commission insists on two conditions for self-determination: violations of human rights and the refusal of the people concerned of the right to participate in the management of public affairs. To bring its recommendation, obliging the *Congrès du Peuple Katangais* to use its right to self-determination within the context of Zaire's sovereignty, in compliance with international law, the Commission ought to have resorted to the classical distinction between self-determination and secession. Admittedly, the UN condemned Katanga's secession attempt in 1960-1961, considering it illegal and hardly representative of any movement of popular will.<sup>36</sup> The fact remains that the two conditions laid down by the Commission itself seem to have been met, thus warranting self-determination: The nature of Mobutu's regime was neither democratic nor did it respect human rights. There ought to have been no doubt, either about the serious and massive violations of human rights,<sup>37</sup> nor of the confiscation of political power by the 'King of Zaire'.<sup>38</sup> Self-determination can be organised in a democratic and peaceful manner, whereas secession is often a violent and illegal action.

As for duties enumerated by the African Charter, while they may give rise to exemplary citizenship, their actual legality and concrete consequences are disputed. The most cited case is that of the duty to promote and realise African unity. Without denying the merit of the line of argument suggested by President Senghor and developed by Kéba M'baye,<sup>39</sup> the true question that could be asked today is how one is to ensure that African individuals will discharge their duties. Or must one simply conclude that this uncertain normative construction bears witness to the pedagogical virtue of the Charter and that duties are ethical beacons that throw light on the African conception of human rights?

Madiot, who finds the first two articles presenting the duties (27 and 28) rather 'insipid', wondered for a long time about the place of article 29 in the African legal order of human rights. According to him:<sup>40</sup>

Article 29, on the other hand, consisting of eight sub-sections, is full of risks. It places the individual at the service of the community, making it possible to

<sup>36</sup> V Berny 'La sécession du Katanga' (1965) *Revue Juridique Indépendance et Coopération* 563-573.

<sup>37</sup> *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 71 (ACHPR 1995).

<sup>38</sup> *Mpaka-Nsusu v Zaire* (2001) AHRLR 17 (HRC 1986).

<sup>39</sup> Ouguergouz (n 6 above) 233-234.

<sup>40</sup> 'L'article 29, en revanche, composé de huit alinéas, est plein de risques. Il met l'individu au service de la communauté et permet de justifier toutes les oppressions. Il aboutit aussi à détruire ou fortement minimiser les droits reconnus à l'homme dans les articles 1 à 18'; Y Madiot *Considérations sur les droits et devoirs de l'homme* (1998) 126.

justify all kinds of oppression. It also results in destroying or greatly minimising the human rights recognised in articles 1 to 18.

The prescription of duties in the African Charter is therefore seen as an exaltation of arbitrary power and a justification of developmental doctrines with little concern for the rights of the individual. The individual would be sacrificed for the sake of an illusory communal development, or subjected to a bloody unanimity that has characterised many African powers. Even the return to traditional African values would only be a façade leading to a dead end.

Admittedly, the African Commission has not been confronted with such a serious and permanent confusion between rights and duties, but should one necessarily continue to maintain in the text prescriptions that are neither convincing nor practicable, at the risk of reinforcing a legitimate suspicion about a camouflage of arbitrary power in the African Charter? A normative clean-up of the Charter seems necessary in so far as duties are concerned, all the more so as doctrine indicates that this Charter is no longer truly valid in the present context of democratic renewal.<sup>41</sup> After all is said and done, unless the African Charter is improved, it would be advisable to take refuge behind the venerable wisdom of Dupuy:<sup>42</sup>

It is really impossible, in the absolute, to set the community off against the individual . . . The dialectic is that of the community, without which man is an irresponsible being, concentrating on his rights as an egotistically guarded heritage, and that of man, without whom the community becomes an oppressive, not to say a murderous entity.

### 2.3 A universalist and positive interpretation of rights

In its function of controlling and interpreting the law, the African Commission has breathed new life into the normative corpus of the African Charter. Through its numerous decisions that constitute a much appreciated *corpus* of case law, the Commission has contributed to the emergence of a dynamic and objective conception of the African law of human rights, even if an internal coherence to interpretation methods remains to be found. Five major issues have surfaced in case law.

In the first place, the modern conception of equality in Africa is gained from the universality of human rights. Several clauses in the

<sup>41</sup> AD Olinga 'L'impératif démocratique dans l'ordre régional africain' (1999) 8 *Revue de la Commission africaine des droits de l'homme et des peuples* 55-76.

<sup>42</sup> 'On ne saurait opposer, dans l'absolu, communauté et individu (. . .) La dialectique est celle de la communauté, sans laquelle l'homme est irresponsable, replié sur ses droits comme sur un patrimoine égoïstement gardé, et celle de l'homme, sans lequel la communauté devient une entité oppressive sinon meurtrière', R] Dupuy 'Thème et variations sur le droit au développement' in *Mélanges offerts à Charles Chaumont, Le droit des peuples à disposer d'eux-mêmes, méthodes d'analyse du droit international* (1984) 273.

African Charter prescribe non-discrimination and equality, particularly articles 2 and 3:<sup>43</sup>

[I]t is apparent that international human rights law and the community of states accord a certain importance to the eradication of discrimination in all its guises. Various texts adopted at the global and regional levels have indeed affirmed this repeatedly.

Three domains have shown the interpretation of the African Commission on this point. They are the questions of foreigners, sexual freedom and the right to participate freely in the public affairs of one's country.

One sees many discriminatory practices in the treatment of foreigners. Thus, in the case of the expulsion of Burundian nationals from the territory of Rwanda in 1989, the African Commission concluded that article 2 of the African Charter had been violated in observing that:<sup>44</sup>

There is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates article 2.

The state, by ratifying the African Charter, is committed to 'secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals'.<sup>45</sup> Another case concerned the collective expulsion of West African nationals by Zambia, on the grounds that they were living there illegally and that the African Charter did not abolish the requirements for visas and the regulation of movement over national borders between member states. The African Commission ruled that these mass expulsions of foreigners constituted 'a flagrant violation of the Charter'.<sup>46</sup> This interpretation of the Commission was confirmed in the case concerning the expulsion of certain West African nationals from Angola in 1996. For the Commission,<sup>47</sup>

African states in general, and the Republic of Angola in particular, are faced with many challenges, mainly economic. In the face of such difficulties, states often resort to radical measures aimed at protecting their nationals and their economy from non-nationals. Whatever the circumstances may be, however, such measures should not be taken to the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations 'constitute a special violation of human rights'.

<sup>43</sup> *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 131.

<sup>44</sup> *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 22.

<sup>45</sup> *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 22.

<sup>46</sup> n 44 above, para 31.

<sup>47</sup> *Union Inter africaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997) para 16.

As far as sexual freedom is concerned, William Courson appealed to the Commission about the discriminatory legislation in Zimbabwe on homosexuals.<sup>48</sup> This ban was encouraged by the President of the Republic and his Minister of the Interior. Although the complaint was withdrawn by the applicant, one of the commissioners, who was the rapporteur, declared:<sup>49</sup>

Because of the deleterious nature of homosexuality, the Commission seizes the opportunity to make a pronouncement on it. Although homosexuality and lesbianism are gaining recognition in certain parts of the world, this is not the case in Africa. Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values . . .

No member of the Commission lodged a formal denial of this interpretation.

Finally, non-discrimination is increasingly violated in the exercise of political functions. The African Commission expounded on this at length in the case of *Legal Resources Foundation v Zambia*. In this case, the complainant alleged a violation of the Charter by a law of 1996, amending the Constitution of Zambia, which stipulates, among other matters, that whoever wants to become a candidate for the presidency of the Republic must prove that both parents are or were Zambians by birth or descent. While condemning the arbitrary nature of such a clause, the Commission very pedantically observed the following:<sup>50</sup>

Article 2 of the African Charter abjures discrimination on the basis of any of the grounds set out, among them 'language . . . nation and social origin . . . birth or other status'. The right to equality is important for a second reason. Equality or lack of it affects the capacity of a person to enjoy many other rights. For example, [a person who is disadvantaged because] of his place of birth or social origin suffers indignity as a human being and an equal and proud citizen.

In the second place, the African Commission has made several pronouncements on the protection of the physical integrity of the individual. The right to life is a primary human right; the one that makes it possible to enjoy all the other rights:<sup>51</sup>

The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, any violation of this right without due process amounts to arbitrary deprivation of life.

In the case of Ken Saro-Wiwa, the African Commission concluded that the 'protection of the right to life in article 4 also includes a duty on the state not to purposefully let a person die while in custody'.<sup>52</sup>

<sup>48</sup> *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).

<sup>49</sup> Ankumah (n 17 above) 174.

<sup>50</sup> n 19 above, para 63.

<sup>51</sup> *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000) para 19.

<sup>52</sup> n 18 above, 104.

The Commission remains very firm on violations of physical integrity. It has ruled that the African Charter has been violated, for example, as soon as an individual had been detained in a sordid and dirty cell in inhuman and degrading conditions. Being detained arbitrarily, without knowing either the reasons for or the duration of one's detention, in itself constitutes mental traumatism. Moreover, not allowing someone contact with the outside world and access to medical care constitutes cruel, inhuman and degrading treatment.<sup>53</sup> In similar cases, the Commission has given priority to the fact that the expression cruel, inhuman or degrading punishment or treatment must be interpreted so as to include the widest possible protection against abuse, physical as well as mental. It upheld the violation of article 5 against Nigeria that kept a prisoner locked up for 147 days without allowing him to take a bath,<sup>54</sup> and against Kenya that detained the student leader, John Ouko, in a basement cell equipped with a light that remained on during the whole 10 months of his detention.<sup>55</sup> The Commission also insists on the fact that<sup>56</sup>

the African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a situation of civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

What is more, even if the violations are not perpetrated by agents of the state, the mere fact of neglecting to ensure respect for the rights contained in the African Charter constitutes a violation of the said Charter, '[e]ven where it cannot be proved that violations were committed by government agents, the government had responsibility to secure the safety and the liberty of its citizens ...'<sup>57</sup>

In the third place, the guarantee of freedom is at the heart of the work of the African Commission. The freedom to criticise the government is considered an essential way of participating in the public life of one's country. Consequently, '[p]eople who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens, otherwise public debate may be stifled altogether'.<sup>58</sup>

The African Charter does not contain any clause exempting states and individuals from the freedoms it guarantees:<sup>59</sup>

<sup>53</sup> *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 40.

<sup>54</sup> *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 70.

<sup>55</sup> *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000) para 22.

<sup>56</sup> *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

<sup>57</sup> n 56 above, para 22.

<sup>58</sup> *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 74.

<sup>59</sup> *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41.



In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.

In the case of *Media Rights Agenda v Nigeria*, the African Commission recognised that the fact of arresting and incarcerating a journalist without an arrest warrant and without informing him of the charges against him was arbitrary.<sup>60</sup> They ruled in a similar fashion when the complainant was neither charged with any crime, nor allowed access to his family, friends, doctors or lawyers.<sup>61</sup> In the latter case, the founder of the NGO Civil Liberties Organisation (Nigeria) had been arrested and detained, the headquarters of his organisation searched and vandalised, and computer equipment taken away by security agents of the government. The government claimed that this action was legal in so far as it was based on Decree 2 of 1984 (amended in 1990) relating to the security of the state authorising the detention of persons. The government felt that its agents had acted within the context of the law. The Commission observed in *Media Rights Agenda v Nigeria* that it 'is not taking issue with the history and origin of the laws nor the intention for the promulgation'.<sup>62</sup> Subsequently, it referred to its decision in *Jawara v The Gambia*,<sup>63</sup> in which it declared that '[f]or a state to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter'.<sup>64</sup>

Arbitrary arrests and detentions often affect foreigners and are concomitant with the discrimination of which they are often victims. Thus, in the case of the Burundians expelled from Rwanda, the Commission ruled that:<sup>65</sup>

The arrests and detentions by the Rwandan government based on grounds of ethnic origin alone, in the light of article 2 in particular, constitute arbitrary deprivation of the liberty of an individual. These acts are clear evidence of a violation of article 6.

Arbitrary detentions also concern persons who have completed their prison sentences, but who are sometimes kept in detention or placed under house arrest. Thus, in the case of *Pagnouille (on behalf of Mazou) v Cameroon*,<sup>66</sup> the complainant was kept in detention by a military tribunal without a verdict, without witnesses and without a defence. Finally, freedom is often dearly paid for by those who express other opinions from those held by the government. Thus, in the case of *Achuthan and*

<sup>60</sup> n 54 above, para 40.

<sup>61</sup> n 53 above, para 21.

<sup>62</sup> n 54 above, para 59.

<sup>63</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>64</sup> n 54 above, para 75.

<sup>65</sup> n 44 above, para 28.

<sup>66</sup> (2000) AHRLR 57 (ACHPR 1997).

*Another (on behalf of Banda and Others) v Malawi*,<sup>67</sup> the African Commission ruled that 'the arbitrary arrests of office workers, trade unionists, Roman Catholic bishops and students' violated article 6 of the African Charter.<sup>68</sup>

In the fourth place, the issue of fair trial has nourished and consolidated the work of the African Commission. The right to a good administration of justice implies, on the one hand, the right to petition competent courts and, on the other hand, the right to a fair trial by an independent and impartial court.<sup>69</sup>

A government that governs truly in the best interest of the people, however, should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society.

The African Commission has often had to pronounce on the good administration of justice:<sup>70</sup>

The Commission is not taking an issue with the history and origin of the laws nor the intention for their promulgation. What is of concern here to the Commission is whether the said trial conforms to the fair hearing standards under the Charter.

First of all, on the level of principles, the African Commission declared in its Resolution on the Right to a Fair Trial and Legal Assistance in Africa that:

In many African countries, military courts and special tribunals exist alongside regular judicial institutions. The objective of military courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.

In many African countries, the violations of human rights committed by the security forces fall within the jurisdiction of military tribunals. This considerably limits the action of citizens to defend their rights, for it is obvious to the Commission that<sup>71</sup>

it is not necessary to find that a tribunal presided over by a military officer is a violation of the Charter. It has already been pointed out that the military tribunal fails the independence test.

Concerning the right of access to the courts, it is particularly foreigners who are denied this right. In the case of mass expulsions, it is not possible for the victims to apply to the tribunals of the state that is

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<sup>67</sup> (2000) AHRLR 144 (ACHPR 1995).

<sup>68</sup> Para 8.

<sup>69</sup> n 58 above, para 81.

<sup>70</sup> n 54 above, para 59.

<sup>71</sup> n 23 above, para 44.

expelling them illegally regardless of the Charter. Thus, in the case of the West Africans expelled from Zambia in 1992:<sup>72</sup>

The Commission . . . has established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation. This constitutes a violation of their rights under article 7 of the Charter and under Zambian national law.

A government is also frequently seen to orchestrate a parody of justice to get rid of its political opponents, defenders of human rights or intellectuals and artists. In the case of *Media Rights Agenda v Nigeria*, the complainant alleged that<sup>73</sup>

prior to the setting up of the tribunal, the military government of Nigeria organised intense pre-trial publicity to persuade members of the public that a coup d'état plot had occurred and that those arrested in connection with it were guilty of treason . . . Consequently, the Commission finds the selection of serving military officers, with little or no knowledge of law as members of the tribunal in contravention of principle 10 of the United Nations Basic Principles on the Independence of the Judiciary.

Certain African states attempt by special legislation to exclude violations of human rights from the competence of the usual competent courts. The Commission in the case of *Huri-Laws v Nigeria* ruled as follows:<sup>74</sup>

Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released.

In this case, the complainants could not contest their detention before the national courts, as the competence of the national courts to judge the legality of acts laid down by the security services of the government had been annulled by a special decree. It is not enough for a government to allege the existence of a law in accordance with which acts have been committed; it also has to prove that this law complies with the obligations pronounced by the African Charter.<sup>75</sup>

Finally, the African Commission was also concerned about the content and process of trials. In the case of *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi*,<sup>76</sup> the criminal division of the Appeal Court of Bujumbura agreed on 13 June 1997 to an adjournment to allow the parties time to prepare their pleas. On the date of the hearing (20 August 1997), the prosecution gave, as a reason for its inability to plead, the fact that they needed enough time to study the plea note of the lawyer. The Court easily acceded to this request and the pleas were adjourned to 25 September 1997. On that day, the lawyer for the

<sup>72</sup> n 45 above, para 30.

<sup>73</sup> n 54 above, paras 47 & 60.

<sup>74</sup> n 53 above, para 45, quoting the Commission's Resolution on the Right to Recourse and Fair Trial (1992) para 2(c).

<sup>75</sup> n 54 above, para 75.

<sup>76</sup> n 21 above.

defendant was ill and could not attend court. The defendant therefore asked the Court to adjourn to a later date. The Court refused and decided to hear the prosecution and forced the defendant to defend himself on his own without the aid of his lawyer, on the grounds that the plea note lodged by the lawyer was sufficient. The Court condemned him to death on that very day at the end of the pleas. Despite his appeal for an annulment, the Supreme Court confirmed the decision of the Appeal Court by judging that the complainant did not need a lawyer. The African Commission ruled that<sup>77</sup>

[t]he judge should have upheld the prayer of the accused, in view of the irreversible character of the penalty involved. . . . The Commission holds that by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial.

The African Commission stated further that the right to legal assistance is a fundamental element of the right to a fair trial:<sup>78</sup>

It was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case . . . not only do the state parties recognise the rights, obligations and freedoms proclaimed in the Charter, they also commit themselves to respect them and take measures to give effect to them.

In the fifth place, the African Commission confirmed the effectiveness of economic, social and cultural rights in Africa. In the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,<sup>79</sup> it affirmed that<sup>80</sup>

[i]nternational law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.

The right to a healthy environment, the right to housing, the right to sufficient food, the right to health and the right to education must be the subject of positive action on the part of the state whose economic and social system should be aimed at the effective realisation of these rights.<sup>81</sup>

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights — both civil and political rights and social and economic — generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect,

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<sup>77</sup> Para 29.

<sup>78</sup> Paras 30 & 31.

<sup>79</sup> (2001) AHRLR 60 (ACHPR 2001).

<sup>80</sup> Para 68.

<sup>81</sup> Para 44.

promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts

...

Admittedly, it has been said by numerous specialists that the African Charter is a regional instrument that is 'poor and incoherent' on a technical level. Others have affirmed that the balance sought between rights and duties or between the individual and the community creates confusion which does not facilitate the social appropriation of such an instrument. For Ouguergouz, at present judge at the African Court of Human Rights:<sup>82</sup>

One of the most notable — but probably the most serious — of the shortcomings of the African Charter is to be found in the imprecise and incomplete formulation of the rights guaranteed. In the present state of their wording, indeed, the pertinent clauses of the African Charter offer only weak legal protection to the individual.

Therefore, with regard to the African Commission's interpretation in the course of various cases submitted by numerous complainants, can one conclude that the African system of protecting human rights is attractive? A positive response to such a question depends on the reality of the functioning of the organs and procedures of the African system, the level of appeal of which remains to be proved.

### **3 The institutional and procedural appeal of the African system of protecting human rights**

The appeal of the African procedures of human rights is marked by the debate on the pertinence and appropriateness of the fusion between the African Court of Human and Peoples' Rights and the Court of Justice of the AU. This reinforces the scepticism about the appropriateness of employing the African system, especially since the obligatory passage of the complainant through the widely criticised internal procedures is already seen as a dissuasive obstacle. If the AU wants to improve the system, would it not be better to go beyond the idea of a fusion of the two organs to enlarge the field of competence and action of the African system of protecting human rights by including a penal dimension?

#### **3.1 The dissuasive precondition of exhaustion of local remedies**

Following the example of other international human rights monitoring bodies, the African Commission can concern itself with a communication only when local remedies have been exhausted and no other international 'jurisdiction' has been approached. It is therefore a matter of

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<sup>82</sup> Ouguergouz (n 6 above) 389.

the exclusive submission of a case, not allowing the applicant to try his or her luck before all the international monitoring bodies at the same time, thus avoiding their being in competition with each other on the same case. Why should a victim turn to the African system rather than to the UN Human Rights Committee?

For Mubiala, the African Commission has become, with the end of the Cold War and the democratisation of Africa, an<sup>83</sup>

interactive mechanism that has recently been enriched with mechanisms inspired by the practice of the United Nations and the principles relating to it. It has consulted decisions of the control organs of the United Nations and the two regional Courts (European and American).

One therefore understands that<sup>84</sup>

The request that domestic remedies be exhausted prevents the Commission from becoming a higher level court, a function that has not devolved to it and for which it does not have suitable means at its disposal.

This obligatory passage before the domestic judge is perceived by numerous persons brought to trial as a dissuasive precondition in so far as the independence of the judiciary in Africa is not guaranteed. Must one be reminded that, in spite of democratisation and the affirmation of human rights in many African constitutions, 'justice remains a supervised justice, the status of which, as a recently acquired legal power, and occasional liberties do not shield it from influence and from shameful promptings?'<sup>85</sup>

The Commission has spoken out on numerous occasions to specify that<sup>86</sup>

it would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective.

It is thus impossible to force complainants to 'exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective'.<sup>87</sup> This position reinforces the Commission's interpretation according to which<sup>88</sup>

<sup>83</sup> Mubiala (n 2 above) 203.

<sup>84</sup> *'La demande d'épuisement des recours internes évite que la Commission ne devienne un tribunal de première instance, une fonction qui ne lui est pas dévolue et pour laquelle elle ne dispose pas de moyens adéquats.'* Commission Nationale des Droits de l'Homme et des Libertés v Tchad RADH 2000 343 (CADHP 1995) para 28. This paragraph is not included in the English version of the case ; see n 55 above.

<sup>85</sup> *'La justice reste une justice surveillée dont le statut de pouvoir judiciaire récemment acquis et les hardiesses occasionnelles ne la soustraient pas à l'emprise et aux sollicitations inavouables'* M Kamto 'Une justice entre tradition et modernité' in G Conac & J du Bois de Gausson (eds) *La justice en Afrique* (1990) 62.

<sup>86</sup> *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 8.

<sup>87</sup> n 45 above, para 12.

<sup>88</sup> n 44 above, para 17.

in cases of serious and massive violations of human rights, and in view of the vast and varied scope of the violations alleged and the large number of individuals involved, the Commission holds that remedies need not be exhausted . . .

for it<sup>89</sup>

can absolutely not demand that the requirement of exhaustion of local remedies be applied literally to cases in which the complainant is unable to apply to the national courts for every individual complaint.

Moreover, the fact that the complainant may have serious fears for his or her safety could also justify not exhausting the internal channels of appeal.<sup>90</sup>

The complainant is no longer in the Republic of Kenya. The above condition is not based on his voluntary will — he has been forced to flee the country because of his political opinions and Student Union activities. . . . the Commission finds that the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life . . .

This interpretation of the Commission can also be found in the case of *Abubakar v Ghana*:<sup>91</sup>

He escaped to Côte d'Ivoire from prison in Ghana and has not returned there. Considering the nature of the complaint it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities.

In addition, when persons have already been killed, the remedies presumed available no longer have any interest. Thus:<sup>92</sup>

The Commission takes note of the fact that the complaint was filed on behalf of people who had already been executed. In this regard, the Commission held that there were no local remedies for the complainant to exhaust. Further that even if such a possibility had existed, the execution of the victims had completely foreclosed such a remedy.

Finally, it would be impossible to exhaust the internal channels of appeal without suitable legal assistance when necessary. Thus:<sup>93</sup>

The accused should be represented by a lawyer of his choice. The purpose of this provision is to ensure that the accused has confidence in his legal counsel.

The situation is aggravated when the lawyer of the defendant is himself harassed by the powers that be. In the case of *Constitutional Rights*

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<sup>89</sup> 'Ne peut pas absolument exiger que la demande d'épuisement des recours internes s'applique littéralement aux cas où le plaignant se trouve dans l'incapacité de saisir les tribunaux nationaux pour chaque plainte individuelle.' *Commission Nationale des Droits de l'Homme et des Libertés v Tchad* RADH 2000 343 (CADHP 1995) para 30. This paragraph is not included in the English version of the case; see n 56 above.

<sup>90</sup> n 55 above, paras 18-19.

<sup>91</sup> (2000) AHRLR 124 (ACHPR 1996) para 6.

<sup>92</sup> n 51 above, para 14.

<sup>93</sup> n 23 above, para 28.

*Project (in respect of Lekwot and Others) v Nigeria*, the African Commission ruled that the Charter had been violated from the moment when 'during the trials the defence counsel for the complainants was harassed and intimidated to the extent of being forced to withdraw from the proceedings'.<sup>94</sup>

Kamto thinks that it is, however, necessary to put into perspective the insurmountable character represented by the obstacle of internal justice for many persons brought to trial. He maintains that it is not enough to proclaim the known deficiencies of the justice system in Africa. Beyond the real problems of justice in Africa, 'it is right to point out the apathy of the defendant and the inefficiency of their counsels'.<sup>95</sup> In numerous African countries, the legal recognition of the applicability of international conventions (including thus the African Charter) has not awakened in defendants the passion to use this to protect their rights. Very often, their ignorance of particularly complex and formalist legal procedures makes them suspicious with regard to internal justice.

### 3.2 The uncertain impact of decisions of African human rights bodies

It should be noted that, out of the first 245 complaints registered since its creation, the African Commission has given a decision on 224. Of these, more than 50 or so are waiting to be acted upon. In certain cases, the Commission does not know the result given to its decision by the defaulting state. Admittedly, one can legitimately be proud of certain successes of the Commission, as in the case of Louis Emgba Mekongo (rehabilitated in his function as magistrate and compensated by Cameroon) or in the case of Father Diamacoune Senghor (lifting of his house arrest by Senegal). But, in the vast majority of cases, the absence of a follow-up procedure makes it impossible to ascertain any improvement to the initial situation. The victim of a violation of human rights in Africa asks a simple question: What benefit can be gained from a decision given by an organ of the African system rather than by one given by the UN, for example? In what way would it be more attractive to have a state condemned before the African Commission or the African Court? The answers to the questions posed are conclusive for any defendant. The African Commission and the African Court give mainly three types of decisions: those concerning interim measures, those concerning the admissibility of communications and those concerning the merits of cases.

Firstly, the fact that the Commission took a decision on interim mea-

<sup>94</sup> (2000) AHRLR 183 (ACHPR 1995) para 13.

<sup>95</sup> 'Il est juste de relever l'apathie des justiciables et l'inefficacité de leurs conseils' M Kamto 'Charte africaine, instruments internationaux de protection des droits de l'homme, constitutions nationales : articulations et perspectives' in Flauss & Lambert-Abdelgawad (n 8 above) 43.



tures in the case of Ken Saro-Wiwa did not prevent the execution of the leader of the Ogoni and his eight companions by the Nigeria of Sani Abacha who ignored all the latter's requests. On the other hand, in the context of the case of José Domingo Sikunda, an alleged member of UNITA, it was apparently necessary for a member of the Commission to go to Namibia to obtain the freedom of the latter who was threatened with expulsion to Angola where he feared for his life.<sup>96</sup> But Mrs Mariette Sonjaleen Bosch was not as fortunate, as she was executed by Botswana in spite of the Commission's request for a stay of execution.<sup>97</sup> However, in the context of the case of Safiya Yakubu Hussaini, the Chairperson of the African Commission successfully launched an urgent appeal to Nigeria's Head of State to ask him to intervene in the context of the death sentence pronounced against her for adultery.<sup>98</sup> Every urgent communication must indicate whether the victim's life, physical integrity or health is in imminent danger. The African Commission is authorised, by rule 111 of its Rules of Procedure, to adopt provisional measures, by asking the state concerned not to take any action liable to cause irreparable harm to the victim, while waiting for the case to be examined by the Commission. However, it does not have any power to force the state to respect provisional measures. Should the state's membership of the AU not be suspended in the event of its not respecting such a serious decision?

Secondly, the admissibility of the communication before the African Commission already implies that the request has been accepted as such by at least seven of the 11 members of the Commission, in the absence of which it would not be inscribed in the official register of communications, which is the start of the procedure. Article 55(2) makes provision for this quorum to be necessary for the examination of a communication to be accepted, which can delay the examination of a complaint in spite of its urgent nature. In the same way, the submission of a case to the African Commission must not be transformed into a slanderous operation against states. Thus, when *Ligue Camerounaise des Droits de l'Homme* described the political regime of Cameroon as '30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya' and referred to 'government barbarisms', the African Commission called such allegations insulting and declared the communication not admissible.<sup>99</sup>

What is more, all seven conditions of admissibility defined in article 56 of the African Charter must be complied with to qualify for admissibility. Among these conditions is indeed that of having exhausted

<sup>96</sup> *Interights (on behalf of Sikunda) v Namibia* (2002) AHRLR 21 (ACHPR 2002).

<sup>97</sup> *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

<sup>98</sup> Communication 269/2003, *Interights (on behalf of Safia Yakubu Hussaini) & Others v Nigeria*, Twentieth Activity Report (2006).

<sup>99</sup> *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) para 13.

local remedies. In the case of *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of the Congo*,<sup>100</sup> the Commission refused to thoroughly examine the request of a Burundian complainant, illegally dismissed from his functions in the DRC and taken refuge in Togo, on the grounds that he had not taken the necessary steps, whereas it was obvious that cases like this had already been dealt with by the African Commission. Even if the Commission disputes it, this case was not very different from many similar communications where it had acknowledged the unavailability of local remedies. A refugee in Togo does not really have the means to contest an illegal act of a government before a court of the country that has violated his rights. To affirm the contrary is to live in an unreal world. Instead of hiding behind a formalism that translates into a denial of justice, the African Commission should have used the appropriate method of investigation into allegations of violations of human rights as stated in article 46 of the African Charter. When the Commission has established that violations have taken place, it makes recommendations to the state concerned, so that it may ensure that an inquiry is held into the allegations, that the victims are compensated (if need be) and that measures are taken to prevent this from happening again. Such an investigation ought to avoid rejecting numerous requests often sent by persons living in despair and not on a sufficient level to understand the whole complexity of procedures before an international authority. The Commission has already undertaken missions of investigation in Togo, Senegal, Mauritania and the Sudan. Nothing prevented it from doing so in the DRC.

One can legitimately wonder about access to the African Commission in the case of persons in distress or destitute, especially as no state makes provision for legal aid for the submission of cases to an international authority. How does one apply to the Commission if one does not have the financial resources to afford a lawyer? How could the African system, which should be in accord with an environment that is characterised by extreme poverty, contribute so that the poor are not dissuaded from applying to its authorities for lack of adequate material means? Should African states not ensure that legal aid that is available on an internal level — at least where this is the case — also be provided in the context of a procedure before the organs of the regional African system of human rights? All these are questions that will not receive any positive solution in the immediate present, but that ought, however, to make the African system of protecting human rights more appealing.

Thirdly, while the African Commission only makes 'recommendations', the African Court gives compulsory rulings. The Commission's recommendations have no authority. This is not the case for the rulings of the African Court. One author who has studied the question wants

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<sup>100</sup> (2003) AHRLR 65 (ACHPR 2003).

the African Commission, following the example of the Human Rights Committee of the UN, to be more aggressive in its approach and adopt a more restrictive style of language towards states instead of being content with vague expressions.<sup>101</sup> However, the lack of implementation of the recommendations of the Commission or of the rulings of the African Court is the most important problem that can dissuade a defendant from daring to submit a case to the organs of the African system for protecting human rights. No special procedure is provided to ensure any follow-up of the implementation of recommendations.<sup>102</sup> As for the rulings of the African Court, provision is made in article 29(2) of the Protocol of Ouagadougou for the Executive Council of the AU to ensure that the decisions given by the African Court are carried out. This in itself does not constitute an effective mechanism, given the diplomatic inertia within this authority.

The system depends on the good faith of the state found guilty of violating human rights, taking action in compliance with its sovereign commitment to respect the decisions of African authorities:

The absence of a context of monitoring and systematic evaluation of the execution of decisions, resolutions and recommendations by the states party to the Charter, makes it impossible to collect exact and exhaustive data on this subject

affirms Baricako, after ten years at the head of the Secretariat of the African Commission.<sup>103</sup> The Secretariat of the African Commission sends letters of reminder to the states whose violation of the clauses of the African Charter has been established, asking them to honour their commitments according to article 1 of the Charter, which requests that they '... recognise the rights, duties and freedoms enshrined in this Charter and ... undertake to adopt legislative or other measures to give effect to them'. The first letters are sent immediately after the adoption of the Activity Report by the Assembly of Heads of State and Government of the AU and other letters are sent as often as possible. The same is done for the compensation of victims, for it is the legislation of the defaulting state that is the norm.<sup>104</sup> This return to domestic remedies, already exhausted without success, can only awaken disinterest in the regional system for protecting human rights in

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<sup>101</sup> GJ Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 691-692.

<sup>102</sup> R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 21.

<sup>103</sup> 'L'absence d'un cadre de suivi et d'évaluation systématique de la mise en œuvre des décisions, résolutions et recommandations par les Etats parties, rend impossible la réunion des données précises et exhaustives à ce sujet', G Baricako 'La mise en œuvre des décisions de la Commission africaine des droits de l'homme et des peuples par les autorités nationales' in Flauss & Lambert-Abdelgawad (n 8 above).

<sup>104</sup> *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995) para 2.

Africa.<sup>105</sup> Would it not be appropriate to appoint a special rapporteur in charge of following up on the decisions of the regional African authorities concerned with human rights, who would have the power to offer to mediate between the defaulting state and the victim to ensure the decision is properly executed? It often happens that the victim becomes a refugee in another country. How can one then believe in a satisfactory compensation if the state from which the victim has fled prevents him or her from returning there by means of veiled intimidation? Admittedly, certain recommendations of the Commission have been carried out in good faith by the defaulting state, but what is the purpose of a decision for the injured party if it is not possible to guarantee that it will be executed?

In 1993, the Assembly of Heads of State of the Organisation of African Unity (OAU), at the request of the African Commission, approved the appointment by every state of a high ranking official responsible for relations with the African Commission. But the great majority of African states have not acted upon this resolution.<sup>106</sup> In conclusion,<sup>107</sup>

it has been stated that the African Commission has very few means at its disposal to see its decisions implemented. It has also been mentioned that the African Commission only has 11 members working part time, who can therefore not be present in all the states that are party to the Charter every time the execution of the Commission's work demands it.

### 3.3 The African Court in the African Union system

Many jurists of repute have wrongly believed that there exists a unique African conception of human rights that would be resistant to any institutionalisation of a justice of human rights.<sup>108</sup> Glélé-Ahanhanzo even hoped that<sup>109</sup>

<sup>105</sup> 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* 229.

<sup>106</sup> AHG/Res 227 (XXIX) para 4.

<sup>107</sup> 'Il a été constaté que la Commission africaine dispose de très peu de moyens pour faire exécuter ses décisions. Il a été également indiqué que la Commission africaine ne compte que 11 membres travaillant à temps partiel, lesquels ne peuvent donc pas être présents au sein de tous les Etats Parties chaque fois que l'exécution du travail de la Commission l'exige', Baricako (n 103 above) 230.

<sup>108</sup> K Vasak 'Les droits de l'homme en Afrique' (1967) 31 *Revue Juridique Indépendance et Coopération* 273-294; I Nguema 'Perspectives des droits de l'homme en Afrique: Les racines d'un défi permanent' (1990) 2(2) *Revue Universelle des Droits de l'Homme* 49-53.

<sup>109</sup> 'Le dynamisme et la doigté de la Commission africaine feront que cette dernière aide au règlement amiable, sans éclat, des litiges relatifs à la violation des droits de l'homme, ce qui aura peut-être pour conséquence de faire oublier la création d'une Cour Africaine des droits dont la nécessité ne s'imposera plus. L'Afrique ne préfère-t-elle pas la palabre?' M Glélé-Ahanhanzo 'La Charte africaine des droits de l'homme et des peuples: Ses virtualités et ses limites' (1985) *Revue de droit africain* 37.

the dynamism and tact of the African Commission will make the latter assist with the amiable and quiet settlement of litigations concerning the violation of human rights, which will perhaps lead to the creation of the African Court of Human Rights being forgotten, as there will no longer be any need for it. Doesn't Africa prefer palavers?

This conception of human rights wants to have one believe in the survival of an African culture of justice that would not approve of the legal duel. From the international judge Kéba M'baye<sup>110</sup> to an official of the UN,<sup>111</sup> this theory of the palaver tree as the African way of settling disputes is nothing but an anthropological fraud, aimed at masking malfunctions, for which African culture is neither responsible nor one of the vehicles. To tell the truth, African dictators have used this cleverly supported discourse to make people forget how their victims suffered. Today we find resurfacing, under a discourse of institutional rationalisation within the AU, the same ideas that yesterday were already seen to be nothing but an expression of a duplicity with bloodthirsty regimes.

The institutional shortcomings of the African system, characterised by a lack of a court, were solved in 1998, at the summit of the OAU in Ouagadougou (Burkina Faso), by the creation of an African Court on Human and Peoples' Rights.<sup>112</sup> While the African Commission has not completely failed in its mission, with regard to the human and financial resources placed at its disposal, and taking into account the enormous work of interpretation accomplished over the last 15 years, it still has to be proved, however, that the coming of an African Court (of which the Protocol came into force on 25 January 2004) could increase the appeal of the system. Mubiala concludes his analysis of the African Court by emphasising that:<sup>113</sup>

The creation of the African Court constitutes indubitably an important contribution to the international law of human rights. On the regional level, it constitutes an added value to the pre-existing control mechanism, ie the Commission.

The enthusiasm expressed in 1998 has for a few years been dampened by the legendary dread of African governments to submit to the decisions of an international court. Even if the African Court has only been instituted as a 'supplement' to the African Commission, one notes that

<sup>110</sup> K M'baye 'Rapport introductif sur la Charte africaine des droits de l'homme et des peuples' Actes du colloque de la Commission internationale des juristes, Nairobi, 2-4 December 1985.

<sup>111</sup> Mubiala (n 2 above) 5-18.

<sup>112</sup> S Kowouvi 'La Cour africaine des droits de l'homme et des peuples: Une rectification institutionnelle du concept de "spécificité" africaine en matière des droits de l'homme' (2004) 15 *Revue Trimestrielle des Droits de l'Homme* 757-790.

<sup>113</sup> 'La création de la cour africaine constitue indubitablement un apport important au droit international des droits de l'homme. Au plan régional, elle constitue une valeur ajoutée au mécanisme de contrôle préexistant, c'est-à-dire la Commission', M Mubiala 'La cour africaine des droits de l'homme et des peuples: Mimétisme institutionnel ou avancée judiciaire?' (1998) 102 *Revue Générale de Droit International Public* 779.

more than 40 years after the Conference of Lagos in 1961, which made provision for the creation of a tribunal in the context of an African Convention of Human Rights, the majority of African states still remain refractory to the legal process that could make them take responsibility for the violation of human rights.

On the occasion of its 3rd ordinary session in Maputo, in July 2003, the Executive Council of the AU decided that the African Court on Human and Peoples' Rights be maintained as a distinct and separate institution from the Court of Justice of the AU.<sup>114</sup> However, at its 4th ordinary session in July 2004 at Addis Ababa, the Assembly of Heads of State and Government revoked this decision, by deciding that 'the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into one court'.<sup>115</sup> This decision of a fusion — the absorption of the African Court on Human and Peoples' Rights by the Court of Justice of the AU — has evoked numerous protests and formidable legal queries. Not only did the authors of the doctrine of the merger of the two courts not really explain the validity of such an operation, but justifications as to the lack of means or the institutional congestion of the AU seem to be pretexts to those who fear having to be forced to ratify the Protocol of Ouagadougou.

It is interesting to recall that the Protocol to the Constitutive Act creating the Court of Justice has not yet received a sufficient number of ratifications and that the (separate) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights came into force on 25 January 2004 after the fifteenth ratification. The Court of Justice of the AU was established by the Constitutive Act of the AU; its statute, composition and functions are defined by the Protocol of the Court of Justice of the AU, which has not yet come into force. The Court of Justice of the AU is competent to resolve disagreements between opposing member states that have ratified its Protocol, but the African Court deals with cases concerning the violations of civil and political, economic, social and cultural rights guaranteed by the African Charter and other pertinent international instruments relating to human rights. Moreover, the judges of the African Court were elected at the summit of Khartoum in January 2006.

On the occasion of the summit of Sirte in July 2005, the Assembly decided

that a draft legal instrument relating to the establishment of the merged court comprising the Human Rights Court and the Court of Justice should be

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<sup>114</sup> A Dangabo Moussa 'Chronique de la cour africaine des droits de l'homme et des peuples à la Cour de justice de l'union africaine. Histoire d'une coexistence pacifique en attendant la fusion' (2005) 76 *Revue internationale de droit pénal* 135-138.

<sup>115</sup> Assembly/AU/ Dec 45 (III).

completed for consideration by the next ordinary sessions of the Executive Council.

The Summit also decided<sup>116</sup>

that all necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalisation of the Registry.

The Algerian Minister of Foreign Affairs, Mohamed Bedjaoui, former President of the International Court of Justice, was appointed to draw up the draft instrument of fusion. At the meeting of experts of the AU on 22 November 2005 in Algiers, the latter declared:<sup>117</sup>

The merger of the African Court of Human and Peoples' Rights and the Court of Justice is not an option. It is a necessity. This fusion is desirable. It is realistic and realisable.

This vision was not shared by everyone. Those — very numerous — who contested this decision think that certain Heads of State and Government take no interest in the system of protecting human rights in order to avoid discovering the confusion that such a merger would imply. This curious decision of the Assembly of the AU is based on an argument of costs linked to the existence of two separate courts within the same pan-African organisation. One can only express a real dissatisfaction as to the pertinence of such an argument. If the demand of rationality is an imperative with regard to the inadequacy of the means allocated by the member states of the AU, one cannot say with certainty that savings can only be achieved with the fusion of these courts. Should one not criticise the tedious pan-African meetings, whose real impact remains to be proved? Does pan-African bureaucracy, which is in full expansion, deserve more attention than an African Court on Human Rights, of which no credible evaluation of costs has been established to warrant getting rid of it with such uncommon speed?

With the outcry from non-governmental organisations (NGOs) and other institutions in defence of human rights, the Executive Council decided in January 2005 in Abuja (Nigeria) to refer to a meeting of government experts the draft legal instrument of merger, without prejudice to the effective establishment of the African Court.<sup>118</sup> The Council should simply have recommended the revision of the decision of July 2004. Similarly, the Chairperson of the African Commission should have demonstrated more pugnacity when faced with Heads of State who do not want to see such a tribunal established in Africa, which they imagine can only disturb their legendary tranquillity in impunity.

<sup>116</sup> Assembly/AU/Dec 83 (V).

<sup>117</sup> *'La fusion de la cour africaine des droits de l'homme et des peuples et de la cour de justice n'est pas une option. Elle est une nécessité. Cette fusion est souhaitable. Elle est réaliste et réalisable'* [http://193.194.78.233/ma\\_fr](http://193.194.78.233/ma_fr) (accessed 30 December 2005).

<sup>118</sup> EX CL/Dec165 (VI).

On 5 December 2005, in a resolution of its 38th session held in Banjul, the African Commission reiterated its preoccupation with making operational an independent and effective African Court on Human and Peoples' Rights.<sup>119</sup> Moreover, one court exists and the other is, for the moment, only virtual, for lack of sufficient ratifications.

The idea of a merger means, in the Mohammed Bedjaoui proposal, that the African Court on Human Rights becomes a specialised chamber in the jurisdictional magma of the AU. The authors of the project claim that:<sup>120</sup>

The draft text submitted for your examination has taken into account all the preoccupations expressed at previous meetings. It also has the advantage of a legal construction taking care of the cost of the recent coming into force of the Protocol creating the African Court on Human and Peoples' Rights. During the whole drafting of this project, our care and motivation have indeed been to draw up a balanced text, offering the best chances for the harmonious functioning of this new Court so that it can meet with efficiency the expectations of the member states of civil African society.

The argument of the rationalisation of means and optimisation of costs masks a desire to bury the African Court. The qualification of judges could have no link with human rights. Consequently we will witness a regression of the jurisprudence courageously developed by the African Commission over the past 15 years. It is to be regretted that Mr Bedjaoui, a jurist of international repute, did not support the argument for an independent court with its own dynamics. In the recent past, he would certainly have reached other conclusions to bring about the universality of human rights in the African context.<sup>121</sup> It is hard to imagine the International Court of Justice worrying so intensely about the violations of human rights that it would not lose the confidence of states so concerned about their commitments to international tribunals.

In spite of numerous protests raised to this project of merger, the heads of African states are not likely to revoke their decision. Consequently, if this is the sovereign will expressed by the AU, why not push rationalisation to its limit by creating another split, the better to tackle

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<sup>119</sup> Resolution adopted on 11 May 2005 in Banjul, published in the Eighteenth Activity Report of the African Commission.

<sup>120</sup> *'Le projet de texte soumis à votre examen a pris en compte l'ensemble des préoccupations exprimées à l'occasion des réunions précédentes. Il présente aussi l'avantage d'une construction juridique prenant en charge l'entrée en vigueur récente du protocole portant création de la Cour africaine des droits de l'homme et des peuples. Tout au long de l'élaboration de ce projet, notre souci et notre motivation étaient justement d'élaborer un texte équilibré, offrant les meilleurs chances d'un fonctionnement harmonieux de cette nouvelle Cour afin qu'elle puisse répondre avec efficacité aux attentes des Etats membres et de la société civile africaine.'* M Bedjaoui Discours du 21 novembre 2005 à Alger, [http://193.194.78.233/ma\\_fr](http://193.194.78.233/ma_fr) (accessed 30 June 2006).

<sup>121</sup> M Bedjaoui 'La difficile avancée des droits de l'homme vers l'universalité' *Universalité des droits de l'homme dans un monde pluraliste*, Actes du colloque organisé par le Conseil de l'Europe en collaboration avec l'Institut international des droits de l'homme, Strasbourg, 17-19 April 1989 (1990).



new issues linked to international criminal justice? On the supposition that African wisdom demands that excessive costs be avoided as far as justice is concerned, it would be just as sensible to be even more ambitious with the little one has at one's disposal.

Without prejudging the final decision of the AU, it would not be too much to envisage a court that could consist of three main sections, these being a section for disagreements between states (following the example of the International Court of Justice), a section for the protection of human rights (following the example of the European Court of Human Rights), and a section for criminal proceedings in the case of crimes against humanity, crimes of genocide, crimes of aggression and war crimes (following the example of the International Criminal Court (ICC)). Every section could then have functional autonomy, its own rules of procedure, its specialised chambers and its internal organisation in accordance with its mandate. Nothing would prevent certain judges, according to their proven professional expertise, presiding in more than one section.

Indeed, the Constitutive Act of the AU makes provision in article 4(h) for the right of intervention of the AU in the event of serious violations of human rights (genocide, crimes against humanity, war crimes). This intervention can be decided upon by the AU or solicited by the state in which the violations are taking place. Similarly, the Non-Aggression and Common Defence Pact makes provision in article 6(b): 'State parties undertake to arrest and prosecute any irregular armed group(s), mercenaries or terrorist(s) that pose a threat to any member state.' Conflicts are the cause of serious violations of human rights in Africa. Therefore, '[s]tate parties undertake to prohibit and prevent genocide, other forms of mass murder as well as crimes against humanity'.<sup>122</sup>

As the case of Hissène Habré has shown, it is unlikely that national justice will repress serious infringements of human rights. Following serious violations of human rights in Côte d'Ivoire, the NGO RADDHO called for the extension of the competence of the tribunal for Sierra Leone to Côte d'Ivoire, failing the creation of an international criminal court for this country.<sup>123</sup> Similarly, in the case of serious violations of human rights in Darfur (Sudan), the Security Council referred the situation to the ICC. However, it must be noted that the ICC can only deal with the most serious cases. What is more, numerous African states show little haste in ratifying its statute. Finally, will the ICC have sufficient means to deal with all the atrocities perpetrated in Africa?

The dynamics for improvement of African law on human rights could only be credible in so far as the African system for protecting human

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<sup>122</sup> Art 3(d) African Union Non-Aggression and Common Defence Pact.

<sup>123</sup> 'Charniers de Bouaké et de korogho: Coupable inaction face à l'impunité!' Communiqué of 3 August 2004, <http://www.raddho.africa-web.org> (accessed 30 June 2006).

rights adopts the route of material and procedural appeal that passes through the effective independence of the African Court. The African Court should be reformed to take into account the international dynamics of the criminal repression of serious mass violations of human rights and the adequate compensation for victims of such violations. Seen from this angle, the reform that has been started can contribute usefully to the positive development of the protection of human rights in Africa.

#### 4 Conclusion

The appeal of the African system of protecting human rights is not sufficient according to the evaluation made of it after 20 years of the African Charter. Ways of accessing this system are winding and steep, thus discouraging many victims from trying to follow them. However, the fact remains that the system, because it exists, contributes progressively to the emergence and consolidation of a regional protection of human rights in Africa. The limits and imperfections of the African system can be surmounted with the real will of the member states of the AU. The arguments previously evoked about African cultures should be abandoned, as the universality of human rights is not an obstacle to the diversity of cultures. However, there are universal values on which no regression can be tolerated. The work accomplished by the African Commission the last 15 years consolidates the idea of an independent court rather than that of a confused and bureaucratic merger. In default of a revocation of the decision taken by the heads of state, it is necessary to aim for a court with extended competences that would take into account situations of serious violations of human rights in Africa. Such a development is desirable if the AU places human rights at the heart of the pan-Africanism that it claims to be realising, and to preserve the African peoples from the scourges of war, fear and misery. What is more, domestic courts should participate in the work of promoting the African Charter and other international instruments on human rights. Beyond the problems of training and information of judges and lawyers, it is an invitation to place the Charter at the heart of legal practice, as African states cannot ignore their own international commitments and official proclamations.<sup>124</sup> Admittedly, priority is given to the satisfaction of the essential needs of populations who suffer poverty. It is, however, almost impossible to leave poverty behind without the real enjoyment of human rights guaranteed by an internal and an independent international justice system.

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<sup>124</sup> JD Boukongou & D Maugenest (eds) *Vers une société de droit en Afrique centrale* (2001) 396.

# The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa

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## Summary

*In this contribution, the author assesses the African Commission's efforts at developing and defending fair trial norms under the African Charter. After discussing resolutions and declarations dealing with fair trial rights adopted by the Commission, the case law of the Commission is analysed. Aspects that are covered include the right to counsel, to be tried within a reasonable time, the right to a public trial, the right to appeal and the prohibition of ex post facto laws. The author concludes that the African Commission should be commended for its inspiring interpretation of the African Charter, but notes that these norms are not given effect to by way of effective remedies.*

Arguably, the greatest challenge facing the Commission at the end of the millennium and into the second decade of its life, is to advance human rights jurisprudence as reflected in articles 45(1)(b) and (3) of the Charter.<sup>1</sup>

## 1 Introduction

Human rights have always been in peril in Africa. Individual freedoms were under intense and sophisticated threats during the dying days of military dictatorships in many countries. By any standard of assessment, the human rights practices of most states still fall far short of minimum conducts expected of governments. Rulers still smite the peoples in wrath with unceasing blow and rule the nations in anger with unrelenting persecution. Fair trial rights have had some worst moments in the

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<sup>1</sup> NB Pityana Preface in R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) vi.

last few decades. Securing these rights and ensuring their enjoyment in Africa have been one of the major concerns, almost a crusade, of the African Commission on Human and Peoples' Rights (African Commission), the implementing institution of the African Charter on Human and Peoples' Rights (African Charter).<sup>2</sup> This article assesses the African Commission's efforts at developing and defending fair trial norms under the African Charter.

The African Commission develops human rights jurisprudence through interpretation of the African Charter and elaboration of resolutions and recommendations. With respect to fair trial, the Commission has fared well in terms of the harvest jurisprudence from its communications and in the development of soft laws. Its jurisprudence has expounded, explained, clarified, amplified and solidified the Charter's guarantees. This article notes, at the level of generality, that there is still a great gulf between the enunciated principles and the reality of human rights enforcement and enjoyment in Africa. It suggests steps that the African Union (AU) and its member states should take to make fair trial rights realisable at the domestic courts — the zones of accountability where objective assessment overrides assertion and propaganda.<sup>3</sup>

## 2 Fair trial as a human right

After briefly examining the meaning and contours of fair trial, this part explores the norms of fair trial under the African regional human rights system. The African Charter, however, receives special attention.

### 2.1 Meaning and contours of fair trial

The right to a fair trial is an aspect of the 'due process of law' principle, embodying the idea of fair play and substantial justice. Due process is essential to the maintenance of certain immutable principles of justice and constitutes standards that a society has the right to expect from those entrusted with the exercise of sovereign prerogatives.<sup>4</sup> As a legal concept, fair trial establishes rules and procedures applicable throughout a trial, intended to ensure the equilibrium between the parties and implement structures that are capable of safeguarding judicial independence and impartiality. As a fundamental norm of international law — its fundamentalness is illustrated by the proposal to include it among the non-derogable rights of article 4(2) of the International Covenant

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<sup>2</sup> See African Charter on Human and Peoples' Rights adopted on 27 June 1981, entry into force 21 October 1986 OAU Doc OAU/CAB/LEG/67/3/Rev5.

<sup>3</sup> I Brownlie Editors preface in D McGoldrick *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights* (1994) v.

<sup>4</sup> See HN Muhammad 'Due process of law for persons accused of crime' in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 138 139.

on Civil and Political Rights (CCPR)<sup>5</sup> — the right to a fair trial seeks to protect individuals from unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, especially the right to life and liberty of the person.

Fair trial is applicable to both the determination of an individual's 'civil rights and obligations'<sup>6</sup> in a 'suit at law'<sup>7</sup> and with respect to the determination of any 'criminal'<sup>8</sup> 'charge'<sup>9</sup> against him or her. This right is essential to the protection of all other fundamental rights and freedoms. Thus, fair trial questions could arise in criminal hearings before administrative bodies that are not independent and impartial, or in trials in which one party has a significant advantage over the other, thereby breaching the principle of 'equality of arms'. They could arise where there are excessive delays in bringing a case to trial or completing court proceedings, or in secret trials, or by denying procedural protection to accused persons, including the presumption of innocence. In *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*,<sup>10</sup> the African Commission, which jurisprudence is the subject of this study, stated:<sup>11</sup>

The right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all.

<sup>5</sup> See International Covenant on Civil and Political Rights 999 UNTS 171 6 *International Legal Materials* 368. See Draft Third Optional Protocol to ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy Annex I in The Administration of Justice and the Human Rights of Detainees, the Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening *Final Report Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities* 46th session E/CN.4/Sub.2/1994/24 3 June 1994 (Final Report) 59-62.

<sup>6</sup> For elaboration of the phrase civil rights and obligation by the European Court, see eg *Ringeisen v Austria* (1971) 1 EHRR 455; where the Court held that the concept is autonomous within the meaning of art 6(1) of the European Convention on Human Rights, compared with their meaning in domestic law. See European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 November 1950 ETS No 5 213 UNTS 221 as amended by Protocol No 11 (entry into force 1 November 1998) ETS No 155 (1994) 33 *International Legal Material* 960.

<sup>7</sup> The term suit at law refers to various types of court proceedings — including administrative proceedings, eg — because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties; see McGoldrick (n 3 above) 415.

<sup>8</sup> On the autonomy of the word criminal, as used in art 6(1) of the European Convention, see eg *Engel v Netherlands* (1976) 1 EHRR 647 para 81.

<sup>9</sup> The European Court has defined the word charge, as used in art 6(1) of the European Convention, as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence; *Deweer v Belgium* (1980) 2 EHRR 439. In a number of cases, the Court has also held that the word charge has to be understood within the meaning of the European Convention, as opposed to its uses in domestic law; see eg the *Engel* case (n 8 above) para 81; the *Ringeisen* case (n 6 above) para 110.

<sup>10</sup> (2000) AHRLR 48 (ACHPR 2000).

<sup>11</sup> n 10 above, para 26.

## 2.2 Fair trial norms in the African regional human rights system

Almost all the regional human rights instruments in Africa incorporate fair trial norms expressly or by necessary implication. The African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>12</sup> guarantees, in relation to juvenile justice, the right to special treatment for a child accused or found guilty of infringing any penal law. It commands its state parties to ensure that no child who is detained or imprisoned or otherwise deprived of liberty is subjected to torture or inhuman or degrading treatment or punishment.<sup>13</sup> It guarantees the rights to presumption of innocence, notice, interpreter, legal and other appropriate assistance in the preparation of defence, to be tried speedily by an impartial tribunal, to appeal, and not to be compelled to give testimony or confess guilt.<sup>14</sup> It prohibits the press and the public in trials involving juveniles.<sup>15</sup>

The African Charter will provide a template for consideration of fair trial norms in this article. It is tempting, without a thorough survey of the African Charter, to conclude that article 7 alone deals with fair trial norms. The truth is that fair trial norms proliferate the African Charter, for example the right to life guarantee, which provides that '[n]o one may be *arbitrarily* deprived of this right'.<sup>16</sup> The word *arbitrarily*, meaning 'without reason', evokes the demands of due process of law, which includes fair trial. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>17</sup> where the accused persons were convicted and later executed based on a trial that was anything but fair, the African Commission held that the arbitrary execution violated articles 4 and 7 of the African Charter. According to the Commission:<sup>18</sup>

Given that the trial which ordered the executions itself violates article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4. The violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any 'irreparable prejudice' to the subjects of the communications before the Commission had concluded its consideration.

Similarly, the African Charter's guarantee of personal liberty incorporates some fair trial provisions:<sup>19</sup>

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and

<sup>12</sup> See African Charter on the Rights and Welfare of the Child adopted 11 July 1990 entry into force 28 November 1999 OAU Doc CAB/LEG/TSG/Rev 1.

<sup>13</sup> n 12 above, art 17.

<sup>14</sup> As above.

<sup>15</sup> As above.

<sup>16</sup> Art 4 African Charter (my emphasis).

<sup>17</sup> (2000) AHRLR 212 (ACHPR 1998).

<sup>18</sup> n 17 above, para 103.

<sup>19</sup> Art 6 African Charter (my emphasis).

conditions previously laid down by law. In particular, no one may be *arbitrarily* arrested or detained.

To explain the import of this provision, reliance may be made to *Sanchez-Reisse v Switzerland*,<sup>20</sup> where the European Court of Human Rights (European Court) held that the possibility for a detainee to be heard either in person or, where necessary, through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty under the European Convention on Human Rights (European Convention).<sup>21</sup>

The writ of *habeas corpus*, which is a fundamental facet of common law legal systems and a component of the right to fair trial, was also developed as a response to arbitrary detention. It permits detained persons or their representatives to challenge their detention and to demand that the authority either release or justify all imprisonments.<sup>22</sup> The writ also allows a detained person to challenge detention proactively and collaterally, rather than wait for the outcome of whatever legal proceedings that may be brought against him. It is especially vital in those instances where charges have not, or may never be, brought against the detained individual. Consequently, the African Commission has held that '[w]here individuals have been *detained without charges being brought*, . . . this constitutes an arbitrary deprivation of their liberty and thus violates article 6'<sup>23</sup> and that where a violation of article 6 is widespread, *habeas corpus* rights are essential to ensure that those rights are respected.<sup>24</sup> The African Commission has also held that long detention without trial leading to a deterioration of the detainee

<sup>20</sup> *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71.

<sup>21</sup> Art 5 European Convention.

<sup>22</sup> Art 7(6) American Convention on Human Rights 1144 UNTS 123 (1970) (entered into force 18 July 1978) providing that '[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.'

<sup>23</sup> *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 55 (my emphasis).

<sup>24</sup> See *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) para 24. Compare the Inter-American Court's view that *habeas corpus* cannot be suspended as it guarantees non-derogable rights such as the prohibition on torture: Advisory Opinion on Habeas Corpus in Emergency Situations (1988) 9 *Human Rights Law Journal* 94. Similarly, the American Convention deals not only with *habeas corpus*, but also with *amparo*; see American Convention arts 7(6) & 25(1). The significance of this provision is that, whereas *habeas corpus* only applies to deprivation of liberty, *amparo* refers to violations of any fundamental right recognised by the constitution or laws of the state concerned or by the Convention. This broad guarantee suggests that, under the American Convention, remedies are also available for challenging a denial of release from detention, conditions of pre-trial detention, or the failure to provide fair procedures prior to trial; J Kokott 'Fair trial — The Inter-American system for the protection of human rights' in D Weissbrodt & R Wolfrum (eds) *The right to a fair trial* (1997) 44 140.

violates article 16 of the Charter on the right to enjoy the best attainable state of physical and mental health.<sup>25</sup>

Article 7, however, provides for fair trial guarantees — safeguards to ensure that any person accused of an offence is given a fair hearing — and is the pivot on fair trial under the African Charter. It provides that everyone shall have the right to have his cause heard.<sup>26</sup> This comprises:

- (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;<sup>27</sup>
- (b) the right to be presumed innocent until proven guilty by a competent court or tribunal;<sup>28</sup>
- (c) the right to defence, including the right to be defended by counsel of his choice;<sup>29</sup> and
- (d) the right to be tried within reasonable time by an impartial court or tribunal.<sup>30</sup>

The African Charter prohibits *ex post facto* laws, providing as follows:<sup>31</sup>

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.

This provision safeguards against arbitrary prosecution, conviction and punishment, ensuring that citizens, at all times, are fully aware of the state of the law under which they are living.

Article 7 is not as comprehensive as the European Convention and the African Charter; the African Charter provisions, building on the European Convention, are the most comprehensive of the three regional human rights instruments. However, like the two systems, article 7 provisions are rules of procedure, not substance; meaning that the African Commission or, in future, the African Court on Human and Peoples' Rights (African Court) cannot substitute its own assessment of the facts for that of the domestic court or tribunal. Its task, to borrow the language of the European Court, is 'to ascertain whether the proceedings in their entirety, including the way evidence was taken, were fair'.<sup>32</sup> This approach is known as the *quatrième instance* doctrine, meaning that a supra-national

<sup>25</sup> See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 91.

<sup>26</sup> Art 7(1) African Charter.

<sup>27</sup> Art 7(1)(a) African Charter.

<sup>28</sup> Art 7(1)(b) African Charter.

<sup>29</sup> Art 7(1)(c) African Charter.

<sup>30</sup> Art 7(1)(d) African Charter.

<sup>31</sup> Art 7(2) African Charter; art 7 European Convention.

<sup>32</sup> *Edwards v United Kingdom* (1992) 15 EHRR 417; *Van de Hurk v The Netherlands* (1994) 18 EHRR 481; Human Rights Committee in *Leonard John Lindon v Australia*, Communication 646/1995 UN Doc CCPR/C/64/D/646/1995 25 November 1998 para 6(3). The Committee reiterates that it cannot reverse decisions made by domestic courts under domestic law. The Committee's competence in this case is solely to consider whether the domestic procedures were in compliance with the Covenant.



human rights institution will not constitute a further court of appeal from decisions of national courts applying national law.<sup>33</sup>

Another important remark is that article 7, like other provisions of the African Charter, is mutually dependent on other rights. Where, for example, the right to a fair trial is infringed, other violations may occur, such as detention being rendered arbitrary. This flows from the indivisibility and interdependence of human rights that itself are benchmarks of the Charter.<sup>34</sup> Thus, in *Constitutional Rights Project and Another v Nigeria*,<sup>35</sup> where several individuals were 'held incommunicado with no access to lawyers, doctors, friends or family', the African Commission held that this 'clearly violates article 7(1)(c)' (providing for the right to defence, including the right to be defended by a counsel of one's choice) and 'article 18 to prevent a detainee from communicating with his family'.<sup>36</sup> The Commission also held that a provision for *habeas corpus* is not of much use without an independent judiciary to apply it.<sup>37</sup>

A fuller ramification of article 7 of the Charter will appear from an examination of the African Commission's decisions on communications, which the next part now undertakes.

### 3 The development of fair trial norms by the African Commission

Since its establishment, the African Commission has grappled with the question of due process in Africa, in particular the right to a fair trial. This part examines the contribution of the African Commission to the development of fair trial norms in Africa. The first segment deals with the development of fair trial norms through the Commission's many resolutions and declarations. The second segment deals with the Commission's case law, as distilled from some of the communications lodged before it pursuant to the African Charter.

#### 3.1 Resolutions and recommendations of the African Commission on fair trial

One way the African Commission discharges its interpretative mandate<sup>38</sup> is by elaborating resolutions and making recommendations on

<sup>33</sup> See DJ Harris *et al Law of the European Convention on Human Rights* (1995) 15.

<sup>34</sup> See Preamble to African Charter, providing that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

<sup>35</sup> n 24 above, 69.

<sup>36</sup> n 35 above, para 29.

<sup>37</sup> n 35 above, para 34.

<sup>38</sup> Besides any other tasks which may be entrusted to it by the Assembly of the AU, the African Commission performs three primary functions: It promotes and protects human and peoples rights and interprets the provisions of the African Charter. See arts 30 & 45 African Charter.

specific human right issue affecting the continent. Though not hard law, the resolutions and recommendations are consequential rules from the experiences of the Commission, elaborated to give practicality and eliminate confusion from the broad formulae sometimes offered by the African Charter. They express the direction in which the law is evolving in Africa. They also serve as useful guidelines to give operational effect to certain Charter provisions and, consequently, the expectations that can, with the benefit of clarity, be placed on the African Commission. The resolutions are of considerable value in better understanding the norms and implementation problems in the legal systems of African countries.

The right to fair trial has occupied a greater, if not a central, part of the African Commission's resolutions. The Commission has also relied on and invoked many of its resolutions when interpreting and applying substantive fair trial norms in the African Charter. Such exercises invest the resolutions with the status of norms, albeit lesser norms *vis-à-vis* the Charter. Though these resolutions are not binding on states, they are precepts emanating from international bodies that conform in some sense to expectations of required behavior.<sup>39</sup>

### 3.1.1 Resolution on the Right to Recourse and Fair Trial

The Resolution on the Right to Recourse and Fair Trial was one of the earliest resolutions adopted by the African Commission, at its 11th ordinary session in Tunis, Tunisia, in March 1992.<sup>40</sup> Coming in the first five years of its inauguration, the resolution underscores the importance that the Commission attaches to the right to fair trial. The resolution recalled article 7 of the African Charter and stressed that 'the right to a fair trial is essential for the protection of fundamental human rights and freedoms'.<sup>41</sup> It restates the fundamental principle that every person whose rights or freedoms are violated is entitled to have an effective remedy.<sup>42</sup> It amplifies the African Charter's provisions on fair trial to cover the following:<sup>43</sup>

- (a) All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations.
- (b) Persons who are arrested shall be informed, at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.

<sup>39</sup> See SR Ratner 'International law: The trials of global norms' (1998) 110 *Foreign Policy* 65 67.

<sup>40</sup> See Resolution on the Right to Recourse and Fair Trial in Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights (2002) <http://www.achpr.org> (accessed 31 August 2006).

<sup>41</sup> n 40 above, Preamble.

<sup>42</sup> n 40 above, para 1.

<sup>43</sup> n 40 above, para 2.

- (c) Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.
- (d) Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court.
- (e) In the determination of charges against individuals, the individuals shall be entitled in particular to —
  - (i) have adequate time and facilities for the preparation of their defence and communicate in confidence with counsel of their choice;
  - (ii) be tried within a reasonable time;
  - (iii) examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses against them; and
  - (iv) have the free assistance of an interpreter if they cannot speak the language use in the court.

The resolution provides that persons convicted of an offence shall have a right of appeal to a higher court.<sup>44</sup> The African Commission expressed its desire to 'continue to be seized with the right to recourse procedures and fair trial with the view of elaborating further principles concerning this right'.<sup>45</sup> It called on state parties to the African Charter 'to create awareness of the accessibility of the recourse procedure and to provide the needy with legal aid'.<sup>46</sup> This stress on legal aid is significant, since the unavailability of legal aid in a country may affect the accessibility of a remedy. In Africa, the lack of resources to pursue a remedy for human rights violations 'is not a special circumstance but rather a common occurrence'.<sup>47</sup> The Commission has subsequently stressed that 'the lack of legal aid in Africa precludes the majority of the African population from asserting their human rights'.<sup>48</sup>

### 3.1.2 Resolution on the Respect and the Strengthening on the Independence of the Judiciary

In 1996, the African Commission, at its 19th ordinary session, adopted the Resolution on the Respect and the Strengthening on the Independence

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<sup>44</sup> n 40 above, para 3.

<sup>45</sup> n 40 above, para 5. See also IAB El-Sheikh 'Preliminary remarks on the right to a fair trial under the African Charter on Human and Peoples Rights' in Weissbrodt & Wolfrum (n 24 above) 325 329-30.

<sup>46</sup> n 40 above, para 4.

<sup>47</sup> EA Ankuamah *The African Commission on Human and Peoples' Rights* (1996) 70. See also AS Butler Legal aid before human rights treaty monitoring bodies (2000) 49 *International and Comparative Law Quarterly* 360.

<sup>48</sup> Conclusions and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in the Internal Legal Systems in Africa para 6(c), recommending that the question of legal aid and recourse procedures should be accorded greater attention in the work of the African Commission and that states and NGOs should take the initiative to promote the establishment of legal aid services in 1992-93 Annual Activity Report of the African Commission Annex VI.

of the Judiciary.<sup>49</sup> The resolution noted that justice is an integral part of human rights and a necessary condition for democracy.<sup>50</sup> It stressed the role of the judiciary 'not only in the quest for the maintenance of social equilibrium, but also in the economic development of African countries'.<sup>51</sup> It urged African states to have a strong, virile and independent judiciary that is geared towards sustainable democracy and development and that enjoys the confidence of the people.<sup>52</sup> The resolution called on African countries to repeal all legislation that are inconsistent with principles of judicial independence, especially on the appointment and posting of judges; provide the judiciary, with the assistance of the international community, with sufficient resources for it to fulfill its function; provide judges with decent living and working conditions for them to maintain their independence and realise their full potential; incorporate universal principles on judicial independence in their legal systems, especially with regard to security of tenure; and refrain from taking actions that could directly or indirectly threaten the independence and the security of judges and magistrates.<sup>53</sup> It urged African judges to organise periodic meetings to share experience and evaluate efforts undertaken in their countries to bring about an efficient and independent judiciary.<sup>54</sup>

The resolution was significant for several reasons. First, there is a love-hate relationship between the judiciary and the executive in most African countries. Judges have, in numerous occasions, been subjected to all forms of intimidation and persecution for carrying out their constitutional mandate. There have been subtle and even violent attacks on judges, including killings, disappearances, dismissals, and removal of judicial discretion.<sup>55</sup> The judiciary was particularly consigned and confounded into impotence during military regimes in many African countries. All of this has serious negative implications to the right to fair trial, since the harassment of judges makes them to look over their shoulders in the dispensation of justice.

### 3.1.3 Resolution on the Right to Fair Trial and Legal Assistance in Africa

The African Commission adopted the Resolution on the Right to Fair Trial and Legal Assistance in Africa during its 26th ordinary session in

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<sup>49</sup> See Resolution on the Respect and the Strengthening on the Independence of the Judiciary in Recommendations and Resolutions of the Commission (n 40 above) 158.

<sup>50</sup> n 49 above, Preamble.

<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> n 49 above, para 1.

<sup>54</sup> n 49 above, para 2.

<sup>55</sup> See M Rishmawi (ed) *Attacks on justice: The harassment and persecution of judges and lawyers* (2000) (reporting measures taken in different countries that affect judges or undermine the judiciary and the legal profession).

November 1999.<sup>56</sup> It recalled earlier resolutions on aspects of fair trial and stressed the need to strengthen the African Charter's provision, in particular legal assistance.<sup>57</sup> The resolution formally adopted the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration)<sup>58</sup> and mandated the Working Group on Fair Trial to prepare a draft general principles and guidelines on fair trial and legal assistance under the African Charter, for the Commission's comments and observations.<sup>59</sup> The Dakar Declaration was the outcome of a collaborative seminar on the right to fair trial organised in Dakar, Senegal, in September 1999. The Declaration states, in its opening paragraph, that:

[t]he right to fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines. The realisation of this right is dependent on the existence of certain conditions and is impeded by certain practices.

The factors that could advance or impede fair trial, according to the Dakar Declaration, include the rule of law and democracy, independence and impartiality of the judiciary, military courts and special tribunals, traditional courts, independence of lawyers, bar associations and other human rights defenders. Others include impunity and effective remedies, victims of crime and abuse of power, legal aid, women and fair trial as well as children and fair trial.<sup>60</sup> The Declaration expressed concern that, in many countries, lawyers representing unpopular causes or persons or groups who perceived to be opponents of the government become targets for harassment or persecution. Yet, '[t]he ability of lawyers to represent their clients without any harassment, intimidation or interference is an important tenet of the right to a fair trial'.<sup>61</sup>

The Declaration called on states to allocate adequate resources to judicial and law enforcement institutions towards the provision of better and more effective fair trial guarantees to users of the legal process; to examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes; and to improve judicial skills through programs of continuing education, giving specific attention to the domestic implementation of international human rights standards, and to increase the resources available to judicial and law enforcement institu-

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<sup>56</sup> See Resolution on the Right to Fair Trial (n 40 above).

<sup>57</sup> n 40 above, Preamble.

<sup>58</sup> Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa.

<sup>59</sup> n 56 above, para 4.

<sup>60</sup> See generally Dakar Declaration (n 58 above) paras 1-11.

<sup>61</sup> n 60 above, para 5.

tions. The Declaration called on bar associations, *inter alia*, to institute a programme of continuing education for its members on issues that advance fair trial rights and seek appropriate technical assistance and resources for its realisation.

### 3.1.4 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

This resolution, adopted at the African Commission's 32nd ordinary session in October 2002,<sup>62</sup> aimed at assisting African states to meet their international obligations on the prohibition of torture and cruel, inhuman or degrading treatment or punishment.<sup>63</sup> It adopted guidelines on measures to prohibit and prevent torture, etc,<sup>64</sup> and established a follow-up committee with the mandate, *inter alia*, to organise seminars towards disseminating the guidelines and to develop strategies towards its implementation.<sup>65</sup> Certain provisions in the guidelines relate to fair trial, such as the requirement that states should establish readily accessible and fully independent mechanisms where all persons can submit allegations of torture and ill-treatment.<sup>66</sup> The guidelines demand that investigations into all allegations of torture or ill-treatment should be conducted promptly, impartially and effectively.<sup>67</sup> It contains basic procedural safeguards for those deprived of liberties, including the right of a relative or other appropriate third person to be notified of the detention; the right to an independent medical examination; and the right of access to a lawyer.<sup>68</sup>

The guidelines mandate states to adopt safeguards during pre-trial process, such as prohibiting the use of unauthorised places of detention and making it a punishable offence for any official to hold a person in a secret and/or unofficial place of detention;<sup>69</sup> prohibiting the use of incommunicado detention;<sup>70</sup> and ensuring that all detained persons are immediately informed of reasons for their detention.<sup>71</sup> Others are ensuring that all arrested persons are promptly informed of any charges against them;<sup>72</sup> and that all persons deprived of liberty are promptly

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<sup>62</sup> Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa in Recommendations and Resolutions of the Commission (n 40 above).

<sup>63</sup> n 62 above, Preamble.

<sup>64</sup> n 62 above, para 1.

<sup>65</sup> n 62 above, paras 2-3.

<sup>66</sup> n 62 above, para 17.

<sup>67</sup> n 62 above, para 19.

<sup>68</sup> n 62 above, para 20.

<sup>69</sup> n 62 above, para 23.

<sup>70</sup> n 62 above, para 24.

<sup>71</sup> n 62 above, para 25.

<sup>72</sup> n 62 above, para 26.

brought before a judicial authority, with the right to defend themselves or to be assisted by legal counsel of their choice.<sup>73</sup> The guidelines further mandate states to keep comprehensive written records of all interrogations, including the identity of all persons present during interrogations, and to consider the feasibility of using video and/or audio taped recordings of interrogations.<sup>74</sup> States should also ensure that statements obtained through torture or other similar acts are not admissible in evidence except against persons accused of torture.<sup>75</sup> They should keep comprehensive written records of those deprived of liberty at each place of detention, detailing, *inter alia*, the date, time, place and reason for the detention.<sup>76</sup> Finally, they should ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.<sup>77</sup>

The guidelines enjoin states to establish mechanisms of oversight, including supporting the independence and impartiality of the judiciary,<sup>78</sup> and establishing and supporting effective and accessible complaint mechanisms empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment. To succeed, such mechanisms must be independent from detention and enforcement authorities.<sup>79</sup>

### 3.2 Fair trial in the case law of the African Commission

There are presently no statistics showing subject matters categories of cases that the African Commission decides. However, a cursory glance at the communications shows that almost fifty percent of the cases lodged with the Commission relates to violations of fair trial norms, either alone or in conjunction with violations of other rights. Comparatively, it has been stated — with regard to the European Convention — that ‘more applications to Strasbourg concern article 6 than any other provision’.<sup>80</sup> This segment examines the Commission’s interpretation and application of fair trial norms under some ‘objective criteria’. Although the arrangement is not entirely chronological, the criteria cover matters that do arise both before pre-trial and during trial.

#### 3.2.1 The right of recourse to courts

Access to court is a central aspiration of all human rights instruments and is central to the rule of law.<sup>81</sup> Problems of access to court could

<sup>73</sup> n 62 above, para 27.

<sup>74</sup> n 62 above, para 28.

<sup>75</sup> n 62 above, para 29.

<sup>76</sup> n 62 above, para 30.

<sup>77</sup> n 62 above, para 32.

<sup>78</sup> n 62 above, para 38.

<sup>79</sup> n 62 above, para 40.

<sup>80</sup> Harris *et al* (n 33 above) 164.

<sup>81</sup> See eg *Golder v United Kingdom* (1979) 1 EHRR 524.

arise in a variety of contexts, including instances where, for reasons of *ordre public*, the state restricts access of persons who might be able to assist the individual in bringing proceedings, such as legal advisers. It could arise where the state denies legal aid to an indigent accused person where the state issues decrees ousting the jurisdiction of the court from entertaining certain complaints.

The African Charter provides for the right to an appeal to competent national organs against acts that violate guaranteed rights.<sup>82</sup> The Charter's provision extends to both criminal and civil proceedings. In *Constitutional Rights Project and Others v Nigeria*,<sup>83</sup> the Nigerian government promulgated some military decrees proscribing over 13 newspapers and magazines published by three media houses. The decrees prohibited the affected media houses from publication and circulation in Nigeria or any part thereof for a period of six months, with a proviso for extension, if necessary. The proscription occurred while suits were pending before competent courts over the illegal invasion and closure of the premises of the said media houses.<sup>84</sup> The African Commission held the act to be a violation of the right to fair hearing.<sup>85</sup>

To have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs. A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequences for the protection of individual rights. . . . The nullification of the suits in progress thus constitutes a violation of article 7(1)(a).

The word 'competent' in article 7(1)(a) is sensitive, encompassing facets such as the expertise of the judges and the inherent justice of the laws under which they operate.<sup>86</sup> Consequently, 'to deprive court of the personnel qualified to ensure that they operate impartially thus denies the right to individual's to have their case heard by such bodies'.<sup>87</sup> The African Commission has also held that '[t]he system of executive confirmation, as opposed to appeal, provided for in the institution of special tribunals, violates article 7(1)(a)'. The phrase 'court or tribunal' indicates that the African Charter applies to all courts and tribunals, whether specialised or ordinary. The Commission maintains that a military tribunal, *per se*, is not offensive to the rights in the Charter, nor does it imply an unfair or unjust process; neither is such a tribunal negated by the mere fact of being presided over by military

<sup>82</sup> Art 7(1)(a) African Charter.

<sup>83</sup> (2000) AHRLR 227 (ACHPR 1999).

<sup>84</sup> Above, para 12.

<sup>85</sup> n 84 above, para 33.

<sup>86</sup> *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 69.

<sup>87</sup> As above.



officers. However, such tribunals present serious problems in areas if equitable, impartial and independent administration of justice. They must be subject to the same requirements of fairness, openness, justice, independence, and due process as any other process.<sup>88</sup>

### 3.2.2 The right to information upon arrest and the presumption of innocence

The presumption of innocence, which is guaranteed under the African Charter,<sup>89</sup> is fundamental to the protection of human rights. It imposes a duty on public authorities to refrain from prejudging the outcome of a trial and places the burden to prove a criminal charge beyond a reasonable doubt. The African Charter failed to provide for the corollary right of persons arrested to be informed at the time of arrest of reasons for their arrest — in a language that they understand — and to be informed promptly of any charges against them. It was the African Commission's Resolution on the Right to Recourse Procedure and Fair Trial that filled this normative gap.<sup>90</sup>

In *Media Rights Agenda and Others v Nigeria*,<sup>91</sup> Mr Niran Malaolu and three other staff of a Nigerian newspaper — the *Diet* newspaper — were arrested by armed soldiers at the editorial offices of the newspaper in Lagos on 28 December 1997. Neither Mr Malaolu nor his three colleagues were informed of the reasons for their arrest or shown a warrant of arrest. Three arrestees were later released, but Mr Malaolu continued to be held without charges until 14 February 1998, when he was arraigned before a special military tribunal for his alleged involvement in a *coup*. Throughout the period of his incarceration, he was not allowed access to his lawyer, doctor or family members. On 28 April 1998, the tribunal, after a secret trial, found the accused guilty of concealment of treason and sentenced him to life imprisonment.<sup>92</sup> The African Commission, relying on its earlier resolutions, held that the accused's right to a fair trial, including the right to be presumed innocent until proven guilty, had been breached.<sup>93</sup> It agreed with the complainant that<sup>94</sup>

<sup>88</sup> See *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) paras 27 & 44. See UN Human Rights Committee General Comment No 13 (XXI/1984) para 4, maintaining that '[w]hile the Covenant does not prohibit such categories of courts (military or special courts which try civilians), nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantee stipulate in article 14'.

<sup>89</sup> Art 7(1)(b) African Charter.

<sup>90</sup> n 40 above, para 3.

<sup>91</sup> n 25 above.

<sup>92</sup> n 25 above, paras 3-8.

<sup>93</sup> n 25 above, para 43.

<sup>94</sup> n 25 above, para 47.

any possible claim to national security in excluding members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore in breach of the right to fair trial, particularly, the right to presumption of innocence.

The Human Rights Committee has also expounded on the right to notice, in relation to CCPR. In its General Comment on the right to a fair trial,<sup>95</sup> the Committee stated that<sup>96</sup>

the right to be informed of the charge 'promptly' requires that information be given as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such.

Presumption of innocence also means that public officials should not make statements that prejudice the accused while in detention or during trial. In *Allenet de Ribemont v France*,<sup>97</sup> the European Court found that certain public statements regarding the applicant's guilt made by the Minister for the Interior and the highest police officials while the applicant was in detention on remand violated the presumption of innocence.

### 3.2.3 The right to defence and to counsel

The right to defence, as provided for in article 7(1)(c) of the African Charter, includes the right of an accused to be informed of the charges against him and the evidence of the said charges, in short, 'all sorts of elements required to prepare his defence'.<sup>98</sup> Where these elements are not brought to the knowledge of the accused, then article 7(1)(c) of the Charter is violated.<sup>99</sup> A state, however, bears no responsibility for a defence lawyer's failure to make objections or call witnesses at trial,<sup>100</sup> unless the defence is denied access to the evidence on which the prosecution is based. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>101</sup> files and documents required by the accused persons for their defence were removed from their residences and offices when security forces searched them during the trial.<sup>102</sup> The African Commission found this to be a violation of the right to defence under article 7(1)(c) of the African Charter.<sup>103</sup>

<sup>95</sup> General Comment No 13 (n 88 above).

<sup>96</sup> As above.

<sup>97</sup> See *Allenet de Ribemont v France* (1995) 20 EHRR 557.

<sup>98</sup> See *Courson v Equatorial Guinea* (2000) AHRLR 93 (ACHPR 1997) para 21.

<sup>99</sup> As above.

<sup>100</sup> Human Rights Committee in *Berry v Jamaica* Communication 330/1988 UN Doc CCPR/C/50/D/330/1988 (1994).

<sup>101</sup> n 17 above.

<sup>102</sup> n 17 above, para 99.

<sup>103</sup> n 17 above, para 101.

A corollary of the right to defence is the right to be defended by counsel of one's choice.<sup>104</sup> International law lays much stress on the importance of scrupulous adherence to procedural fairness in capital cases and the right to counsel in all criminal proceedings, even non-capital cases involving only the discretionary considerations of abstract legal issues. The right to counsel, which is essential to the assurance of a fair trial, must be available during detention, trial,<sup>105</sup> and even after conviction. The logic is that a lawyer could scarcely defend his client, in terms of article 7(1)(c), unless he has had some previous consultations with the client.<sup>106</sup> Indeed, international tribunals regard an adequate defence as depending on the accused earliest possible access to legal advice. The European Court has found governments in violation of article 6 of the European Convention in legally complicated cases<sup>107</sup> and simple ones,<sup>108</sup> and in situations where the proceedings were in high courts solely concerned with legal rules of general applicability.<sup>109</sup> Its goal in all cases has been to ensure that the contests between governments and individuals take place on a level field.

In *John Murray v UK*,<sup>110</sup> the applicant's right of access to a lawyer during the first 48 hours of police detention was restricted under section 15 of the Northern Ireland (Emergency Provisions) Act 1987. The authorities argued that they had reasonable grounds to believe that the exercise of the right of access would interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act.<sup>111</sup> The European Court held that the act violated article 6 of the European Convention. It was of paramount importance for the rights of the defence that the accused had access to a lawyer at the initial stages of police interrogation and that<sup>112</sup>

the concept of fairness enshrined in article 6 requires that the accused has the benefit of the assistance of a lawyer at the initial stages of police investigation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is — whatever the justification for such denial — incompatible with the rights of the accused . . .

<sup>104</sup> Art 7(1)(c) African Charter.

<sup>105</sup> n 98 above, para 22, where the African Commission held that the right to defence included the right to be informed of the charges against one, as well as the evidence of the said charges as these were required to prepare a defence, and the right to a lawyer was to be exercised during detention and not just during the trial.

<sup>106</sup> See generally *Civil Liberties Organisation v Nigeria* (n 24 above).

<sup>107</sup> See eg *Granger* case (1990) 174 European Court of Human Rights (ser A) 18-19.

<sup>108</sup> See eg *Boner v United Kingdom* (1994) 300 European Court of Human Rights 66 75.

<sup>109</sup> See eg *Pakelli* case (1983) 64 European Court of Human Rights (ser A) 17-18.

<sup>110</sup> See *John Murray v UK* (1996) 22 EHRR 29.

<sup>111</sup> n 110 above, para 64.

<sup>112</sup> n 110 above, para 66.

In *Constitutional Rights Project and Another v Nigeria*,<sup>113</sup> the Nigerian government established a special military tribunal to try persons alleged to have plotted the forceful overthrow of Sani Abacha's military junta. The decree setting up the tribunal precluded the jurisdiction of ordinary courts. The trials were conducted in secret — as is typical of such trials — and suspects were not given the opportunity to state their defence or to access their lawyers or families. They were not informed of the charges against them until their trial. The government appointed military lawyers to defend the suspects.<sup>114</sup> The African Commission found a violation of article 7(1)(c) of the African Charter. In *Media Rights Agenda and Others v Nigeria*,<sup>115</sup> the complainant alleged that Mr Malaolu was denied the right to be defended by lawyers of his choice and was, instead, assigned a military lawyer by the tribunal, in contravention of the right to a fair hearing.<sup>116</sup> The African Commission agreed, relying on its Resolution on the Right to Recourse and Fair Trial, which provides, *inter alia*, that '[i]n the determination of charges against individuals, the individual shall be entitled in particular to: (i) . . . communicate in confidence with counsel of their choice'.<sup>117</sup>

The *Avocats Sans Frontières* case<sup>118</sup> raised an interesting component of the right to counsel. The issue involved the denial of an accused counsel the freedom to make oral submissions in criminal proceedings after written pleadings had been submitted — although the Criminal Appeal Court accorded this right to the prosecution. The complainant alleged that the accused was denied the right of defence and judicial assistance, including equality of treatment, which includes the freedom of counsel to renounce certain arguments contained in his note, depending on the issues raised by the prosecution.<sup>119</sup> In a striking passage deserving to be quoted *in extenso*, the African Commission stated as follows:<sup>120</sup>

The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner.

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<sup>113</sup> n 24 above.

<sup>114</sup> n 24 above, paras 2 & 3.

<sup>115</sup> n 25 above.

<sup>116</sup> n 25 above, paras 11 & 55.

<sup>117</sup> n 25 above para 56.

<sup>118</sup> n 10 above.

<sup>119</sup> n 10 above, paras 3-10.

<sup>120</sup> n 10 above, para 27.

In the case under consideration, it is expected of the Commission to attend to the first aspect, that is, observation of the rule of equality of the means utilised by the defence and the prosecution.

The Commission also held that the right to defence implies that, at each stage of the criminal proceedings, the accused and his counsel should be able to reply to indictment of the public prosecutor and should be the last to intervene before the court retires for deliberations.<sup>121</sup> It concluded that 'by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial'.<sup>122</sup>

Threats and harassment of counsel by government agents during pendency of judicial proceedings are also violations of the right to counsel. Sadly, the harassment of counsel and judges are hallmarks of many judicial proceedings in Africa.<sup>123</sup> In the *International Pen* case,<sup>124</sup> the defence counsel was compelled to withdraw from the case because of harassment by the authorities, both in the conduct of the trial and in their professional and private lives. Two of the lawyers were seriously assaulted by soldiers acting on instruction of the military officer responsible for the trial.<sup>125</sup> On three occasions, defence lawyers were arrested and detained and two of them had their offices searched.<sup>126</sup> The harassment ceased only when the lawyers withdrew from the case.<sup>127</sup> Even the defence team chosen by the tribunal to replace the previous ones also later resigned due to harassment, leaving the accused persons with no counsel throughout the remainder of the trial.<sup>128</sup> The African Commission found a violation of article 7(1)(c) of the African Charter.<sup>129</sup>

Interestingly, such harassment of counsel is not peculiar to Africa, though the degree of harassment might differ. The Inter-American Commission had occasion to warn that 'the defence of the accused . . . can in no way constitute grounds for the malicious and unfounded linking of a defence lawyer to unlawful activities of which his client is falsely accused'.<sup>130</sup>

### 3.2.4 The right to be tried within a reasonable time

The trial of a person accused of a crime within a reasonable time is, in the language of the Strasbourg institution, 'designed to avoid that a

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<sup>121</sup> n 10 above, para 28.

<sup>122</sup> n 10 above, para 29.

<sup>123</sup> Dakar Declaration (n 58 above) para 5.

<sup>124</sup> n 17 above.

<sup>125</sup> n 17 above, para 97.

<sup>126</sup> As above.

<sup>127</sup> As above.

<sup>128</sup> n 17 above, para 98.

<sup>129</sup> n 17 above, para 101.

<sup>130</sup> Annual Report 1994 OEA/SerL/V/II 88 Doc 9 Rev 1995 123.

person charged should remain too long in a state of uncertainty about his fate'.<sup>131</sup> This right has always been regarded as a fundamental component of the right to a fair trial and the African Charter has made adequate provision in this regard.<sup>132</sup> The reality is that, in many African countries, government officials are given powers to detain citizens arbitrarily and sometimes without trial. Governments often use emergencies to ground such detentions, notwithstanding that the African Charter permits no derogation of rights during emergencies. Most times, the arrests and detentions are made during peace times but sheltered under some bogus reasons of state security. The African Commission has pronounced on such detentions.

In *Jawara v The Gambia*,<sup>133</sup> the state law gave the Minister of the Interior power to detain anyone without trial for up to six months, with the possibility for extension *ad infinitum*. The African Commission held that such a power was analogous to that of a court, and that the minister<sup>134</sup>

for all intents and purposes, . . . is more likely to use his discretion at the detriment of the detainees, who are already in a disadvantaged position. The victims will be at the mercy of the minister who, in this case, will render favour rather than vindicating a right.

Such a naked exercise of power, according to the African Commission, cannot be right, since it 'renders valueless the provision enshrined in article 7(1)(d) of the Charter'.<sup>135</sup>

The African Charter does not define the phrase 'reasonable time' and, consequently, what length of detention without trial will constitute an unreasonable time, but other sources suggest that the reasonable time runs from the moment that an individual is subject to a 'charge' and continue to apply until the case is finally determined.<sup>136</sup> The African Commission has held a two-year detention without charges being filed as an unreasonable delay and a violation of article 7(1)(d) of the African Charter.<sup>137</sup> Detentions for shorter periods could also be unreasonable, especially where there are no genuine grounds to support such detentions. The problem that the African Commission might confront in future is that the test of a reasonable time generally differs between

<sup>131</sup> *Stogmuller v Austria* (1969) 9 European Court of Human Rights (ser A) 40 (1969).

<sup>132</sup> Art 7(1)(d) African Charter; art 6(1) European Convention: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Note that the African Charters provision does not expressly include determination of civil rights and obligations, though this may be implied from the use of the word cause in art 7(1).

<sup>133</sup> (2000) AHRLR 107 (ACHPR 2000) para 46.

<sup>134</sup> n 133 above, para 61.

<sup>135</sup> As above.

<sup>136</sup> n 131 above 173; *Harris et al* (n 33 above) 223.

<sup>137</sup> See *Constitutional Rights Project & Another v Nigeria* (n 24 above) para 20.

the common law and civil law systems of criminal justice. By the nature of a civil law jurisprudence, which is inquisitorial in nature, investigation of a crime generally takes a longer period,<sup>138</sup> during which an accused may spend several years in detention. Striking a balance between these two competing systems is a task that the Commission must address at the earliest opportunity.

### 3.2.5 The right to a public trial

Almost all international human rights instruments guarantee the right to a public trial in criminal proceedings, as such a trial serve the general interest in the open administration of justice. 'Publicity', says Bentham, 'is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.'<sup>139</sup> Public trials also deter perjury, as witnesses are likely to come forward to confound lies when they learn that they are being told. They enable the press to report court cases, thereby enhancing public knowledge and appreciation of the workings of the law. Press reporting, in particular, assists the deterrent function of criminal trials and permits the revelation of matters of genuine public interest.<sup>140</sup>

Unfortunately, '[n]either the African Charter nor the Commission's Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to public trial'.<sup>141</sup> In the *Media Rights Agenda* case, where members of the public and the press were excluded from the actual trial by the tribunal, the African Commission did not abdicate its responsibility to create such a norm. It appealed to articles 60 and 61 of the African Charter permitting the application of comparative international human rights law. Invoking these articles, the Commission called in aid UN Human Rights Committee's General Comment No 13<sup>142</sup> on the right to fair trial, paragraph 6 of which provides:<sup>143</sup>

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1 acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such

<sup>138</sup> For the distinction between the adversarial (common law) and inquisitorial (civil law) system of criminal investigation, see Harris *et al* (n 33 above) 164-5.

<sup>139</sup> J Bentham cited in G Robertson *Freedom, the Individual and the Law* (1993) 341.

<sup>140</sup> As above.

<sup>141</sup> See *Media Rights Agenda & Others v Nigeria* (n 25 above) para 51.

<sup>142</sup> The General Comments, as formulated by the Human Rights Committee, are authoritative interpretations of rights under CCPR. Their purpose is to assist state parties in fulfilling their reporting obligations and to provide greater interpretative clarity as to the intent, meaning and content of the Covenant. On the Committee, see eg T Buergenthal 'The UN Human Rights Committee' in (2001) 5 *Max Planck Yearbook of United Nations Law* 241 (discussing the Committee's *modus operandi* and reflecting on the challenges facing the Committee).

<sup>143</sup> Cited in *Media Rights Agenda & Others v Nigeria* (n 25 above) para 51.

exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons . . .

The African Commission observed that the exceptional circumstances justifying the exclusion of the public must be for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. These circumstances are exhaustive, as indicated by the use of the phrase 'apart from such exceptional circumstances'.<sup>144</sup> Rejecting the respondent government's *alibi*,<sup>145</sup> the Commission found that the exclusion of the public in the trial was unjustified and in violation of the victim's right to fair trial under the African Charter.<sup>146</sup>

The Commission has not yet been called upon to consider how the right to a public trial applies to criminal proceedings against children. The question may be asked if procedures generally considered to safeguard the rights of adults on trial, such as publicity, should be abrogated in respect of children in order to promote their understanding and participation. The principle in the *Media Rights Agenda* case seems to cover such a situation, but the Strasbourg Court has expressly pronounced on the question. In *V v UK*,<sup>147</sup> the Court stated:<sup>148</sup>

It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition.

There is a strange paradox in the whole concept of the right to a public trial. While the African Commission is calling on domestic courts and tribunals to conduct its proceedings in public, including allowing the press access to courts, the Commission conducts its own cases in cultic seceries. The confidentiality clause, which is rearing its head again in recent years, provides that '[a]ll measures taken within the provisions of the present Charter shall remain confidential until such a time as the

<sup>144</sup> n 25 above, para 52.

<sup>145</sup> The respondent government had presented an omnibus statement in its defence to the effect that the right to a fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc; n 25 above, para 53. It did not, according to the Commission, specifically indicate which of these circumstances prompted it to exclude the public from such trial.

<sup>146</sup> n 25 above, para 54.

<sup>147</sup> See *V v UK* (1999) 30 EHRR 121.

<sup>148</sup> n 147 above, paras 86 & 87.



Assembly of Heads of State and Government shall otherwise decide'.<sup>149</sup> Besides the petitioner, respondent state, counsel and few secretarial staff, no other party is allowed to witness the Commission's proceedings during its 'private' sessions. The Commission must find a way out of this moral dilemma, since a teacher gains few proselytes by instruction that his own behaviour contradicts.

### 3.2.6 The right to appeal

Although the right to appeal is a general and non-derogable principle of international law, there is no express requirement of an appeal against conviction in the African Charter — unlike CCPR.<sup>150</sup> The African Commission implied the existence of this right, as part of article 7 fair hearing guarantee, in *Constitutional Rights Project and Another v Nigeria*.<sup>151</sup> In that case, the Commission held that the foreclosure of any avenue of appeal in criminal cases bearing penalties that affected life and liberty was a clear violation of article 7(1)(a) of African Charter and increased the risk that severe violations of those rights might go unredressed. This principle may not extend to all criminal cases, but it will most probably apply in cases where severe penalties are imposed.

The right to appeal, where it exists, must satisfy conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction. Such reconsideration requires that the court of superior jurisdiction should provide all necessary guarantees of good administration of justice.<sup>152</sup> A system of executive confirmation, as opposed to appeal, is a denial of the right of appeal under article 7(1)(a) of the African Charter.<sup>153</sup> In *Forum of Conscience v Sierra Leone*,<sup>154</sup> the complainant alleged that 24 soldiers were tried and sentenced to death by a court martial for their alleged roles in the *coup* that overthrew the elected government of President Tejan Kabbah; that the trial of the soldiers by the court martial was flawed in law and in violation of Sierra Leone's obligation under the African Charter; and that the court martial allowed the victims no right of appeal against conviction or sentence to a higher tribunal.<sup>155</sup>

Twenty-four soldiers were executed prior to the filing of the complaint before the African Commission, making the issue of exhaustion

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<sup>149</sup> Art 59 African Charter.

<sup>150</sup> See art 14(5) CCPR.

<sup>151</sup> n 24 above.

<sup>152</sup> n 86 above, para 37.

<sup>153</sup> n 24 above, para 22.

<sup>154</sup> (2000) AHRLR 293 (ACHPR 2000).

<sup>155</sup> n 154 above, paras 2-4.

of local remedies irrelevant.<sup>156</sup> The complaint having been declared admissible,<sup>157</sup> the Commission considered the merit of the case, reiterating its Resolution on the Right to Fair Trial and Legal Assistance in Africa and insisting that '[t]he purpose of military courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.'<sup>158</sup> The Commission held that the denial of the victim's right of appeal to competent national organs fell short of the requirement of the respect for fair trial standards expected of such courts and that their execution without the right of appeal was a violation of the African Charter. This violation, according to the Commission, was 'more serious given the fact that [it was] irreversible'.<sup>159</sup>

Such pronouncements may not have beneficial effect on the victims, who had already been executed, but they help to highlight the state of human rights in Africa. They also underscore the need for concerted efforts by civil societies to work towards changing the *status quo*.

### 3.2.7 The right to legal assistance

The right to provide an indigent person with free legal representation is almost a universally accepted component of a fair trial. Many human rights instruments require state parties to provide an indigent person with free legal representation whenever the demands of justice dictates.<sup>160</sup> The rationale is to ensure access to courts, which are fulcrums of the right to a fair trial. There can be no 'equality of arms' where parties to a suite, whether criminal or civil, are unable to approach

<sup>156</sup> On local remedies *vis-à-vis* the African Commission, see N Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples Rights' (2003) 97 *American Journal of International Law* 1.

<sup>157</sup> n 154 above, para 14, stressing that the execution of the victims had completely foreclosed any local remedy.

<sup>158</sup> n 154 above, para 16.

<sup>159</sup> n 154 above, para 17.

<sup>160</sup> See eg art 14(3)(d) CCPR, providing for the right of everyone, in a criminal determination against him, to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. The American Convention states that counsel provided by the state will be paid only if domestic law so provides. See art 8(2)(e) American Convention. However, the Inter-American Court interprets this provision liberally. In the Exceptions to the Exhaustion of Domestic Remedies in Cases of Indigency or Inability to Obtain Legal Representation because of a Generalised Fear within the Legal Community Advisory Opinion OC-11/90 Inter-American Court of Human Rights No 11 1990 reprinted in (1991) 12 *Human Rights Law Journal* 20, the Court explained that since the Convention does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his economic status if, when in need of legal counsel, the state were not to provide it to him free of charge. Art 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing.

the temple of justice by reason of impecuniousness. The ultimate ability to vindicate other rights guaranteed in a human rights treaty as well as the individual's ordinary civil rights depends on access to court.<sup>161</sup> There is, however, a more extensive obligation to provide legal aid in criminal than in civil cases.<sup>162</sup>

Surprisingly, African states ignored this fundamental right when they elaborated and adopted the African Charter. Although the Charter remarkably guarantees several economic, social and cultural rights, yet it contains no provision on the right of an indigent person accused of a criminal offence to be provided with legal assistance by the state. Not surprisingly, the Dakar Declaration devotes much space to the obligations of states to provide legal aid and assistance to its citizens, and the case law of the African Commission also imputes the existence of such a right. In the *Avocats Sans Frontières* case,<sup>163</sup> where the trial court refused to designate a defence lawyer for the accused, the Commission 'emphatically' held that this was a denial of the right to a fair trial, '[m]oreso where the interests of justice demand it'.<sup>164</sup> The Commission further held that<sup>165</sup>

in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case.

In the case under survey, the trial court argued that Burundian law allowed a judge the liberty whether or not to designate a defence lawyer for the accused. The African Commission held that the argument flew in the face of a well-known general legal principle that 'no one may profit from his own turpitude'.<sup>166</sup> The Commission did not ground its decision on any rule of international law, but article 1 of the African Charter could logically have been called in aid. The availability of legal aid is relevant to the question whether a state satisfies the internationally guaranteed right to a fair trial. The African Charter itself provides that<sup>167</sup>

[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, *fortune*, birth, or other status.

<sup>161</sup> See M Beloff & M Hunt 'The Green Paper on Legal Aid and international human rights law' (1996) 1 *European Human Rights Law Review* 4 7.

<sup>162</sup> See eg Harris *et al* (n 33 above) 261.

<sup>163</sup> note 10 above.

<sup>164</sup> n 10 above, para 30.

<sup>165</sup> As above.

<sup>166</sup> n 10 above, para 31.

<sup>167</sup> Art 2 African Charter (my emphasis).

The African Commission, in future, could validly invoke such provisions to ground the right to legal aid.

The African Commission can and should also ground the existence of the right to legal aid, objectively, on considerations of humanity. Considerations of humanity 'may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy'.<sup>168</sup> The Commission and, indeed, all judicial bodies in Africa must be mindful of the prohibitive costs of legal services in the continent and the fact that majority of Africans live at the outskirts of prosperity.

Given the rudimentary nature of the African Commission's jurisprudence on legal assistance, it is vital to draw some comparison with, and the Commission's attention to, other human rights bodies. The Human Rights Committee, for example, stresses that a component of free legal representation is effective representation, meaning that counsel must be competent and must consult with his client, especially if he intends to withdraw an appeal or to argue lack of merit in the appeal.<sup>169</sup> According to the Committee:<sup>170</sup>

While article 14, paragraph 3(d) [CCPR], does not entitle the accused to choose counsel provided to him free of charge, the court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice.

The European Court also maintains that it is not open to national authorities to refrain from providing free legal aid to criminal defendants on the ground that there was nothing to prevent them from defending themselves personally.<sup>171</sup> The Court also refused to accept a government's argument that an appeal for which an applicant is making a request for legal aid does not stand any real chance of success.<sup>172</sup> It even imputes into the European Convention a right to legal aid in civil cases, notwithstanding the absence of an express provision to that effect. In *Airey v Ireland*,<sup>173</sup> the question was whether the applicant's

<sup>168</sup> I Brownlie *Principles of public international law* (1998) 27.

<sup>169</sup> See eg Human Rights Committee, in Case No 459/1991 adopted at the Committee's 55th session in October 1995 (where the Committee found a violation of art 14(3)(d) of CCPR because the legal aid counsel for the appeal conceded at the hearing that there was no merit in the appeal without consulting with the accused).

<sup>170</sup> As above.

<sup>171</sup> See eg *Pakelli v Germany* (1983) 6 EHRR 1, holding that failure of the German Federal Supreme Court to appoint an official defence counsel to represent the applicant in an appeal on a point of law violated art 6(3)(c) of the European Convention. The Court rejected the German government's argument that art 6(3)(c) did not require the grant of free legal assistance to the applicant because he could have appeared in person and presented his case to the Federal Court. See also *Campbell and Fell v UK* (1984) 7 EHRR 165, where the European Court found a violation of art 6(3)(c) of the European Convention.

<sup>172</sup> See eg *Boner v UK* (1994) 19 EHRR 246; *Maxwell v UK* (1994) 19 EHRR 97.

<sup>173</sup> (1979) 2 EHRR 305.

appearance before the Irish High Court without the assistance of a lawyer would be effective, that is to say, whether she would be able to present her case properly if her husband were represented by a counsel and she was not. The Court held that she would be disadvantaged, in view of the complexity of the procedure before the High Court.<sup>174</sup>

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.

Legal aid questions should not be left to governments alone. As the Dakar Declaration stressed, '[t]he contribution of the judiciary, human rights NGOs and professional associations should be encouraged'.<sup>175</sup> The Declaration also recommends that bar associations should collaborate with appropriate government institutions and non-governmental organizations (NGOs) to enable paralegals to provide legal assistance to indigent suspects at the pre-trial stage, besides establishing programmes for *pro bono* representation of accused in criminal proceedings.

### 3.2.8 Prohibition of *ex post facto* laws

The purpose of *ex post facto* laws is to ensure that citizens, at all times, are fully aware of the state of the law under which they are living.<sup>176</sup> In the *Media Rights Agenda* case,<sup>177</sup> the African Commission stated that article 7(2) of the African Charter must be read to prohibit not only condemnation and infliction of punishment for acts not constituting crimes at the time they were committed, but to retroactivity itself. Since it is expected that citizens take the laws of the land seriously, they should know at any moment if their actions are legal.<sup>178</sup> The rule of law will be undermined if laws change with retroactive effect. It is no excuse that a retroactive law has not been enforced; '[a]n unjust but un-enforced law undermines . . . the sanctity in which the law should be held'.<sup>179</sup>

Comparatively, the European Court has held that article 7 of the European Convention — the African Charter's equivalent — is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty<sup>180</sup>

<sup>174</sup> n 173 above, para 24.

<sup>175</sup> Dakar Declaration (n 58 above) para 9.

<sup>176</sup> n 133 above, para 63.

<sup>177</sup> n 25 above, 70.

<sup>178</sup> n 25 above, para 59.

<sup>179</sup> n 25 above, para 60.

<sup>180</sup> *Nullum crimen, nulla poena sine lege*.

and the principle that the criminal law must not be extensively construed to an accused detriment.<sup>181</sup> The Court, however, noted that the provision cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

### 3.2.9 The independence of the judiciary

The independence of the judiciary is a precondition of any political system that aims to protect citizens against abuses of state power.<sup>182</sup> Independence implies regulations able to ensure the freedom of decision — requirements for assignment, retribution, carrying out functions etc — while impartiality refer to the judge's personal attributes and his intellectual and moral harshness.<sup>183</sup> In determining whether a judicial body is independent, regard has to be had to the manner of appointment of its members and the duration of their office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.<sup>184</sup> Similarly, a court is said to be independent if it exercises jurisdiction over all issues of a judicial nature and has exclusive authority to decide whether an issue submitted for decision is within its competence, as laid down by law. Impartiality has two aspects. First, the tribunal must be subjectively free of personal prejudice or bias. Second, 'it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.<sup>185</sup>

Judicial independence is a corollary to the right of access to court, since the right to a fair trial is breached where the independence and objective impartiality of courts — concepts that are closely linked — are not guaranteed and secured. The rights and freedoms of individuals enshrined in the African Charter can only be fully realised if governments provide structures that enable them to seek redress if they are violated. Article 26 of the African Charter — the obligation to establish and protect the courts — remains extremely relevant in this area. Regrettably, judicial independence has not been the experience in many African countries, particularly during the era of military regimes when military decrees were routinely employed to oust courts' jurisdictions. Ouster clauses prevent ordinary courts from taking up cases placed before special tribunals or from entertaining appeals from decisions of such tribunals. Curiously, the Nigerian government, in the

<sup>181</sup> See *Kokkinakis v Greece* (1993) 17 EHRR 397. See also *CR v UK* (1995) 21 EHRR 363.

<sup>182</sup> See Robertson (n 139 above) 370.

<sup>183</sup> See F Vasilescu *The right to a fair trial* <http://www.ccr.ro/Publicatii/Buletin%20CCR/Nr.1/Engleza/theright.htm> (accessed 31 August 2006).

<sup>184</sup> See eg *Findlay v UK* (1997) 24 EHRR 221 para 73.

<sup>185</sup> As above.

*Media Rights Agenda* case,<sup>186</sup> offered a stunning defence that 'it is in the nature of military regimes to provide for ouster clauses', because without such clauses the volume of litigation would make it 'too cumbersome for the government to do what it wants to do'.<sup>187</sup>

The African Commission has held that a government that ousts the competence of the ordinary courts to handle human rights cases, and ignores court judgments — as the Gambian military government did in *Jawara v The Gambia*<sup>188</sup> — demonstrates that the courts are not independent.<sup>189</sup> In *Lawyers for Human Rights v Swaziland*,<sup>190</sup> the Commission also held that retaining a law that vests all judicial powers in a king or the head of state, with the possibility of hiring and firing judges, directly threatens the independence and security of judges and the judiciary as a whole.<sup>191</sup> The African Commission urges countries to stop the practice of removing entire areas of law from the jurisdiction of the ordinary courts.<sup>192</sup> Whether African states are taking this admonition seriously remains to be seen in practice, but some newly democratised countries have repealed some obnoxious decrees.

The case of *Civil Liberties Organisation v Nigeria*<sup>193</sup> presented the African Commission with the opportunity to consider the relationship between the independence of the judiciary, access to court, and state's obligations under the African Charter. The military government enacted various decrees, including one suspending the Constitution and specifying that no decree promulgated after December 1983 could be examined in any court. Another decree dissolved political parties, ousted the jurisdiction of the courts and nullified any domestic effect of the African Charter. The Civil Liberties Organisation complained on the effect of these decrees on the independence of the judiciary and the inability to seek redress for acts violating fundamental rights. The Commission held that the right to have one's cause heard included complaints about violations of rights in treaties that Nigeria had ratified. Given that Nigeria has not denounced the African Charter, it could not negate the effects of its ratification through domestic action, but remains under an obligation to guarantee to all its citizens the rights under the Charter, including the one on fair hearing. The African Commission also held that the ousting of the courts' jurisdiction over decrees enacted, or to be enacted, since 1983 constituted 'an attack of incalculable proportions on article 7' on the right to be heard and the obliga-

<sup>186</sup> n 25 above, 242.

<sup>187</sup> n 25 above, para 78.

<sup>188</sup> n 133 above, 90.

<sup>189</sup> n 133 above, para 74.

<sup>190</sup> Communication 251/2002, *Lawyers for Human Rights v Swaziland* Eighteenth Activity Report.

<sup>191</sup> n 190 above, paras 54 & 58.

<sup>192</sup> n 24 above, para 17.

<sup>193</sup> (2000) AHRLR 188 (ACHPR 1995).

tion to establish and protect courts. The *Civil Liberties Organisation* decision indicates that the fair hearing guarantee in the African Charter, unlike other regional human rights instruments, is expressly applied to all guaranteed human rights. Consequently, the Commission is concerned that any ousting of the court's jurisdiction 'is especially invidious, because while it is a violation of human rights itself it permits other violations of rights to go unredressed'.<sup>194</sup>

Judicial independence is also assaulted where military personnel with little or no knowledge of the law are appointed to serve in judicial capacities; indeed, in the *International Pen* case,<sup>195</sup> the Commission held that the violation of the impartiality of tribunals occurs, in principle, regardless of the qualifications of the individuals chosen for a particular tribunal.<sup>196</sup> Appointment of non-judicial personnel into judicial bodies has been a regular feature of the judicial system in Africa, especially under military regimes. Governments usually justify the creation of these special tribunals on the need to ease the burden of cases on civil courts, but the African Commission rightly rejects such an alibi. It insists that<sup>197</sup>

if the domestic courts are overburdened, which the Commission does not doubt, the Commission recommends that government consider allocating more resources to them. The setting up of a parallel system has the danger of undermining the court system and creates the likelihood of unequal application of the laws.

Special tribunals also violate the African Charter to the extent that<sup>198</sup> their judges [are] specially appointed for each case by the executive branch, and would include on the panel at least one, and often a majority, of military or law enforcement officers, in addition to a sitting or retired judge.

In the *Media Rights Agenda* case,<sup>199</sup> the complainant alleged that the tribunal that tried and convicted the accused person was neither competent, independent nor impartial, as the then military head of state, the despicable General Sani Abacha, and his Provisional Ruling Council (PRC) hand-picked its members — the same persons against whom the alleged offence was committed. The President of the tribunal, Major-General Victor Malu, was a member of the PRC.<sup>200</sup>

The African Commission rightly found that the whole exercise was a contravention of Principle 10 of the Basic Principles on the Independence

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<sup>194</sup> n 193 above, para 12.

<sup>195</sup> n 17 above.

<sup>196</sup> n 17 above, para 86.

<sup>197</sup> n 24 above, para 23.

<sup>198</sup> n 24 above, para 21.

<sup>199</sup> n 25 above.

<sup>200</sup> n 25 above, paras 12 & 57.



of Judges.<sup>201</sup> The Commission found, in particular, that the setting up of the special tribunal for the trial of treason and other related offences impinged on the independence of the judiciary, 'in as much as such offences are being recognised in Nigeria as falling within the jurisdiction of the regular courts'.<sup>202</sup> The Commission relied on other universal instruments on fair trial, such as the UN Basic Principles on the Independence of the Judiciary,<sup>203</sup> and the General Comment of the UN Human Rights Committee on article 14 of CCPR<sup>204</sup> and restated its general position on the issue of trials of civilians by military tribunals in its Resolution on the Right to Fair Trial and Legal Assistance in Africa. It found that<sup>205</sup>

the arraignment, trial and conviction of Malaolu, a civilian, by a special military tribunal, presided over by serving military officers, who are still subject to military commands, without more, [was] prejudicial to the basic principles of fair hearing guaranteed by article 7 of the Charter.

It advised that special tribunals should not have jurisdiction over civilians and should not try offences that fall within the jurisdiction of regular courts.<sup>206</sup>

The Commission has also held that failing to recognise a grant of bail by a domestic court, as the Nigerian government did in *Constitutional Rights Project and Another v Nigeria*,<sup>207</sup> 'militates against the independence of the judiciary'.<sup>208</sup>

<sup>201</sup> n 25 above, para 60; and UN the Basic Principles on the Independence of the Judiciary Seventh UN Congress on the Prevention of Crime and Treatment of Offenders, Milan 26 August to 6 September 1985 UN Doc A/CONF 121/22/Rev 1 (1985) 59 Principle 10, providing that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.

<sup>202</sup> n 25 above, para 63.

<sup>203</sup> See UN Basic Principles (n 201 above) Principle 5, providing that [e]veryone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

<sup>204</sup> See General Comment of the UN Human Rights Committee on art 14 of CCPR: The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. (See also its Comment on the Report of Egypt UN Doc CCPR/79/Add 3, para a of August 1993) cited in *Media Rights Agenda & Others v Nigeria* (n 25 above) para 65.

<sup>205</sup> n 25 above, para 61.

<sup>206</sup> n 25 above, para 62.

<sup>207</sup> n 24 above, para 30: The fact that the government refuses to release Chief Abiola, despite the order for his release on bail made by the Court of Appeal, is a violation of article 26 which obliges states parties to ensure the independence of the judiciary.

<sup>208</sup> As above.

## 4 Concluding remarks

The African Commission deserves commendation for its contribution to developing international law on fair trial. The Commission's resolutions and case law on fair trial are inspiring, contributing to an enhanced understanding of the normative implications of many of the provisions contained in the African Charter. There are, however, a few areas that the Commission needs to strengthen in its interpretation of the Charter, such as instances where allegations of human rights abuses go uncontested by the respondent government. In such cases, the Commission has rightly held that it decides on the facts provided by the complainant and treats those facts as given.<sup>209</sup> However, in many such instances, the Commission simply draws logical conclusions without seizing the opportunity to expound and expand on the norms involved, even in cases where communications reveal extremely novel issues. Such an easy route stultifies the development of the African Charter's provisions. The Commission should use such opportunity to expound and expand on the Charter's provisions.

As the Commission itself acknowledges, '[t]he uniqueness of the African situation and the special qualities of the African Charter . . . imposes upon the African Commission an important task'.<sup>210</sup> A liberal interpretation of the Charter's provisions on fair trial will particularly aid state parties in their bid to enact legislation towards improving the status of human rights in their countries. It will provide a rich body of jurisprudence for national courts daily grappling with interpretation and application of fair trial norms. It will encourage non-state entities to lodge more complaints before the Commission, which, in turn, will further develop the Charter's provisions. More importantly, a liberal interpretation of the Charter will inspire the future African Human Rights Court and serve as a template for the Court's interpretation and application of fair trial norms in cases that will be brought before it.

Every human rights institution has its Achilles heel. For the African Commission, it lies in the reality that African leaders always exhibit a spirit of furious indifference to the Commission's findings and recommendations. There is nothing more damaging to the cause human rights than an ineffective complaint procedure. In particular, the right

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<sup>209</sup> See eg *Constitutional Rights Project v Nigeria (1)* (2000) AHRLR 241 (ACHPR 1999) para 14, citing its earlier decisions on the subject, including *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995); *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995); *Achuthan & Another (on behalf of Banda & Others) v Malawi* (2000) AHRLR 143 (ACHPR 1994); *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); and *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995).

<sup>210</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

to a fair trial is meaningless where there is no effective remedy. According to Byrnes:<sup>211</sup>

An effective procedure is one that provides an accessible and relatively speedy procedure for reviewing both parties' claims of fact and law in a fair manner, that results in the determination which gives a clear indication of the basis of finding and of the steps that need to be taken to remedy any violation, and that is acted upon by the state concerned within a reasonable time.

This is not the experience of Africans with respect to the findings and recommendations of the African Commission, where attempts are not always rewarded with success. At any rate, most of the violations discussed in this paper have gone without remedies to the complainants, made possible by the normative deficiency in the African Charter, for which the Commission cannot be blamed. There is no mechanism to compel states to abide by the Commission's recommendations. Much depends on the goodwill of the state concerned, which is patently lacking at the moment. The danger in all this, as the Dakar Declaration rightly noted, is that '[t]he failure of the state to deal adequately with human rights violations often results in the systematic denial of justice and, in some instances, conflict and civil war'.<sup>212</sup> Such irritating impunity is one of many reasons for the unremitting conflicts in Africa.

The Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights<sup>213</sup> seeks to strengthen these deficiencies. Of course, the Protocol, in itself, does not translate into effective remedies for human rights violations in Africa; to think so is to live in a fool's paradise. Nevertheless, the Protocol is the first and good place to start, 'an essential step in the historic process of ensuring judicially enforceable, effective recourse to Africans who have been denied their basic rights as human beings within their domestic jurisdictions'.<sup>214</sup> Regrettable, there is presently much confusion regarding the fate of the Court. The court project has been a speedy approach, in terms of adoption and ratification, but delayed arrival, because of the political

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<sup>211</sup> A Byrnes 'An effective complaints procedure in the context of international human rights law' in AF Bayefsky (ed) *The UN human rights treaty system in the 21st century* (2000) 139 143.

<sup>212</sup> Dakar Declaration (n 58 above) para 7.

<sup>213</sup> See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights OAU Doc OAU/LEG/MIN/AFCHPR/PROT (III). The Protocol establishes a court to complement the protective mandate of the Commission and provides that [i]f the Court finds that there has been a violation of human and peoples rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation (art 27(1)). Under the Protocol, state parties undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution (art 30).

<sup>214</sup> NJ Udombana 'Towards the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45 47.

shadow that now surrounds its actual establishment. Lukewarm acceptance is more bewildering than outright rejection.

For the African Commission, it should make the best out of the current bad situation, bearing in mind that much remains to be done to get African states to appreciate the importance of the norms provided for in the African Charter and to give effect to them in their domestic legal systems. Many of these norms, as painstakingly amplified and elaborated by the Commission, are still like floating charges, hovering in the sky and awaiting specific actions to crystallise, since the constitutions of many African countries do not permit international treaties to operate automatically in these countries upon ratification. Such treaties have to be incorporated into domestic law for them to become justifiable in domestic courts.

The AU, undoubtedly, has made various pledges to respect human rights and democratic values, not only in the African Charter but also in several other instruments, including the AU Constitutive Act.<sup>215</sup> However, as this article has shown, the practices of member states are jumbles of inconsistencies. Egregious human rights violations of human rights by government officials occur daily in many, if not all, African countries. This is not just a pity; it is a danger, the danger that the continent might slide back into despotism. The AU has a responsibility to prevent such drift, by calling on its members to take necessary steps at all levels to make their human rights commitments crystallise and become fixed and enforceable before relevant judicial institutions. Africans will not take their governments seriously in their human rights rhetoric until the lines of enunciated principle are connected by dots of practice to bring about shapes of legitimate rules.

All this calls for that eternal vigilance that truly has been called the price of liberty. Africans should continue to resist authoritarianism in all shapes or forms, mindful that a submissive sheep is an easy prey for a wolf.

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<sup>215</sup> See eg art 3(g) Constitutive Act of the African Union, adopted 11 July 2000, entry into force 26 May 2001 OAU Doc CAB/LEG/23, which promises to promote democratic principles and institutions, popular participation and good governance; and art 3(h), 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.

# Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides

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## Summary

*The fight against poverty and underdevelopment in Africa is amongst others dependent on how successfully the socio-economic rights protected in both the regional and universal instruments are concretised. The last 20 years since the adoption of the African Charter show a slow but steady move towards such concretisation. The African Commission has moved from a stage of redundancy, when not much was done to give normative content to the rights, to a stage of progression, in which the African Commission has started giving content to the rights. In spite of this, the recommendations of the African Commission are yet to be taken seriously not only by state parties, but by the African Union. There is no reliable mechanism to enforce the recommendations of the African Commission and, as the African Court on Human and People's Rights begins operation, its success is likely to be hampered by the same problem. This is in spite of the fact that the African Court has a wide remedial mandate in comparison to the African Commission. As the African Court propels the African human rights system into a stage of significant strides, this is the biggest obstacle in its way. The*

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*African Union is central in sanctioning states that fail to implement the judgments of the African Court. However, history shows that the Assembly of Heads of State and Government has always been reluctant to sanction its members. Unless there is a change of heart and more commitment to human rights, this practice is likely to persist and thereby negatively impact on the rights protected by the African Charter.*

## 1 Introduction

Africa's trademark as a continent is punctuated by poverty, ignorance, diseases and a high level of underdevelopment not comparable to other continents. Poverty in Africa has been described as a harsh reality that translates into half the population living on less than one dollar a day; not having access to safe drinking water; and more than two million infants dying annually before reaching their first birthday.<sup>1</sup> Recent statistics show a very wide gap in life span between African and European countries: Zimbabwe at 37,9, Zambia at 39 and Angola at 39,9. On the other side of the spectrum, Switzerland is at 80,6, Sweden at 80,4 and France at 79,7.<sup>2</sup>

Africa's poverty has been exacerbated by the HIV/AIDS epidemic; out of the 38,6 million people living with HIV/AIDS worldwide, 24,5 million are in sub-Saharan Africa.<sup>3</sup> This epidemic has contributed to the decline in the state of health and increased mortality rates of many Africans; it has also contributed to unemployment arising from physical incapacity and the consequential loss of income. Household savings have been depleted to access care for the sick and income inflows cut off due to sickness and attending to the sick.<sup>4</sup> Governments have been forced to divert resources that would have otherwise been used for developmental and other health purpose towards the fight against the epidemic.<sup>5</sup> It is in this context that the protection of economic, social and cultural

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<sup>1</sup> UNDP *The primacy of pro-poor policies for growth* <http://www.undp.org/rba/poverty.html> (accessed 5 June 2006).

<sup>2</sup> 'AIDS is cutting African life span to 30-year low, report says' *The New York Times* 6 June 2006.

<sup>3</sup> UNAIDS *2006 Report on the global AIDS epidemic* 13 [http://www.unaids.org/en/HIV\\_data/2006GlobalReport/default.asp](http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp) (accessed 7 June 2006) 4. The report also shows that in the last 25 years, close to 40 million children have been orphaned by AIDS.

<sup>4</sup> Uganda AIDS Commission 'HIV/AIDS in Uganda' <http://www.aidsuganda.org/> (accessed 13 June 2006).

<sup>5</sup> Eg, the National Strategic Framework for HIV/AIDS Activities in Uganda: 2000/1–2005/6 projected that of 3,3% of government expenditure would be on HIV/AIDS; see D Ddamulira *HIV/AIDS spending study — International component: The case of Uganda* (2002) 12 <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&R-ID=649> (accessed 16 June 2006).

rights (socio-economic rights)<sup>6</sup> on the continent should be understood.<sup>7</sup>

This paper sets out to review the approach of the African Commission on Human and Peoples' Rights (African Commission) in enforcing the socio-economic rights protected by the African Charter on Human and Peoples' Rights (African Charter)<sup>8</sup> in the 20 years since it entered into force. The approach of the African Commission has occurred in two stages, the first stage being the 'redundancy' stage and the second the 'progression' stage. The first stage describes that period in time when very little was done in developing the normative content of the rights and elucidating on the obligations they engender. The second stage represents a period when the African Commission started giving content to the rights and construing the obligation they engender. The stage of 'significant strides' is only prospective and premised on the potential success of the African human rights system as seen through the prism of the African Court on Human and Peoples' Rights (African Court).

The contribution of this paper is not only its description of the stages defined above, but its account of the factors dictating the direction of the stages. The paper places the stages in context by tracing the genesis of socio-economic rights in Africa and briefly describing their nature in the African Charter. The stages are described by using examples of some of the major communications decided by the African Commission in the respective stages. The paper also highlights some of the obstacles likely to be encountered by the African Court as it propels socio-economic rights into a third stage of significant strides.

## 2 The genesis of socio-economic rights in Africa

Events and ideological developments that preceded the adoption of the African Charter are important in understanding the justification for the inclusion of socio-economic rights in this instrument. When Africa emerged from colonial rule in the early 1960s, there was consensus that the 'independent state' should assume the responsibility of cham-

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<sup>6</sup> The term 'socio-economic rights' is used for convenience purposes. It is not in any manner intended to undermine the importance of cultural rights and their position as part of the African Charter. Later in this article I give examples of African cultural practices that have relevance in respect of the enjoyment of socio-economic rights.

<sup>7</sup> Though undocumented as human rights abuses, violations of the rights to health, education, food, water, housing, environment and social security have taken place in Africa on a large scale; N Udombana 'Towards the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45.

<sup>8</sup> Adopted on 27 June 1981 by the OAU Assembly of Heads of State and Government in Nairobi, Kenya OAU Doc CAB/LEG/67/3 rev 5, (1982) 21 *International Legal Materials* 58, entered into force 21 October 1986.

pioneering rapid political, social and economic reforms. The colonial state had been exploitative, large-scale exploitation of natural resources had taken place but not much returned to the Africans in the form of socio-economic development.<sup>9</sup> According to Oliver and Atmore,<sup>10</sup> the colonial state felt that its main duty in Africa was to maintain law and order and to do so without expense to the European taxpayer. They cite education as an example; it was left to the private enterprises of church missions. To maintain law and order, as was perceived by the colonial government, required adoption of draconian laws that intruded on all aspects of African life. It is therefore not surprising that the state was characterised by massive violation of civil and political rights.<sup>11</sup> On the economy side, there is no doubt that colonialism fast-tracked Africa's integration in the global economy. But as argued by Mamdani, this integration was one-sided and outward-looking, the economies were groomed as crop exporters and importers of necessities which created dependence.<sup>12</sup> Mdani also demonstrates how the colonial economy denied Africans self-sustenance and made them dependent on the economy which came with several impositions that further impoverished the African.<sup>13</sup>

As one scholar has put it, 'African states with their inherited weak economies thought their primary task was to overcome poverty, disease, malnutrition, illiteracy, etc.'<sup>14</sup> The post-colonial African leaders have persistently resisted human rights as an agent for human development. They believe that what Africa needs are sound economic policies implemented without detractions created by notions of human rights. But in spite of the enforcement of several economic policies on the continent, self-sustenance has not be realised. The problem with the independent African state is that it has recycled and used in the same manner the relationship of subjection, as described by Mbembe,<sup>15</sup> between itself and the state as was created by colonialism.

Unless economic policies integrate the African individual in its making, give him or her a voice and improve his or her socio-economic wellbeing, the policies remain tools of white collar debate. The African peasantry can only be empowered to participate in this debate and

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<sup>9</sup> J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa' University of Minnesota Human Rights Library <http://www1.umn.edu/humanrts/africa/Oloka-Onyango.html> (accessed 20 June 2006).

<sup>10</sup> R Oliver & A Atmore *Africa since 1800* (1994) 124.

<sup>11</sup> For a detailed account of the extent of human rights violations by the colonial state, see V Nmeielle *The African human rights system: Its laws, practice and institutions* (2001) 17-29.

<sup>12</sup> M Mamdani *Citizen and subject: Contemporary Africa and the legacy of later colonialism* (1996) 145.

<sup>13</sup> n 12 above, 6-147.

<sup>14</sup> E Ankumah *The African Commission on Human and Peoples' Rights: The practice and procedures* (1996) 5.

<sup>15</sup> A Mbembe *On the post-colony* (2001) 34.



influence its direction in their favour if they are empowered through human rights norms. Emphasis on public wellbeing in white collar debates tends to alienate the individual and his needs; an equitable balance should be made between the requirements of the public well-being and the rights of the individual.<sup>16</sup> This can be done through provisions that protect both collective and individual socio-economic rights and integrate them as part of policy conception and implementation.

### 3 Towards the African Charter on Human and Peoples' Rights

Express references to the need to protect socio-economics emerged from two colloquiums held in 1978: the Butare Colloquium<sup>17</sup> and the Dakar Colloquium,<sup>18</sup> both on human rights and development. The participants at the Butare Colloquium discussed the relationship between human rights and development and concluded that the lack of resources in many African countries did not justify lack of respect for civil and political rights and for socio-economic rights.<sup>19</sup> At the Dakar Colloquium, it was concluded that human rights could not be reduced to civil and political rights, socio-economic rights needed particular attention as the rights were mutually interdependent.<sup>20</sup> Subsequent efforts, initiated mainly by the United Nations (UN) Commission on Human Rights, directed to establishment of a human rights system for Africa failed, mainly because of the reluctance of African leaders to cede their sovereignty to a system of human rights.<sup>21</sup>

However, calamitous events, especially in the 1970s, leading to the rise of dictatorships in some African countries, drew the Organization of the African Unity (OAU), now the African Union (AU), to accepting that there was a need to protect human rights on the continent. At its 16th ordinary session, 16 to 20 July 1979, the OAU Assembly of Heads of State and Government expressed its commitment to the protection of

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<sup>16</sup> First Conference of French-Speaking African Jurists, held in Dakar, Senegal 5-9 January 1967, 5, as quoted by F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 21.

<sup>17</sup> Human Rights and Economic Development in Francophone Africa, a colloquium organised by the Institute of International Law and Economic Development (Washington DC) and the Faculty of Law of the National University of Rwanda 3-7 July 1978; see Ouguergouz (n 16 above) 23-24.

<sup>18</sup> Organised by Association Sénégalaise d'Études et de Recherches Juridiques and by the International Commission of Jurists, September 1978; see Ouguergouz (n 16 above) 24.

<sup>19</sup> Ouguergouz (n 16 above) 24.

<sup>20</sup> Ouguergouz (n 16 above) 25.

<sup>21</sup> Nmehielle (n 11 above) 70; see also Ankumah (n 14 above) 5.

human and peoples' rights, and more particularly the right to development.<sup>22</sup> It is not very clear why the right to development was particularly singled out; one could but guess that this was motivated by the high levels of underdevelopment prevalent on the continent. The African leaders could have intended to translate the political obligations assumed by the independent state to champion development into legal obligations based on human rights.

Emphasis on the right to development meant that the OAU was looking beyond merely civil and political rights, though at this stage this could have been unconsciously. One could also argue that emphasis on the right to development was because of the need to create a sort of bulwark against continued economic exploitation by the former colonial powers and to the redress exploitation that had taken place.<sup>23</sup> Addressing the meeting of experts who convened in Dakar to sketch the way forward for an African human rights instrument, President Senghor of Senegal indicated that the right to development deserved a particular place because it embraced all socio-economic rights as well as civil and political rights.<sup>24</sup> It is in line with this call that the African Charter was drafted.

#### 4 The African Charter: A leap beyond ideological cleavages

Although the African Charter was adopted at the height of the Cold War, it was able to surmount the ideological disputes that had led to socio-economic rights being condemned to an inferior status.<sup>25</sup> The African Charter was able to proclaim that civil and political rights and socio-economic rights are indivisible. This portrayed Africa as offering 'ripe ground for challenging the universality of international law principles'.<sup>26</sup>

Senghor's message played a very important role in guiding the drafters; when the Charter was adopted at the Eighteenth Assembly of

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<sup>22</sup> AHG/Dec 115 (XVI) Rev 1 'Decision on Human and Peoples' Rights in Africa', 16th ordinary session of the OAU Assembly of Heads of State and Government, Monrovia, Liberia 16-20 July 1979. The resolution called upon the OAU Secretary-General to organise, as soon as possible, a restricted meeting of highly qualified experts to prepare a preliminary draft of the African Charter.

<sup>23</sup> I would like to acknowledge Prof Sandra Liebenberg for drawing this argument to my attention.

<sup>24</sup> Address delivered by Mr Leopold Sedar Senghor, President of Senegal, OAU DOC CAB/LEG/67/5; Ouguergouz (n 16 above) 41.

<sup>25</sup> See C Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 181.

<sup>26</sup> R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 11.

Heads of State and Government, 24 to 28 June 1981 in Nairobi, socio-economic rights appeared along side civil and political rights without any distinction. Indeed, the African Charter proclaims that:<sup>27</sup>

[I]t is . . . essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality . . . that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

This is a fundamental leap away from the ideological differences that had proclaimed that civil and political rights were pure rights while socio-economic rights were inferior rights. Literally, one could interpret the preamble as suggesting that civil and political rights are dependent on socio-economic rights without a reverse statement. As I have suggested elsewhere,<sup>28</sup> socio-economic rights and civil and political rights are symbiotic — they depend on each other in a two way manner. In spite of this, civil and political rights continue to be hoisted above socio-economic rights. In the African context it is important that both categories of rights be respected because freedom to vote could be as important to the impoverished African as the right to health. The vote could for instance be used to influence decisions as regards the health system.

The bifurcation of human rights, contrary to the spirit of the Universal Declaration of Human Rights (Universal Declaration),<sup>29</sup> led to the adoption of two different covenants: the International Covenant on Civil and Political Rights (CCPR), protecting civil and political rights, and the International Covenant on Economic, Social and Cultural Rights (CESCR), protecting socio-economic rights.

According to Scott and Macklem, the split was not influenced by the view that socio-economic rights are somehow inferior to civil and political rights. 'Rather, social rights were not viewed as justiciable because courts, or court-like bodies, were not thought to be competent bodies to deal with them.'<sup>30</sup> A reporting mechanism, and not a complaints procedure, was considered most suitable for enforcement of socio-economic rights.<sup>31</sup> When one examines the arguments that have been advanced to oppose socio-economic rights, some of them question

<sup>27</sup> Preamble, para 8.

<sup>28</sup> C Mbazira 'A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 35.

<sup>29</sup> Adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948.

<sup>30</sup> C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 89.

<sup>31</sup> K Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999) 26.

the fabric of socio-economic rights as rights.<sup>32</sup> However, these arguments are misconceived; socio-economic rights also engender negative obligations and civil and political rights engender positive obligations as well.<sup>33</sup> It is also true that the implementation of civil and political rights, just like the socio-economic rights, requires resources.<sup>34</sup>

## 5 Normative content of the African Charter

The African Charter guarantees a broad range of socio-economic rights. Although some of the Charter's provisions mirror CESC, there are significant differences between these instruments. While CESC requires 'progressive realisation' of socio-economic rights subject 'to the maximum of the available resources', the African Charter does not. Article 1, which appears to be definitive of the broad nature of the obligations of states, merely provides that:

The member states of the [African Union] parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative and other measures to give effect to them.

This provision raises a number of issues. On its literal interpretation it appears to suggest the view that the realisation of all the rights in the African Charter, including socio-economic rights, are not subject to any conditions. The provision has in fact led some commentators to state that except for the right to health, the obligations in respect of other socio-economic rights are stated as being immediate.<sup>35</sup> This position appears very attractive in reaction to the view that socio-economic rights are not human rights. In fact, the Commission itself appears to have been tempted to adopt this position when it stated that although it was aware of Africa's economic difficulties all rights have to be implemented immediately.<sup>36</sup> However, the perception of the immediacy of the rights in the African Charter raises one question: Considering Africa's economic circumstances, is it practicable to realise all the socio-economic rights immediately? The answer is a definite no. While some

<sup>32</sup> M Cranston *What are human rights?* (1973) as quoted by Arambulo (n 31 above) 58; see also C Orwin & T Pangle 'The philosophical foundation of human rights' in F Plattner (ed) *Human rights in our time — Essays in memory of Victor Baras* (1984) 16.

<sup>33</sup> M Sepúlveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 125-126.

<sup>34</sup> P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 8 *Human Rights Quarterly* 172; see also A Eide 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 41; *In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC).

<sup>35</sup> Odinkalu (n 25 above) 196.

<sup>36</sup> Presentation of the Third Annual Activity Report by Prof Umozurike, Chairperson of the African Commission to the 26th Assembly of Heads of State and Government of the OAU, 9-11 July 1990.

levels of the obligations, such as respect, may be realised immediately, the protection, promotion and fulfilment of socio-economic rights requires substantial resources. Many, if not all, African states have very poor economies riddled by corruption, poor planning and insignificance in the global economy save as consumers. It is hard for such economies to immediately overcome their structural problems and to marshal the resources necessary to provide for all socio-economic needs immediately. At best, human rights obligations should compel the African leaders to ensure that they do whatever is reasonable to improve the resources necessary for socio-economic rights realisation and to utilise the available resources maximally.

Though civil and political rights too require resources to protect, promote, and fulfil,<sup>37</sup> generally there are significant differences in the levels of resource required between the two categories of rights. It is therefore does not come as a surprise that even countries endowed with economic resources are yet to fully realise socio-economic rights and have always raised the defence of resources.<sup>38</sup> On this note I agree with Nmehielle that the debate on the justiciability of socio-economic rights under the Charter should not assume an extreme posture.<sup>39</sup> It is important that the socio-economic rights in the African Charter be realised progressively due to the underdevelopment of most African countries,<sup>40</sup> though states have to begin taking immediate measures. In addition to Africa's underdevelopment, it is also important that socio-economic rights be realised progressively because the standards for their full realisation are dynamic; they are defined by changing socio-economic circumstances and establish shifting standards. This is because peoples' standards must improve on a continuous basis. There is no stage at which one can say that the zenith of human socio-economic development has been reached.

### 5.1 Socio-economic rights in the African Charter

The African Charter protects a broad range of socio-economic rights and also a number of collective rights relevant to socio-economic rights. Some of the collective rights have elements that are directly relevant to socio-economic rights. In this respect, the African Charter serves a good purpose by not making distinctions on the basis of the outdated generational description of rights. The rights include

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<sup>37</sup> See Constitutional Court of South Africa in *In re Certification of the Constitution of the Republic of South Africa* (n 34 above).

<sup>38</sup> Eg, see the Canadian case of *Eldridge & Others v British Columbia & Others (Attorney-General)* [1997] 3 SCR 624, 151 DLR (4th) 577.

<sup>39</sup> Nmehielle (n 11 above) 124.

<sup>40</sup> Ankumah (n 14 above) 144.

equitable and satisfactory conditions of work,<sup>41</sup> right to health,<sup>42</sup> right to education,<sup>43</sup> protection of the family,<sup>44</sup> right to self-determination,<sup>45</sup> right to dispose of wealth and natural resources,<sup>46</sup> right to economic, social and cultural development,<sup>47</sup> right to peace,<sup>48</sup> and right to a satisfactory and favourable environment.<sup>49</sup>

It is not my intention to discuss the normative content of each of these rights as this has been covered adequately by a number of authors.<sup>50</sup> But just to point out a few things, some of these rights are drafted along the same lines as CDESCR. However, some distinctions can be registered. A number of rights such as development are not protected in CDESCR though recognised by the UN.<sup>51</sup> Provisions on rights such as health and work are not as extensively drafted as their counterparts in CDESCR. In spite of this, their construction could still lead to their understanding in an extensive manner.

The difference between the African Charter and CDESCR reflects a desire on the part of the drafters of the former to produce an exclusively African instrument. They could have copied and reproduced the provisions of CDESCR and CCPR in the area of civil and political rights. But they chose not to, this is because they wanted to produce a distinctively African instrument elaborating the normative understanding of human rights in the African context. However, the African states are also parties to the global instruments and considerable jurisprudence has been generated on these global instruments. This compels the African Commission, as well as the African Court, to refer to the global instruments and jurisprudence. I will revert to this argument later.

## **6 Twenty years of losses and gains: From redundancy to progression and significant strides**

### **6.1 The redundancy stage**

The redundancy stage represents a period in time when the African Commission seemed either reluctant or unable to give the rights in

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<sup>41</sup> Art 15.

<sup>42</sup> Art 16.

<sup>43</sup> Art 17.

<sup>44</sup> Art 18.

<sup>45</sup> Art 20.

<sup>46</sup> Art 21.

<sup>47</sup> Art 22.

<sup>48</sup> Art 23.

<sup>49</sup> Art 24.

<sup>50</sup> See Nmehielle (n 11 above); Ouguerouz (n 16 above); Odinkalu (n 25 above); Murray (n 26 above).

<sup>51</sup> See United Nations General Assembly Declaration on the Right to Development GA Res 41/128, Annex, 41GAOR Supp (No 53).

the African Charter their fullest interpretation.<sup>52</sup> For socio-economic rights, this was exacerbated by the fact that in the initial years not so many complaints invoking socio-economic rights provisions were filed. This redundancy also represents the high degree of apathy exhibited towards socio-economic rights at the international human rights arena. Though theoretically the African Charter emphasises the indivisibility of civil and political rights and socio-economic rights, translating this into practice and transcending the apathy has not been a straightforward path.

Another factor that precipitated the redundancy stage relates to the weaknesses of the African Commission in its initial years of operation. So many factors have been identified as contributing to the ineffectiveness of the African Commission in exercising its mandate. Doubts have been expressed about the independence and impartiality of the members of the African Commission. Since its commencement, a sizeable number of commissioners have simultaneously held posts in the public service of their countries, either as attorneys-general, cabinet ministers or ambassadors. This appears to have compromised their independence and stopped them from condemning their governments.

The effectiveness of the African Commission has also been affected by promotion of confidentiality of its proceedings which has in the past eroded the culture of accountability on its part.<sup>53</sup> A decision maker who makes a decision, knowing that such decision must be justified, will act more carefully and pay attention to all the relevant issues.<sup>54</sup> The African Commission has in the past missed the opportunity of being such a decision maker because of its confidentiality. This could be one of the factors why its initial decisions were sloppy as the possibility of public criticism was limited.

The African Commission has also been suffering from resource deficiencies; it was under-funded by the OAU and continues to be under-funded by the AU. This has affected all activities of the Commission, including its capacity to do research and deliver well-reasoned legal opinions. At the moment most of the few technical personnel at the Commission's Secretariat are funded by donors on a periodic basis, and usually leave the Commission at times when their experience becomes most relevant.

The Commission has for a long time been a 'toothless bull-dog', a point I shall revert to later below. Initially, the African Commission was conceived as a promotional institution. The OAU was reluctant to give the Commission a significant protective role. This is reflected in the

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<sup>52</sup> See Ankumah (n 14 above) 2.

<sup>53</sup> Art 59(1) of the African Charter provides that all measures taken within the provisions of ch III shall remain confidential until such time as the Assembly of Heads of State and Government shall otherwise decide.

<sup>54</sup> See E Mureinik 'A bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

vagueness of the provisions that empower the Commission to entertain and consider individual communications. While the African Charter makes express provisions empowering the African Commission to entertain and consider state complaints,<sup>55</sup> there are no corresponding provisions in respect of individual complaints. All that the Charter says is that before each session, the Secretary of the Commission shall make a list of the communications, other than those of state parties, and transmit them to the members of the Commission who shall indicate which communications should be considered.<sup>56</sup> Though the Commission has exploited the vagueness to assert its powers to hear individual complaints, its efforts in this regard have been drawn back by the absence of an effective remedial and enforcement mechanism.<sup>57</sup>

As seen in the next section, all socio-economic rights decisions made by the African Commission during the redundancy stage are inadequate in normative terms. In these decisions, there is no effort on the part of the Commission to draw from international human rights law in the area of socio-economic rights. Most decisions just declare that the state has violated rights without elaborating the normative basis of the right. But we should not pay a blind eye to the fact that at this stage not all communications were properly argued; yet the failure of most states to defend the communications denied the Commission the opportunity to hand down reasoned judgments in a balanced manner. At the same time, one sees communications that were defended, yet they suffer from the same weaknesses from all perspectives.

### 6.1.1 Major decisions during the redundancy stage

The communications discussed under this heading represent the very few that invoked, in one way or another, together with civil and political rights and socio-economic rights provisions in the African Charter. Some common features run through all of them. Apart from consolidating several communications, they are not elaborate; the normative content of the rights is not discussed adequately. Some are not defended by the state, yet in the defended ones there is no elaboration of the legal arguments of the state or of the applicants in the final decision. There does not appear to be adequate legal research put in on the part of the African Commission, justification of findings by authoritative international human rights law sources is lacking. This is so even where in some cases there is international literature, which is also easily accessible, like the standards of treatment of prisoners.<sup>58</sup> In remedial

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<sup>55</sup> Art 47.

<sup>56</sup> Art 55(1).

<sup>57</sup> E Welch 'The African Commission on Human and Peoples' Rights: A five-year report and assessment' (1992) 14 *Human Rights Quarterly* 49.

<sup>58</sup> Like the UN Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990.



terms, other than make simple declarations of violation of rights, the African Commission does not make any substantive recommendations to remedy the violations.

In *Free Legal Assistance Group v Zaire*,<sup>59</sup> it was alleged that the mismanagement of public finances, the failure to provide basic services, the shortage of medicines and closure of schools and universities was a violation of the African Charter.<sup>60</sup> In finding that there was a violation of the right to health, the African Commission regurgitates article 16 of the African Charter and without explanation concludes that there is a violation of the Charter.<sup>61</sup> The Commission also held that the failure of the government to provide services such as safe drinking water and electricity and the shortage of medicines also amounted to violation of the right to health. One could read the Commission here as saying that the right to health gives rise to such rights as water and electricity, rights not expressly protected by the Charter. However, the scanty nature of the decision does not give chance for concrete imputation on the Commission of this position. Also, in an unelaborated manner, the Commission concluded that the closure of universities and secondary schools constituted a violation of the right to education in article 17.<sup>62</sup> It is, however, apparent from the operative part of the decision that the Commission did not formally hold that article 17 had been violated.

It has been argued that this communication appears to impose on the state the obligation to fulfil socio-economic rights, though it does this in a terse manner.<sup>63</sup> The Commission should have seized the opportunity to elaborate on the right to education, especially considering the fact that article 17 does not detail the content of this right. This is in comparison to article 13 of CESC, which details the right as comprising of compulsory and free primary education and access to secondary and higher education.

The above communication may be contrasted with the slightly elaborate *Union Interafricaine des Droits de l'Homme and Others v Angola*,<sup>64</sup> also touching on the right to education, but also on the right to work. The communication arose from the mass rounding up and expulsion in 1996 of West African citizens from Angola by the government. The Commission found the expulsion, in addition to other rights, to have violated the right to education and the right to work. It was stated that though the Republic of Angola was facing economic difficulties this did

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<sup>59</sup> (2000) AHRLR 74 (ACHPR 1995).

<sup>60</sup> Para 4.

<sup>61</sup> Para 47.

<sup>62</sup> Para 48.

<sup>63</sup> F Viljoen 'The justiciability of socio-economic and cultural rights: Experience and problems' (unpublished paper on file with author) 23.

<sup>64</sup> (2000) AHRLR 18 (ACHPR 1997).

not justify radical measures against non-nationals.<sup>65</sup> The deportations were found to have called into question such rights as education and the right to work, amongst others. The Commission also held that article 2 of the Charter (non-discrimination) obligates states to ensure that all persons in its territory, nationals or non-nationals, enjoy all the rights guaranteed.<sup>66</sup> But again the communication falls short of an elaboration of the right to education and how it became applicable to the applicants. This could be associated with the scanty nature of the facts and the failure of the Commission to interrogate them fully.

In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>67</sup> the right to health was brought into issue. The communication, a consolidation of four communications,<sup>68</sup> arose from the detention of Ken Saro-Wiwa, a writer and Ogoni rights activist, together with others. They had been detained by the Nigerian Abacha government following the death of four people and consequent riots in the oil producing region of Ogoniland. The detainees were tried by a military tribunal and sentenced to death. In spite of interim measures adopted by the Commission pending the disposal of the communication, the 'convicts' were executed on 10 November 1995.<sup>69</sup> It was alleged that while in detention Saro-Wiwa had been severely beaten and in spite of his high blood pressure, had been denied access to medicine and a doctor.<sup>70</sup>

Without elaboration of the content of the right to health, the African Commission held that the responsibility of the state in respect of the right to health is heightened when a person is in detention. In such cases a person's integrity and wellbeing are completely dependent on the state. It was declared that the denial of access by Saro-Wiwa to a qualified doctor was a violation of article 16 of the African Charter.<sup>71</sup> Again, the decision is not elaborate. In spite of this, however, it is important in as far as it states that prisoners enjoy special protection and are wholly dependent on the state for their wellbeing. In Africa, as well as other parts of the world, prisoners are ostracised and removed from society. They are considered moral outcasts not worthy of protection or entitled to any human rights. The African Commission and the African Court could, in future, build on this case to elaborate on the health rights of prisoners and to redeem them as moral beings entitled to live as wholesome humans.

The massive violation of prisoners' socio-economic rights is seen again in *Malawi African Association and Others v Mauritania*,<sup>72</sup> also con-

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<sup>65</sup> Para 16.

<sup>66</sup> Para 18.

<sup>67</sup> (2000) AHRLR 212 (ACHPR 1998).

<sup>68</sup> Communications 137/94, 139/94, 154/96 & 161/97.

<sup>69</sup> Para 8.

<sup>70</sup> Para 2.

<sup>71</sup> Para 112.

<sup>72</sup> (2000) AHRLR 149 (ACHPR 2000).

solidating several communications. In reaction to popular disapproval of racial marginalisation of black people in the country, the government detained hordes of people under the most inhumane conditions. The prisoners, who had survived execution, were denied adequate food and medical attention, and as a result some had died in detention. Their cells were infested with bedbugs, lice and cockroaches. The prisoners slept in overcrowded cells on dirty floors without any blankets.<sup>73</sup> Again, the communication, in a shorthand manner, restates the responsibility of the state towards prisoners as regards their right to health.<sup>74</sup> The African Commission hastily, and without further elaboration, condemned the conditions of detention under article 5, which prohibits torture and degrading treatment or punishment.<sup>75</sup> One would have expected the Commission to give a detailed elaboration of the obligations of states towards prisoners in relation to their socio-economic rights and to refer to international standards in this respect.

### 6.1.2 The progression stage

The progression stage, which is the current stage, represents a time when the African Commission has begun to surmount some of its weaknesses and to proclaim socio-economic rights in a more progressive manner. This stage is highlighted by two important decisions: *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (SERAC case)*<sup>76</sup> and *Purohit and Another v The Gambia (Purohit case)*.<sup>77</sup> In these cases, discussed later in detail, the African Commission has given normative content to some of the socio-economic rights in the African Charter. The Commission has even gone ahead to read into the Charter rights which are not expressly protected, such as rights to food and shelter. The decisions also indicate increased reliance on standards established by international human rights in the area of socio-economic rights. In remedial terms, these decisions make clear and elaborate recommendations that transcend the declaratory nature of the Commission's recommendations in previous cases.

The *Purohit* case, contrary to perceptions that the socio-economic rights obligations in the African Charter are immediate, has defined the obligations in a realistic manner, taking into account the resource constraints of African countries. This has brought the Charter very close to CESC. I have argued elsewhere that this is very important in as far as it seeks to marry the regional human rights system with the international system.<sup>78</sup> This is very important, considering especially the position of the

<sup>73</sup> Para 12.

<sup>74</sup> Para 122.

<sup>75</sup> Para 115.

<sup>76</sup> (2001) AHRLR 60 (ACHPR 2001).

<sup>77</sup> (2003) AHRLR 96 (ACHPR 2003).

<sup>78</sup> See C Mbazira 'The right to health and the nature of socio-economic rights obligations under the African Charter: The *Purohit* case' (2005) 6(4) *ESR Review* 15.

African Court with its jurisdiction to apply international instruments ratified by the state. I will elaborate this point later. The Commission's progression has been driven by a number of factors. One of the factors is its increased co-operation with human rights organisations both within and outside Africa. Non-governmental organisations (NGOs) have played a very important role, not only in filing communications, but also in prosecuting them in a professional manner. NGOs have also been sponsoring interns to provide technical assistance to the Commission. The NGOs have, on so many occasions, during the ordinary sessions of the Commission, brought to the fore some of the human rights problems in Africa. They have made statements, submitted research reports and draft resolutions. All of these have helped in advancing the normative understanding of the rights in the Charter. Some organisations with academic roots, such as the Centre for Human Rights at the University of Pretoria, have engaged in high-level research on the African human rights system and also trained students in the field. This has increased academic knowledge and literature on the system.

However, in spite of the tremendous achievements realised at the progression phase, a number of obstacles still have to be surmounted. Full integration of the international human rights law standards is yet to be realised. The weaknesses of the enforcement mechanisms are still an impediment to the effectiveness of the African Commission. The Commission continues to be under-funded and is still understaffed.

### **6.1.3 Major decisions during the progression phase**

As already stated, the phase of progression is punctuated by two major decisions, *SERAC* and *Purohit*. The difference between these decisions and those during the redundancy phase is, first, the African Commission appears to have invested some research in writing the decisions. Secondly, they are elaborate in the rights they protect. The *SERAC* case goes as far as reading into the African Charter rights not explicitly protected. Thirdly, there is some reference to international human rights jurisprudence in the area of socio-economic rights at the UN level. In remedial terms, the Commission goes beyond making declarations of violations of rights; it makes comprehensive recommendations of things that have to be done to remedy the violation. Recommendations include the repeal of legislation and the appointment of a commission of inquiry and keeping the African Commission posted on the measures adopted after the decision.

It could be argued that in these cases the Commission did not hesitate to make far-reaching recommendations because it knew that their legitimacy would not arise since the decisions of the Commission have persistently been ignored. The governments would then find it easy to be indulgent to the recommendations since they are considered to be

inconsequential.<sup>79</sup> Indeed, as argued later, there is no evidence that either *SERAC* or *Purohit* have been implemented. Of course it may be too early to judge the implementation of *Purohit*.

The *SERAC* case arose from the exploitation of oil resources by the Nigerian government, in partnership with Shell, in disregard of the environment and health of the Ogoni people. The Nigerian government had neither required environmental impact assessments nor enforced an effective regulatory mechanism. The oil activities had led to illnesses arising from environmental degradation. People's protests had been met with un-proportionate and brutal military force placed at the disposal of Shell by the Nigerian government. Thousands of people were evicted from their homes, their homesteads and farms destroyed and livestock killed, leading to malnutrition and starvation.

Before going into the merits of the case, the African Commission discussed, in general terms, the nature of the socio-economic rights obligations engendered by the African Charter. Consistently with the ideas of Shue,<sup>80</sup> and as used by the UN Committee on Economic, Social and Cultural Rights (Committee), the Commission stated that the rights 'generate at least four levels of duties, namely the duty to respect, protect, promote and fulfil'. 'These obligations', according to the Commission, 'universally apply to all rights and entail a combination of negative and positive obligations.'<sup>81</sup> The Commission then explained each of the levels and in the context of article 2(1) of CESCRR held that sometimes the need to enjoy some of the rights requires concerted action from the state in terms of more than one of the duties above.<sup>82</sup> These pronouncements, together with the statement that there is no right in the African Charter that could not be made effective, have been described as underscoring the justiciability and commitment to enforce socio-economic rights by the African Commission.<sup>83</sup>

The Commission found that the actions of the Nigerian government violated the right to a clean and healthy environment. This right, said the Commission, requires the state to take reasonable legislative and other measures to prevent pollution and ecological degradation, promote conservation and to secure an ecologically sustainable development and use of resources.<sup>84</sup> The Commission also referred to article 12 of CESCRR and said that the government was under a duty to improve all aspects of the environment, including industrial hygiene.

The Commission also found the state to have violated the right to health. This right was linked to the right to a clean and healthy enviro-

<sup>79</sup> These arguments were brought to my attention by Prof Liebenberg and I acknowledge her in this respect.

<sup>80</sup> H Shue *Basic rights: subsistence, affluence, and US foreign policy* (1980).

<sup>81</sup> n 7 above, para 44.

<sup>82</sup> Para 48.

<sup>83</sup> Viljoen (n 63 above) 23.

<sup>84</sup> n 7 above, para 52.

onment, which at best required the government 'to desist from carrying out or sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual'.<sup>85</sup> Compliance with these two rights, according to the Commission, must also include ordering, or at least permitting, independent scientific monitoring of the environment, and requiring and publicising of environmental and social impact studies.<sup>86</sup> The government of Nigeria had defaulted on all these.

The Commission condemned the failure of the government to protect its people from third party activities. The government had in fact, instead, facilitated Shell's violations by lending it its military power, contrary to the African Charter and international obligations.<sup>87</sup> Further to this, the Commission declared that there was a violation of the right of peoples to dispose of their wealth.<sup>88</sup> In my opinion, it is necessary to protect the peoples' right to development, especially in the context of increased globalisation of exploitation of natural resources without regard to peoples' rights. The right to dispose of wealth should be linked to the right of peoples to self-determination and their capacity to resist exploitation in the cultural context should be strengthened.<sup>89</sup>

The most innovative stance by the Commission is its reading into the Charter of the rights to shelter and food, rights which are not explicitly protected by the Charter. According to the Commission, the right to food is implicitly recognised in such provisions as the right to life, the right to health and the right to economic, social and cultural development, which are expressly recognised under the Charter. This right, held the Commission, is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.<sup>90</sup>

Like the right to food, the Commission held that the right to housing or shelter is implicitly recognised by the Charter. It reasoned that this right could be derived from a combination of the provisions protecting the right to health, the right to property, and the protection accorded to the families. The Commission noted that the destruction of houses adversely affects people's property, their health and families. Furthermore, shelter means more than a roof over one's head. It embodies the

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<sup>85</sup> As above.

<sup>86</sup> Para 53.

<sup>87</sup> Para 58.

<sup>88</sup> Para 55.

<sup>89</sup> See J Oloka-Onyango 'Who is watching "Big Brother"? Globalisation and the protection of cultural rights in present-day Africa' (2005) 5 *African Human Rights Law Journal* 1.

<sup>90</sup> n 7 above, paras 65-67.

right to be left alone and to live in peace — whether under a roof or not.<sup>91</sup>

Regarding remedies, the Commission made extensive recommendations. It recommended that investigations be conducted, those responsible for violations prosecuted and compensation paid to those who had suffered. The Commission also recommended that an environmental and social impact assessment be carried out. The government was urged to keep the Commission posted on the measures undertaken to solve the problem.<sup>92</sup> These are perhaps the most comprehensive recommendations made by the Commission up to that date, which, if enforced, would have gone a long way in vindicating the rights that had been violated. The recommendations, if implemented, would have also deterred future violations and established a relationship of trust between the government and the people. Unfortunately, there is no evidence that these recommendations were taken seriously by the government. The recommendations, when read together with the findings on merit, lead one to conclude that the Commission can make very strong declarations of rights and still move to establish a constructive dialogue with the state on implementation of its recommendations. However, the success of this move is dependent on the state's willingness to engage, in good faith, in such a post-decision dialogue.

The *Purohit* case was filed by two mental health advocates, on behalf of mental patients at a psychiatric unit in The Gambia, and existing and future mental health patients detained under the mental health laws of the Republic of The Gambia. The complainants alleged that the provisions of the Lunatic Detention Act and the manner in which mental patients were treated amounted to a violation of various provisions of the African Charter, including the right to health. It was alleged that the Act failed to provide safeguards for patients who were (suspected of being) insane during their diagnosis, certification and detention. Among other things, it did not make provision for either review or appeal against orders of detention and there was no remedy for erroneous detentions. No provision existed; it was argued, for the independent examination of the administration, management and living conditions within the unit itself.

In a rare feat, the Commission began by lambasting states for their failure to defend communications. In spite of repeatedly having been

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<sup>91</sup> See paras 60-64. I have argued elsewhere that within the African context, there is a strong link between the right to food and the right to shelter. Most African communities survive on subsistence agriculture. Food sources are often close to their houses. Some societies ensure food security by storing and preserving the excess of their harvest in granaries, constructed with traditional techniques. Others plant crops in such a manner that some mature before others, in order to ensure a steady supply of food. Forced evictions and the denial of access to housing interfere with this process; C Mbazira 'Reading the right to food into the African Charter on Human and Peoples' Rights' (2004) 5(1) *ESR Review* 5.

<sup>92</sup> n 7 above, para 71.

given time to file its response, the government of The Gambia filed its submissions only two days before the consideration of the communication. The Commission stated that when states accede to international instruments, they do so voluntarily and that having to make several requests to states to file their submissions is troubling. According to the Commission, this practice 'not only seriously hampers the work of the African Commission, but it also defeats the whole purpose of the African Charter'.<sup>93</sup> The Commission was especially perturbed by the fact that the Secretariat of the Commission is situated in The Gambia.

On the merits, the Commission found The Gambia to be in violation of a range of African Charter rights. It held that the Lunatic Detention Act was discriminatory because the categories of people who would be detained under it were likely to be people picked up from the streets and people from poor backgrounds.<sup>94</sup> Secondly, it was held that the legislative scheme of the Act, its implementation and the conditions under which persons were detained amounted to a violation of respect for human dignity. Among other things, the Act used such terms as 'idiots' and 'lunatics' to describe persons with mental illness. Such terminology, according to the African Commission, was dehumanising.<sup>95</sup>

On the right to health, the Commission held that the enjoyment of this right is vital to all aspects of a person's life and wellbeing and is crucial to the realisation of all other rights. It held that this right requires 'the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind'.<sup>96</sup> The Commission held that mental health patients deserve special treatment because of their condition and by virtue of their disability, they should be enabled not only to attain but also sustain their optimum level of independence and performance.<sup>97</sup>

The Lunatic Detention Act was found to be deficient in terms of its therapeutic objectives and the provision of matching resources and programmes for the treatment of persons with mental disabilities.<sup>98</sup> The Commission relied heavily on the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Care (Principles).<sup>99</sup> The Principles accord special treatment to mental health patients and stress that such patients are entitled to the highest standards of medical care at three levels: analysis and diagnosis, treatment and rehabilitation. However, the Commission took note of the difference in standards between the Principles and the African Charter. While

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<sup>93</sup> n 7 above, para 41.

<sup>94</sup> Para 53.

<sup>95</sup> Para 59.

<sup>96</sup> Para 80.

<sup>97</sup> Para 81.

<sup>98</sup> Para 83.

<sup>99</sup> Adopted by UN General Assembly Resolution 46/119, December 1991.



article 16 uses 'best attainable state of mental health', the Principles use 'highest attainable standards'. But this was not viewed by the Commission as a bar to the application of the Principles, as there was nothing to suggest that elaborating the right in the Charter in the direction of the Principles was deficient.

The Commission took note of the relevance of resources and the realities facing African countries in their efforts to realise the right to health. According to the Commission:<sup>100</sup>

[M]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having regard to this depressing but real state of affairs, the African Commission would like to read into article 16 the obligation on the part of states party to the African Charter to *take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.*

The finding above establishes the fact that the availability of resources is a relevant factor when determining whether a state is in violation of the socio-economic rights in the African Charter. This case suggests that the African Commission is leaning towards adopting standards the Committee has developed in its General Comments on the socio-economic obligations under CESC, especially General Comment No 3.<sup>101</sup> As noted earlier, socio-economic rights under CESC are realisable progressively to the maximum of a state's available resources. The Committee has interpreted this to mean that state parties must not take retrogressive measures that have a negative impact on existing access to socio-economic rights. It has also stated that states must comply with minimum essential levels of socio-economic rights.

The approach adopted by the African Commission is justifiable, given that the formulation of the rights in the African Charter is not substantially different from that of CESC. There is apparently no reason why Africa should adopt a different standard, and one which appears to be idealistic and out of touch with reality. In addition, CESC has been interpreted by the Committee in a manner that considers the position of poor countries. For example, the Committee has held that states seeking exemption from liability for not meeting their socio-economic rights obligations on the ground of a lack of resources must demonstrate that they have used the available resources to satisfy minimum essential levels of socio-economic rights as a matter of priority.<sup>102</sup>

<sup>100</sup> n 7 above, para 84 (my emphasis).

<sup>101</sup> Committee on Economic, Social and Cultural Rights, General Comment No 3, *The nature of state parties' obligations* (5th session, 1990) UN Doc E/1991/23, annex III 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev 6 at 14 (2003).

<sup>102</sup> n 101 above, para 10.

## 6.2 The phase of significant strides: The African Court on Human and Peoples' Rights

The commencement of operations by the African Court and its delivery on socio-economic rights in my opinion represent a phase I would describe as the phase of significant strides. Considering the calibre of the persons that have been elected the first judges of the African Court, and considering their experience in the area of international law, one hopes that they will deliver quality judgments.<sup>103</sup> The jurisprudence of the African Court in the area of socio-economic rights is likely to have an indelible impact on the African continent and to inspire the African Commission and domestic courts. Contrary to belief that the African Court will undermine domestic courts by establishing an extra-territorial jurisdiction,<sup>104</sup> the Court will strengthen human rights in all African countries.

The African Court is empowered to apply the African 'Charter and any other *relevant human rights instruments ratified by the states concerned*' as one of its sources of law.<sup>105</sup> This is different from the African Charter, which merely authorises the African Commission to seek inspiration from international human rights law.<sup>106</sup> This new move is crucial as it seeks to integrate the global human rights system and the regional system. This means that the Court will have to apply the standards of CESC, in respect of states that have ratified it. But as I have argued elsewhere, this integration presents a challenge to the African Court because of the problem of permeability.<sup>107</sup> Most international treaties have their own monitoring bodies, which have interpreted and applied such treaties. Inconsistent interpretation by other bodies not charged with the implementation of a treaty may have fatal results. Additionally, while there is a need for inspiration to be sought from international human rights law, there is also the need to maintain the identity of regional human rights treaties and to allow them to address peculiar regional issues.

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<sup>103</sup> The Judges elected by the Executive Council of the AU on 21 January 2006 include: Sophia Akuffo (Judge of the Supreme Court of Ghana); Fanoush Hamid Faraj (Member of the Supreme Council of Justice Authority, Libya); Guindo Modibo Tounty (Judge of First Instance of Timbukutu, Mali); Guisse El-Hadji (Former Presiding judge of the Court of Appeal of Senegal); George Kanieyamba (Justice of the Supreme Court of Uganda); Kelello Mafoso-Guni (Judge of the High Court of Lesotho); Jean Ngabishma Mutsinzi (Judge of the Supreme Court of Rwanda); Bernard Ngoepe (Judge President of the Transvaal Provincial Division, South Africa); Gérard Niyungeko (Professor of Law, University of Burundi); Fatsa Ouguergouz (Secretary of the ICJ, The Hague); and Jean Emile Somda (Member of the Constitutional Court, Burkina Faso).

<sup>104</sup> See NB Pityana 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 121 124.

<sup>105</sup> Art 7 (my emphasis).

<sup>106</sup> Art 60.

<sup>107</sup> Mbazira (n 78 above) 17.

However, unless a situation presents absolutely peculiar circumstances, the universality of human rights should be promoted by the interpretation of regional treaties in a manner consistent with international human rights law. I have argued that this could be achieved if the regional and international instruments are married. This would make it possible to apply the norms proclaimed by universal standards without making the international treaty a primary source of law.<sup>108</sup> The marrying process would integrate the instruments in a manner that does not collapse the norms of one into another. In this, the normative nature of the regional instruments would be enhanced, while at the same time preserving their identity. Unless there is evidence of a need for a divergent interpretation, the African Court will have to interpret the provisions of the African Charter in a manner that is consistency with international law. This is not an easy task in the African Court's enterprise of redeeming the poor.

However, there are still some very important challenges that the African Court should face in its attempts to actualise the rights in the African Charter. The most important challenge is to overcome the problem of non-enforcement of the judgments of the Court, as discussed in the next section.

### 6.2.1 Enforcement of judgments

The success of the way into the phase of significant strides is, amongst others, dependent on whether the African states respect and execute the judgments of the African Court. The implementation of the recommendations of the African Commission leaves a lot to be desired. The recommendations have been ignored, not only by the state parties but also by the AU Assembly of Heads of State and Government. Prominent incidents include the stay of execution communications ignored, in a flagrant manner, by some African states. Examples include the execution of Ken Saro-Wiwa by the Nigerian government in 1995 in spite of a *note verbale* from the African Commission that the execution be halted until the case has been heard by the Commission.<sup>109</sup> Another example is the 2001 execution of Mariette Bosch by Botswana authorities only four days after the African Commission communicated its appeal for a stay.<sup>110</sup> In the area of socio-economic rights, in spite of the good recommendation of the African Commission in the *SERAC* case, Ogoniland still experiences massive exploitation of oil in a manner that is detrimental to the people. This could only mean that the recommenda-

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<sup>108</sup> As above.

<sup>109</sup> n 67 above.

<sup>110</sup> See L Chenwi 'Towards the abolition of the death penalty in Africa: A human rights perspective' unpublished LLD thesis, University of Pretoria, 2005 178; see also L Chenwi 'The African Commission and the death penalty' (2005) 11 *Amicus Journal* 13.

tions of the Commission have not been implemented by the Nigerian government.

Theoretically, the problems of the enforcement mechanism have been surmounted by the enforcement procedures provided to the African Court. The African Court Protocol enjoins state parties to comply with the judgments of the African Court. By ratifying the Protocol, the parties guarantee execution of the judgments.<sup>111</sup> The AU Council of Ministers is also enjoined to monitor execution of judgments of the Court on behalf of the AU Assembly.<sup>112</sup> The Court's remedial mandate is not restricted to making recommendations, but extends to ordering 'payment of fair compensation or reparation'.<sup>113</sup> Additionally, in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court is empowered to adopt such provisional measures as it deems necessary.<sup>114</sup> What remains to be seen, however, is whether this is going to be operationalised. This is because the enforcement of decisions of international tribunals has always been a problem in international law.

It is important to note that the enforcement of the decisions of the African Court at the domestic level is not going to be an easy task. The Protocol of the Court anticipates a reliance on good faith implementation on the part of the state. All it does is to require states to guarantee execution of the judgments of the Court.<sup>115</sup> Although the Court may report to the AU Assembly cases which have not been executed,<sup>116</sup> history shows us that the AU Assembly has always been very reluctant to punish its members. While the Protocol compels the Council of Ministers of the AU to monitor compliance with the judgment on behalf of the Assembly,<sup>117</sup> it is likely that the Council will await instructions from the Assembly.

Without being pessimistic, it is unlikely that African states will enforce the judgments in good faith. It is advisable that in its initial years, the African Court should concentrate on influencing domestic courts. This is because the domestic courts are closer to the people and closely linked to domestic enforcement mechanisms; their role is likely to have a bigger impact in comparison with the African Court — whose enforcement mechanism may be somewhere in Addis Ababa.

Influencing the decisions of the domestic courts will also forestall counter-majoritarian accusations against the African Court. While the counter-majoritarian dilemma has been predominantly domestic, there

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<sup>111</sup> Art 30.

<sup>112</sup> Art 29(2).

<sup>113</sup> Art 27(1).

<sup>114</sup> Art 27(2).

<sup>115</sup> Art 30.

<sup>116</sup> Art 31.

<sup>117</sup> Art 29.

is evidence that it is being taken to the international stage.<sup>118</sup> Counter-majoritarian objections have been especially intense in respect of enforcement of socio-economic rights because of their impact on government policy and resources. With the proliferation of international courts having a wide mandate, questions may be asked about their legitimacy to direct domestic affairs in a manner that is inconsistent with the wishes of the people. These concerns would be obviated if the domestic courts assume the role of translating international norms into domestic law using the jurisprudence of international courts. The domestic courts have confronted the counter-majoritarian dilemma and appear to be succeeding in establishing appropriate balances. Establishing such balances may be hard for international tribunals because they operate outside the political contexts of a country and yet their intervention is occasional.

## 7 Conclusion

The last 20 years of the African Charter have been mixed with losses and gains in the area of socio-economic rights. In spite of the initial frustration of the African Commission with respect to enforcing the rights in the African Charter, there is evidence that some gains have been made in the area of socio-economic rights. The watershed decisions of *SERAC* and *Purohit* have gone into some detail in elaborating the nature of the obligations engendered by the socio-economic rights provisions of the African Charter. Though the Commission's enforcement mechanisms remain weak, this void has, to a certain extent, been filled with the establishment of the African Court. The Court has been given a wide mandate and powers to issue binding judgments. What remains to be done by the Court in the area of socio-economic rights is to pick up from the gains of the Commission and to propel socio-economic rights into the phase of significant strides.

Some obstacles, however, still have to be surmounted if the operation of the Court and its judgments are going to have an impact. The biggest obstacle is the enforcement of the judgments of the Court. In its initial years of operation, the Court should aim at developing a jurisprudence which has the capacity to influence the judgments of domestic courts. This is because the domestic courts are close to the enforcement mechanisms and are also likely to be able to issue more meaningful and enforceable remedies.

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<sup>118</sup> See R Alford 'Misusing international sources to interpret the Constitution' (2004) 98 *American Journal of International Law* 57.

# The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights

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## Summary

*The African Charter has many unique features that have given it a place of its own in the family of human rights instruments. The most important of these is its departure from the individual rights orientation of almost all human rights instruments by entrenching collective rights of peoples. It is the only instrument to provide for an elaborate list of peoples' rights beyond and above the internationally recognised and controversial right of all peoples to self-determination. Nevertheless, since the African Charter provides no definition to the term 'peoples' and the formulation of the rights in the Charter invites various interpretations, which are not always consistent, the elaboration of peoples' rights by the Charter was received with little or no optimism. This article seeks to examine the extent to which such expectations were borne out in the interpretations and applications of peoples' rights in the jurisprudence of the African Commission. To that end, the article seeks to identify the conceptual and legal issues raised with respect to peoples' rights and examines how the African Commission addressed them. Although it is maintained here that the jurisprudence of the Commission has clarified many of the doubts and questions that have been raised with respect to peoples' rights in the Charter, opening a new direction for*

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*the development of jurisprudence on such rights, there are some outstanding issues that the jurisprudence of the Commission did not address. The examination of the Commission's jurisprudence further reveals that there is no commonly discernable thread in the conceptualisation and interpretation of peoples' rights.*

## 1 Introduction

The African Charter on Human and Peoples' Rights (African Charter)<sup>1</sup> is the foundation of the African regional human rights system. Like similar founding human rights instruments, the African Charter provides for substantive rights, lays down enforcement procedures and establishes a supervisory body.<sup>2</sup> The African Charter, however, represents a significant departure from such other instruments in the range of rights that it enshrines. The two other regional human rights instruments, namely, the European Convention on Human Rights and Fundamental Freedoms<sup>3</sup> and the American Convention on Human Rights,<sup>4</sup> enumerate the classic civil and political rights of individuals only. By contrast, the African Charter incorporates not only the traditional civil and political rights and the substantive guarantees of economic, social and cultural rights, but also collective rights of 'peoples'. This gives the African Charter a special character, though for that very reason it was received with pessimism by many human rights scholars and practitioners.

It has now been 25 years since the adoption of the African Charter and 20 years since its entry into force.<sup>5</sup> As the adoption and entry into force of the African Charter are commemorated, it is important to reflect on achievements and challenges in the enforcement of the African Charter in general and the newly recognised rights of peoples in particular. The aim of this article is to examine the interpretation and application of peoples' rights in the decisions of the African Commission on Human and Peoples' Rights (African Commission). In doing so, the article seeks to look into the extent to which the African Commission

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<sup>1</sup> African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3 Rev 5 (1981) reprinted in (1982) 21 *International Legal Materials* 59.

<sup>2</sup> For a recent discussion on the nature and operation of the African Charter, see C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 679.

<sup>3</sup> European Convention on Human and Fundamental Rights, adopted on 4 November 1950 by the Council of Europe and entered into force on 3 September 1953. See ETS No 5, 213.

<sup>4</sup> The American Convention on Human Rights was adopted on 22 November 1969 and entered into force on 8 July 1978. Reprinted in (1970) 9 *International Legal Materials* (1970) 99.

<sup>5</sup> The African Charter was adopted by the Eighteenth Assembly of Heads of State and Government of the Organization of African Unity in Nairobi in July 1981 and entered into force on 21 October 1986.

outlived the expectations and fears of many commentators on this unique feature of the African Charter. To this end, the article will discuss the conceptual and legal dilemmas raised with respect to peoples' rights of the African Charter and the ways in which the decisions of the African Commission have addressed these dilemmas.

Apart from this introduction, the article is divided into four sections. The first section examines the conceptual problems caused by the openness of the term 'peoples' and the various interpretations it has given rise to, as well as the approach of the African Commission to the problem. It is my belief that the extent to which peoples' rights are employed to address the human rights concerns of vulnerable communities within a state is a litmus test to determine the potential of peoples' rights to advance the cause of human rights in Africa. Thus, the second section examines the determination of the application of peoples' rights to sub-state groups. Concerns about the validity of peoples' rights relate to their legal nature and enforceability. The issue of the legal nature and enforceability of peoples' rights is therefore dealt with in part three. Finally, the article concludes its discussion in section four.

## 2 The conceptual and legal dilemmas with respect to peoples' rights of the African Charter

All peoples have a right to self-determination. *There may, however, be controversy as to the definition of peoples and the content of the right.*<sup>6</sup>

The above paragraph, quoted by the African Commission, spells out the most vexing issue with respect to peoples' rights in the African Charter. This pertains to the meaning of the concept 'peoples' and the content of these rights. The Charter provides for peoples' rights without clearly delimiting both the subject or beneficiary of the rights and the nature of the content of the rights. The absence of a definition for the term 'peoples' in the Charter has opened it up to different interpretations. The result is that no agreement and certainty exist as to when and how peoples' rights apply to particular cases.

A textual analysis of the African Charter reveals that the term 'peoples' can be understood to refer to five different situations. The least controversial conception of the term signifies peoples subject to colonial or alien domination. Seen from this perspective, peoples' rights in the Charter are manifestations of the struggle for the eradication of colonialism in Africa, which has been the core objective of the

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<sup>6</sup> African Commission in *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 3 (my emphasis).



Organization of African Unity (OAU).<sup>7</sup> It is therefore rightly observed that some of the provisions on peoples' rights represent 'a reaction to the continental experience of slavery and colonialism'.<sup>8</sup> The jurisprudence of the African Commission affirms this historical origin of peoples' rights. For example, with respect to article 21 of the Charter, the African Commission said:<sup>9</sup>

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for African themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African society.

The term 'peoples' is also used to refer to the population of a state as a whole. The reading of article 23(2)(b) reveals this:<sup>10</sup>

For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that . . . their territories shall not be used as basis for subversive or terrorist activities against the *people* of any other State party to the present Charter.

'On different occasions, the African Commission also spoke of the protection of the 'people of Rwanda' against the consequences of the war, the 'people of Togo' and the 'people of Liberia' who were suffering as a result of conflicts, and the 'people of South Africa' in their fight against apartheid.<sup>11</sup> There is little debate as to whether 'peoples' can mean the entire population of a state. Indeed, in the practice of the United Nations (UN), the OAU and African states, the term 'people' as a reference to the whole people of a state is no longer debatable.<sup>12</sup>

<sup>7</sup> See the Charter of Organization of African Unity that was adopted by a conference of Heads of State and Government at the Ethiopian capital, Addis Ababa on 25 May 1963. Reprinted in (1963) 2 *International Legal Materials* 766. Art 2(1)(d) of the OAU Charter states that one of the objectives of the OAU was 'to eradicate all forms of colonialism from Africa', 767.

<sup>8</sup> Heyns (n 2 above) 679. Indeed, some maintain that the reaction to Africa's colonial history through the expression of the desire for self-determination and sovereignty over natural resources is the core of the Charter. See J Swanson 'The emergence of new rights in the African Charter' (1991) 12 *New York Law School Journal of International and Comparative Law* 307 328.

<sup>9</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para. 56.

<sup>10</sup> See J Crawford 'The rights of peoples: "Peoples" or "governments"?' in J Crawford (ed) *The rights of peoples* (1988) 62.

<sup>11</sup> See R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 231.

<sup>12</sup> See S Kwame Nyameke Blay 'Changing African perspectives on the right to self-determination in the wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29 *Journal of African Law* 147, particularly 147-154.

Another interpretation of the term as employed in the African Charter signifies the people of Africa in general. The Preamble to the African Charter referred to the awareness of African states of their duty to achieve the total liberation of Africa, *the peoples of which* are still struggling for their dignity and genuine independence.<sup>13</sup> Similarly, the African Commission has on several occasions spoken of 'African peoples'.<sup>14</sup> From a human rights perspective, this can be understood as imposing a collective responsibility on African governments to promote the wellbeing of African peoples using the institutions of the OAU (now African Union (AU)).

Article 21(4) of the African Charter envisages the state as yet another entity entitled to exercise the right of peoples to freely dispose of their natural wealth, although in paragraph one the right is declared as a right of 'all peoples'. According to this provision:

States parties to the present Charter shall individually and collectively *exercise the right to free disposal of their wealth and natural resources* with a view to strengthening African unity and solidarity.

There is no doubt that in adopting the African Charter, African states might have viewed this and other peoples' rights through a statist prism and hence as a boost to their sovereign rights.<sup>15</sup> As we shall see below, this understanding of the term people has been the basis for the pessimism that many scholars expressed regarding the merit of the African Charter's extensive elaboration of peoples' rights.

Finally, we have an understanding of the term 'peoples' that is highly controversial in Africa.<sup>16</sup> According to this understanding, 'peoples' is a reference to the distinct communities constituting the state. In this sense, the subjects of peoples' rights are the different ethnic groups or inhabitants of a particular territory within the state, who on account of historical, cultural and/or existing patterns of discrimination have come to form a sense of separate identity. This finds textual support in the African Charter, particularly in article 19: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'<sup>17</sup> This

<sup>13</sup> Para 8 Preamble to the African Charter.

<sup>14</sup> See Resolution on the Celebration of African Day of Human Rights Second Annual Activity Report (1988-1989) ACHPR/RPT/2nd, Annex VII; Resolution on the African Commission on Human and Peoples' Rights, Sixth Annual Activity Report (1992-1993) ACHPR/RPT/6th.

<sup>15</sup> See Blay (n 12 above) 158-159. After proposing that 'all peoples' can mean the collection of individuals who make up the constituent communities of Africa, Blay states that this is not to say that signatory states pledge themselves to accept such interpretation and makes reference to the objections that state representatives raised against such interpretations.

<sup>16</sup> The objections raised by state representatives that Blay referred to (n 15 above) were directed particularly against such an interpretation.

<sup>17</sup> The Guidelines for National Periodic Reports require states to supply information with respect to art 19 on 'precautions taken to proscribe any tendencies of some people dominating another as feared by the article'. See text in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 65.

recognises the multi-ethnic composition of many African states and seeks to address situations in which one group of people may be subject to domination by another. Once again, although it did not make a direct pronouncement as to the applicability of peoples' rights to such sub-state groups *vis-à-vis* their states, the African Commission on a few occasions referred to distinct groups within states as 'people' entitled to peoples' rights. It is, however, never clear from the jurisprudence of the Commission how a particular territory of a state inhabited by groups with different ascriptive qualities, such as language, as in the case of the Katanga or the Casamance of Senegal, may be entitled to peoples' rights in the same way as the Ogoni of Nigeria, a minority group with an identifiable ethnic character.

The openness of the term 'peoples' to such various interpretations, not necessarily consistent, has given rise to some conceptual and legal dilemmas. These include, among others, the nature of the relationship between these interpretations and questions regarding which rights apply to the different situations that these interpretations envisage.

This has led some to express fear that the inclusion of peoples' rights might lead to abuses and confusions. For some, particularly, the conceptualisation of the term 'peoples' as a reference to states endangers the perpetuation of a statist approach to peoples' rights. Kiwanuka accordingly reiterated that 'equating peoples and states further strengthens the state and subjects the rights of the people to the whims of whoever controls the political process'.<sup>18</sup> According to him, under such circumstances the apparently progressive introduction of the concept 'people' into the African Charter could actually turn out to be counterproductive.<sup>19</sup> Others seriously question the contribution of the African Charter in advancing the concept of peoples' rights. As recently as 2001, Alston concluded that 'there is no reason to expect that the African Charter will prove in the years ahead to be a force for the progressive development of peoples rights'.<sup>20</sup>

There are also others who expressed doubt that a robust and more innovative interpretation can be attributed to the term 'peoples'. The fear here is that the conceptual indeterminacy of the term 'peoples' as used in the African Charter might lead to a restrictive interpretation that excludes the application of peoples' rights to sub-state groups. This is particularly valid, given the practice of the OAU and African states in declining from recognising sub-state groups as peoples. It is for this reason that Howard laments that:<sup>21</sup>

There are no rights to minorities, in opposition to the larger nation-state, in

<sup>18</sup> RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 97.

<sup>19</sup> As above.

<sup>20</sup> P Alston 'Peoples' Rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 287.

<sup>21</sup> RE Howard *Human rights in Commonwealth Africa* (1986) 92.

the African Charter on Human and Peoples' Rights; rather, the rights of peoples mentioned in articles 19-24 are clearly meant to be the rights of national, not sub-national, groups.

Similarly, Maxted and Zegeye maintain that the term 'people' as used in the African Charter refers to the people of a state as a whole, and not to minority communities constituting the state.<sup>22</sup>

Most importantly, the different interpretations of the term have also led to a division of opinion among members of the African Commission. During the examination of the state report of Rwanda, Commissioner Nguema asked, in response to the view of some commissioners, that the African Charter is concerned with the rights of communities:<sup>23</sup>

Does that mean we have to take into account the rights of the Hutu community, the Tutsi Community or the Tua community? I think that according to the interpretation and even the principles which are enforced in the OAU at the level of the states it is admitted that we do not have to take account of the rights of various ethnic groups to consider them as peoples' rights.

By contrast, Commissioner Umozurike observed:<sup>24</sup>

It seems pretty obvious that one of the peculiarities of the African Charter is its emphasis not just on individuals but on peoples, and this starts right from the very title and runs throughout there is no way that people here simply means all the people of the country — it is people that have an identifiable interest, and this may be carpenters, may be tribes, may be fishermen or whatever.

Indeed, if the term 'people' in the Charter is seen in the light of the practice of the AU and its member states, its applicability to sub-state groups will come into question. Equally, however, the attribution of peoplehood to any group of persons such as carpenters or fishermen would not make the understanding of the concept any clearer. As such, it is necessary for the African Commission to make a clear pronouncement as to the meaning of 'peoples' and rule that the understanding of 'peoples' in the African Charter is a departure from the traditional state-centred approach of the OAU. In the next section, I will examine whether and how the jurisprudence of the African Commission addresses these complex legal and conceptual dilemmas.

## 2.1 The approach of the African Commission

The African Commission has shown an increasing willingness to deal with cases involving allegations of violations of peoples' rights of the African Charter, including the right to self-determination. In the first

<sup>22</sup> J Maxted & A Zegeye 'North, West and the Horn of Africa' in P Thornberry *et al* (eds) *World directory of minorities* (1997) 392.

<sup>23</sup> African Commission, Examination of State Reports (Libya-Rwanda-Tunisia) General Discussions (9th session March 1991) <http://www1.umn.edu/humanrts/achpr/sess9-generaldiscussions.htm> (accessed 15 May 2006 (my emphasis)).

<sup>24</sup> As above.

case on peoples' rights, *Katangese Peoples' Congress v Zaire*,<sup>25</sup> the complainant, the President of the Katangese Peoples' Congress, requested the African Commission to recognise, among other things, the independence of Katanga by virtue of article 20(1) of the African Charter.<sup>26</sup> It is worth noting two points here. First, the Katangese are only a portion of the population of Zaire. As such, the case brought into sharp focus the politically sensitive question of whether peoples' rights apply to the different sections of society separately. Second, they identify themselves as people and hence entitled to peoples' rights under the African Charter, including the right to self-determination in article 20, which the African Commission did not contest. At this point, it is important to note that Katanga is a province of Zaire that consists of different ethnic groups, including the Luba and the Kongo. This raises the important question of when the inhabitants of a particular territory of a state may, irrespective of their heterogeneity in terms of ethnic differences, qualify to be a people for the purpose of peoples' rights of the African Charter.

In its decision, the African Commission identified two versions of self-determination. The first is self-determination for all Zairians as a people, which it said was not the issue involved in the case. The other is self-determination for a section of the population of a state, that is, the Katangese, which was central to the communication. As regards the latter, the Commission emphasised the interplay between self-determination and the principles of sovereignty and territorial integrity of states. According to the Commission, although the right to self-determination may be exercised in different ways, including independence, it must be 'fully cognisant of other recognised principles such as sovereignty and territorial integrity'.<sup>27</sup> In affirming that territorial integrity takes priority over the right to self-determination, the African Commission declared that it is 'obliged to uphold the sovereignty and territorial integrity of Zaire'.<sup>28</sup> Consequently, the Commission held that<sup>29</sup>

in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13 of the African Charter, the Commission holds the view that *Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.*

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<sup>25</sup> n 6 above.

<sup>26</sup> n 6 above, para. 1.

<sup>27</sup> n 6 above, para 4.

<sup>28</sup> n 6 above, para 5. This view reflects the observation of the ICJ that the interpretation of the right to self-determination in the context of Africa takes account of the inviolability of territories inherited at independence. See ICJ Reports *Burkina Faso v Mali frontier dispute* (1986) para 25.

<sup>29</sup> n 6 above, para 6.

It is, however, interesting to note that the African Commission referred to the Katangese as 'the people of Katanga'. Moreover, the Commission's analysis affirms self-determination as a right of peoples, although it admits that 'there may be controversy as to the definition of peoples and the content of the right'.<sup>30</sup> This largely addresses the fear that peoples' rights would collapse into the sovereign rights of states.<sup>31</sup> The finding of the Commission also suggests that the relationship between the two conceptions of peoples' rights to self-determination is such that the self-determination of Katangese gives way to the self-determination of all Zairians as a people. Thus, as long as there is a constitutional and statutory framework that guarantees political participation of all Zairians equally, the self-determination of the Katangese finds expression through the exercise with other Zairians of the self-determination of all Zairian people.

The Commission's decision also suggests and affirms that the concept 'peoples' can be construed to mean a section of the population of a state.<sup>32</sup> Nevertheless, in the particular case no attempt has been made by the African Commission to determine under what circumstances inhabitants of a territory of a state may, in spite of their ethnic differences, come to develop a common identity enabling them to constitute a people entitled to peoples' rights and whether the Katangese have established such a common identity and hence they are people entitled to peoples' rights, including the right to self-determination. It is without such jurisprudential conceptualisation that the Commission referred to the Katangese as the 'People of Katanga'.

The African Commission also considered the issue of peoples' right to self-determination in relation to the separatist movement of Casamance in Senegal.<sup>33</sup> After analysing the positions of both the government and the separatist movement, the Commission rejected the claim of the separatists for the independence of Casamance from Senegal as lacking 'pertinence'.<sup>34</sup> Although it criticised the Senegalese state because it

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<sup>30</sup> n 6 above, para 2.

<sup>31</sup> Howard expresses the view that 'what peoples' rights appear to refer to is the rights of sovereign states' (n 21 above) 6. Similarly Kiwanuka cautioned that 'peoples rights might initially be treated as state rights and then degenerate into sectarian, class, government and clique rights' (n 18 above) 97.

<sup>32</sup> In the *Reference re Secession of Quebec*, the Supreme Court of Canada held a similar but straightforward view: 'It is clear that a "people" may include only a portion of the population of an existing state ... To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.' *Reference re Secession of Quebec* 2 SCR [1998] 217 paras 123-124 (my emphasis).

<sup>33</sup> African Commission Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights Tenth Annual Activity Report (1996-1997) Annex VIII reprinted in Murray & Evans (n 17 above) 530 (*Casamance* case).

<sup>34</sup> n 33 above, 536.

'had a mechanical and static conception of national unity', the Commission recommended that the issue must be addressed within the framework of 'the cohesion and continuity of the people of the unified Senegalese state in a community of interest and destiny'.<sup>35</sup> Once again, this affirms the nature of the relationship between the two interpretations of self-determination as one of priority. Significantly, however, in outlining the objectives for a constructive dialogue between the two parties, the Commission indicated that part of the search for a solution must aim 'to post to Casamance so far as possible, officials native to the region'.<sup>36</sup> One can understand this as suggesting some form of self-administration for the Casamance whom the Commission referred to as people.<sup>37</sup> Once again one observes that the Commission did not explain the defining features of peoplehood and whether the Casamance people possess these features.

One can say from the foregoing that under the African Charter, even a section of the population of a state or, to be precise, the inhabitants of a particular territory of a state, can be taken as being entitled to the right of self-determination. But this is recognised within the limits of the territorial integrity of the state.<sup>38</sup> As such, the nature of the rights that the section of the population of a state may exercise can be all but secession.<sup>39</sup> Subject to the territorial integrity of the state, this may involve 'self-government, local government, federalism, confederalism, unitarism or any other form of relations'.<sup>40</sup> Which of these various

<sup>35</sup> As above.

<sup>36</sup> n 33 above, 537.

<sup>37</sup> 'The Commission maintains . . . that the sincerity, loyalty, and the transparency which the authorities demonstrated throughout the mission will contribute to reestablish peace, justice and well-being of the populations of Senegal and of the people of Casamance in particular' (n 33 above, 537). Note that the Commission makes a distinction in the use of terms between Senegalese in general — whom it called 'the populations of Senegal' — and the community inhabiting Casamance — whom it called 'the people of Casamance'.

<sup>38</sup> *Report of the African Commission Working Group of Experts on Indigenous Population/Communities* (Banjul and Copenhagen: ACHPR and IWGIA, 2005) 75.

<sup>39</sup> There seems to be an emerging consensus that the right to self-determination, as elaborated under art 20 of the African Charter, does not involve secession. Thus, in the Second Workshop on Multiculturalism in Africa, a member of the African Commission has underlined the need to promote the understanding that the protection of the rights of groups of their identity and culture was to be made on the basis that 'members of such groups were citizens of the state and not through self-determination as a right to secession'. See ECOSOC *Report on the Second Workshop on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples* UN Doc E/CN.4/Sub.2/AC.5.2001/3 (2 April 2001) para 58. *Report of the African Commission's Working Group* (n 38 above) 74-75; NB Pityana 'The challenge of culture for human rights in Africa: The African Charter in comparative context' in Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986-2000* (2002) 233-234. For a contrary view, see UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 89-90.

<sup>40</sup> *Katanga* case (n 6 above) para 4.

modes of exercising self-determination is available to a group seems to be a domestic matter to be decided by the agreement of the group concerned and the state to which the group belongs. It follows from this that, although the African Commission accepted that the exercise of self-determination by groups within a state may take different forms, including self-government, it is not legally established under the African Charter that sub-national groups can choose the form of self-determination as long as their effective participation is ensured.<sup>41</sup>

In cases involving allegations of violations of other peoples' rights of the African Charter, the African Commission employed peoples' rights as providing protection to sub-state groups against their states. In a series of communications brought before the African Commission against Mauritania,<sup>42</sup> it was alleged that black Mauritians were being murdered,<sup>43</sup> expelled from their lands,<sup>44</sup> inhumanly treated and tortured in custody,<sup>45</sup> and had their goods confiscated and villages destroyed.<sup>46</sup> In its decision on this case in May 2000, the African Commission held that:<sup>47</sup>

Central to the communications in question is the domination of black Mauritians by a ruling Arab clique, for which the communication presents abundant evidence. The subsequent discrimination against black Mauritians goes against a principal objective of the Charter, that of equality. Such oppression constitutes a violation of article 19.

Even more significant was the interpretation the Commission has given to article 23 of the African Charter. Although the reading of this article leads to an understanding that the term 'peoples' as used in this context is a reference to the population of a state in their entirety, the African Commission innovatively interpreted it so as to give protection to a part of the population of a state. In the words of the Commission, 'the unprovoked attack on the villages [of black Mauritians]

<sup>41</sup> The UN Human Rights Committee held a similar view with respect to the right to political participation in the *Mikmaq People* case. The Committee held that 'article 25(a) of the Covenant [CCPR] cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the participation in the conduct of public affairs' (para 5.5). According to the Committee 'it is for the legal and constitutional system of the state party to provide for the modalities of such participation' (my emphasis) (para 5.4). Communication 205/1986, *Grand Chief Donald Marshal & Others (Mikmaq people) v Canada* UN Doc CCPR/C/43/D/205/1986 40 (1991).

<sup>42</sup> See *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

<sup>43</sup> Communication 98/93 provides list of villages that were destroyed.

<sup>44</sup> Communication 98/93 provides a list of villages all or almost all of which the inhabitants were expelled to Senegal.

<sup>45</sup> Communication 61/91 contains list of 339 persons believed to have died in detention.

<sup>46</sup> n 42 above, para 17.

<sup>47</sup> n 42 above, paras 65-67, as quoted in Pityana (n 39 above) 232-233. See also the *Report of the African Commission Working Group* (n 38 above) 73.



constitutes a denial of the right to live in peace and security'.<sup>48</sup> Also, the burden of securing this right falls on the state in that, not only must the state respect this right, but it must also ensure its protection from violation by others within the state.<sup>49</sup>

In the light of the troubled experience of African peoples, as illustrated by the Rwandan Genocide of 1994 and currently the Darfur crisis, such an insightful interpretation gives peoples' rights in the African Charter continuing relevance to the African reality. Not only article 23, but also the right to existence under article 20, would provide protection to address situations in which a section of the population of a state is exposed to attacks either by state organs or with the complicity of the state.<sup>50</sup> Indeed, as regards the right to existence, it is rightly asserted that it 'can in any event be interpreted as a reaction to certain tragic events which Africa has witnessed and which must be prevented from occurring again by making them an issue of *international concern*'.<sup>51</sup>

The implication of this innovative approach is that the term 'peoples' finds a broader and more robust meaning that gives it the potential to address the conflicts involving states and sub-state groups afflicting many countries in Africa. The decision of the African Commission on the *SERAC* case<sup>52</sup> in October 2001 is a very good illustration of this potential use of peoples' rights in the African Charter.

The *SERAC* case was lodged by two non-governmental organisations (NGOs), namely, the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights. It was brought before the Commission in March 1996 on behalf of the Ogoni people, who inhabit a certain territory in the oil-rich Niger Delta area of Nigeria.<sup>53</sup> The complaint disclosed allegations that the oil extraction operations of the

<sup>48</sup> n 42 above, para 140.

<sup>49</sup> This interpretation has a particular contemporary relevance to Africa in the light of the violations that have been and continue to be perpetrated against one or another group in the context of civil wars, inter-ethnic conflicts and situations of political crisis. The unabated plight of various communities in the Darfur region of Sudan aptly demonstrates the need to ensure respect for the right to peace by groups within the state.

<sup>50</sup> What the *Report of the African Commission's Working Group* in this regard states is illuminating: 'The genocide in Rwanda in 1994 has brought into sharp focus concerns about the domination of one people by another (art 19) and the systematic manner in which one group may design the "elimination" of another's "right to existence"' (n 27 above, 74).

<sup>51</sup> F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 227 (emphasis in the original).

<sup>52</sup> *SERAC* case (n 9 above).

<sup>53</sup> For a historical and political background on the Ogoni issue, see J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 851 862-865.

Nigerian military government, in the hands of the Nigerian National Petroleum Company and Shell Petroleum Development Company, caused environmental contamination and degradation to Ogoni land and health problems among the Ogonis. It further alleged that the Nigerian military and security forces were involved in acts of terror and insecurity against the members of the Ogoni people and in the destruction of the food sources and several villages and homes of the Ogonis. The complainants therefore submitted that the Nigerian government violated rights ranging from civil and political rights (articles 2, 4 and 14) to socio-economic rights (articles 16 and 18), and to collective rights of peoples (articles 21 and 24).

In the context of our discussion on peoples' rights, this case is particularly important, because it deals with allegations of violations of the peoples' rights of a distinct community with a minority status, the Ogoni people. In its decision, the African Commission held that the state of Nigeria violated the rights, *inter alia*, to the free disposal of one's wealth and natural resources under article 21 and to a healthy environment under article 24.

With respect to article 21, although it did not clearly and thoroughly analyse the content of the rights as applied to Ogonis and obligations under this article,<sup>54</sup> the Commission upheld the complaint that the Nigerian government 'did not involve the Ogoni communities in the decisions that affected the development of Ogoniland'.<sup>55</sup> More significantly, the Commission further said that 'the destructive and selfish role played by oil development in Ogoniland, closely tied to repressive tactics of the Nigerian government, and *the lack of material benefits accruing to the local population*, may well be said to constitute a violation of article 21'.<sup>56</sup> From this, it concluded that, by anyone's standards, the government's practice falls short of the minimum conduct expected of governments and, therefore, is in violation of article 21 of the African Charter.<sup>57</sup> In its recommendations, as a remedy to the violation of article 21 by the Nigerian government, the African Commission appealed to the government to provide, *inter alia*, meaningful access to regulatory and decision making bodies to the communities likely to be affected by oil operations.<sup>58</sup> It can be inferred from this that article 21 of the African Charter obliges states to ensure the participation of

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<sup>54</sup> Oloka-Onyango rightly argues that the reason for the Commission's failure to clearly spell out the contents of the rights and obligations under art 21 'is an enduring reluctance to address the logical implications of holding that peoples, and not the state, are allowed to "freely dispose their wealth and natural resources"' (n 53 above, 891).

<sup>55</sup> SERAC case (n 9 above) para 55.

<sup>56</sup> n 9 above, para 58 (my emphasis).

<sup>57</sup> As above.

<sup>58</sup> n 9 above, para 70.

the communities concerned in decisions that involve (and in benefits that accrue from) development operations in their territories.<sup>59</sup>

This case illustrates that there is a tension between the two conceptions of the term 'peoples', that is, peoples as the whole people of a state and peoples as the distinct communities constituting the state. The decision of the African Commission attempts to address this tension, although it did not take it to its logical conclusion. According to the Commission, although the Nigerian government has the right to produce oil 'to fulfil the economic and social rights of Nigerians' as a whole (people of a state as a whole), regard must be had to the interests of the communities who inhabit the territory from which the oil is to be extracted (people as a section of the population of a state).

The finding of the African Commission also sheds light on the dangers associated with the equation of peoples with states. In cases where the term 'people' is used as a synonym for the state, the Commission's analysis indicates that the state can be viewed only as the agent of its people. Thus, while acknowledging the right of the Nigerian government to produce oil in Nigeria, the Commission nevertheless emphasised that such must be 'used to fulfil the economic and social rights of Nigerians'. This can also be seen as an affirmation of the second sentence of article 21(1), which stipulates that this 'right shall be exercised in the exclusive interest of the people'.

As regards article 24, the Commission expressed the view that the right to a healthy environment 'requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure the ecologically sustainable development and use of natural resources'.<sup>60</sup> Thus, while acknowledging the right of the Nigerian state to produce oil, the African Commission held that the care that should have been taken for the protection of Ogoniland from despoliation has not been taken.<sup>61</sup> Accordingly, the Commission found Nigeria to be in violation of the right to a healthy environment under article 24 of the African Charter.

These findings of the Commission presuppose the view that the Ogonis are protected by peoples' rights in the African Charter. The clear distinction that the African Commission made between the group (the Ogoni people) and the state (Nigeria) affirms this point. Indeed, this

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<sup>59</sup> This is comparable to the requirement of art 4(5) of the Declaration on the Rights of Minorities which is to the effect that states are required to ensure the full participation of minorities when venturing into development activities in the territories occupied by the concerned minorities. Some of the cases of the UN Human Rights Committee imply that art 27 imposes similar obligations in some circumstances. See eg Communication 511/1992, *Ilmari Lämsmä & Others v Finland* Report of the Human Rights Committee Vol II GAOR 50th session, Suppl No 40 para 9(6); Communication 547/1993, *Apirana Mahika & Others v New Zealand* Report of the Human Rights Committee Vol II UN Doc A/56/40 para 9(6).

<sup>60</sup> SERAC case (n 9 above) para 52.

<sup>61</sup> n 9 above, para 54.

distinction is meant to treat the Ogonis as beneficiaries of peoples' rights and the state as the bearer of the corresponding obligations that the rights impose.<sup>62</sup> Moreover, the reference by the Commission to the Ogonis as 'the Ogoni people' and 'the people of Ogoniland' suggests that the Ogonis as a group qualify for protection as a 'people' from peoples' rights of the African Charter.

Although the African Commission has been increasingly willing to apply peoples' rights in the African Charter to groups within the state, it did so without determining whether these groups were minorities, indigenous groups or simply peoples. In the *Katanga* case, the Commission made reference only to the issue of whether the Katangese consist of one or more ethnic groups, which, it said, was immaterial for its purpose.<sup>63</sup> In the Ogoni case, '[t]hroughout the decision, the Commission does not deal with the issue of what kind of "peoples" the Ogonis are — indigenous, a minority, or both?'<sup>64</sup> Nor did the Commission find it necessary to deal with this issue in any of the other cases. The African Commission seems to have found such a determination irrelevant to the interpretation and application of peoples' rights of the Charter.

This approach is plausible and appropriate in the African context for at least three reasons. First, it avoids the controversies surrounding the categorisation of sub-state groups as minorities or indigenous.<sup>65</sup> In effect, it saves the Commission from the hostility that this may attract. Given the diverse demographic composition of the state in Africa, the Commission's approach is at present good enough to make available the protections given by peoples' rights of the Charter to sub-state groups, notwithstanding their status as minorities, indigenous groups, tribes or nations. Finally, it avoids the legal distinctions that are drawn between 'peoples', 'minorities' and 'indigenous peoples' and the resultant confusion and complications that may ensue from that.<sup>66</sup> as long

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<sup>62</sup> Oloka-Onyango contends that it is possible to read the provisions on peoples' rights, including art 21, as 'a direct boost to the rights and interests of peoples within the state, and of the responsibility of the state to those peoples' (n 53 above, 890). The undertaking of state parties under art 1 of the African Charter is to give effect to all the rights proclaimed in the Charter. Viewed in this light, the state is under obligation to ensure peoples' rights and thus is not itself a beneficiary of peoples' rights. See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) paras 45-46.

<sup>63</sup> *Katanga* case (n 6 above) para 3.

<sup>64</sup> Oloka-Onyango (n 53 above) 891.

<sup>65</sup> The protest by representatives of the governments of Ethiopia and Rwanda during the 39th ordinary session of the African Commission illustrates this problem. According to the representatives, the identification of groups in the report as indigenous peoples was arbitrary and lacked proper evidence and support from the states and groups concerned.

<sup>66</sup> In rejecting these distinctions, Brownlie reiterated that 'the issue of self-determination, the treatment of minorities, and the status of indigenous populations, are the same, and the segregation of topics is an impediment to fruitful work. The rights and claims of groups with their own cultural histories and identities are in principle the same — they must be. It is the problems of implementation of principles and standards which vary, simply because the facts will vary.' I Brownlie 'Rights of peoples in international law' in Crawford (n 10 above) 1 16.

as sub-national groups can find protection from utilising the concept 'peoples' rights' in the African Charter, it is unnecessary for the African Commission to determine the status of the group as a minority or indigenous people and require evidence to that effect. There is very little good to be achieved from that. If anything, it would only frighten away groups aspiring to seek protection under the peoples' rights provisions of the Charter.

This, however, does not mean that the jurisprudence of the African Commission has resolved all the conceptual problems surrounding the concept of 'peoples'. Significantly, in the few cases on peoples' rights, the African Commission decided on the merits of the case without articulating the nature of the category or group of persons who qualify to be 'peoples' for the purpose of peoples' rights of the Charter. Indeed, as much as it gives answers to some of the questions, the jurisprudence of the Commission raises other important questions. The most important of such questions is whether there can be more than one understanding of the term 'people' when it is used as a reference to a section of the population of a state. For example, is it required for a group to have a common identity defined by a common language, culture, territory or any other similar ethnic markers, in which case 'people' means the various ethnic groups within a state such as Ogoni? Is there any way in which the inhabitants of a section of the territory of a state can be taken as having a sense of being a people, while they have ethnic differences? If yes, under which circumstances? Irrespective of whether they have established a sense of being a people different from the rest of the population of a state, is it possible for inhabitants of a section of the territory of a state to claim people's rights under the Charter, for example the right to a clean environment?

Thus, so far there is no standard to determine the attributes of peoplehood for the purposes of peoples' rights in the African Charter. In other words, it is not as yet clear how and when a group qualifies to be a 'people', and hence a subject of peoples' rights. The attribution by some members of the Commission of peoplehood to any group of persons, such as 'fishermen' or 'carpenters', makes the need for establishing a sufficiently clear criterion even stronger. The next section addresses itself to this issue.

### **3 Towards a criterion for determining peoplehood: The test in the *Legal Resources Foundation* case**

In *Legal Resources Foundation v Zambia*,<sup>67</sup> the complainant contended that the requirement in the Constitution of Zambia (Amendment) Act of 1996 that anyone who wants to contest the office of the President

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<sup>67</sup> (2001) AHRLR 84 (ACHPR 2001).

has to prove that both parents are/were Zambians by birth or decent is, *inter alia*, a violation of article 19 of the African Charter. The state rejected this contention saying that 'article 19 of the Charter relates to the principle of "self-determination" by the mere mention of the term "peoples"'.<sup>68</sup>

In its decision, rendered in May 2001, the African Commission held that 'recourse to article 19 of the Charter was mistaken', and, thus, 'the section dealing with "peoples" cannot apply in this instance'.<sup>69</sup> The reason for this finding was not, however, the same as the objection that the state raised. It was rather because the case did not fulfil the elements necessary to require the application of peoples' rights in the African Charter. According to the Commission, in order for peoples' rights in the African Charter to apply, it would require evidence that '[t]he effect of the measure was to affect adversely *an identifiable group of Zambian citizens* by reason of their *common ancestry, ethnic origin, language or cultural habits*'.<sup>70</sup> This offers the elements required to invoke the application of the term 'peoples' to a section of the population of a state. This approach does not attribute peoplehood to any group of persons. It can be inferred from this test that a group qualifies to be a people only if it consists of persons who are bound together by reason of common ancestry, ethnic origin, language or cultural habits.

This is essentially comparable to the ethnic meaning that is attributed to the term 'peoples' at the international level. Thus, for example, the UN Educational, Scientific and Cultural Organisation (UNESCO) employed a similar approach in identifying the defining elements of the term. According to this approach, to qualify as 'peoples' it at the minimum requires:<sup>71</sup>

- 1 An enjoyment by a group of individuals of some or all the following common features:
  - (a) a common historical tradition;
  - (b) racial or ethnic identity;
  - (c) cultural homogeneity;
  - (d) linguistic unity;
  - (e) religious or ideological affinity;
  - (f) territorial connection;
  - (g) common economic life.
- 2 The group as a whole must have the will to be identified as a people or the consciousness of being a people.

The first category, which should not necessarily be met cumulatively, constitutes the objective characteristics that define the term 'peoples'.

<sup>68</sup> n 67 above, para 49.

<sup>69</sup> n 67 above, para 73.

<sup>70</sup> n 67 above (my emphasis).

<sup>71</sup> See UNESCO *New reflections on the concept of peoples' rights* Final Report and Recommendations of an International Meeting of Experts (27-30 November 1989) reprinted in (1990) 11 *Human Rights Law Journal* 446-447.

The second category involves the subjective element. The consciousness and assertion by a group of its distinctness are the subjective elements necessary for treating a group as people.<sup>72</sup> Some add attachment to a particular territory as another element of the definition of the term people.<sup>73</sup>

In the *Legal Resources Foundation* case, reference was made only to the objective dimension of the ethnic definition of the term 'peoples', that is, an 'identifiable group of Zambian citizens' having a 'common ancestry, ethnic origin, language or cultural habits'. The omission of the subjective element does not, however, make the Commission's approach less consistent with the approach at the international level. The reason for this is that the existence of the subjective dimension is often inferred from the objective existence of a group.<sup>74</sup> It can, therefore, be gathered from this that the sub-national groups to which peoples' rights under the African Charter apply have to be an identifiable group of citizens of a state who share and are bound together by some or all of the objective ethnic markers including 'common ancestry, ethnic origin, language or cultural habits'.

It seems that the issue of whether such group is a minority, an indigenous group or a nation does not have relevance for the African Commission in its determination of the application of peoples' rights in the Charter to groups within the state. If the criterion that the Commission outlined in the *Legal Resources Foundation* case is something to go by, to determine whether a sub-national group can find protection from peoples' rights under the African Charter, what matters is not the minority or indigenous status of the group. It is rather whether the group consists of an identifiable group of citizens of a state who share some form of common identity on account of some or all of the objective ethnic markers.

If the test outlined by the African Commission in the *Legal Resources Foundation* case is to be taken as establishing a jurisprudential conception of the attributes of a 'people', it would go a long way to advancing the understanding of the term. It is unfortunately difficult to consider the test as providing such a conceptualisation. A testimony of this is the fact that the Commission itself did not employ this test in subsequent cases involving peoples' rights. Thus, in its decision on the *SERAC* case in October 2001, the Commission did not raise and address the issue of whether and in what way the Ogonis constitute a 'people' for the

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<sup>72</sup> The centrality of self-identification is recognised in some international instruments. This is the case, eg, for indigenous peoples under art 1(2) of the International Labour Organisation's Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries.

<sup>73</sup> See Kiwanuka (n 18 above) 86-88.

<sup>74</sup> See MN Shaw 'The definition of minorities in international law' in Y Dinstein & M Tabory (eds) *The protection of minorities and human rights* (1992) 28.

purposes of articles 21 and 24.<sup>75</sup> This leaves the issue of the criterion for peoplehood still in limbo. In the absence of a clear pronouncement, this would make the applicability of peoples' rights to particular groups within a state arbitrary and hence something that is left to the discretion of the African Commission.<sup>76</sup> This does not, however, mean that the Commission cannot in future cases utilise the standard set in the *Legal Resources Foundation* case for determining the peoplehood of a group alleging entitlement to peoples' rights under the African Charter. At this point, it is important to emphasise that ethnic identity, in the way it is conceptualised by the *Legal Resources Foundation* case, has to be the only point of departure in examining whether a group constitutes a people. In the light of the decision of the Commission in the *Katanga* case, inhabitants of a section of the territory of a state who belong to different ethnic groups may in some circumstances qualify as a people. Unfortunately, there is so far little guidance from the Commission's jurisprudence regarding the circumstances under which such a group would come to establish a sense of being a people. One may indicate here such considerations as historical factors, cultural differences between the centre and the territory, existing patterns of economic underdevelopment separating the territory, issues of political discrimination affecting the territory, and so on.<sup>77</sup>

#### 4 The legal nature and enforceability of peoples' rights

As a preliminary point, it is important to underline that peoples' rights are distinct from individual rights.<sup>78</sup> At the same time, the two are also interrelated and interdependent. There is no indication in the African

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<sup>75</sup> The Commission's Guidelines for national periodic reports do not help much either. It is only with respect to arts 19 and 20 of the Charter that the Guidelines envisage that the various distinct communities within the state are beneficiaries of peoples' rights. See Murray & Evans (n 17 above) 65-66.

<sup>76</sup> Since members of the African Commission change from time to time, if at some point the majority of the members of the Commission tend to be lawyers who follow the view that peoples' rights do not apply to sub-state groups, the emerging jurisprudence of the Commission would be reversed. There is no guarantee that this would not happen.

<sup>77</sup> One can cite as evidence of such an approach in defining the attributes of a people as holders of the right to self-determination the successful secession of Eritrea from Ethiopia. One can also look at the nature of the claim for self-determination of South Sudan, which is mainly based on these considerations. See H Hannum's case study on South Sudan in his *Autonomy, sovereignty and self-determination* (1990) 308-332; A Heraclides *The self-determination of minorities in international politics* (1991) 107-112.

<sup>78</sup> As Mojekwu puts it: 'The nature and attributes of individual and collective rights are fundamentally different.' C Mojekwu 'Self-determination: The African perspective' in Y Alexander & R Friedlander *Self-determination: National, regional and global dimensions* (1980) 223.



Charter that one category is more important than the other. It is only logical to assert that they all are of equal value and significance.<sup>79</sup> Many people have expressed their doubts that peoples' rights in the African Charter are legal rights. They argued that peoples' rights are not rights in the legal sense at all, but are merely aspirational ideals or have rhetorical purpose.<sup>80</sup> For some they are just political abstractions historically employed to undermine human rights.<sup>81</sup> In the end, they could not be enforced in a way that human rights are enforced through a court action.<sup>82</sup>

These conclusions might have been prompted by the fact that there has been no mechanism to enforce the right to self-determination under article 1 of the International Covenant on Civil and Political Rights (CCPR). In one case the Human Rights Committee, the body monitoring the implementation of CCPR, received a communication by a representative of an indigenous people alleging the violation of the right to self-determination by a state party to CCPR, Canada.<sup>83</sup> The Committee rejected the communication on the ground 'that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right to self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such'.<sup>84</sup> The effect of this is that self-determination, being a collective right, could not be enforced through the existing individual communications procedure.<sup>85</sup> Fortunately, in the context of the African human rights system, the issue of enforceability of peoples' rights is subject to a broader and novel test.

Peoples' rights in the African Charter are more than mere political or moral principles intended to guide the political actions of member states. Of course, they dictate policy directions as to the right course of political action that states must follow in this area.<sup>86</sup> But they are more than that. Peoples' rights are also legal rights. As such, they can

<sup>79</sup> See n 89 below and accompanying text.

<sup>80</sup> See eg E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643 657; Alston (n 20 above) 289.

<sup>81</sup> P Sieghart *The international law of human rights* (1988) 368.

<sup>82</sup> See L Thio 'Battling balkanisation: Regional approaches toward minority protection beyond Europe' (2002) 43 *Harvard International Law Journal*. 458 n.320 (referring to some of the peoples' rights recognised under the African Charter as being so broad that they 'defy enforcement').

<sup>83</sup> See Communication 167/1984, *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (Views adopted 26 March 1990, Report of the Human Rights Committee, Vol II, GAOR, 45th session, Suppl NO 40 (A/45/40), 1-30 (*Ominayak* case).

<sup>84</sup> n 33 above, para 13(3).

<sup>85</sup> See Optional Protocol to the International Covenant on Civil and Political Rights, concluded 16 December 1966, entry into force 23 March 1976.

<sup>86</sup> Peoples' rights have a bearing on the policy of state parties to the Charter in such areas as language, political participation and such. See Guidelines in Murray & Evans (n 17 above).

be claimed by an identifiable collectivity or group and enforced against a state.<sup>87</sup>

Under the African human rights system, it is not just the violation of individual human rights in the African Charter that can be brought before the African Commission, but violations of peoples' rights as well. This is partly because there is no requirement that communications be brought before the Commission only by individuals directly affected.<sup>88</sup> Interestingly enough, unlike the international and other regional human rights systems,<sup>89</sup> the affected people or representatives of such people or even groups that act on behalf of such people can lodge the complaint before the African Commission. This approach thus seems to suggest that, as long as the facts complained of reveal a state party's failure to comply with any of the peoples' rights in the Charter, the Commission can hold the state responsible for a violation of the right. As such, peoples' rights are enforceable.

#### 4.1 The approach of the African Commission

The position of the African Commission on this matter is emphatically spelt out in the *SERAC* case:<sup>90</sup>

Clearly, *collective rights* (peoples' rights), environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that *there is no right in the African Charter that cannot be made effective.*

The African Commission thus clearly establishes that communications

<sup>87</sup> Murray & Wheatley argued that 'there was no indication in the Charter that the rights enumerated in articles 19 through 24 were not legally binding' (n 11 above, 226). Even better is the observation of Ouguergouz that 'the states parties to the African Charter are legally responsible for implementing the collective rights set forth in it, on the same basis as individual rights; article 1, on undertaking of states, moreover, draws no distinction between the rights protected' (n 51 above, 575).

<sup>88</sup> See art 55 of the African Charter. Note that the provision does not speak of individual communications; rather it speaks of 'communications other than those of state parties'. There is no reason why this should be construed as a provision that gives standing before the Commission only to individuals. It must as well be read as giving standing before the Commission to peoples as well since the Charter guarantees human rights and peoples' rights on an equal basis.

<sup>89</sup> In the Inter-American system, although peoples' rights are not yet recognised, the Inter-American Human Rights Commission has given standing to representatives of indigenous peoples by permitting them to address it. See eg Inter-American Commission on Human Rights *Report on the situation of human rights in Brazil 1997*, OEA/Ser L/V/II.97 Doc 29 rev 1, 29 September 1997.

<sup>90</sup> *SERAC* case (n 9 above) para 68 (my emphasis).

alleging violations of peoples' rights are enforceable at par with those of individual rights.<sup>91</sup>

In the *Katanga* and the *SERAC* cases, the African Commission had the opportunity to decide on allegations that peoples' rights were violated. The approach of the Commission to these cases seems to suggest that it is the merit of the question that should be decisive rather than method and procedure.

In the *Katanga* case, it was the President of the Katangese Peoples' Liberation Movement that lodged the communication.<sup>92</sup> The complainant and his organisation are members of the Katangese people. No issue was raised as to the capacity of the complainant to lodge the communication representing the Katanga. Nor did the Commission held it relevant to decide whether the Katangese consist of one or more ethnic groups.<sup>93</sup> The Commission declared the case inadmissible, but because 'the case holds no evidence of violations of any rights under the African Charter'.<sup>94</sup>

The *SERAC* case is even more interesting in this regard. Here, unlike the *Katanga* case, the complainants are not in any way associated with the people on whose behalf the communication was lodged before the African Commission. It was the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights that jointly brought the case before the Commission.<sup>95</sup> And the Commission has been willing to consider the case and went further to speak about the usefulness of the *actio popularis* for enforcing the rights in the African Charter.<sup>96</sup>

## 5 Conclusion

The above discussion demonstrates that significant strides have been made in the understanding of the subjects and content of peoples' rights through the decisions of the African Commission. One can also conclude from the decisions discussed above that the main areas of focus of peoples' rights are 'people' as the population of a state as a whole and 'people' in the sense of a section of the population of a state. The role of the state with respect to peoples' rights under the African

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<sup>91</sup> This does not assume that all the rights of peoples under the African Charter are equally enforceable. On account of the level of their precision and their socio-political ramifications, the nature of their enforceability could vary. Indeed, the nature of enforceability of peoples' rights in general is not necessarily the same as the nature of enforceability of individual rights. Thus, eg, the nature of enforceability of the right to vote and the right to self-determination is significantly different.

<sup>92</sup> See the *Katanga* case (n 6 above) para 1.

<sup>93</sup> n 6 above, para 3.

<sup>94</sup> n 6 above, para 6.

<sup>95</sup> *SERAC* case (n 9 above) para 43.

<sup>96</sup> n 9 above, para 43.

Charter is to respect, protect and fulfil them,<sup>97</sup> and in some instances exercise peoples' rights on behalf of and to the benefit of its people as a whole.<sup>98</sup> This enhances the human rights content of the concept of 'peoples' in the African Charter and replaces the traditional state-centric understanding of the concept.<sup>99</sup> Moreover, the decisions of the Commission leave no room for doubt about the legal nature and enforceability of peoples' rights. Generally, the interpretation and application of peoples' rights by the African Commission has addressed much of the fears and misgivings of many commentators. To the extent that peoples' rights are interpreted and applied as providing protection to vulnerable communities against domination and abuse of their rights by the state and others within the state, the entrenchment of those rights in the African Charter advances the cause of human rights in Africa and the concept of peoples' rights in general. In terms of its approach to cases on peoples' rights, the African Commission did not develop a principled approach to the interpretation of peoples' rights under the Charter. Instead, the Commission employed a case-by-case approach. As a result, one cannot find a commonly discernable pattern in the Commission's jurisprudence on the conceptualisation and interpretation of peoples' rights. There are also some outstanding issues that have yet to be addressed.

Although it can be gathered from its decisions that sub-state groups are beneficiaries of peoples' rights in the Charter, the Commission has as yet to make a clear pronouncement to that effect. Moreover, for reasons of legal certainty it is also crucial that the African Commission elaborates sufficiently clear criteria for determining the nature of the groups who qualify to be peoples in such circumstances. The Commission has also to offer a full analysis of the content of peoples' rights under the Charter in its decisions. In this regard, one can note that, whereas the Commission delimited the extent of the entitlement of sub-national groups to the right of peoples to self-determination (notwithstanding its acceptability), and the various modalities of exercising the right,<sup>100</sup> it has not gone far enough in analysing the nature and extent of their entitlement in other areas. If peoples' rights under the Charter are to be utilised to address some of the human rights challenges affecting the continent, it is imperative that the African Commission puts extra effort into the interpretation and application of these rights and

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<sup>97</sup> n 9 above, paras 44-47 in conjunction with paras 52-57.

<sup>98</sup> n 62 above and accompanying text.

<sup>99</sup> Oloka-Onyango elaborates the promise of the *SERAC* decision in this regard: 'The Ogoni decision helps us to move away from the pessimism that has engulfed much of the scholarship in this area and the conclusion that the future of peoples' rights is "... not very bright". It provides some hope that issues such as self-determination, minority rights and even the "explosive" issue of secession can be approached in a more creative and non-state-centric fashion' (n 53 above 895).

<sup>100</sup> nn 25-41 above and accompanying text.

in the promotion of their understanding. In this regard, the establishment of the African Commission's Working Group of Experts on Indigenous Populations/Communities<sup>101</sup> and the adoption by the Commission of the report of the Working Group<sup>102</sup> are significant developments to be commended.

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<sup>101</sup> The Working Group was established by the Resolution of the African Commission on the Rights of Indigenous Populations/Communities passed at the Commission's 28th ordinary session held in Cotonou, Benin in October 2000. One of the tasks that the Working Group was entrusted under this Resolution was to study the implications of the African Charter and the well-being of indigenous communities, especially with respect to the right to equality (arts 2 & 3), the right to dignity (art 5), protection against domination (art 19), on self-determination (art 20) and the promotion of cultural development and identity (art 22).

<sup>102</sup> In 2003, the African Commission adopted the report in recognising, among others, the standards of international law for the promotion and protection of minorities and indigenous peoples. The report as adopted by the Commission expresses the view that peoples' rights 'should be available to sections of populations within nation states, including indigenous people and communities' (n 27 above, 116 79).

# Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights

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## Summary

*In 2003, the African Commission established a Working Group of Experts on Indigenous Populations/ Communities in Africa. This development has been heralded as a recognition of the existence of particular marginalised groups in Africa identifying themselves as indigenous peoples whose rights are protected by the African Charter. The establishment of the African Commission's Working Group was largely a regional manifestation of the developments taking place at international law. This article discusses the concept of indigenous peoples as it is developing at international law and under the African human rights system. It also explores the extent to which the African Charter, according to the African Commission's Working Group, accommodates the rights of indigenous peoples.*

## 1 Introduction

The adoption of the African Charter on Human and Peoples' Rights (African Charter)<sup>1</sup> and the subsequent establishment of the African

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<sup>1</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981 in Nairobi, Kenya, OAU Doc CAB/LEG/67/3 Rev 5, entered into force 21 October 1986.

Commission on Human and Peoples' Rights (African Commission),<sup>2</sup> more than two decades ago, heralded a new dawn for a continent ravaged by civil wars, dictatorships and notorious human rights violations.<sup>3</sup> The African Charter has been hailed as an innovative document that seeks to address the peculiarities of African human rights problems, particularly of the 'exemplification of group rights'.<sup>4</sup> However, neither the African Charter, nor its implementing institution, the African Commission, has escaped criticism; the African Charter particularly for its extensive claw-back clauses,<sup>5</sup> and the African Commission for its apparent lack of 'teeth'.<sup>6</sup> The scope of this paper is, however, limited to tracing the African Charter's and the African Commission's approach towards the rights of indigenous peoples.

While there is no express reference to indigenous peoples in the African Charter, its embodiment of group or peoples' rights could be read as addressing their rights.<sup>7</sup> However, while the African Commission's jurisprudence on 'peoples' rights' has undoubtedly paved the way for the protection of indigenous peoples, we argue that the African

<sup>2</sup> The African Commission (established under art 30 of the African Charter) was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia and is based in Banjul, The Gambia; Information Sheet 1 [http://www.achpr.org/english/information\\_sheets/ACHPR%20inf.%20sheet%20no.1.doc](http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.1.doc) (accessed 20 July 2006).

<sup>3</sup> See J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 912.

<sup>4</sup> n 3 above, 857. Some other cited unique innovative examples include setting out individual duties in addition to the traditional individual rights. See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339. It also includes in the same treaty economic, social and cultural rights without distinction as to implementation (arts 14-17 African Charter).

<sup>5</sup> Mutua (n 4 above) 7. For further critique, see C Flinterman & E Ankumah 'The African Charter on Human and Peoples' Rights' in H Hannum (ed) *Guide to international human rights practice* (1992) 159; O Ojo & A Sessay 'The OAU and human rights: Prospects for the 1980s and beyond' (1994) 8 *Human Rights Quarterly* 89; R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667; J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa' (1995) 35 *California Western International Law Journal* 1; C Heyns 'The African human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155-174.

<sup>6</sup> As above. See also F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13-22.

<sup>7</sup> See generally *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa and adopted by the African Commission at its 28th ordinary session in Cotonou, Benin, ACHPR & IWGIA 2005; RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 82; P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2000) 266; F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 203; P Nobel 'The concept of "peoples" in the African Charter on Human and Peoples' Rights' in P Nobel (ed) *Refugees and development in Africa* (1987) 15.

Commission's jurisprudence thus far has not always interpreted indigenous peoples' rights favourably.<sup>8</sup> Indeed, we argue that the concept of indigenous peoples' rights as developing internationally finds home in the African human rights system with the establishment of the African Commissions' Working Group of Experts on Indigenous Populations Communities (African Commission's Working Group)<sup>9</sup> and the subsequent adoption of its report.<sup>10</sup>

The paper commences by briefly highlighting the international development of indigenous peoples' rights in a bid to etch out how the concept reached the African human rights system. Next it discusses the issue of indigenous peoples within the African human rights system prior to and after the establishment of the African Commission's Working Group. Finally, the paper analyses the report of the African Commission's Working Group in an attempt to identify its potential in protecting indigenous peoples on the continent.

## 2 The development of indigenous peoples' rights

The concept of indigenous peoples and the concern for the rights of groups who regard themselves as indigenous peoples have enjoyed extensive scholarly,<sup>11</sup> judicial<sup>12</sup> and political attention in recent years.

<sup>8</sup> *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). This is notwithstanding the fact that some commentators contend that an attempt by the African Commission to address indigenous peoples' rights could be seen in its decision in *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). See Oloka-Onyango (n 3 above) 856.

<sup>9</sup> See ACHPR /Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000), adopted by the African Commission at its 28th ordinary session held in Cotonou, Benin in October 2000 [http://www.achpr.org/english/resolutions/resolution70\\_en.html](http://www.achpr.org/english/resolutions/resolution70_en.html) (accessed 29 May 2006).

<sup>10</sup> See ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/ Communities (Resolution on the Adoption of the Report) [http://www.achpr.org/english/resolutions/resolution70\\_en.html](http://www.achpr.org/english/resolutions/resolution70_en.html) (accessed 29 May 2006). The report titled *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa* adopted by the African Commission at its 28th ordinary session held in Cotonou, Benin in October 2000, IWGIA & ACHPR, 87 (2005).

<sup>11</sup> See generally SJ Anaya *Indigenous peoples in international law* (2004); D Sanders 'The re-emergence of the indigenous question in international law' (1983) 1 *Canadian Human Rights Year Book* 3; C Tennant 'Indigenous peoples, international institutions, and international legal literature from 1945-1993' (1994) 16 *Human Rights Quarterly* 1; B Kingsbury "'Indigenous peoples'" in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414; R Torres 'The rights of indigenous populations: The emerging international norm' (1991) 16 *Yale Journal of International Law* 127.

<sup>12</sup> For the practice of international political bodies, see generally SC Perkins 'Indigenous peoples and international organisations: Issues and responses' 1995 23 *International Journal of Legal Information* 217; J Debeljak 'Indigenous rights: Recent developments in international law' (2000) 28 *International Journal of Legal Information* 266.



However, the issue of indigenous peoples is not a new phenomenon. Philosophers and jurists have grappled with the problem of indigenous peoples from the moment Spanish incursions into the Western hemisphere brought European explorers into contact with the native peoples of the Americas (Indians). Debates ensued amongst Western scholars with respect to the legality of Spanish activities in the Americas and the propriety of the treatment meted out to the Indians.<sup>13</sup> These debates are closely associated with the development of international law.<sup>14</sup> To be sure, the debates pertaining to indigenous peoples during the period under consideration 'did not arise in consequence of indigenous assertions of rights, but rather centred on the nature, scope and justification which others claimed over them'.<sup>15</sup>

Put simply, the debates conducted within the framework of international law had little to do with interrogating the 'rights' indigenous peoples had or claimed, but more with the 'position' they occupied within international law. The position of indigenous peoples within international law was assumed to have, and did have, relevance to the rights that the European 'others' had over indigenous peoples. Despite the debates, European incursions into the Western hemisphere, and indeed the rest of the world, continued unabated and the extent to which early international law recognised and respected the rights of indigenous peoples is highly controversial.<sup>16</sup> Be that as it may, in recent years the issue of indigenous peoples has been featuring prominently within international law.

Modern international law's concern for indigenous peoples was kick-started by the International Labour Organisation (ILO) in the early 1920s, and culminated in the adoption of ILO Convention 107 of 1957.<sup>17</sup> For a very long time, this was the only international instrument that provided for the rights of indigenous peoples. However, in time, ILO Convention 107 came under fire, as it was regarded as assimilationist and out of tune with modern international law, which tended to

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<sup>13</sup> See generally GC Marks 'Indigenous peoples and international law: The significance of Francisco de Vitoria and Bartolome de las Casas' (1992) 2 *Australian Yearbook of International Law* 13; P Keal *European conquest and the rights of indigenous peoples: The moral backwardness of international society* (2003).

<sup>14</sup> Anaya (n 11 above) 9.

<sup>15</sup> P Thornberry *Indigenous peoples and human rights* (2002) 64; see also generally PG McHugh *Aboriginal societies and the common law: A history of sovereignty, status and self-determination* (2004).

<sup>16</sup> See eg J Ngugi 'The decolonisation-modernisation interface and the plight of indigenous peoples in post-colonial development discourse in Africa' (2002) 20 *Wisconsin International Law Journal* 298.

<sup>17</sup> See United Nations *The ILO and the indigenous and tribal peoples* Leaflet 8, 2. For a useful exposé of the formation of ILO and indigenous peoples, see L Swepston 'The Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption' in C Cohen *Human rights of indigenous peoples* (1998).

emphasise respect for cultural integrity.<sup>18</sup> Accordingly, ILO Convention 107 was replaced by Indigenous and Tribal Populations Convention 169 in 1989, hailed as the 'most concrete manifestation at the international level of the growing responsiveness to indigenous peoples' demands'.<sup>19</sup> The new Convention represented a major paradigm shift on the subject because, unlike its predecessor, it 'adopted an attitude of respect for cultures and ways of life of these peoples'.<sup>20</sup>

In the interim, the United Nations (UN) had also taken on board the issue of indigenous peoples.<sup>21</sup> A study that it commissioned in 1970 culminated in the establishment of the Working Group on Indigenous Populations (WGIP) in 1982.<sup>22</sup> Subsequently, the WGIP commenced drafting a Declaration on the Rights of Indigenous Peoples.<sup>23</sup> The Draft Declaration was adopted by new UN Human Rights Council<sup>24</sup> and awaits final adoption by the UN General Assembly.<sup>25</sup> Other

<sup>18</sup> L Swepston 'A new step in the international law on indigenous and tribal peoples: ILO Convention No 169 of 1989' (1990) 15 *Oklahoma City University Law Review* 677.

<sup>19</sup> SJ Anaya 'Indigenous rights norms in contemporary international law' (1991) 8 *Arizona Journal of International and Comparative Law* 1 5. In fact, Anaya argues that the Convention expressed norms of customary international law. Interestingly, at the time it had been ratified by only four states. It has been said that the significance of Convention 169 will depend not only on ratification but 'on whether aggressive use of the Convention by indigenous peoples themselves can give it a relatively more progressive effect as its novelty fades'. R Barsh 'An advocate's guide to the Convention on Indigenous and Tribal Peoples' (1990) 15 *Oklahoma City University Law Review* 211.

<sup>20</sup> Swepston (n 17 above) 23; see eg ILO Convention, art 4 (measures to safeguard property, cultures, labour and environment of indigenous peoples), art 5 (respect for cultural and religious values of indigenous peoples), art 6 (right to consultation in relation to legislative or administrative measures affecting indigenous peoples).

<sup>21</sup> J Burger 'The United Nations Draft Declaration on the Rights of Indigenous Peoples' (1996) 9 *St Thomas Law Review* 209; I Washinatok 'International emergence: Twenty-one years at the United Nations' (1998) 3 *New York City Law Review* 41.

<sup>22</sup> See *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* E/CN.4/2002/97 para 6 and ECOSOC Resolution ESC Res 1589, 21 May 1971, UNESCOR, 50th sess, Supp 1, 16 UN Doc/E/5044 (1971). The WGIP, whose members are from the sub-commission, has a double-pronged mandate. The first is to review the developments pertaining to the promotion and protection of indigenous peoples and the second is to give special attention to the evolution of standards on the subject.

<sup>23</sup> Draft Declaration on the Rights of Indigenous Peoples UN Doc E/CN.4/Sub 2/1994/2/Add 1 (1993). See also *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* E/CN 4/2002/97 para 7; J Burger 'Indigenous peoples and the United Nations' in Cohen (n 17 above) 6.

<sup>24</sup> See *Report to the General Assembly on the First Session of the Human Rights Council (A/HRC/1/L 10*, 30 June 2006 (56-58), A Resolution on the Declaration on the Rights of Indigenous Peoples, adopted on 29 June 2006 by the Human Rights Council by a roll-call vote of 30 in favour to two against and 12 abstentions.

<sup>25</sup> The Draft Declaration has now been forwarded to the UN General Assembly for adoption, hopefully before the end of 2006.

developments with respect to indigenous peoples within the UN include the establishment of a Permanent Forum<sup>26</sup> and the appointment of a Special Rapporteur.<sup>27</sup> It was only a matter of time before these developments percolated through to the African human rights system. What follows next is a discussion of the developments with regard to indigenous peoples within the African human rights system.

### 3 The issue of indigenous peoples within the African human rights system

The African Charter is the main treaty in the African human rights system,<sup>28</sup> while the African Commission has been its main implementing institution.<sup>29</sup> Since its inception in 1987, the African Commission has sought to execute its mandate as stipulated in article 45 of the African Charter, which includes promoting and protecting human and peoples' rights and interpreting the African Charter.

The African Commission meets twice a year (for 15 days per session) in ordinary sessions,<sup>30</sup> and can hold extraordinary sessions to execute its mandate, which includes considering state reports, communications, adopting resolutions, deliberating on its relationship with civil society and national human rights institutions and discussing current human rights concerns on the continent. During the ordinary sessions, the

<sup>26</sup> United Nations *The Permanent Forum on Indigenous Issues* Leaflet No 6, 1; See ECOSOC Resolution 2000/22, 28 July 2000. For a thorough exposition of the establishment of the Permanent Forum, see Debeljak (n 12 above) 299-310.

<sup>27</sup> Commission on Human Rights Resolution E/CN.4/RES/2001/57.

<sup>28</sup> It is worth noting that there are other human rights instruments adopted by the OAU/AU to promote and protect specific human rights on the continent, such as the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, entered into force 20 June 1974; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd ordinary session of the AU Assembly in Maputo, CAB/LEG/66.6 (13 September 2000) entered into force 25 Nov 2005; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) entered into force 25 January 2005; the African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24 9/49 (1990), entered into force 29 November 1999.

<sup>29</sup> The African Court Protocol was adopted by the Assembly of Heads of State and Government of the OAU in Ougoadougou, Burkina Faso, on 9 June 1998 and came into force on 25 January 2004. However, the 3rd ordinary session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec 45 (111). The first judges of the Court were sworn in on 2 July 2006 at the 7th AU Summit, and the Court is expected to take off in the near future and will complement the African Commission.

<sup>30</sup> This is in accordance with Rule 1 of its Rules of Procedure. The African Commission has had 39 ordinary sessions since its establishment in 1987. The 39th ordinary session was held in Banjul, The Gambia, 11- 25 May 2006.

African Commission holds sittings where its members, states, organisations having observer or affiliate status and other stakeholders engage in dialogue on pertinent human rights issues on the continent.<sup>31</sup> It is at these sittings that issues such as the rights of indigenous peoples on the continent have been raised by their representatives and international and national organisations concerned about their welfare and rights. The International Work Group for Indigenous Affairs (IWGIA) has been at the forefront and indeed elicited interest through raising awareness and supporting the participation of indigenous peoples at the African Commission's sessions.<sup>32</sup> The organisation has also facilitated and funded the African Commission's Working Group and its activities, including the publication of a report, the contents of which we will revisit shortly.<sup>33</sup>

The protective mandate of the African Commission mainly encompasses the consideration of complaints alleging human rights violations (commonly referred to as communications) from individuals, non-governmental organisations (NGOs) or state parties.<sup>34</sup> Under this mandate, the African Commission also undertakes fact-finding missions to investigate allegations of massive human rights violations within member states.<sup>35</sup> The African Commission has considered communications from groups considered indigenous peoples, albeit with little, if any,

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<sup>31</sup> See ACHPR /Res.33(XXV)99 Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights (1999). By the 39th ordinary session of the African Commission held in Banjul, The Gambia from 11-25 May 2006, more than 300 NGOs had been granted observer status before the Commission. These NGOs can participate in the sessions of the Commission and indeed before each ordinary session of the Africa Commission, NGOs organise an 'NGO Forum' to discuss pertinent human rights issues on the continent and propose relevant recommendations and resolutions to the African Commission for consideration. See also ACHPR /Res 31(XXIV)98 Resolution on the Granting of Affiliate Status to National Human Rights Institutions in Africa (1998). At least seven national human rights institutions by the same period had been granted affiliate status before the Commission. These organisations attend and address the Commission. See the African Commission's Rules of Procedure Rules 75 & 76.

<sup>32</sup> Sourced from IWGIA's official website <http://www.iwgia.org/sw249.asp> (accessed 30 July 2006).

<sup>33</sup> See *Report of African Commission's Working Group* (n 10 above) 10.

<sup>34</sup> See F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986-2000* (2002) 61-99 for a detailed discussion on admissibility under the African Charter. The inter-state communications are envisaged under arts 47-54 of the African Charter. However, apart from a communication brought by the Democratic Republic of Congo against Rwanda and Uganda, there has not been any other inter-state communication to-date.

<sup>35</sup> The African Commission has undertaken such fact-finding missions in Ethiopia, Nigeria and Zimbabwe. Apart from the report of Zimbabwe, which was published as part of the Seventeenth Annual Activity Report of the Commission, the reports of Ethiopia and Nigeria have never seen the light of day.

substantive results, at least in the practical realisation of their rights.<sup>36</sup> Some of the African Commission's jurisprudence in this regard is considered in the report of the African Commission's Working Group, which is discussed in the next section.

States have generally been unco-operative with regard to their obligation to report under article 62, since there are many states that are yet to even submit their initial reports and very few who are up to date with their submissions. However, the process could potentially be a key forum to address and highlight indigenous peoples' rights.<sup>37</sup> The state reporting mechanism has so far not been employed effectively to raise the concerns and discuss the situation of indigenous peoples on the continent.<sup>38</sup> Recently, however, the African Commission has taken to raising issues related to indigenous peoples during the examination of state reports. During the 39th ordinary session, for example, the Commission sought further information on the measures being taken to protect the rights of indigenous peoples during the examination of the periodic state reports of Cameroon, the Central African Republic and Libya.<sup>39</sup> Some of the questions raised revolved around the measures taken to ensure that the economic, social, cultural and political rights of minorities were respected.<sup>40</sup> While the state representatives responded generally and did not have the statistical evidence that was sought, the fact that the African Commission has started to raise indigenous peoples' issues during the examination of state reports is commendable and will hopefully ensure that states give regard to indigenous peoples in their territories. There is still, however, a need for follow-up on the questions raised on state reports to ensure that it is not an academic exercise. This may possibly be done during promotional missions, making sure that states do indeed respond and implement

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<sup>36</sup> See eg the *Katangese* and *SERAC* cases (n 8 above) and currently still under consideration Communication 276/2003, *CEMIRIDE (on behalf of the Endorois Community) v Kenya* [http://www.minorityrights.org/news\\_detail.asp?ID=342](http://www.minorityrights.org/news_detail.asp?ID=342) (accessed 22 May 2006).

<sup>37</sup> See generally FD Gaer 'First fruits: Reporting by states under the African Charter on Human and Peoples' Rights' (1992) 10 *Netherlands Human Rights Quarterly* 29 for an evaluation of the initial state reporting under the African Charter; M Evans *et al* 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 34 above) 36-60.

<sup>38</sup> Eg, during the consideration of the state report of the Republic of Rwanda during the 36th ordinary session of the African Commission in Dakar, Senegal, in December 2004, the state delegates from the Republic of Rwanda insisted that the concept of indigenous peoples does not exist in Rwanda and the Batwa people (who are widely considered indigenous, even in the African Commission Working Group Report 15) could not be regarded as such. (One of the authors participated in this session and was a member of the Secretariat of the African Commission.)

<sup>39</sup> See IWGIA Report, *39th ordinary session of the African Commission*, Banjul, The Gambia, 11-25 May 2006 11 (copy with authors).

<sup>40</sup> As above.

suggestions and concluding observations adopted with respect to indigenous peoples.

In executing its promotional mandate, the African Commission conducts promotional missions whereby commissioners<sup>41</sup> visit states to disseminate information about the African Charter and the African Commission. It has also established special mechanisms such as Special Rapporteurs and Working Groups<sup>42</sup> to undertake specific activities on various thematic human rights issues of concern on the continent. The promotional mandate of the African Commission envisages, among others, research and documentation, dissemination of information through workshops, seminars and symposia, and the formulation of principles to address legal problems of human rights.<sup>43</sup>

Individuals, groups and communities identified as indigenous peoples, with support from international and national organisations participating in the African Commission's activities, lobbied for recognition and protection from the African Commission.<sup>44</sup> The intensive lobbying process is actually traceable to 1999, when IWGIA held a conference on the situation of indigenous peoples in Africa in co-operation with a local NGO, named Pastoralists Indigenous NGO Forum in Tanzania.<sup>45</sup>

The conference 'recommended that the African Commission on Human and Peoples' Rights should be encouraged to address the human rights situation of indigenous peoples in Africa, which it had so far never done before'.<sup>46</sup> In the words of IWGIA:

[O]ne of the then members of the African Commission, Commissioner Barney Pitsoa Moleketi from South Africa, participated in the Tanzania conference and, during the following sessions of the African Commission in Rwanda and Algeria respectively, he brought up the issue.

Initially, the African Commission tended to reject the issue, as it did not find the term 'indigenous peoples' applicable to African conditions. The main argument was that all Africans are indigenous to Africa and that

<sup>41</sup> In terms of art 31 of the African Charter, the African Commission shall be composed of 11 members drawn from among African personalities with the highest reputation and integrity serving in their personal capacities. The first members of the Commission were elected at the 23rd ordinary session of the Assembly of Heads of State and Government of the OAU held in July 1987.

<sup>42</sup> Some of the Rapporteurs currently in existence are the Special Rapporteur on the Rights of Women in Africa; the Special Rapporteur on Prisons and Conditions of Detention in Africa; the Special Rapporteur on Human Rights Defenders in Africa; and the Special Rapporteur on Refugees and Displaced Persons in Africa, Special Rapporteur on the Freedom of Expression in Africa and Working Group on Economic, Social and Cultural Rights in Africa; Working Group on Specific Issues Relevant to the Work of the African Commission; Working Group on the Death Penalty; Working Group on the Implementation of the Robben Island Guidelines; Working Group on the Situation of Indigenous Peoples/Communities in Africa.

<sup>43</sup> Art 45(1) African Charter.

<sup>44</sup> *Report of the African Commission's Working Group* (n 10 above) 10.

<sup>45</sup> IWGIA *Indigenous world* (2001-2002) 453.

<sup>46</sup> As above.

no particular group can claim indigenous status.<sup>47</sup> With skilful interventions, plodding and convincing, members of the African Commission, seized with more information on the situation of peoples identified as indigenous peoples in Africa, 'saw the light'. As they say, the rest is now history, and in 2000, on the basis of article 45(1) of the African Charter, the African Commission adopted a resolution establishing a Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa to study the issue of indigenous peoples on the continent.<sup>48</sup>

### 3.1 The African Commission's Working Group of Experts on Indigenous Populations

The African Commission opted for the Working Group model which, as stated above, is one of the established mechanisms available to the African Commission for analysing a mosaic of human rights issues in Africa. It has to be pointed out that the African Commission's Working Group is dissimilar in its mandate and mode of operation from the WGIP. Unlike the latter, the African Commission's Working Group is a small task force whose members are appointed by the African Commission in their personal capacities as experts.<sup>49</sup> The mandate of the African Commission's Working Group is as follows:<sup>50</sup>

- (1) to examine the concept of indigenous people and communities in Africa;
- (2) to study the implications of the African Charter on the human rights and well-being of indigenous communities; and
- (3) to consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.

The first meeting of the African Commission's Working Group was convened on 12 October 2001 in The Gambia.<sup>51</sup> This meeting preceded the 30th session of the African Commission, which was similarly held in The Gambia from 13 to 27 October 2001.<sup>52</sup> At this pioneering meeting, the African Commission's Working Group took upon itself the task of developing a conceptual framework paper as a point of departure. This

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<sup>47</sup> As above.

<sup>48</sup> Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000) (n 9 above).

<sup>49</sup> n 45 above, 454. Eg, unlike the UNWGIP, the African Commission's Working Group does not hold periodic public sessions where indigenous peoples, governments and interested parties meet to exchange ideas and share experiences. The current members of the Working Group are Commissioner Rezag-Bara (Chairperson), Commissioner Musa Ngary Bitaye, Dr Naomi Kipuri, Mohammed Khattali, Marianne Jensen and Zephryn Kalimba.

<sup>50</sup> n 9 above, paras 1-5.

<sup>51</sup> n 45 above.

<sup>52</sup> As above.

paper, it was agreed, would form the basis of a report that was to be submitted to the African Commission, encapsulating the findings of the African Commission's Working Group in the discharge of its mandate.<sup>53</sup> It was agreed that this paper would, in the main, briefly discuss the characteristics of indigenous peoples in Africa and highlight their specific human rights problems.<sup>54</sup> This would shed light on the types of groups being discussed.

A draft of the conceptual framework paper was discussed at a roundtable meeting held prior to the 31st session of the African Commission, which was held in Pretoria, South Africa from 1 to 16 May 2002.<sup>55</sup> The roundtable meeting, which was attended by members of the African Commission's Working Group and four invited experts, generally endorsed the approach adopted by the African Commission's Working Group and this paved the way for the drafting of the report to be submitted to the African Commission.<sup>56</sup> The African Commission's Working Group, after extensive consultations with human rights experts and indigenous peoples' organisations, prepared a report which was submitted to and adopted by the African Commission in 2003.<sup>57</sup>

Apart from the report, which is analysed in detail in the next section, the African Commission's Working Group has undertaken other research projects and country information visits in Burundi, Congo Brazzaville, Libya and Uganda.<sup>58</sup> Mainly these visits have been undertaken with a view to gathering information about the human rights situation of indigenous peoples in the countries visited and to provide information on the work of the African Commission's Working Group. It has also conducted country visits to Botswana,<sup>59</sup>

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<sup>53</sup> As above.

<sup>54</sup> n 45 above, 455.

<sup>55</sup> As above.

<sup>56</sup> n 45 above, 456.

<sup>57</sup> Resolution on the Adoption of the Report of the African Commission's Working Group (n 10 above).

<sup>58</sup> See generally IWGIA *The indigenous world* (2006) and IWGIA *The 38th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia*, 21 November to 5 December 2005. See also The African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities *Report of a Research and Information Mission to Burundi from 27 March to 9 April 2005* and The African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities *Report of a Research and Information Mission to the Republic of Congo*, 5-19 September 2005. Reports of Research and Information Missions to the Republic of Congo and Burundi are available at <http://www.iwgia.org> (accessed 1 August 2006).

<sup>59</sup> See IWGIA 'Press Conference by Commissioner Andrew R Chigovera, Chairperson of the African Commission's Working Group on Indigenous Populations and Communities in Africa on the Mission to the Republic of Botswana' (15-23 June 2005) <http://www.iwgia/graphics/Synkron-Library/Documents/InternationalProcesses/A> (accessed 26 July 2006).



Namibia<sup>60</sup> and Niger<sup>61</sup> in order to lay a foundation and work with all stakeholders to enhance the human rights situation of the indigenous communities in those countries.

### 3.2 The report of the African Commission's Working Group

The report of the African Commission's Working Group is divided into three main sections. It commences by analysing the human rights situation of indigenous peoples in Africa. In this section the report identifies certain groups regarded as indigenous peoples in Africa. The section also draws attention to their specific human rights concerns. The next section discusses the jurisprudence of the African Commission with specific reference to the rights of indigenous peoples. The African Commission's Working Group concludes that the African Charter protects the rights of groups identifying themselves as indigenous peoples and that the concept of peoples in the African Charter may be interpreted to include groups within independent states. The report then discusses the criteria for identifying indigenous peoples in Africa and concludes by making recommendations to the African Commission for the protection of indigenous peoples' rights in Africa.

In this paper we adopt a slightly different sequence from that of the report of the African Commission's Working Group. We first discuss the concept of indigenous peoples and the criteria for identifying such groups as adopted by the African Commission's Working Group. We next discuss the specific human rights situations of groups identified as indigenous peoples in Africa. We then discuss the jurisprudence of the African Commission and the implications of the African Charter with respect to indigenous peoples. In our view, it makes more sense to first discuss the concept of indigenous peoples and the criteria for identifying such groups before discussing the human rights situations of such groups.

#### 3.2.1 The concept of 'indigenous peoples' in Africa

As noted above, the concept and the rights of indigenous peoples have been the subject of intense scholarly attention in recent years.<sup>62</sup> Despite this attention and the enormous strides that have been made at international law, at least with respect to drawing world attention to the

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<sup>60</sup> IWGIA 'Press Conference by Commissioner Andrew Ranganayi Chigovera, Chairperson and Head of Delegation of the African Commission's Working Group on Indigenous Populations/Communications in Africa on the Mission to the Republic of Namibia' (26 July to 6 August 2005) <http://www.iwgia.com/graphics/Synkron-Library/Documents/InternationalProcesses/A> (accessed 26 July 2006).

<sup>61</sup> IWGIA Report (n 39 above) 6.

<sup>62</sup> See generally various writings (n 11 above).

plight of groups that identify themselves as indigenous peoples, there is controversy regarding its applicability to certain parts of the world.<sup>63</sup> Perhaps this explains why there is presently no universal definition of the concept of indigenous peoples. In Africa the concept is even more controversial. The African Commission itself did not initially embrace the concept of indigenous peoples in Africa with enthusiasm. In fact, the African Commission had to be cajoled into action by civil society to consider the rights of indigenous peoples in Africa. This was because the African Commission initially 'did not find the term indigenous peoples applicable to African conditions'. The argument was that all Africans are indigenous to Africa and that no particular group can claim indigenous status.<sup>64</sup>

Even when the African Commission adopted the resolution establishing the African Commission's Working Group, its decision was not unanimous, evident from the resolution which reflects the ambiguity felt within the African Commission about this initiative. It also reflects a divergence of conceptual thought between French- and English-speaking members. The expression 'indigenous' had long been problematic within the African Commission and the report attempts to deal with the matter. The term 'populations/communities' reveals a residual consideration of indigenous people as 'minorities' or as a cohesive population in their own right. The resolution avoided direct reference to 'peoples' due to the divergence of views within the African Commission itself about its value and meaning within the African Charter.<sup>65</sup>

This uncertainty within the African Commission perhaps mirrors the general attitudes of African governments with respect to the issue.<sup>66</sup> Hitchcock and Vinding point out that most African governments maintain that all their citizens are indigenous.<sup>67</sup> Yet other countries have denied citizenship to groups that identify themselves as indigenous.<sup>68</sup> In light of this controversy on the subject, the African Commission left it to the experts to examine the concept of indigenous peoples in Africa.

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<sup>63</sup> Eg the applicability of the concept of indigenous peoples is disputed in Asia. For a thorough exposition of the Asian controversy, see generally B Kingsbury 'The applicability of the international legal concept of "indigenous peoples" in Asia' in JR Bauer & DA Bell *East Asian challenge* (1999) 336; Kingsbury (n 11 above).

<sup>64</sup> n 45 above, 453.

<sup>65</sup> *Report of the African Commission's Working Group* (n 10 above) 11-12.

<sup>66</sup> Even after adoption of the report, some states are still reluctant to embrace the concept, as evidenced during the 39th ordinary session of the African Commission. See IWGIA Report (n 39 above).

<sup>67</sup> RK Hitchcock & D Vinding 'Introduction' in RK Hitchcock & D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004) 8. See also *Report on the Third Workshop on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples* para 9 and generally *Report of the African Commission's Working Group* (n 10 above).

<sup>68</sup> Eg the government of Zambia is said to have maintained that the small number of the San in Zambia are not Zambian citizens but are refugees from Angola who fled from Angola during the civil war in that country; Hitchcock & Vinding (n 67 above) 8.

In examining the concept of indigenous peoples in Africa, the African Commission's Working Group was not oblivious to the controversy surrounding the concept of indigenous peoples in Africa. In particular, it was alive to the common argument that all Africans are indigenous to Africa. In terms of this argument, the term indigenous is seen as synonymous with aboriginality.<sup>69</sup> The African Commission's Working Group therefore had to adopt an approach to the concept that circumvented reference to aboriginality or prior occupation.

The African Commission's Working Group commenced by noting that a 'strict definition of indigenous peoples is neither necessary nor desirable'.<sup>70</sup> In this way, the Working Group was merely echoing widely held sentiments.<sup>71</sup> As a result, the Working Group, instead of defining the concept of indigenous peoples, considered the criteria for identifying indigenous peoples in Africa. In our view the end result is the same, which is to shed light on the types of groups under consideration. The African Commission's Working Group observed that 'all Africans are indigenous to Africa'.<sup>72</sup> However, there are certain groups in Africa that 'have, due to past and continuing processes, become marginalised in their own countries' and now 'need recognition and protection of their rights'.<sup>73</sup> As a result of their marginalisation, these groups decided to join the international movement for the rights of indigenous peoples since the 'kind of human rights protection they urgently need is reflected in the international law regime on the rights of indigenous peoples'.<sup>74</sup> In a move clearly intended to distance itself from the association of indigenous with aboriginality, the African Commission's Working Group expressed the opinion that the term 'indigenous peoples' has<sup>75</sup>

become a much wider internationally recognised term by which to understand and analyse certain forms of inequalities and suppression such as the ones suffered by many pastoralists and hunter-gather groups and others in Africa today and by which to address their human rights sufferings. 'Indigenous peoples' has come to have connotations that are much wider than the question of 'who came first'. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life

<sup>69</sup> See eg K Lehman 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 86 91, where she opines that '[a]ll aboriginal peoples are indigenous peoples, and vice versa'.

<sup>70</sup> *Report of the African Commission's Working Group* (n 10 above) 87.

<sup>71</sup> See eg E Daes 'Standard-setting activities: Evolution of standards concerning the rights of indigenous people: The concept of "indigenous"' UN Doc E/CN 4/Sub 2/AC 4/1996/2/Add1 para 1.

<sup>72</sup> *Report of the African Commission's Working Group* (n 10 above) 86.

<sup>73</sup> As above.

<sup>74</sup> As above.

<sup>75</sup> n 10 above, 87.

are subject to discrimination and contempt and whose very existence is under threat of extinction.

From the foregoing, the following characteristics can be distilled from the report of the African Commission's Working Group as distinguishing indigenous peoples from other groups in Africa. The first characteristic is that of marginalisation, discrimination and exclusion from developmental processes. The second is cultural distinctiveness. This characteristic acknowledges that, whilst most African states contain culturally diverse groups within their borders, there are certain groups whose cultures are markedly different from the cultures of other groups within African states. In fact, their cultural distinctiveness is their bane, as their cultures are regarded as primitive.<sup>76</sup> The African Commission's formulation of this characteristic is stated as follows:<sup>77</sup>

They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society . . . They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalisation . . . threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development.

The third characteristic is that of self-identification. The African Commission's Working Group regards this third characteristic as crucial and criticises other approaches for not emphasising it.<sup>78</sup> In this regard, the Working Group endorses the approach adopted by the WGIP.<sup>79</sup> The Working Group also draws from ILO Convention 169.<sup>80</sup> Article 1(2) of the ILO Convention provides that self-identification 'as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which this concept of this Convention apply'.

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<sup>76</sup> n 10 above, 89.

<sup>77</sup> As above.

<sup>78</sup> Eg it criticises the approach proposed by Mr Jose R Martinez Cobo, the Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (later renamed the Sub-Commission on the Promotion and Protection of Human Rights) who was commissioned to conduct the study. See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problems of Discrimination Against Indigenous Population, UN ESCOR, 1986 UN Doc E/CN4 Sub2 1986/7/Add5 1-4; see also *Report of the African Commission's Working Group*, 91.

<sup>79</sup> The WGIP proposes four criteria that may be used to identify indigenous peoples: (1) The occupation and use of territory; (2) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; (3) self-identification, as well as recognition by other groups, as a distinct collectivity; (4) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. See E/CN4/Sub2/AC4/1996/2.

<sup>80</sup> ILO Convention 169 of 1989.

It is important to note that, according to WGIP, self-identification must be accompanied by recognition by other groups as a distinct group. This is important, if only to curtail the proliferation of spurious claims. However, the African Commission's Working Group does not appear to expressly require the added precondition of recognition by other groups.

We submit that the self-identification criterion is not on its own decisive as that which would otherwise lead to preposterous results. For example, a group of South Africa's Afrikaner nationalists in 1996 attended a session of the WGIP claiming that they were indigenous people.<sup>81</sup> Although their claim was then dismissed by the UNWGIP, the issue was reignited during the visit by the UN Special Rapporteur during his mission to South Africa in 2005. He also dismissed their claim on the basis that they are not marginalised.<sup>82</sup> The self-identification criterion therefore cannot be applied in isolation and would involve a combination of the other elements of marginalisation and cultural distinctiveness.

While the approach by the African Commission's Working Group represents a commendable effort to address a controversial issue, it may be criticised on some fronts. Firstly, it is true that the concept of indigenous peoples ought to be stripped of its association with colonialism and prior occupation if it is to have global resonance. For this reason, the approach of the Working Group would be a development of international law with respect to indigenous peoples. The problem is that the Working Group presents its formulation of the concept of indigenous peoples not as a suggestion of how it should be understood at international law, but of how it is actually understood.<sup>83</sup> However, a careful reading of the works of leading commentators on the subject reveals the tendency to associate the concept of indigenous peoples with prior occupation, conquest and colonialism.<sup>84</sup> Even ILO Conven-

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<sup>81</sup> ILO *Indigenous peoples of South Africa: Current trends* (1999) 11.

<sup>82</sup> See E/CN4/2006/78/Add2.

<sup>83</sup> *Report of the African Commission's Working Group* (n 10 above) 101-103.

<sup>84</sup> See, for examples, Torres (n 11 above) 133, where she refers to the common problems of indigenous peoples as resulting from a relationship between the conquered and the colonisers; Anaya (n 11 above) 4, where he argues that the category of indigenous peoples is 'generally understood to include not only the native tribes of the American continents but also other culturally distinctive non-state groupings, such as the Australian aboriginal communities and tribal peoples of Southern Asia, that similarly are threatened by the legacies of colonialism'; C Oguamanam 'Indigenous peoples and international law' (2004) 30 *Queen's Law Journal* 348-353, where he notes that 'from the onset of colonialism in the 15th century, the law of nations has grappled with the question of the appropriate treatment of indigenous peoples by colonising powers'; ME Turpel 'Indigenous peoples' rights of political participation and self-determination: Recent international legal developments and the continuing' (1992) 25 *Cornell International Law Journal* 580, where the author notes that indigenous peoples 'find themselves caught up in the confines of a subsuming, and frequently hostile, state political apparatus imposed

tion 169, on which much reliance is placed by the African Commission's Working Group, suffers from the same deficiency. Article 1 of the Convention provides that the Convention applies to, among others, peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

It is this association with colonialism, prior occupation and conquest that most African states find unacceptable. It is important that the African Commission's Working Group stresses that the concept of indigenous peoples *ought* to be understood in a way that eschews reference to prior occupation and colonialism in the African context, as opposed to how it actually is understood. In this way, the Working Group would be making a profound contribution to the development of international law with respect to indigenous peoples.

Secondly, the reliance on the ILO Convention may subject the formulation of the African Commission's Working Group to criticism. Firstly, whereas it is true that ILO Convention 169 is part of international law, it is important not to lose sight of the fact that it has not been ratified by a single African state.<sup>85</sup> Secondly, and most importantly, it must be borne in mind that ILO Convention 169 also applies to 'tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'.<sup>86</sup> ILO Convention 169 therefore draws a distinction between tribal and indigenous peoples to whom it applies with equal force.

The reason for the distinction between the two groups was to bring out the limitations of the term 'indigenous'. The term 'indigenous', which denotes occupation of a particular territory before other groups arrived, may be suitable to North and South America and some parts of

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by an immigrant or settler society following colonisation'; EA Daes 'Equality of indigenous peoples under the auspices of the United Nations: Draft Declaration on the Rights of Indigenous Peoples' (1995) 7 *St Thomas Law Review* 497, where she observes that indigenous peoples 'have defined historical territories — even within the borders of existing states — and the right to keep these territories physically intact, environmentally sound and economically sustainable in their own ways'.

<sup>85</sup> In fact, it has only been ratified by 14 countries, mostly from Latin America, where the concept of indigenous peoples is hardly controversial. So far this Convention has not been ratified by a single African country.

<sup>86</sup> ILO Convention 169, art 1.

the Pacific with European settler communities, but not to some parts of the world.<sup>87</sup> With respect to some regions<sup>88</sup>

there is very little distinction between the time at which tribal and other traditional peoples arrived in the region and the time at which other populations arrived. In Africa . . . there is no evidence to indicate that the Masai, the Pygmies or the San . . . namely peoples who have distinct social, economic and cultural features, arrived in the region . . . before other African populations. The same is true in some parts of Asia.

Two observations may be made from this statement. The first is that ILO Convention 169 is intended to be wider in its scope of application because of its avoidance of confining its application to descendants of prior occupants of a particular territory (indigenous peoples), thus extending it to people who are not necessarily descendants of prior occupiers but who have distinct cultural, economic and social conditions (tribal peoples).<sup>89</sup> The second is the appreciation that the term 'indigenous' is bound up with first or prior occupation, an assertion that the African Commission's Working Group seeks to dispute. The point being made here is that reliance on ILO Convention 169 may draw the African Commission's Working Group into the undesirable situation of having to draw distinctions between indigenous peoples and tribal peoples.

### 3.2.2 The groups that identify themselves as 'indigenous peoples' in Africa

The African Commission's Working Group lists some people in Africa 'who are applying the term "indigenous" in their efforts to address their particular human rights violations', asserting that 'they cut across various economic systems and embrace hunter gatherers, pastoralists as well as small scale farmers'.<sup>90</sup> Hunter/gatherer communities cited include the Batwa/Pygmy people (Baka, Yaka, Babendjelle, Bagyeli, Bambuti and Medzan) of the Great Lakes region and Central Africa; the San (Xu, Khwe, Nama, Naro, Qgoon) of Southern Africa, the Hadzabe of Tanzania and the Ogiek of Kenya. Examples of pastoralist communities regarded as indigenous are the Pokot of Kenya and Uganda, Somalis, Oromos, Samburu, Turkana, Rendile, Orma and Borana of

<sup>87</sup> M Tomei & L Swepston *Indigenous and tribal peoples: A guide to ILO Convention No 169* (1996). Swepston and Tomei were merely stating the reasons for making a distinction between tribal peoples and indigenous peoples under ILO Convention 169, being that in other parts of the world it is unclear which group came first. Be that as it may, there seems to be evidence that the San are the prior inhabitants of large parts of Southern Africa.

<sup>88</sup> Tomei & Swepston (n 87 above) 5.

<sup>89</sup> For this reason, Convention 169 has been criticised for being over-inclusive. See eg S Wiessner 'Rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) 12 *Harvard Human Rights Law Journal* 112.

<sup>90</sup> *African Commission's Working Group Report* (n 10 above) 15.

Kenya and Ethiopia, Masai of Kenya and Tanzania, Karamojong of Uganda, Barabaig of Tanzania the Mbororo who are spread over Cameroon and other West African countries, the Himba of Namibia and the Fulanis, Tuareg/Berbers of West and North Africa. Other groups are small-scale farmers such as the Ogoni of Nigeria.<sup>91</sup>

The identification and listing of these groups by the African Commission's Working Group are, however, not without controversy. For instance, at the launch of the Working Group's report, during the African Commission's 36th ordinary session, a state delegate of the Republic of Ethiopia in his contribution queried the authenticity of the statistics and identification of certain groups as being indigenous peoples in Ethiopia.<sup>92</sup> He averred that, to the best of his knowledge, there were no official statistics relied upon to make conclusions about groups who could be identified as indigenous in the country. While such a query could be dismissed as the states' continued denial in Africa of the existence or categorisation of certain peoples as being indigenous in their territories, it does raise some important issues for debate. Although the report does not claim to have done an empirical data sourcing and analysis, it would help if the sources of such key statistics were revealed, if only to rest valid concerns related to the question of who is indigenous in Africa.

The report, however, is quick to point out that the list enumerated, while not comprehensive or exhaustive, is only meant to give a general idea about some of the groups that could be considered indigenous on the continent. It does seem to suggest therefore that what is important is articulating 'the concrete human rights concerns of these peoples whose problems resemble those of indigenous people all over the world'.<sup>93</sup>

### 3.2.3 The African Charter on Human and Peoples' Rights and the rights of indigenous peoples

As stated earlier, the second mandate of the African Commission's Working Group was to study the implications of the African Charter and the wellbeing of indigenous populations/communities with regard to specific articles.<sup>94</sup> The African Commission's Working Group, therefore, analysed these provisions and the jurisprudence of the African

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<sup>91</sup> n 10 above, 15-19.

<sup>92</sup> One of the authors participated in this session as a member of the Secretariat of the African Commission.

<sup>93</sup> *African Commission's Working Group Report* (n 10 above) 19.

<sup>94</sup> See Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000) (n 9 above) paras 1-5. The African Charter articles are: arts 2 and 3, which provide for the right to equality; art 5, which provides for the right to dignity; art 19, which provides for protection against domination; art 20, which provides the right of self-determination; and art 22, which provides for the promotion of cultural development and identity.



Commission with regard to the concept of 'peoples'. This analysis would then guide the African Commission's Working Group in deciding whether the African Charter protects the rights of indigenous peoples. It is to be noted that articles 2 and 3 (the right to equality) and article 5 (the right to dignity) are individual rights. The Working Group had no difficulty in finding that members of groups that identify themselves as indigenous peoples are entitled to the enjoyment and protection of these rights. Thus, for example, the Working Group found that the rampant discrimination that the Batwa or Pigmies of Central Africa and the Khoisan of Southern Africa are subjected to is in violation of the above provisions.<sup>95</sup> The entitlement of the members of groups that identify themselves as indigenous peoples to these rights, as indeed to all individual rights, is hardly contested and nothing more need be said about the position of the African Commission's Working Group.

Articles 19, 20 and 22 are all rights of 'peoples'. In order for the groups that identify themselves as indigenous peoples to be entitled to them, they must qualify as 'peoples' under the African Charter. This is what the African Commission's Working Group had to consider. In doing so, the Working Group commenced by noting that the African Charter expressly recognises and protects collective rights.<sup>96</sup> This express recognition of collective rights served as a clear intention to draw a distinction between traditional individual rights from the rights that can only be enjoyed in a collective manner.<sup>97</sup> The Working Group noted that despite the use of the term 'peoples', the African Charter does not define the concept of 'peoples'.<sup>98</sup> Furthermore, the African Commission 'initially shied away from interpreting the concept of peoples'.<sup>99</sup> However, the African Commission has in recent years considered communications in which a specific sector or group of the population has invoked collective rights against the state.

#### *The right of self-determination*

One communication which, according to the African Commission's Working Group, manifests the African Commission's willingness to consider cases of violations of peoples' rights brought by a section of the population is *Katangese Peoples' Congress v Zaire*.<sup>100</sup> This was a communication brought by the President of the Katangese Peoples' Congress on behalf of the Katangese people. The communication alleged violations of the right to self-determination under article 20(1) of the African Charter. The communication was dismissed for want of evi-

<sup>95</sup> n 10 above, 34.

<sup>96</sup> n 10 above, 72.

<sup>97</sup> n 10 above, 73.

<sup>98</sup> n 10 above, 72.

<sup>99</sup> As above.

<sup>100</sup> n 8 above.

dence that demonstrated that the people of Katanga were denied the right to participate in government. The African Commission has been criticised from missing the opportunity to determine whether or not it is competent to review claims rooted in self-determination.<sup>101</sup> Nevertheless, the African Commission's Working Group interpreted the *Katangese* communication in a positive manner. It noted that<sup>102</sup>

by recognising the right of a section of a population to claim protection when their rights are being violated, either by the state or by others, the African Commission has paved the way for indigenous people to claim similar protection.

Interestingly, in *Jawara v The Gambia*,<sup>103</sup> the African Commission seemed to interpret article 20(1) as providing for a right that accrues to the entire population.

The African Commission's Working Group has stressed that the right of self-determination must be exercised within the national boundaries of the states within which they are located.<sup>104</sup> To be sure, this interpretation of the right to self-determination seems to find support from the OAU Charter, which places emphasis on territorial integrity of states and respect for national boundaries.<sup>105</sup> If this is true, the challenge for groups that identify themselves as indigenous peoples in Africa is to claim the right of self-determination in a manner that does not pose a threat to the territorial integrity of states. This is a crucial challenge for indigenous peoples because states have tended to interpret self-determination in a manner that equates it to self-determination.<sup>106</sup> In our view, it is not enough for the African Commissions' Working Group to find in the abstract that indigenous peoples in Africa are entitled to the right to self-determination without clearly elaborating how that right could be exercised in a manner that poses no threat to the territorial integrity of states.<sup>107</sup> In other words, it failed to elaborate what the nature of the right to self-determination under the African Charter is and how states may ensure the enjoyment and protection of such right with respect to indigenous peoples.

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<sup>101</sup> E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1997) 164.

<sup>102</sup> n 10 above, 79.

<sup>103</sup> (2000) AHRLR 107 (ACHPR 2000). In this communication, the African Commission held that the military *coup d'état* was a violation of art 20(1) of the African Charter. This was because the *coup* had the effect of imposing a government on the people of The Gambia against their will.

<sup>104</sup> n 10 above, 75.

<sup>105</sup> See particularly art II(1)(C) of the Charter of the OAU. See also NB Pityana 'The challenge of culture for human rights' in Evans & Murray (n 34 above) 231.

<sup>106</sup> See eg Anaya (n 11 above).

<sup>107</sup> n 10 above, 75.

*Prohibition against domination of a people by another: Article 19*

In a series of communications brought against Mauritania,<sup>108</sup> there were allegations of the violation of the right to equality and the prohibition against domination of a people by another under article 19 of the African Charter. In those communications, there were allegations of systematic discrimination, domination and brutality against black Mauritians by the ruling Arab group. The African Commission found that such discrimination and domination went against the central principle of equality under the African Charter and was in violation of the article 19. According to the African Commission's Working Group, this finding by the African Commission is indicative of its willingness to consider collective rights brought by a section of a population. In turn, this willingness provides an opening for interpreting the concept of 'peoples' under the African Charter as including groups within African states that identify themselves as indigenous peoples.

In our view, the interpretation of the practice of the African Commission by the African Commission's Working Group appears sound. However, it has been observed that 'these cases do not provide evidence of the Commission seriously examining the significance of 'peoples' in the Charter. Neither does the Commission describe the nature and content of their rights, especially as these sets of cases are the only occasions where the Commission has ventured into the application of collective rights or the rights of 'peoples'.<sup>109</sup> This is a valid observation, since the African Commission did not in those communications proffer a definition of the term 'peoples'. In other words, it is still unclear which groups within states would be regarded as 'peoples' under the African Charter.

Be that as it may, it is important to note that in *Social and Economic Rights Action Centre and Another v Nigeria*,<sup>110</sup> the African Commission held that the act of the Nigerian military government of allowing oil consortiums to exploit oil reserves in Ogoniland without their involvement was a violation of article 21 of the African Charter. In this communication, the African Commission seems to imply that the Ogoni were 'peoples' in terms of article 21. Similarly, the African Commission found that the Nigerian military government violated the right of 'peoples' to a satisfactory environment in terms of article 24 of the African Charter. What is interesting in this communication is the African Commission's indiscriminate and interchangeable use of the terms 'persons' and 'peoples'. It is important to note that, although the African Commission's Working Group recognises the Ogoni as one of the indigenous peoples in Africa, no such suggestion was made in the *SERAC* communication.

<sup>108</sup> *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

<sup>109</sup> Pityana (n 105 above) 233.

<sup>110</sup> *SERAC* case (n 8 above). For a discussion of this communication, see generally Oloka-Onyango (n 3 above). See also GO Odongo 'Making non-state actors accountable for study of translational corporations in the African context' unpublished LLM dissertation, University of Pretoria, 2002.

*The right of peoples to freely dispose of their wealth and natural resources and the right of peoples to economic, social and cultural development: Articles 21 and 22*

The African Commission's Working Group, having found that groups identifying themselves as indigenous peoples may claim collective rights under the African Charter, had no difficulty in finding that such groups are entitled to economic, social and cultural development. The African Commission's Working Group referred to the Guidelines for National Periodic Reports to the African Commission which state that these rights<sup>111</sup>

consist in ensuring that the material wealth of the countries are not exploited by aliens to no or little benefit to the African countries. Establishment of the machinery which would monitor the exploitation of natural resources by foreign companies and strictly contrasted to the economic and material benefit accruing to the country.

The African Commission's Working Group observed that the guidelines seem to be hinged on the assumption that the threat of exploitation and the threat to development come from foreign companies and therefore there is a need to protect African countries from exploitation.<sup>112</sup> On this basis, the right of a people is equated with that of the state itself.<sup>113</sup> This theme was echoed in the *SERAC* communication, where the African Commission noted as follows:<sup>114</sup>

The origin of this provision may be traced to colonialism, during which the human and material resources were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation.

Nevertheless, as noted above, the African Commission in the *SERAC* communication held that article 21 of the African Charter also accrued to the Ogoni, a section of the population of Nigeria. It is on this basis that the African Commission's Working Group is of the opinion that the rights provided for under articles 21 and 22 accrue to groups identifying themselves as indigenous peoples. The Working Group emphasised that the protection of the right to their land is fundamental for the survival of groups that identify themselves as indigenous peoples in Africa. It found that groups that identify themselves as indigenous peoples have traditionally occupied lands rich in natural resources.<sup>115</sup> It found that the incremental dispossession of indigenous peoples of their traditional lands is a violation of the rights under articles 21 and 22 of the African Charter.

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<sup>111</sup> African Commission Second Annual Activity Report Annex XII para II.6.

<sup>112</sup> n 10 above, 76.

<sup>113</sup> As above.

<sup>114</sup> *SERAC* case (n 8 above) para 56.

<sup>115</sup> n 10 above, 21.

### 3.2.4 Recommendations of the African Commissions' Working Group to the African Commission

It will be recalled that the African Commission's Working Group was also mandated to 'consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities'.<sup>116</sup> The Working Group made several recommendations to the African Commission. The first recommendation was the establishment of 'a focal point on indigenous issues within the African Commission'.<sup>117</sup> The Working Group recommends that that this focal point could be a Special Rapporteur.<sup>118</sup> There is no suggestion what the mandate of the Special Rapporteur would be, but it can be assumed that the Special Rapporteur would have the usual broad mandate of conducting investigations into and receiving reports of human rights abuses.<sup>119</sup>

The second recommendation is the establishment of a forum which would bring together indigenous participants and other stakeholders to meet regularly to consider developments with respect to indigenous peoples and also to provide indigenous peoples with a forum to express their concerns and experiences.<sup>120</sup> The third recommendation is that the elaboration of the concept of 'peoples' in light of collective rights of indigenous peoples should be maintained.<sup>121</sup> This is a clear indication that the uncertainty surrounding the meaning of 'peoples' under the African Charter is not over. The rest of the recommendations include the continuance of the function of the African Commission's Working Group as a focal point on indigenous issues until such time as another focal point is established, and that the issue of indigenous populations in Africa should remain an agenda item at all ordinary sessions of the African Commission.<sup>122</sup>

Although the African Commission has not established a Special Rapporteur mechanism towards this end, the African Commission's Working Group's mandate has been extended for a further two years.<sup>123</sup> The Working Group meets twice every year before each ordinary session of the African Commission to deliberate on issues arising in the protection of indigenous peoples in Africa. The activities of the Working Group at present include the publication and distribution of the Working Group's

<sup>116</sup> See Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000) (n 9 above) paras 1-5.

<sup>117</sup> n 10 above, 114.

<sup>118</sup> As above.

<sup>119</sup> For a discussion of the nature and mandate of the African Commission Special Rapporteurs, see generally M Evans & R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 34 above) 280.

<sup>120</sup> n 10 above, 115.

<sup>121</sup> As above.

<sup>122</sup> As above.

<sup>123</sup> African Commission Resolution on the Composition and Renewal of the Mandate of the Working Group on Indigenous Populations/Communities in Africa adopted during the 38th ordinary session of the African Commission in Banjul, December 2005.

report; country visits to Botswana, Namibia and Niger; research and information country visits to Uganda, Burundi, Libya and the Republic of Congo (Brazzaville); the establishment of an advisory network of experts; the compilation of a database of indigenous organisations; preparations for a regional sensitisation seminar in Cameroon; the current undertaking of a research project in co-operation with the ILO; co-ordination with UN human rights mechanisms; and the bi-annual meetings of the Working Group.<sup>124</sup>

#### 4 Conclusion

A number of groups across the African continent have been, and continue to be, subjected to gross human rights violations. In particular, they have been dispossessed of lands they consider their traditional homes and with which they have a special attachment. These groups have also been, and continue to be, subjected to discrimination and marginalisation. This marginalisation and discrimination largely stems from their perceptively inferior and outdated cultural practices. In recent years, these groups have joined the burgeoning international movement of indigenous peoples. International law has, in recent years, been responsive to the plight and concerns of indigenous peoples worldwide. This responsiveness has found expression in the development of a specific corpus of law for the promotion and protection of the rights of indigenous peoples. African governments have always maintained that the concept of indigenous peoples is irrelevant in Africa since all Africans are indigenous to Africa. However, developments at international law, particularly under the African human rights system, challenge this view. The adoption of a report by the African Commission that recognises certain groups as indigenous peoples is a milestone in so far as the protection of the rights of these groups is concerned. The report may be criticised on some fronts, but it is commendable for at least two reasons. Firstly, it has succeeded in drawing attention to the plight of the groups it identifies as indigenous peoples. Secondly, and perhaps entwined with the first, it adopts a pragmatic approach and focuses on finding a way of protecting these groups as opposed to fixating on conceptual issues.

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<sup>124</sup> See African Commission's Working Group on Indigenous Populations/Communities, Activity Report 2005 (April 2006); see also IWGIA Report, 39th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 11 to 25 May 2006 (copy with authors).

# Standing and the African Commission on Human and Peoples' Rights

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## Summary

*The African Commission has in its individual communications procedure adopted an approach where no connection needs to be present between the victim and the complainant in a case. The reasoning is justified as allowing Africans with limited economic or technical abilities to have a chance to have their cases heard. The broad approach to standing has led to difficulties for complainants to provide sufficient evidence and information as well as unexplained withdrawals of cases. This article explores the Commission's approach to standing, focusing on the preparatory work of the African Charter and communications decided by the Commission. It concludes that a connection to the victim of the alleged violation should be present, while at the same time ensuring an open procedure, allowing accessibility for victims with limited economic or technical abilities. It is suggested that the procedure of the CEDAW Committee should be used as a point of departure. With the inauguration of the African Court on Human and Peoples' Rights, it is imperative that the African Commission works efficiently and smoothly to ensure a trustworthy regional mechanism, amongst others requiring that a solid foundation of evidence and certainty be present.*

## 1 Introduction

The African Charter on Human and Peoples' Rights (African Charter) establishes the African Commission on Human and Peoples' Rights (African Commission) as a regional African mechanism for the promotion and protection of human and peoples' rights as well as interpreting the

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provisions of the African Charter.<sup>1</sup> The African Commission has been in existence since 1987. It convenes twice every year to, among other tasks, consider state reports, individual complaints and to adopt resolutions on human and peoples' rights issues. The African Charter provides for a complaints mechanism between states and an individual complaints mechanism. The latter is mentioned in article 55, which refers to 'communications other than those of state parties to the present Charter.'<sup>2</sup> The Commission over the years allowed a broad range of persons and organisations to submit these communications, without them necessarily having any affiliation with the alleged act in violation of the Charter. Such an approach is sometimes referred to with the Latin expression *actio popularis*, which is a principle referring to a general legal capacity of persons or institutions to instigate proceedings. However, this possibility for a broad range of actors to submit complaints has in some cases proved to be counterproductive as it has been difficult for the complainants to provide sufficient evidence and information on some violations. In the near future the African Commission must be part of a wider regional human and peoples' rights mechanism along with the African Court on Human and Peoples' Rights (African Court), recently inaugurated at the July 2006 AU Summit, in time probably to be transformed into the African Court of Justice and Human Rights. These developments make a discussion of the Commission's approach to standing pertinent.

This article addresses standing in the light of a historical approach thereto, taking into consideration the principles of standing of other international human rights tribunals. A few options that the African Commission has to consider in addressing this issue will be presented.

## **2 Standing of non-state actors in the communication procedure of the African Commission**

### **2.1 Standing in the preparatory work of the African Charter**

A thorough examination of standing should include research on the content of the preparatory works.<sup>3</sup> The preparatory work of the African Charter consists of documents drafted by non-governmental organisations (NGOs), the United Nations (UN) and the Organization of African

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<sup>1</sup> And other tasks, art 45 African Charter [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf) (accessed 31 July 2006).

<sup>2</sup> Art 55 African Charter.

<sup>3</sup> Art 61 African Charter, referring to international conventions, customary international law and general principles of law, directly referring to art 32 of the Vienna Convention on the Law of the Treaties and preparatory work as a source of interpretation.



Unity (OAU).<sup>4</sup> The process at the OAU level consisted of meetings of an Expert Committee and ministerial meetings. In the draft prepared by the Expert Committee, a direct reference was made to the rights of individuals, groups of persons or NGOs to submit communications alleging violations of the African Charter.<sup>5</sup>

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provision of this Charter.

In a subsequent draft, it was also stated that the African Commission would receive communications both from states (articles 47-54) and from others (articles 55-57). The wording is the following:<sup>6</sup>

Communications relating to Human Rights other than those from the States Parties to the present Convention, received at the Commission, shall be considered by the Commission if they comply with the following conditions.

However, the exact reference to 'persons, groups or NGOs' was left out in the second draft. Why this choice was made and whether it was intended to exclude either of these subjects is not clear. These drafts suggest that it was the intention of the Expert Committee that the African Commission should receive complaints not only from states but also from other entities. At the Ministerial Meeting held in Banjul from 8 to 15 June 1980, some changes were implemented in the article relating to the capacity of entities other than states to lodge complaints. The current wording of article 55(1) was agreed upon and the admissibility conditions were moved to the subsequent article 56. Article 55(1) has the following wording:<sup>7</sup>

Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of State Parties to the present Charter and transmit them to Members of the Commission, who shall indicate which Communications should be considered by the Commission.

It is not mentioned why this change was made. It can be deduced from the preparatory work that it was intended that entities other than states should be able to submit complaints. However, because of the rephrasing of article 55, resulting in the wording in the quote above, it cannot

<sup>4</sup> R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 10. The documents of the OAU consist primarily of the Meeting of Experts for the Preparation of the Draft African Charter of Human and Peoples' Rights convened in Senegal 28 November 1979 to 8 December 1979 and documents drafted at the Ministerial Meeting held in Banjul 8 to 15 June 1980 and the Second Ministerial Meeting held 7 to 19 January 1981.

<sup>5</sup> Meeting of Experts in Dakar, Senegal, from 28 November to 8 December 1979, CAB/LEG/67/1.

<sup>6</sup> Meeting of Experts for the Preparation of the Draft African Charter of Human and Peoples' Rights, Dakar, Senegal, 28 November 1979 — 8 December 1979, CAB/LEG/67/3/Rev1 art 55.

<sup>7</sup> Ministerial Meeting on Human and Peoples' Rights, The Gambia, 9 to 15 June 1980, CAB/LEG/67/Draft Rapt. Rpt (II) Rev 4, 21.

be concluded that individuals, groups of individuals and NGOs were to have standing. A probable explanation is that the drafting states wished to leave the question of exactly which subjects, other than states, were to have standing for the Commission to decide.

## 2.2 Standing in the African Charter and the Rules of Procedure

Currently, neither the African Charter nor the Rules of Procedure of the Commission elaborates on the meaning of standing and there is no reference to the question of a link between the author of a communication and the victim of a violation. Article 55(1) of the Charter, the basis for individual communications, only refers to the elaboration of a list of communications other than those of state parties and that the Commission can consider communications on this list.<sup>8</sup> However, the former Rules of Procedure referred to this issue. The victim could submit communications, as could non-victims, if the latter was unable to do so himself or herself.<sup>9</sup> Non-victims as persons or organisations could also submit communications in cases of serious or massive violations.<sup>10</sup> It was also mentioned that the African Commission could accept communications from any individual or organisation, irrespective of where they lived.<sup>11</sup> However, these provisions in the Rules of Procedure were removed at the 18th ordinary session of the Commission, held in Praia, Cape Verde, from 2 to 11 October 1995, when the current Rules of Procedure were adopted. There are no clear indications why this amendment was enacted.<sup>12</sup>

## 2.3 Standing in the decisions of the African Commission

The question of standing was raised in the case of *Achutcan and Another (on behalf of Banda and Others) v Malawi*, decided at the 17th session in March 1995. Krishna Achutan submitted the case on behalf of his father-in-law.<sup>13</sup> Similarly, in the same year, the African Commission decided the case *Free Legal Assistance Group and Others v Zaire*, where the authors of the communication were not the victims in the case.<sup>14</sup> These two cases serve as examples of the application of the former Rules of Procedure as they were decided when these were still in force.

<sup>8</sup> Art 55 African Charter.

<sup>9</sup> Rules 114(1)(a) & 114(3)(b) of the Rules of Procedure, First Annual Activity Report of the African Commission on Human and Peoples' Rights, 28 April 1988 in *Documentation No 1 Activity Reports (1988-1990) (1990) 22-23*.

<sup>10</sup> Rule 114(1)(b) 22.

<sup>11</sup> Rule 114(2) 22.

<sup>12</sup> Ninth Annual Activity Report, para 21 in African Commission on Human and Peoples' Rights, Annual Activity Reports vol 1 1987-1997 (1997) 297.

<sup>13</sup> (2000) AHRLR 143 (ACHPR 1994) para 1.

<sup>14</sup> (2000) AHRLR 74 (ACHPR 1995). See F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice 1986-2000* (2002) 75.

The case of *Malawi African Association and Others v Mauritania*,<sup>15</sup> decided on 11 May 2000, was submitted by an NGO on behalf of ethnic groups in Mauritania. Serious and massive violations of the African Charter were established. The African Commission also established in *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* that a human rights violation not necessarily needs to be serious or massive for others than the victim to submit the complaint.<sup>16</sup> These two decisions do not elaborate on the reasoning for the application of the *actio popularis* principle, but they are in compliance with the previous decisions and reflect the principles in the former Rules of Procedure. The African Commission has also referred directly to the *actio popularis* principle:<sup>17</sup>

The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Centre (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.

An example of the reasoning behind the broad approach to standing was the case of *Odjouriby Cossi Paul v Benin*.<sup>18</sup> This case was deferred several times because the complainant was not familiar with the procedures of the African Commission. Because the complainant, in the opinion of the Commission, had not submitted his case logically, it was entrusted to the NGOs Interights and the Institute for Human Rights and Development in Africa to present and process the case on his behalf.<sup>19</sup> The case serves as an example of the reasoning on the broad standing principle and is a sound justification for a broad standing requirement reaching beyond a strict victim condition.

The approach by the African Commission also entailed that a specific victim did not need to be proven at all and that the victim or victims could be purely hypothetical and collectively defined. Other communications have concerned more individualised victims, but still within the category of *actio popularis*, such as 'all the national officials of the Universities Academic Staff Union (UASF)',<sup>20</sup> 'certain West African nationals',<sup>21</sup> or 'Senegalese, Malian, Gambian, Mauritanian and other

<sup>15</sup> (2000) AHRLR 149 (ACHPR 2000).

<sup>16</sup> (2000) AHRLR 183 (ACHPR 1995).

<sup>17</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>18</sup> Communication 199/97, *Odjouriby Cossi Paul v Benin* Seventeenth Annual Activity Report Annex VI para 14.

<sup>19</sup> Para 10.

<sup>20</sup> *Kenya Human Rights Commission v Kenya* (2000) AHRLR 133 (ACHPR 1995) para 9.

<sup>21</sup> *Union Interafricaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997) para 1; *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 1, referring to '517 West Africans'. See also I Österdahl *Implementing human rights in Africa, the African Commission on Human and Peoples' Rights and individual communications* (2002) 103-104.

nationals'.<sup>22</sup> The question is whether such hypothetical and collectively defined groups allow for too broad a definition of standing, as it leaves open the question whether proper information and facts surrounding the case can be ascertained and it is difficult to know if a withdrawal of the case serves the interest of these alleged victims.

The African Commission also adopted the approach that persons from countries that were not state parties to the African Charter could submit communications. For example, in the case of *Baes v Zaïre*,<sup>23</sup> the Commission accepted a communication by a Danish national and foreign NGOs.<sup>24</sup> This application of the principles of standing is sound as a foreign individual or person can process a case as efficiently and thoroughly as someone who is based in Africa.

#### 2.4 Comments on the African Commission's approach to standing

The broad standing approach described above results in a certain lack of control over the communications that may be submitted as the connection between the individual or NGO submitting it and the actual alleged violation of the African Charter is blurred. For the African Commission to be able to assess whether a violation of the Charter has occurred or not, it must have access to credible evidence and information on the violation. Such access is hampered due to the current interpretation of the standing requirement, as the following example illustrates. The case *Interights (on behalf of Safia Yakubu Husaini) and Others v Nigeria*<sup>25</sup> was filed by the NGO Interights on behalf of Ms Safiya Yakubu Husaini and others who allegedly had been subjected to gross and systematic violations of fair trial and due process rights in the Shari'a courts of Nigeria. Ms Safiya Hussaini herself was sentenced to death by stoning by a Shari'a court in Sokoto State in Nigeria. The complainant in the case alleged that this case was only one in many cases decided under the recently implemented Shari'a legislation in Northern Nigerian states. Various other applications of Shari'a legislation were mentioned in the communication. According to the complainant, these cases constituted violations of articles 2, 3, 4, 5, 6 and 7 of the African Charter. Throughout the development of the case, the NGO was unable to

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<sup>22</sup> Österdahl (n 21 above) 103-104.

<sup>23</sup> (2000) AHRLR 72 (ACHPR 1995).

<sup>24</sup> *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaïre and Zambia* (2003) AHRLR 111 (ACHPR 2003) para 1.

<sup>25</sup> Communication 269/2003, *Interights (on behalf of Safia Yakubu Husaini & Others) v Nigeria* Eighteenth Activity Report Annex III.

obtain the necessary information for its further process.<sup>26</sup> The NGO even suggested to the Commission that it continues processing the case until the necessary information was obtained.<sup>27</sup> The specific victim of the case would obviously, as the object of the violation, have better and more precise information on the violation and the circumstances surrounding it, compared to an NGO that has limited or no information on the violation or the condition of the victim. Such information does not pertain to the legal evaluation, which is up to the Commission to decide following the formal procedures, but to the actual facts surrounding the violation. In addition, the Commission itself does not have the capacity to investigate violations on its own.

The broad standing principle has also as consequence that any NGO or individual can choose to withdraw or cease to pursue the case without it necessarily being to the benefit of the victims. To the extent that a case is withdrawn or that it is not pursued seriously because of other reasons than the cessation of the violation, it is to the detriment of the victims. Such other reasons could be economic problems by the person or NGO involved, a shift in management, or a change in priority of the

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<sup>26</sup> At an early stage of the procedure, the complainant was requested to submit additional information on the developments surrounding the application of penal provisions of Shari'a religious law before the Nigerian Shari'a courts as well as complete and specific cases of alleged irregularities. The complainant was also asked to furnish information regarding which of the specific decisions of the Shari'a courts had been executed and which had not (para 13). On 3 March 2002 the complainant wrote to the Secretariat of the Commission that it would assemble as many of the documents as possible and get back to it (para 17). Subsequently, the Secretariat wrote back that it was awaiting the information (para 18). On 2 April 2002 the Secretariat again wrote to the complainant reminding it of the need for further information on Ms Amina Lawal whom allegedly a Shari'a court in Katsina State had sentenced to a similar punishment as Ms Safiya Hussaini. Simultaneously, the Secretariat reminded the complainant that it was still waiting for the submission on material as indicated in its earlier letters (para 21). During the 31st ordinary session in Pretoria, the complainant informed the Secretariat orally that it was trying to compile the relevant information on the complaint and that it would be best if the Secretariat waited for the information before further action on the complaint (para 23). At the 32nd ordinary session of the Commission, the complainant informed the Secretariat orally that it was unable to compile the relevant information in time, that it was in touch with local partners in Nigeria and suggested that the Commission progressed in dealing with the complaint (para 26). In the period before the following session, the Secretariat called the complainant by telephone to inquire about the progress in furnishing the relevant information and on the status of the cases pending before national courts (para 27). At the 33rd ordinary session in Niamey, Niger, the Commission decided to be seized of the communication (para 28). Right after the session, on 12 June 2003, the parties were requested to submit their arguments on admissibility before the 34th ordinary session (para 29). However, the arguments on admissibility were never submitted in spite of reminders and deferrals of the communication. Finally, on 7 September 2004 another reminder was sent to the parties for the submission of arguments on admissibility before the 36th ordinary session, but during this session the complainant informed the Rapporteur orally of the communication of his wish to withdraw the case (para 38). Finally, during the 37th ordinary session the written request for withdrawal was obtained (para 42).

<sup>27</sup> Para 26.

work of an NGO. No matter what the reason is, the violation might still persist, while another international tribunal may have refrained from adopting the case because the Commission was processing it.

In *Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare v Nigeria*,<sup>28</sup> the case was submitted on behalf of Mr A Emmanuel. He was a member of the Movement for the Actualisation of the Sovereign State of Biafra. The communication alleges that the Nigerian Police Force arrested Mr Emmanuel during a raid at the organisation's headquarters and that, since the arrest no charges had been brought against him and attempts to have him released on bail had failed.<sup>29</sup> Accordingly, the complainant alleged that the government of Nigeria had violated articles 2, 3, 4, 5, 6, 7, 8, 10 and 20(1) of the African Charter.<sup>30</sup> The complainant suddenly withdrew the case and it was difficult for the African Commission to ascertain whether the victim was still being detained.<sup>31</sup> If an NGO decides to withdraw the communication without further explanation and information, it leaves open the question whether this is the wish of the victim and in his or her interest. Even if the Commission in this case, contrary to the opinion of the complainant, had wished to pursue the case, the complainant insisted that he would not communicate further.<sup>32</sup>

In *B v Kenya*,<sup>33</sup> the Secretariat received an e-mail from the author of the complaint withdrawing the communication, as she believed the matter was now being addressed by the respondent state. Again, it leaves open the question whether this was the wish of the victim and in his or her interest and whether the violation persisted or stopped. It is important that the uncertainty of the wish of the victim and the status

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<sup>28</sup> Communication 273/2003, Eighteenth Activity Report Annex III para 2.

<sup>29</sup> Paras 3-4.

<sup>30</sup> Para 5.

<sup>31</sup> A letter sent on 3 December 2003 by the Secretariat reminded the complainant to submit his arguments on admissibility. In the letter the Secretariat further informed the complainant of the difficulties it had encountered in contacting him and requested information as to whether the victim was still detained and about the conditions of his detention. In a new letter dated 19 April 2004 the Secretariat informed the complainant that it had not received any information despite constant reminders and that the Commission had decided to postpone the case for consideration at the 36th ordinary session (para 14). On 25 May 2004 the Secretariat received an electronic message from the complainant that the organisation was withdrawing its complaint and it was specified that the organisation would stop all correspondence on the subject (para 16). The Commission realised at the 35th ordinary session that the request for the withdrawal of the complaint came from the e-mail address of the complainant but not from the usual correspondent in the case. Accordingly, the Secretariat sent a request for confirmation on whether the request for withdrawal was genuine (para 17). No response was received in relation to later requests by the Secretariat to confirm the withdrawal and the case was closed because of a lack of interest (paras 18-24).

<sup>32</sup> Para 16.

<sup>33</sup> Communication 283/2003, Seventeenth Annual Activity Report Annex VII paras 18 & 31.

of the violation themselves are problematic. In *Association Que Choisir Benin v Benin*, the Secretariat lost all contact with the author of the communication:<sup>34</sup>

In the case at hand, the numerous letters from the Secretariat requesting the complainant for evidence that the said requirement had been satisfied remained, for a long time, without response. In fact, the Secretariat of the Commission lost contact with the complainant from October 2003.

Obviously, an NGO or an individual may also withdraw the case or cease to communicate because the violation has stopped. A possible approach is to consider a submitted communication, as falling within the exclusive domain of the African Commission and that only the Commission is able to withdraw communications. Such an approach does not compromise the nature of the individual complaint, as it is merely the continuation of a procedure that has already begun.

### 3 Standing, the African Commission and the African Court on Human and Peoples' Rights

The Protocol Establishing an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on 1 January 2004.<sup>35</sup> Article 5 of the Protocol, read with article 34(6), does not allow direct individual petitions from individuals and NGOs without an explicit declaration to this effect by the state party. It is unknown what effect this will have on the standing of individuals and NGOs before the African Commission. There is a clear precedence in the decisions by the Commission to allow NGOs and individuals to submit communications without consent. Why was a more restrictive approach adopted in the African Court Protocol? During its drafting, the draft submitted by the African Experts to the Governmental Experts entailed that the Court could<sup>36</sup>

on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the court, without first proceeding under article 55 of the Charter.

According to this formulation, the specific consent of the state party was probably not intended. At a meeting in Nouakchott, Mauritania, it was decided that the cases that could be submitted directly by individuals and NGOs to the African Court were restricted to 'urgent cases,

<sup>34</sup> Communication 264/2002, Eighteenth Activity Report Annex III para 22.

<sup>35</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights [http://www.achpr.org/english/\\_info/court\\_en.html](http://www.achpr.org/english/_info/court_en.html) (accessed 29 March 2005).

<sup>36</sup> Draft Protocol submitted by the OAU General Secretariat to Governmental Legal Experts, 6 to 12 September 1995, Cape Town, South Africa, art 6(1).

or serious, systematic or massive violations of human rights'.<sup>37</sup> It was also decided that such submission was optional for the state and depended on its consent.<sup>38</sup> Most of the delegates at the meeting in Mauritania were of the view that individuals and NGOs should have access to the African Court the same way as the African Commission and state parties, meaning without separate consent.<sup>39</sup> The important point was raised by some states that only because of the submission by NGOs and individuals had the Commission been functional and that state parties at the time had not submitted any complaints against each other.<sup>40</sup> However, Sudan, Nigeria and others opposed this point of view. Nigeria, in particular, wanted an optional solution which resulted in the current wording.<sup>41</sup> At the subsequent meeting in Addis Ababa, the optional nature of the submission of cases of individuals and NGOs was preserved in the new article 5 and the reference to urgent or serious cases or a case involving systematic or massive violations was deleted.<sup>42</sup>

The *actio popularis* rule would still be maintained at the Commission stage of the process for complaints that would later be submitted to the African Court. As it is still uncertain how many declarations will be submitted allowing direct complaints from individuals and NGOs to the African Court and when, the Court is dependent on the Commission for such cases and they need to be based on clear facts without being withdrawn prematurely in order for the new Court to establish itself as a credible human rights court. Such credibility is necessary for the contracting states to develop enough faith in the new system to submit declarations allowing direct petitions from NGOs or individuals. It is still unclear whether individuals submitting cases directly before the African Court have to be victims or can submit such cases on behalf of others. It has been argued that because the African Court Protocol does not refer to this issue, it is clear that no victim condition would apply.<sup>43</sup>

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<sup>37</sup> As above.

<sup>38</sup> n 36 above, art 6(5).

<sup>39</sup> Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, 11 to 14 April 1997, Nouakchott, Mauritania, Report OAU/LEG/EXP/ AFCHPR/RPT(2) para 21.

<sup>40</sup> Para 22.

<sup>41</sup> Para 24.

<sup>42</sup> Conference of Ministers of Justice/Attorneys-General on the Establishment of an African Court on Human and Peoples' Rights, 12 December 1997, Addis Ababa, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/MIN/AFCHPR/PROT(I) Rev 2. See also IAB El-Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' Introductory Note (1997) 9 *African Journal of International and Comparative Law* 943-4. Political circumstances surrounding the Nigerian dictatorship in power during the drafting of the Protocol have been raised as a possible explanation for the restrictive approach. J Harrington 'The African Court on Human and Peoples' Rights' in Evans & Murray (n 14 above) 320-321.

<sup>43</sup> F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 38.



However, it would be a mistake for the Court to adopt the extreme *actio popularis* principle used by the Commission. Such an approach would only repeat the problem of insufficient information and irrational withdrawals in cases of declarations pursuant to article 34(6) which allow NGO or individual complaints.

At the 3rd ordinary session of the African Union (AU) Assembly of Heads of State and Government (AU Assembly) in July 2004 in Addis Ababa, it was decided to merge the African Court and the African Court of Justice.<sup>44</sup> The reasoning behind this decision was the lack of funding for the two courts and it was believed to be unnecessary for two courts to have competence over human rights issues.<sup>45</sup> A protocol on the merger was drafted, but it was decided to continue with the operationalisation of the African Court. Currently, a single draft legal instrument on the merger has been made and a working group met from 21 to 25 November 2005 in Algiers, Algeria, to discuss this instrument.

At the January 2006 AU Summit in Khartoum, Sudan, the 8th ordinary session of the AU Executive Council elected the 11 judges of the African Court.<sup>46</sup> At the 7th ordinary session of the AU Assembly in July 2006, it was decided to endorse the recommendations of the Executive Council on the draft single instrument.<sup>47</sup> The AU Commission was requested to make recommendations on a draft protocol on the statute of the new court and submit these to the Executive Council in January 2007.<sup>48</sup> What the rules on standing will be after this probable merger of the African Court and the African Court of Justice is not clear. The Rules of Procedure for the African Court of Justice will probably elaborate on the matter.<sup>49</sup>

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<sup>44</sup> Assembly of Heads of State and Government of the AU, Assembly/AU/Dec 33-54(III), Decision on the Seats of the African Union, para 4 <http://www.africa-union.org/AU%20summit%202004/Assm%20en%20decl.htm> (accessed 15 September 2005).

<sup>45</sup> Coalition for an Effective African Court on Human and Peoples' Rights, Submission on the Single Legal Instrument relating to the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, 28 March 2006 [http://www.africancourtcoalition.org/merger\\_submission\\_eng\\_06.pdf](http://www.africancourtcoalition.org/merger_submission_eng_06.pdf) (accessed 20 June 2006) 3. See also Coalition for an Effective African Court on Human and Peoples' Rights Legal and Institutional Issues Arising from the Decision by the Assembly of Heads of State and Government of the African Union to Integrate the African Court on Human and Peoples' Rights and Court of Justice of the African Union [http://www.justiceinitiative.org/db/resource2/fs/?file\\_id=14964](http://www.justiceinitiative.org/db/resource2/fs/?file_id=14964) (accessed 20 June 2006).

<sup>46</sup> AU Executive Council, Decision on the Election of Judges of the African Court on Human and Peoples' Rights (DocEXCL/241 (VIII)) EXCL/Dec 261 (VIII) para 2 [http://www.africa-union.org/root/au/Documents/Decisions/com/AU6th\\_ord\\_Council\\_Decisions\\_Jan2006\\_Khartoum.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/AU6th_ord_Council_Decisions_Jan2006_Khartoum.pdf) (accessed 14 September 2006).

<sup>47</sup> Assembly of the AU, Decision on the Draft Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, DOC EX CL/253 (IX) Assembly/AU/Dec 118(VII) para 1.

<sup>48</sup> n 47 above, para 2.

<sup>49</sup> MA Baderin 'Recent developments in the African regional human rights system' (2005) 5 *Human Rights Law Review* 117 146.

#### 4 Standing of non-state actors before international human rights tribunals

Three international human rights tribunals have a victim requirement. These are the European Court of Human Rights (European Court), the UN Human Rights Committee (HRC) and the UN Committee on Migrant Workers (MWC). Article 34 of the European Convention on Human Rights (European Convention) establishes that the person submitting a case must be a victim of a violation covered by the European Convention.<sup>50</sup> However, the European Court and the previous European Commission on Human Rights also accepted applications from relatives of a dead person, and in certain other cases a wide interpretation of the concept of victim has been applied. For example, in the *Klass* case, the European Court, concerning widespread telephone call interception, followed a broader standing principle.<sup>51</sup> It is not sufficient that a law in general is alleged to be contrary to the European Convention for the establishment of standing of an individual. However, the individual has standing if the law directly affects the individual submitting the complaint and the law is applied to his detriment. In the *Klass* case, it was found that legislation allowing secret measures to be applied did not entail such direct interest to be present. Thus, the European Court follows a fairly strict standing principle.

According to article 1 of the First Additional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee can only accept communications by individuals who claim to be victims of a violation.<sup>52</sup> In *Shirin Aumeeruddy-Cziffra and Nineteen Other Mauritian Women v Mauritius*,<sup>53</sup> the Human Rights Committee interpreted this requirement to mean that the individual must be 'actually affected'. It was furthermore stated that 'no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant'.

The HRC has also stated that the alleged violation must relate to specific individuals at a specific time.<sup>54</sup> However, there is some degree

<sup>50</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English\\_Anglais.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English_Anglais.pdf) (accessed 15 December 2005).

<sup>51</sup> Communication 5029/71, *Klass & Others v Germany* 6 September 1978 <http://www.echr.coe.int> (accessed 8 September 2005) para 33.

<sup>52</sup> First Additional Protocol to the Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force 23 March 1976 <http://www.ohchr.org/english/law/ccpr-one.htm> (accessed 6 April 2006). See D McGoldrick *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights* (1994); M Nowak *UN Covenant on Civil and Political Rights*. CCPR Commentary (1993).

<sup>53</sup> *Aumeeruddy-Cziffra & Others v Mauritius* (2000) AHRLR 3 (HRC 1981) para 9.2.

<sup>54</sup> *JH v Canada* Doc A/40/40 230 para 4.2; *Lovelace v Canada*; Communication R6/24 UN Doc SoppP No 40 Doc A/36/40 166 <http://www1.umn.edu/humanrts/undocs/session36/6-24.htm> (accessed 19 April 2006) para 10.

of flexibility, and the HRC has accepted that there may be circumstances when the mere existence of a domestic law may violate the International Covenant on Civil and Political Rights.<sup>55</sup>

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in article 77(1) establishes that the committee attached to the Convention can receive petitions from individuals 'who claim that their individual rights as established by the present Convention have been violated by that state party'.<sup>56</sup>

Five tribunals have as their point of departure that the complainant need not be the victim. These are the African Committee on the Rights and Welfare of the Child, the Inter-American Human Rights Commission, the UN Committee against Torture, the UN Committee on the Eradication of Racial Discrimination and the Committee on the Elimination of Discrimination against Women (CEDAW Committee).

The African Charter on the Rights and Welfare of the Child states in article 44:<sup>57</sup>

The Committee may receive communication, from any person, group or non-governmental organisation recognised by the Organization of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter.

However, this Committee has yet to adopt any decision on communications.

Article 44 of the American Convention on Human Rights establishes that<sup>58</sup>

[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organisation may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

There is no victim requirement in article 44. In relation to NGOs, it is sufficient for the NGO to be recognised in the territory of a state party, but not necessarily in the particular case.<sup>59</sup> The International Conven-

<sup>55</sup> Communication 61/1979 CCPR/C/15/D/61/1979, *Hertzberg v Finland, Leo R Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA v Finland* UN Doc Supp No 40 (A/37/40) 161 (1982) <http://www1.umn.edu/humanrts/undocs/session37/14-61.htm> (accessed 14 October 2005).

<sup>56</sup> Adopted by General Assembly Resolution 45/158 of 18 December 1990 and entered into force 1 July 2003 <http://www.ohchr.org/english/law/cmw.htm> (accessed 15 December 2005).

<sup>57</sup> African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999 [www1.umn.edu/humanrts/africa/afchild.htm](http://www1.umn.edu/humanrts/africa/afchild.htm) (accessed 23 September 2005).

<sup>58</sup> American Convention on Human Rights adopted at the Inter-American Specialised Conference on Human Rights San José Costa Rica 22 November 1969 <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed 19 October 2005).

<sup>59</sup> Case 9213 (USA) Inter-American Commission on Human Rights, Annual Report, 1986-1987 184.

tion on the Elimination of all Forms of Racial Discrimination states in article 14(1) that communications may be brought 'not only by or on behalf of individuals, but also by or on behalf of groups of individuals'.<sup>60</sup> A similar provision is found in article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>61</sup> The Optional Protocol to the Convention on the Elimination of Discrimination against Women establishes in article 2 that a communication may be submitted by (or on behalf of) alleged victims, but adds that<sup>62</sup>

where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

The CEDAW Committee has not yet elaborated on when applications can be submitted without the consent of victims. The approach by the European Convention, the HRC and the MWC seems to be narrow and, if applied to the Commission, would exclude deserving petitions. It is not clear why different solutions were arrived at by the different treaty bodies, besides that they have rules on standing reflecting the convention they are based upon. However, the CEDAW Committee's approach applies a victim condition, while at the same time allowing exceptions thereto.

The approach by the CEDAW Committee seems to be the best compromise as the benefits of both principles would be met. Possible grounds that may justify that 'consent' be dispensed with include the existence of massive or serious violations, and of substantiated obstacles that impede submission by the alleged victim personally. In comparison with the current approach, a victim requirement would be the point of departure. Although the CEDAW Committee has not yet elaborated in depth on when the consent of the victim can be deviated from, the same approach can be followed and it should be required that the victim be identified and facts surrounding the case presented. The approach by the CEDAW Committee is the only one that comes close to a compromise between individualising the victim or victims and allowing complaints to be submitted on their behalf if they are unable to do so themselves for economic or other reasons.

Consent by the victim, or at least the identification of the victim, would allow better information on the violation and foundations of

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<sup>60</sup> Adopted by General Assembly Resolution 2106(XX) of 21 December 1965 and entered into force 4 January 1969 <http://www.ohchr.org/english/law/cerd.htm> (accessed 7 April 2005).

<sup>61</sup> Adopted by General Assembly Resolution 39146 of 10 December 1984 and entered into force 26 June 1987 <http://www.hrweb.org/legal/cat.html> (accessed 15 December 2005).

<sup>62</sup> Adopted by General Assembly Resolution A/54/4 of 6 October 1999 and entered into force 22 December 2000 <http://www.ohchr.org/english/law/cedaw-one.htm> (accessed 7 April 2005).

evidence and would limit the worst cases of lack of information, as in *Interights (on behalf of Safia Yakobu Husaini) and Others v Nigeria*.<sup>63</sup> Such an approach is further relevant when taking into account that, with the inauguration of the African Court, the African Commission will be part of a wider regional human rights mechanism and that cases that reach the African Court from the Commission should be based on solid facts and some comfort in the NGOs or individual's ability to present the case consistently. At the same time, the success of the new human rights mechanism depends on the possibility of cases reaching the African Court that would not otherwise do so because of the inability of the victim or victims to submit a communication. The success of the new human rights system therefore depends on finding this balance.

## 5 Conclusion

At the time the African Charter was drafted, a broad approach to standing was probably not intended. The African Commission later on developed its current approach where all individuals and organisations, whether foreign or African, could submit communications, no matter whether they had an actual connection with the victim or victims, or the act alleged to have been committed. This approach was intended to overcome the difficulties that the victims would have themselves in terms of economic or technical expertise in submitting the communications. However, this approach has also proven to be problematic because, as is explained above, the African Commission has experienced difficulties in obtaining sufficient evidence and information on the cases and inconsistency in the handling of cases. The current and future funding of the Commission does not allow for this.

Various approaches could be followed by the Commission to remedy its current approach. A connection to the victim should be established, as a point of departure, while at the same time ensuring an open procedure, making the Commission accessible for victims without the economic or technical abilities to do so. The CEDAW Committee has adopted a balanced approach between the two where, as a point of departure, only the victim can petition the CEDAW Committee and if a petition is submitted on behalf of a victim, it must be with their consent, unless it can be justified submitting it without their consent. Such justification would be the case of serious or massive violations pursuant to article 58 of the African Charter or a documented and well-reasoned problem for the victims in doing so themselves. An example could be actions by the government to impede the submission of a communication. It is also recommended that the approach in *Odjouriby Cossi Paul v Benin*<sup>64</sup> be pursued, where it was entrusted to another NGO to pursue

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<sup>63</sup> n 25 above.

<sup>64</sup> n 18 above.

the case due to the inability of the victim. A list or database of NGOs or persons with the capability and will to do so could be developed. This approach corresponds to the previous concept of the African Commission owning the communication, as it will be the Commission which determines if and to which individual or NGO the complaint should be assigned.

A proper solution to the current problems of standing must take into account that, with the inauguration of the African Court, the African Commission will be part of a wider regional human rights mechanism. To ensure the success of the new system, it is imperative that the Commission works efficiently and smoothly. Accordingly, a solid foundation of evidence and certainty of the complainant NGO's ability to handle the case is imperative to ensure the functioning of the new African Court and the success of the new regional human rights mechanism.

# An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights

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## Summary

*While the right to freedom from torture is one of the few non-derogable rights, it is also one of the rights commonly violated in Africa. The right to freedom from torture is protected under article 5 of the African Charter. This article looks at the measures the African Commission has put in place to protect the right to freedom from torture in the last 20 years that the African Charter has been in force. The definition of torture is given, the principle of jus cogens is discussed, and the general situation of torture in Africa is reviewed. The article also discusses the human rights instruments in Africa and how they protect the right to freedom from torture. In particular, the African Charter and the African Charter on the Rights and Welfare of the Child are discussed and emphasis is put on the mechanisms in those treaties and how such mechanisms have been used to protect the right to freedom from torture. On the role of the African Commission and how it has used its mechanisms to protect the right to freedom from torture, the article looks at how torture has been dealt with in the seminars and workshops organised by the African Commission, how the African Commission has laid down rules and co-operated with other African and international institutions to protect the right to freedom from torture, and how it has protected the right to freedom from torture through individual communications. The role of the Special Rapporteur on Prisons and Conditions of Detention in*

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*Africa in protecting the right to freedom from torture and the Robben Island Guidelines are also discussed in detail. The author recommends that Africa should adopt a torture-specific treaty, as has been the case in the European and Inter-American systems of human rights if the right to freedom from torture is to be protected effectively.*

## 1 Introduction

Torture is so common in some African countries that its occurrence rarely makes the headlines, even in local newspapers. From Algeria to Zimbabwe, cases of torture are reported every year by either international or national human rights organisations. The unfolding humanitarian crisis in Darfur, Sudan, is still fresh in our memories. Here torture was committed against innocent civilians on an unimagined scale. The civil wars that have ravaged some African countries, such as the Democratic Republic of Congo, Liberia, Sierra Leone and Somalia, have been accompanied by large-scale gross human rights violations, including torture. Some dictatorial regimes in countries such as Eritrea, Sudan and Zimbabwe employ torture on a daily basis as a tool to weaken the opposition.

In this article, existing mechanisms to combat torture in Africa are covered, and the way in which the African Commission on Human and Peoples' Rights (African Commission) has addressed the issue of the right to freedom from torture is discussed. This discussion is based on the Tenth to Eighteenth Activity Reports of the African Commission. This is because they are readily available on the African Commission website, except for the Seventeenth Annual Activity Report which was obtained from the website of the University of Minnesota. The Robben Island Guidelines are analysed, and it is recommended that the mechanisms in place designed to combat torture in Africa are not effective and that there is a need for a torture-specific treaty.

## 2 Definition of torture

The exact meaning of the term 'torture' is still debated in the academic world.<sup>1</sup> However, it is beyond the scope of this article to explore in

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<sup>1</sup> See A Cullen 'Defining torture in international law: A critique of the concept employed by the European Court of Human Rights' (2003) 34 *California Western International Law Journal* 29, where he calls for a need for a less definitive and broader view of the concept of torture; E Gross 'Legal aspects of tackling terrorism: The balance of the right of a democracy to defend itself and the protection of human rights' (2001) 6 *UCLA Journal of International Law and Foreign Affairs* 89 94, who argues that there is no clear definition of torture. His argument is based on the fact that in *Republic of Ireland v The United Kingdom*, judges at the European Court of Human Rights did not agree on the exact meaning of the term 'torture'.



detail those debates. The author here relies on the definition of torture in the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (article 1).<sup>2</sup> Torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

### 3 The right to freedom from torture as *jus cogens*

The basic principles of international law which states are not allowed to contract out of are known as *jus cogens*.<sup>3</sup> The concept of *jus cogens* is founded 'upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in the domestic legal orders'.<sup>4</sup> Some examples of *jus cogens* have been given, particularly during the discussions by the International Law Commission on the topic, and they include unlawful use of force, piracy, slave trading<sup>5</sup> and, recently, torture.<sup>6</sup>

For a rule to qualify as *jus cogens*, in the light of article 53 of the Vienna Convention on the Law of Treaties (Vienna Convention), a two-stage approach is involved.<sup>7</sup> The first is the establishment of the proposition as a rule of general international law and, second, the acceptance of that rule as a peremptory norm by the international community of states as a whole.<sup>8</sup> The fact that torture is a *jus cogens*

<sup>2</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

<sup>3</sup> See arts 53, 64 & 71 of the 1969 Vienna Convention on the Law of Treaties.

<sup>4</sup> MN Shaw *International law* (1997) 97.

<sup>5</sup> As above.

<sup>6</sup> HJ Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 77. The authors argue that, at present, very few rules pass the test of *jus cogens* and that torture is one of them.

<sup>7</sup> n 3 above.

<sup>8</sup> n 4 above. In *Siderman de Blake v Republic of Argentina* 965 F 2d 699 (9th Cir 1992), where the Sidermans sued the government of Argentina in a United States court for, *inter alia*, torture, the Ninth Circuit Court of Appeals rightly observed, in para 717, '[t]hat states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens . . . under international law, any state that engages in official torture violates *jus cogens*.' See also MJ Leavy 'Discrediting human rights abuse as an "Act of State": A case study on the repression of the Falun Gong in China and commentary on international human rights law in US Courts' (2004) 35 *Rutgers Law Journal* 749 780.

has practical consequences for the community of states in general and for African states in particular. The House of Lords, in *Ex Parte Pinochet Ugarte* [2000], observed that 'the *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture whenever it is committed'.<sup>9</sup> The only correct interpretation that can be given to the above observation is that every state has a duty to punish the crime of torture for so long as the perpetrators are within the jurisdiction of that state. It does not matter whether the offence was committed within that state or in another state. It also does not matter whether the crime was committed against the nationals of that particular state or not.<sup>10</sup>

State immunity<sup>11</sup> is not a defence in cases where torture has been alleged. According to *Jones v Saudi Arabia*,<sup>12</sup> victims of Saudi Arabia torture could claim compensation in the United Kingdom despite Saudi Arabia's claim of state immunity. It has been rightly stated that the prohibition against torture prevails over state immunity because of the normative characteristics of that prohibition, not because the rules on state immunity should or should not allow this.<sup>13</sup> It is also vital to note that former heads of state cannot claim immunity from prosecution for the crime of torture.<sup>14</sup>

Though state practice, international humanitarian law, international law and human rights law all consider the prohibition against torture as *jus cogens*, there is an unpopular view that torture should be permissible in some situations. Dershowitz, while reviewing current instances where

<sup>9</sup> *Ex Parte Pinochet Ugarte* (NO 3) [2000] 1 AC 147 198 (HL 1999); see also DM Amann 'Abu Ghraib' (2005) 153 *University of Pennsylvania Law Review* 125.

<sup>10</sup> J Bacchus 'The garden' (2005) 28 *Fordham International Law Journal* 308 332.

<sup>11</sup> It is a principle of international law to the effect that states are equal sovereigns and that domestic courts in a given state have no jurisdiction in cases where a foreign state is the respondent. For a detailed discussion of this subject, see Shaw (n 4 above) 491-540. The Special Court for Sierra Leone held that 'the principle of state immunity derives from the equality of sovereign states'. See *Prosecutor v Charles G Taylor*, SCSL-2003-01-I-AR72 (E) para 51.

<sup>12</sup> *Jones v Saudi Arabia* [2005] UKHRR 57, cited in C Miéville 'Anxiety and the sidekick state: British international law after Iraq' (2005) 46 *Harvard International Law Journal* 441, where the author argues that this decision was 'constructed from a complete lattice of international law, European human rights law, British human rights law, and the prohibition of torture as *jus cogens*' and that the case vividly illustrates the slippery boundaries between these various elements; see 451. See also *Siderman de Blake v Republic of Argentina* (n 8 above).

<sup>13</sup> A Orakhelashvili 'Restrictive interpretation of human rights treaties on the recent jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529 562.

<sup>14</sup> Lord Browne-Wilkinson observed that the fact that torture is an offence of universal character, the fact that the international community is obliged to outlaw and punish it and that it is committed by government officials indicate that ex-heads of states are not immune from jurisdiction when they are being accused of torture. He said that continued immunity contradicts the Torture Convention. See F Sullivan 'A separation of powers perspective on Pinochet' (2004) 14 *Indiana International and Comparative Law Review* 409 499.

the United States has used torture, argues that 'of course it would be best if we didn't use torture at all, but if the United States is going to continue to torture people, we need to make torture legal and accountable'.<sup>15</sup> It is submitted that the fact that a state violates its obligations under international law does not mean that other states should follow suit. The argument that torture should be legalised because countries like the United States of America have disregarded their international law obligations does not hold water.<sup>16</sup>

Bagaric and Clarke have argued that 'torture is morally defensible, not just pragmatically desirable'.<sup>17</sup> Their unpopular view is based on 'the harm minimisation rationale', which is based on a hypothetical case of a terrorist leader having instigated the planting of a bomb, which is about to explode, on an aircraft. The police arrest him and he refuses to reveal the details of the aircraft on which the bomb was planted. It is argued by them that torture is morally defensible in such circumstances to get information and prevent the loss hundreds of lives. The authors themselves realise that their argument is 'hypothetical' and that it 'is not . . . one that has occurred in the real world'.<sup>18</sup>

#### 4 The situation of torture in Africa

The situation of torture in Africa is succinctly summarised as follows:<sup>19</sup>

All reports by human rights organisations point to the same thing: Torture is still a major problem in African society. Few African countries are free of this practice, employed by governments to counter all dissent, and by individual groups to impose their ideas or authority on others, to demand observance of a regime, to impose a reign of terror among entire populations.

Though 'African states still relish and cherish the use of torture as [an] instrument of state policy',<sup>20</sup> it is beyond the scope of this paper to discuss the situation of torture in every African country. However, a cursory perusal of the Activity Reports of the African Commission (as discussed in detail below), and conclusions and recommendations

<sup>15</sup> As quoted in J Silver 'Why America's top liberal lawyer wants to legalise torture?' *Scotsman* 22 May 2004. It is quoted again in M Bagaric & J Clarke 'Not enough torture in the world? The circumstances in which torture is morally justifiable' (2005) 39 *University of San Francisco Law Review* 581 582.

<sup>16</sup> Prof A Dershowitz has been criticised; see SF Kreimer 'Too close to the rack and the screw: Constitutional constraints on torture in the war on terror' (2003) 6 *University of Pennsylvania Journal of Constitutional Law* 278 278-325.

<sup>17</sup> See Bagaric & Clarke (n 15 above).

<sup>18</sup> n 17 above, 583.

<sup>19</sup> Statement made at an international seminar 'African cultures and the fight against torture' which was held from 29 July 2005 to 1 August 2005 at Dakar, Senegal [http://ww2.fiacat.org/en/article.php3?id\\_article=41](http://ww2.fiacat.org/en/article.php3?id_article=41) (accessed 31 July 2006).

<sup>20</sup> NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1177 1225.

made by the Committee against Torture (Committee) on the reports of some African countries, indicate that torture is a serious problem in Africa. For instance, the Committee has expressed its 'wide concern' at 'the widespread evidence of torture of detainees by law enforcement agencies' in Egypt;<sup>21</sup> the Committee expressed its 'concern over the increase in the number of allegations of torture' in Morocco;<sup>22</sup> 'torture seemed to be a very widespread practice in Cameroon' and the Committee, still referring to Cameroon, was 'troubled by the sharp contradictions between consistent allegations of serious violations of the Convention and the information provided by the state'.<sup>23</sup> After examining Uganda's report, the Committee was concerned about the continued allegations of torture in a widespread manner by the state's security forces and agencies together with the apparent impunity enjoyed by the perpetrators.<sup>24</sup>

## 5 The African human rights instruments and torture

Two African regional human rights treaties that deal with torture, the African Charter on Human and Peoples' Rights (African Charter)<sup>25</sup> and the African Charter on the Rights and Welfare of the Child (African Children's Charter) are now discussed.<sup>26</sup>

### 5.1 The African Charter on Human and Peoples' Rights

The right to freedom from torture is protected under article 5 of the African Charter, which provides that

[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The African Charter has been ratified by all the 53 states in Africa<sup>27</sup> and,

<sup>21</sup> CAT/C/CR/29/4 (para 5 (b)) 23 December 2002.

<sup>22</sup> CAT/C/CR/31/2 (para 5(d)) 5 February 2004.

<sup>23</sup> CAT/C/CR/31/6 (para 4) 5 February 2004.

<sup>24</sup> CAT/C/CR/34/UGA (para 6(c)) 21 May 2005. See also the Committee's conclusions on the following reports: Egypt, A/54/44, paras.197-216 (para 206); Libyan Arab Jamahiriya, A/54/44, paras 176-189 (para 182 (b)); Cameroon, A/56/44, paras 60-66 (para 65); Tunisia, A/54/44, paras.88-105 (para 99); and Zambia, CAT/C/XXVII/Concl.4 (para 5).

<sup>25</sup> Also known as the Banjul Charter, adopted on 27 June 1981 and entered into force on 21 October 1986.

<sup>26</sup> Entered into force 29 November 1999.

<sup>27</sup> See <http://www.africa-union.org/home/Welcome.htm> (accessed 2 September 2005).

unlike the other instruments,<sup>28</sup> article 5 of the African Charter is not only limited to the right to freedom from torture, inhuman or degrading treatment or punishment, but it also covers 'respect of the dignity inherent in a human being'. This is important because torture aims at breaking down the individual to the level of losing their human dignity, and the right to freedom from torture is inseparable from the guarantee of human dignity.

Another unique feature about the African Charter is that it puts torture in the same category as slavery and slave trade, and categorises them as 'forms of exploitation and degradation'. It may be argued that, by so doing, it expressly enacts that torture has acquired the status of *jus cogens*<sup>29</sup> as is the case with slavery and slave trade.

## 5.2 The African Charter on the Rights and Welfare of the Child

The African Children's Charter, which has been ratified by 38 of the 53 African states,<sup>30</sup> also prohibits torture, specifically with regard to children. It requires state parties to take 'specific legislative, administrative, social and educational measures to protect the child from all forms of torture'.<sup>31</sup> Measures to ensure that this article is made effective are introduced, and they include:

[e]ffective procedures for the establishment of special monitoring units to provide necessary support for the child as well as other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child abuse and neglect.

<sup>28</sup> See eg the Convention against Torture (n 2 above); the International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976 in accordance with art 49 (see art 7)); the Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990 (see art 37(a)); the American Convention on Human Rights (signed at the Inter-American Specialised Conference on Human Rights, San Jose?, Costa Rica, 22 November 1969 and entered into force on 18 July 1978 (art 5(2)); and the European Convention on Human Rights (signed by the state members of the Council of Europe at Rome on 4 November 1950 and entered into force on 3 September 1963 and, as amended by Protocol 11, on 1 November 1998 (see art 3)). According to arts 60 and 61 of the African Charter, the Commission may rely on these instruments when interpreting the Charter.

<sup>29</sup> It has been rightly argued that 'the prohibition of slavery and torture is *jus cogens*, prevailing over all other forms of international law'; see A Smith 'Child labour: The Pakistan effort to end a scourge upon humanity — is it enough?' (2005) 6 *San Diego International Law Journal* 461 493.

<sup>30</sup> States that have not yet ratified this treaty are Central African Republic, Congo, Côte d'Ivoire, Congo, Djibouti, Congo, Gabon, Guinea Bissau, Liberia, Mauritania, Sahrawi Arab Democratic Republic, Somalia, São Tomé and Príncipe, Sudan, Swaziland, Tunisia and Zambia. See <http://www.africa-union.org/home/Welcome.htm> (accessed 31 July 2006).

<sup>31</sup> Art 16(1).

State parties are also required to ensure that 'no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment or punishment'.<sup>32</sup>

Unlike the Inter-American and the European systems of human rights, the African human rights system expressly extends the right to freedom from torture to children. This could be attributed to the fact that in many African countries, children still suffer maltreatment at the hands of public entities and private individuals. In some African countries, children are detained in the same cells as adults<sup>33</sup> and are at times subjected to torture when prison or police authorities want to extract confessions from them with regard to some of the offences they are alleged to have committed. Their protection against torture is therefore of utmost importance, especially in cases where they have been deprived of their liberty.

## **6 Mechanisms to protect the right to freedom from torture in Africa**

It is one thing to enumerate rights in an instrument and another to realise those rights. The African human rights system has put in place mechanisms to safeguard, among other rights, the right to freedom from torture. The discussion below will cover those mechanisms.

### **6.1 The African Commission on Human and Peoples' Rights**

The African Commission is established under article 30 of the African Charter with the mandate of promoting human and peoples' rights<sup>34</sup> by collecting documents, undertaking studies and research on African problems in the field of human and peoples' rights, organising seminars, symposia and conferences, disseminating information, encouraging national and local institutions concerned with human and peoples'

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<sup>32</sup> Art 17(2)(a).

<sup>33</sup> In some instances prison authorities 'inflate' children's ages and detain them with adults.

<sup>34</sup> Art 45. The Committee on the Rights and Welfare of the Child that is established under art 32 of the African Children's Charter has the same mandate as the African Commission. See art 42. Like the African Commission, it has the jurisdiction to entertain individual communications (art 44) and to examine reports from state parties on the efforts taken to comply with the provisions of that treaty (art 43). However, it does not have jurisdiction to entertain inter-state communications. Its jurisprudence has not yet been developed and therefore it will not be necessary to discuss it in detail here.

rights, and, where necessary, giving its views or making recommendations to governments.

### 6.1.1 Seminars and conferences

As mentioned above, one of the ways in which the African Commission is empowered to promote human and peoples' rights is by organising seminars and conferences. If implemented properly, this could be one of the best mechanisms to combat torture. Seminars and conferences could be used to create awareness about the prohibition on torture and also to call upon governments to ratify the relevant international treaties that prohibit torture.

However, it can safely be stated that the African Commission has not been very effective in this regard. According to the Activity Reports of the African Commission, very few seminars or conferences dealing with torture have been organised, and the same applies to those at which the African Commission has been represented.<sup>35</sup> This could be

<sup>35</sup> In the Tenth Annual Activity Report, none of the four workshops organised by the African Commission was on torture, apart from the fact that it was mentioned at a workshop on prison conditions held in Kampala, Uganda (para 17); in the Eleventh Annual Activity Report, of the seven seminars organised by the Commission, none was on torture (para 22). Torture is only mentioned in passing as one of the issues raised (para 24); in the Twelfth Annual Activity Report, of the six seminars and conferences the Commission organised, none dealt specifically with torture and this applied to all the six seminars at which the Commission was represented, (para 21); in the Thirteenth Annual Activity Report, of all the seminars and conferences at which the Commission was represented, torture was not on the agenda (paras 20-22 (a-g)); in the Fourteenth Annual Activity Report, of the three workshops (excluding those attended by the Chairperson of the Commission) none dealt with torture (para 16)), none of the seminars at which the Commission was represented dealt with torture (para 17). However, it is vital to note that, of the eight seminars organised by the Commission during that period, one was on torture (para 18); and in the Fifteenth Annual Activity Report, the trend shifted towards the Commission getting interested in co-organising and attending seminars dealing specifically with torture, thanks to the role played by the Association for the Prevention of Torture (a Geneva-based non-governmental organisation (NGO)). Consequently, from 12 to 14 February 2002, Commissioners Andrew Chigovera and Barney Pitanya attended a workshop on The Prevention of Torture and Ill-Treatment in Africa, held at Cape Town and Robben Island, South Africa. This workshop was organised by APT in collaboration with the African Commission and resulted in the adoption of the RIG. Commissioner Ben Salem also maintained contacts with APT. Commissioner EVO Dankwa attended a seminar on The Definition of Torture organised by the APT from 10 to 11 November 2001 (see paras 17-21). The influential role of APT on the Commission in the area of torture also features highly in the Seventeenth Annual Activity Report 2003-2004 (see para 35) (one official from APT is a member of the Commission's Follow-Up Committee on RIG), para 39 (APT actively participated in the launching and publicising of the RIG on 11 July 2003 at Maputo, Mozambique), and para 40 (where APT together with the Commission held a consultative meeting about the implementation of RIG at Ouagadougou, Burkina Faso, 8 to 9 December 2003).

attributed to factors such as the lack of sufficient funding<sup>36</sup> and also that there are many duties<sup>37</sup> and rights in the African Charter that the African Commission, consisting of 11 commissioners<sup>38</sup> (who do not work on a full-time basis) has to oversee. In its Eighteenth Activity Report (28 June to 2 July 2005),<sup>39</sup> the African Commission specifically mentions the prohibition and prevention of torture as some of the activities that the commissioners carried out during the period under review and it makes torture part of its promotional activities (see paragraph 21). This has, however, been at the expense of having torture feature in the seminars and conferences organised by the African Commission.<sup>40</sup>

### 6.1.2 Laying down rules and co-operating with African and international institutions

The African Commission is empowered to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation and also to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.<sup>41</sup>

In an attempt to fulfil these two duties with regard to the right to freedom from torture, the African Commission, together with the Association for the Prevention of Torture,<sup>42</sup> drafted and later adopted the Robben Island Guidelines (RIG), which are discussed below, and has ensured their distribution in some African countries.<sup>43</sup> It is assumed

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<sup>36</sup> The Commission has acknowledged that it lacks sufficient funding from the African Union to carry out its activities (see para 63 of the Seventeenth Annual Activity Report 2003-2004). It was not until the intervention of APT that the Commission started concentrating on torture. Like other activities of the African Commission, it is the NGOs who influence the activities of Special Rapporteurs. See M Evans & R Murray 'The Special Rapporteurs in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2004) 289. In the Eighteenth Activity Report (28 June to 2 July 2005), EX CL/199(VII), the African Commission reports that its 'work . . . was compromised due to lack of funding', and that the 'Commission was unable to carry out several promotion missions to member states' (see para 58).

<sup>37</sup> Arts 27-29.

<sup>38</sup> Art 31.

<sup>39</sup> See n 36 above.

<sup>40</sup> Paras 38-41 of the report that covers the conferences and seminars that were organised by the African Commission indicate that in none of the seminars or conferences did torture feature on the agenda.

<sup>41</sup> Arts 45(1)(b) & (c).

<sup>42</sup> It is a Geneva-based human rights NGO.

<sup>43</sup> Commissioner Angela Melo distributed the RIG and the resolution leading to their adoption to the Ministries of Foreign Affairs, Justice and Interior, Parliaments and women NGOs in lusophone countries. See Sixteenth Annual Activity Report (2002-2003) para 20.



that African governments will base their legislation relative to torture on the RIG.<sup>44</sup> The African Commission has liaised with certain institutions, especially prison authorities, in some European countries in an effort to gain an insight on how, among other rights, torture can be prevented in places of detention,<sup>45</sup> and also with various human rights institutions in Africa.<sup>46</sup> It has granted observer status to many non-governmental organisations (NGOs) that deal with torture.<sup>47</sup>

### 6.1.3 Inter-state and individual communications

The African Commission has the mandate to entertain both inter-state<sup>48</sup> and individual communications.<sup>49</sup> As is the case in the Inter-American and European systems of human rights, the inter-state procedure is rarely resorted to by African states, notwithstanding the fact that some countries grossly violate the provisions of the African Charter.<sup>50</sup> Traditionally, African states have tended to emphasise the principle of non-interference, which originates in the Charter of OAU<sup>51</sup> and

<sup>44</sup> The African Commission has recommended that the government of Zimbabwe study and implement the RIG after allegations of torture were made during its fact-finding mission to Zimbabwe (see Executive Summary of the Report of the Fact-Finding Mission to Zimbabwe 24-28 June 2002) Annex II, Seventeenth Annual Activity Report 2003-2004. However, it should be noted that in the same report, the government of Zimbabwe discredited the findings of the fact-finding mission on a number of grounds, among others that the Commission did not carry out enough research to verify whether the alleged stories of torture had not been fabricated (see Comments by the Government of Zimbabwe on the Report of the Fact-Finding Mission in the Seventeenth Annual Activity Report).

<sup>45</sup> The Special Rapporteur on Prisons and Conditions of Detention in Africa 'informed the Commission that he [Prof EVO Dankwa] had visited various prisons in Paris, France'; see Thirteenth Annual Activity Report (para 27); and 'As part of her [Commissioner Chirwa's] and to be able to study the practices of developed countries, the Special Rapporteur also visited one prison in Glasgow, UK on 9th April 2002' (Fifteenth Annual Activity Report (para 30)).

<sup>46</sup> C Heyns (ed) *Human rights law in Africa* (2004) 611. The African Commission has to date granted affiliation status to 15 national human rights institutions; see Seventeenth Annual Activity Report (para 56).

<sup>47</sup> n 46 above, 604-610. For a detailed discussion of the role of NGOs in the African human rights system, see A Motala, 'Non-governmental organisations in the African system' in Evans & Murray (n 36 above) 246-279.

<sup>48</sup> Arts 47-54.

<sup>49</sup> Arts 55-59.

<sup>50</sup> Countries like the Sudan that have violated human rights in Darfur should have been taken to the Commission by some African states. 'It is only recently that the Commission was seized for the first time with an inter-state communication [Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*] worthy of the name.' See F Ouguergouz *The African Charter on Human and Peoples' Rights. A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 571.

<sup>51</sup> Art III(2) of the Charter of the OAU, adopted in Addis Ababa, Ethiopia, on 25 May 1963, entered into force on 13 September 1963; replaced in 2001 by the Constitutive Act of the African Union. See O Umzurike 'The complaint procedure of the African Commission on Human and Peoples' Rights' in G Alfredsson *et al* (eds) *International human rights monitoring mechanisms. Essays in honour of Jakob Th Möller* (2001) 707.

which was recently re-introduced by the Constitutive Act of the African Union (AU).<sup>52</sup> The African Commission therefore has no true practice in this respect,<sup>53</sup> and consequently it is not going to be a subject of detailed discussion. However, it is important to note that the inter-state complaint procedure has been rightly criticised, in light of the Inter-American and European procedures, as 'too state-centric' with the African Commission appearing to settle 'inter-state disputes rather than serving as a watchdog of human rights transgressions'.<sup>54</sup>

However, many individual communications have been filed, by both individuals and NGOs, to the African Commission alleging the violation of the right to freedom from torture. These communications indicate the extent to which the right to freedom from torture is violated in Africa, the brutality of the methods used,<sup>55</sup> the misunderstanding of the meaning of torture by the complainants,<sup>56</sup> and the failure by the African Commission to define torture. (To date, the African Commission has not defined what torture is, though it has in numerous communications held that the right to freedom from torture has been violated.)<sup>57</sup> They also indicate the unfortunate instance where the Commission allowed the state to amicably settle with the victims a communication that alleged torture.<sup>58</sup>

<sup>52</sup> Accepted in Lomé, Togo, on 11 July 2000, and entered into force on 26 May 2001; CAB/LEG/23 15.

<sup>53</sup> Ouguergouz (n 50 above) 572.

<sup>54</sup> O Ojo & A Sesay 'The OAU and human rights: Prospects for the 1980s and beyond' (1986) 8 *Human Rights Quarterly* 89, quoted in J Pehman *International human rights law. A practical approach* (2003) 255.

<sup>55</sup> In *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), International Pen alleged that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to beatings and held in cells which were airless (para 80). In *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), it was alleged that many villagers were arrested and tortured. A method of torture called 'jaguar' was used where the victim's wrists are tied to his feet, he is then suspended from a bar and thus kept upside down, some times over a fire and he is beaten on the soles of the feet. Other forms of torture involved beating the victim, burning them with cigarette stubs or with a hot metal. As for women, they were just raped (para 20). Other methods included electric shock to the genital organs, as well as burns all over the bodies (para 22). Detainees at J'Reida military camp were allegedly undressed, had their hands tied behind their backs, were sprayed with cold water and beaten with iron bars (para 23).

<sup>56</sup> In *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), the complaints alleged the detaining of persons incommunicado and preventing them from seeing their relatives amounted to torture (para 56) and this was rightly rejected by the Commission.

<sup>57</sup> The African Commission has not attempted to define the meaning of the term torture. In *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000), the Commission relied on standards laid down in the case of *Ireland v The United Kingdom* (para 41).

<sup>58</sup> In *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000), which alleged that torture had been committed against members of the Afar ethnic group and indicated that 26 people had been tortured (para 1), the Commission opted for an amicable settlement because the government had requested so.

These communications also indicate the standard of proof of torture,<sup>59</sup> and an instance where the African Commission declared as inadmissible a communication which clearly alleged torture on the ground that it was couched in an insulting and disparaging language.<sup>60</sup> Though the African Charter gives the Commission discretion to declare a communication inadmissible when it has been phrased in insulting and disparaging language,<sup>61</sup> it is argued that the Commission in this case should have looked at the substance of the communication and not the form.<sup>62</sup> It could be argued that not very many lawyers, victims of human rights abuses and human rights activists know about the procedural technicalities involved at the African Commission level<sup>63</sup> and the Commission should always give them the benefit of doubt in cases like this. The protection of human rights should take precedence over technical legal issues which may be beyond the understanding and appreciation of non-experts in the African human rights system.

#### 6.1.4 Absence of a Special Rapporteur and torture

The African Charter does not provide for the institution of Special Rapporteurs. However, having seen how effective Special Rapporteurs have been under the United Nations (UN) system, the African Commission has started to appoint Special Rapporteurs in order to strengthen its promotional and protectional roles of human and peoples' rights.<sup>64</sup> The Commission has appointed five Special Rapporteurs on the following thematic issues: Extra-Judicial Executions, Prisons and Conditions of Detention, Women's Rights, Human Rights Defenders in Africa and

<sup>59</sup> The Commission has always required medical evidence to back up the allegations of torture for it to find a violation. In *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999), the communication (para 7) included medical evidence that the victim, Mr Charles B Wiwa, had been tortured and the Commission admitted it and found a violation. However, in *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000), which alleged that Mr Ayodele Ameen had been tortured by the Nigerian security officials, and where no medical evidence was adduced to substantiate the allegations, the Commission did not find a violation of art 5 (para 16).

<sup>60</sup> *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997), the communication which alleged that between 1984 and 1989 at least 46 prisoners were tortured was declared inadmissible because, among other things, it referred to the ruling regime as a 'regime of torturers'.

<sup>61</sup> Art 56(3).

<sup>62</sup> 'In principle, it appears diversionary to reject a communication because of the quality of the phraseology.' See Umozurike (n 51 above) 709.

<sup>63</sup> This is probably because the Commission has not created much awareness about its procedural aspects in many parts of Africa. It is rightly suggested that 'apparently, this problem is universal. African NGOs, like their Inter-American counterparts, have great difficulties in trying to use the African systems when seeking to vindicate the rights of the victims.' See M Hansungule 'Protection of human rights under the Inter-American system: An outsider's reflection' in Alfredsson (n 51 above) 689.

<sup>64</sup> M Evans & R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 36 above) 280.

Refugees and Internally Displaced Persons in Africa.<sup>65</sup> It is vital to note that the Special Rapporteur on Extra-Judicial Executions had difficulties in carrying out his work and he consequently resigned and the office was closed.<sup>66</sup> Some authors rightly concluded that 'this has been largely a wasted opportunity and a matter of some considerable embarrassment for the reputation of the African human rights system in general and the African Commission in particular'.<sup>67</sup>

The Special Rapporteur on Prisons and Conditions of Detention in Africa is mandated, among other things, to examine the situation of prisons and prison conditions in Africa and to ensure the protection of persons in detention or in prisons.<sup>68</sup> The mandate of the Special Rapporteur is based on many human rights treaties, declarations and codes of conduct, including CAT and the African Charter. The Special Rapporteur has generally been regarded as successful.<sup>69</sup>

Nevertheless, it can be safely argued that this institution has not been effective in preventing torture in Africa. This can be attributed to two factors. One is that the Special Rapporteur has many issues to focus on during these visits to prisons or places of detention. Therefore there is not enough time to concentrate on investigating allegations of torture. Any investigation of torture would need at least the involvement of a physician and a psychologist to verify whether the allegations correspond with the medical examination or a psychological assessment.<sup>70</sup>

The second factor is that the Special Rapporteur does not have

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<sup>65</sup> The nomination of the last two is reported in the Seventeenth Annual Activity Report 2003-2004 (para 34). They are Commissioner Bahame Tom Mukirya Nyanduga (Special Rapporteur on Refugees and Internally Displaced Persons in Africa) and Commissioner Jainaba Johm (Special Rapporteur on Human Rights Defenders in Africa).

<sup>66</sup> See Twelfth Annual Activity Report (para 25) and Fourteenth Annual Activity Report (para 20).

<sup>67</sup> Evans & Murray (n 64 above) 289.

<sup>68</sup> Mandate of the SRP [http://www.achpr.org/english/\\_info/index\\_prison\\_en.html](http://www.achpr.org/english/_info/index_prison_en.html) (accessed 15 September 2005).

<sup>69</sup> Evans & Murray (n 64 above) 292. See also Ouguergouz (n 50 above) 498-501. The SRP has carried out a number of prison visits to various African countries. The SRP has been to Zimbabwe (Tenth Annual Activity Report Annex VII); Madagascar, Mali and Mozambique (Eleventh Annual Activity Report paras 30-31); Cameroon, Kenya, Uganda and Zimbabwe (once again) (Twelfth Annual Activity Report paras 26-27); Benin, The Gambia and Mali (once again) (Thirteenth Annual Activity Report para 26); Mozambique (once again) (Fourteenth Annual Activity Report para 22); Malawi, Namibia, and Uganda (once again) (Fifteenth Annual Activity Report para 30); Benin (once again) and Cameroon (once again) (Sixteenth Annual Activity Report para 25); and Ethiopia and Malawi (once again) (Seventeenth Annual Activity Report para 28).

<sup>70</sup> The European Committee for the Prevention of Torture, eg, ensures that medics and psychologists form part of the teams that visit places of detention. See R Morgan & MD Evans (eds) *Protecting prisoners. The standards of the European Committee for the Prevention of Torture in context* (1999) 13.

enough time<sup>71</sup> and resources (both financial and human)<sup>72</sup> to visit all places of detention and prisons in all African countries (let alone in one country) every year. Consequently, visits of the Special Rapporteur are limited to a few countries for a very short period of time, and, needless to say, to a few prisons or places of detention in the capital cities or major towns. The issue of human resources is a vital one, especially when it comes to investigating and documenting allegations of torture. The Special Rapporteur or any member on the team should be able to spend enough time in a place of detention, talk to the prisoner or detainee in a language both understand, and be able to verify the allegations of torture by carrying out a medical examination on the alleged victim.

It is unfortunate that the future of the Special Rapporteur is uncertain. This is due to the fact that in 2003, Penal Reform International, a Paris-based NGO and the backbone of the Special Rapporteur, withdrew its financial support<sup>73</sup> and the activities of the Special Rapporteur were gravely affected.<sup>74</sup> In the Eighteenth Activity Report, it is reported that the Special Rapporteur, Dr Vera Mlangazuwa Chirwa, conducted missions in only two countries during the period under review; that is, in Keyna and South Africa.<sup>75</sup> What is also of note about those two missions is that the Special Rapporteur did not highlight whether there were any allegations of torture in the prisons that she visited. Therefore, the discussion whether it is an effective way of preventing torture in Africa is of no practical importance unless the financial situation changes positively, enabling the office of Special Rapporteur to effectively investigate and document allegations of torture in prisons.

## 7 The Robben Island Guidelines

### 7.1 A brief introduction to the Robben Island Guidelines

There is no academic work as yet done on the RIG and therefore this

<sup>71</sup> On his first visit, the SRP spent 10 days in Zimbabwe. See Ouguergouz (n 50 above) 498. The SRP was in Malawi from 17 to 26 June 2001, in Namibia from 17 to 28 September 2001, and in Uganda from 11 to 23 March 2002 (Fifteenth Annual Activity Report para 30); in Cameroon from 1 to 14 September 2002, in Benin from 23 January to 5 February 2003 (Sixteenth Annual Activity Report para 25); and in Ethiopia from 15 to 29 March 2004 (Seventeenth Annual Activity Report para 28). This clearly shows that there is not much time available for the SRP to spend in a given country.

<sup>72</sup> The SRP has always depended on the funding provided by an NGO called Penal Reform International and, as will be discussed later, when it withdrew its funding, the activities of the SRP came to a standstill.

<sup>73</sup> The official reason for the withdrawal of financial support is not given in the Seventeenth Annual Activity Report.

<sup>74</sup> Paras 27-28 Seventeenth Annual Activity Report.

<sup>75</sup> Para 24 Eighteenth Annual Activity Report.

section will be based on the *travaux préparatoires*<sup>76</sup> and the text of the RIG. Two factors spring immediately to the mind as to why no commentary has appeared: One is that the RIG is a relatively new development (barely three years old) and secondly, few writers write about torture in Africa.<sup>77</sup>

## 7.2 The history of the Robben Island Guidelines

Realising that there was a need to develop a torture-specific instrument in Africa, and that the prevention of torture is a multidimensional issue, the Association for the Prevention of Torture (APT) made an oral presentation at the 29th session of the African Commission in Tripoli, Libya, and informed the Commission that it was to organise 'a workshop that would reflect on measures and concrete strategies and that it would draw up the draft of a plan of action [for the prevention of torture in Africa]'.<sup>78</sup> In the same presentation, APT proposed the objectives of the workshop,<sup>79</sup> the number of participants<sup>80</sup> as well as the date<sup>81</sup> and venue of the workshop.<sup>82</sup>

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<sup>76</sup> The author was able to acquire this by fax and e-mail from the APT. The following documents were acquired and are available on file with the author: a copy of the letter dated 16 January 2001 in which the African Commission gave APT the go-ahead to organise the workshop; a copy of the introductory paper containing proposals for the plan of action for the prevention of torture in Africa that was presented and discussed at the workshop in Cape Town and Robben Island, South Africa; a copy of the letter dated 6 August 2001 in which the African Commission notified APT that Commissioner Andrew Chigovera had been designated to work with the APT in preparing the workshop; and a copy of the letter dated 1 November 2002 in which the African Commission informed APT that a resolution has been passed at the 32nd ordinary session that adopted the RIG.

<sup>77</sup> Some developments in Africa attract the attention of writers before they are even implemented. This was the case, eg, with the International Criminal Tribunal for Rwanda and also with the Special Court for Sierra Leone.

<sup>78</sup> See oral presentation by APT <http://www.apr.ch/africa/oralapr29.htm> (accessed 31 July 2006).

<sup>79</sup> It had 'the goal of drafting a plan of action for the prevention of torture and ill-treatment in Africa'.

<sup>80</sup> It proposed 15, including the Chairperson of the Commission, three members of the Commission, the Secretary of the Commission, a representative of the General Assembly of the OAU (as it then was), as well as other international experts, notably a representative of the International Committee of the Red Cross, the UN Committee Against Torture, the Inter-American Human Rights Commission and the European Committee for the Prevention of Torture. However, the workshop was not able to attract all the anticipated experts. Notably absent were experts from the UN Committee on Torture, the European Committee for the Prevention of Torture and the Inter-American Commission on Human Rights. It did, however, attract participants from relevant human rights bodies. See list of participants at the Workshop on the Prevention of Torture and Ill-treatment in Africa Cape Town and Robben Island 12-14 February 2002 <http://www.apr.ch/Africa/rig/Robben%20Island%20Participants.pdf> (accessed 14 September 2005).

<sup>81</sup> It proposed 12-14 December 2001.

<sup>82</sup> It proposed Johannesburg, South Africa.

The African Commission, in a letter dated 16 January 2001,<sup>83</sup> informed APT that it was 'in agreement with [the] proposal [for APT] to hold a workshop' and urged APT to follow up on the matter. After that, APT drafted an introductory paper,<sup>84</sup> which would later form the basis of the discussion and also of the RIG. The paper proposed that the plan of action should include legal, control and training and empowerment measures for the prevention of torture.<sup>85</sup> It also indicated that around 20 African and international experts would be invited to the workshop,<sup>86</sup> and that the venue of the workshop would be at Robben Island, South Africa<sup>87</sup> from 12 to 14 February 2002. The reason for holding the workshop at Robben Island was given:<sup>88</sup>

Robben Island has been chosen for the final day<sup>89</sup> of the workshop and as a focus of the closing ceremony, because it is a place which has come to symbolise the fight against repression. To finalise the 'Robben Island Plan of Action' for the prevention of torture and ill-treatment and to hold a closing ceremony there, would have a powerful and symbolic impact.

The African Commission<sup>90</sup> notified APT that Commissioner Andrew Chigovera had been designated to work in collaboration with APT to organise the workshop. The workshop took place as indicated and the Robben Island Statement was adopted on 14 February 2002 recommending, among other things, that the African Commission adopts 'a resolution endorsing the Robben Island Guidelines'.<sup>91</sup> At its 32nd ordinary session,<sup>92</sup> the African Commission adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.<sup>93</sup> In a letter dated 1 November 2002,<sup>94</sup> the African Commission informed APT that a resolution had been passed on the Robben Island Guidelines.

### 7.3 The Robben Island Guidelines and its approach to torture

The RIG approaches the question of torture in three ways: prohibition, prevention, and responding to the needs of victims. Each way enumer-

<sup>83</sup> ACHPR/ORG/MIS available on file with the author.

<sup>84</sup> Available on file with the author.

<sup>85</sup> Para II(a).

<sup>86</sup> Hence increasing the number from 15; see para II(b).

<sup>87</sup> Changing it from Johannesburg; see para II(c).

<sup>88</sup> As above.

<sup>89</sup> The paper states that '[f]or practical and logistical reasons the first two days of the workshop will be held in Cape Town, where better conference and accommodation facilities are located. The final day of the workshop will be held on Robben Island.'

<sup>90</sup> ACHPR/OBS/164, available on file with the author.

<sup>91</sup> Robben Island Statement <http://www.apr.ch/africa/rig/Robben%20Island%20Statement.pdf> (accessed 14 September 2005).

<sup>92</sup> Held in Banjul, The Gambia, from 17 to 23 October 2002.

<sup>93</sup> See Annex VI to the Sixteenth Annual Activity Report.

<sup>94</sup> ACHPR/SEM/3, available on file with the author.

ates in detail the measures that should be taken in that regard. It is beyond the scope of this paper to reproduce the RIG, but that notwithstanding, an attempt will be made to briefly tackle what is required under each approach.

### 7.3.1 Prohibition of torture

African states are required to take six measures to prohibit torture: the ratification of regional and international instruments;<sup>95</sup> the promotion and support of co-operation with international mechanisms (including the African Commission, UN human rights treaty bodies and the UN Special Rapporteur on Torture);<sup>96</sup> criminalisation of torture;<sup>97</sup> and non-refoulement (no one is to be expelled or extradited to a country where he or she is at the risk of being subjected to torture).<sup>98</sup> The RIG also requires states to combat impunity for both nationals and non-nationals who commit acts of torture;<sup>99</sup> and to establish complaints and investigation procedures to which all persons can bring their allegations of torture.<sup>100</sup>

### 7.3.2 Prevention of torture

States are required to establish basic procedural safeguards for those deprived of their liberty (the rights to an independent medical examination and of access to a lawyer);<sup>101</sup> to establish safeguards during the pre-trial process (this includes prohibiting the use of incommunicado detention and ensuring that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation);<sup>102</sup> to take steps to ensure that conditions of detention comply with international standards;<sup>103</sup> to establish mechanisms of oversight (this includes ensuring the independence of the judiciary, of the national human rights bodies with the mandate to carry out visits to places of detention, to encourage and facilitate visits by NGOs to places of detention, and to support the adoption of the Optional Protocol to CAT to create an international visiting mechanism with the mandate to visit all places of detention);<sup>104</sup> states are also required to train and empower (among others) law enforcement officers so that they refrain from using

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<sup>95</sup> Part IA (1 a-d).

<sup>96</sup> Part IB (2-3).

<sup>97</sup> Part IC (4-14).

<sup>98</sup> Part ID (15).

<sup>99</sup> Part IE (16 a-e).

<sup>100</sup> Part IF (17-19).

<sup>101</sup> Part IIA (20 a-d).

<sup>102</sup> Part IIB (21-32).

<sup>103</sup> Part IIC (33-37). In particular, they should comply with the UN Standard Minimum Rules for the Treatment of Prisoners, UN ECOSOC Res 663 C (XXIV) 31 July 1957 as amended by UN ECOSOC Res 2076 (LXII), 13 May 1977.

<sup>104</sup> Part IID (38-44).



torture;<sup>105</sup> and, finally, to educate and empower civil society so that they disseminate information relating to the prohibition of torture.<sup>106</sup>

### 7.3.3 Responding to the needs of victims

States are required to ensure that all victims of torture and their dependants are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support. In addition, families and communities which have been affected by the torture and ill-treatment of one of its members can also be considered torture victims.<sup>107</sup>

## 8 Conclusion

The above discussion covered torture in Africa and the African human rights instruments to address it. It was largely based on the Activity Reports of the African Commission because it is not possible to find many books written about torture in Africa, apart from the reports by human rights organisations such as Amnesty International and Human Rights Watch.

Much as the RIG derives its provisions substantially from CAT, it leaves a lot to be desired. In the first place, it is not binding on states, as it is a mere declaration and not a treaty. Its enforcement mechanism is very weak. A follow-up committee was established, but it has only five members with the mandate to organise, with the support of interested partners, seminars to disseminate the RIG, to develop and propose to the African Commission strategies to promote and implement the RIG at national and regional levels, to promote and facilitate the implementation of the RIG within member states, and to draft a progress report to the African Commission at each session.<sup>108</sup> This is clearly too much work for only five individuals.

The RIG does not give the follow-up committee 'real power', such as by authorising it to visit places of detention, nor do members of the follow-up committee enjoy any immunity<sup>109</sup> when carrying out their work. This means that there is a need to establish a committee that has the same powers and privileges as that in the European system. This can only be achieved by having that committee established by a treaty and not a declaration, and therefore it is argued that there is a need for Africa to adopt a treaty on torture.

<sup>105</sup> Part IID (45-46).

<sup>106</sup> Part IIE (47-48).

<sup>107</sup> Part III (49-50 a-c). This part attempts to draw a distinction between primary and secondary victims to torture.

<sup>108</sup> See Resolution on the RIG adopted by the African Commission at its 32nd ordinary session, 17-23 October 2002, Banjul, The Gambia (para 3).

<sup>109</sup> Members of the European Committee for the Prevention of Torture enjoy immunity when carrying out their activities. See art 16 of the European Convention on Torture.

# The right to an effective remedy under the African Charter on Human and Peoples' Rights

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## Summary

*The question of remedies lacks clarity in international human rights law, in particular under the African Charter on Human and Peoples' Rights. Yet, no protected right would have any meaning to its claimants without the provision for effective mechanisms to give effect to it, including an effective remedy when breached. The very concept of a right carries with it a duty to redress its violation. While the African Charter does not contain a specific provision on the right to an effective remedy, a somewhat rudimentary jurisprudence and practice has emerged through 'situational' interpretation. This article considers the chequered practice of the African Commission with regard to this right under the African Charter, arguing that the 'remedies jurisprudence' from the Commission lacks in theorisation, is inconsistent and unco-ordinated. As such, the African Commission's laudable efforts in elaborating substantive Charter standards are not complemented by a reasoned remedies jurisprudence. The article outlines the right to effective remedies in two respects. It reviews generally the African Commission's jurisprudence specific to this right with a view to establishing its thinking. In this regard, because of the focus of the African Commission's jurisprudence, the article pays more attention to domestic remedies as opposed to locating this jurisprudentially in international human rights law generally.*

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*By reviewing the practice of the African Commission in respect of the communications procedure, which it concludes as being for the most part deferential to states, it evaluates the Commission's effectiveness as a forum of recourse for human rights violations. It also considers, in an abridged manner, how the Protocol to the African Court on Human and Peoples' Rights may change, if at all, the regime on remedies under the Charter.*

## 1 Introduction

The African human rights system, founded on the African Charter on Human and Peoples' Rights (African Charter),<sup>1</sup> has in its 20 years travelled a difficult road. Inspired by other initiatives of its kind, and though charged with the mandate of offering region-specific solutions for human rights concerns while drawing from the former experiences, it has not been immune to the obstacles that confront a somewhat revolutionary idea in an unreceptive political environment where human rights were largely considered a foreign (Western) concept.<sup>2</sup> From the African Charter's embryonic days at the 1961 Lagos Conference on the Rule of Law, to its eventual adoption in Nairobi, to Banjul 20 years later, it has been a journey of many false starts indeed.<sup>3</sup> Celebrated at inception as the most important development in human rights protection on the continent, commentators got over the euphoria and began to interrogate the African Charter for what it really was — a far from perfect, sparsely-drafted instrument that would need creativity to achieve its intended objectives. It has been no surprise, therefore, that the Charter and its main oversight body, the African Commission on Human and Peoples' Rights (African Commission), have received some of the most trenchant criticisms relating to various aspects, ranging from the scope and content of protected rights to the nature of enforcement mechanisms established and to various practices

<sup>1</sup> African [Banjul] Charter on Human and Peoples' Rights adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, (1982) 21 *International Legal Materials* 58, entered into force 21 October 1986.

<sup>2</sup> The African regional human rights system was preceded by the European and Inter-American systems established by the European Convention on Human Rights and Fundamental Freedoms (1950) and the American Convention on Human Rights (1978), together with the American Declaration on the Rights and Duties of Man (1948).

<sup>3</sup> On the legislative history of the Charter, see M Hansungule 'The African Charter on Human and Peoples' Rights' (2000) 8 *African Yearbook of International Law* 265; AE Anthony 'Beyond the paper tiger: The challenge of a human rights court in Africa' (1997) 32 *Texas International Law Journal* 511; C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 679-685-686.

under the African Charter.<sup>4</sup> Yet, in this period there have also been a lot of recognisable developments rightly applauded by commentators.<sup>5</sup> Most notably, the constructive elaboration of sparsely-drafted Charter provisions has seen some of the most outstanding jurisprudence issue from the African Commission.<sup>6</sup> As a result, there exists now a burgeoning *corpus* of continental human rights jurisprudence. This development has been accompanied by the deployment of various procedures aimed at effectively implementing various African Charter mandates. This paper argues with respect to effective remedies that, due to the unco-ordinated nature of the African Commission's decisions, no jurisprudential thread is apparent. The generally short and unreasoned closing comments on remedies have stunted the Commission's jurisprudence. This has not served to illuminate this problematic area in human rights protection and international law generally. Further, the Commission's deferential attitude towards states and inappropriate insistence on amicable settlements has rendered the Commission an ineffective forum of recourse for victims of human rights violations.

A survey of the jurisprudence of the African Commission shows that the question of remedies has been considered in two different contexts: admissibility proceedings and 'substantive jurisprudence' in the elaboration of specific rights under the African Charter, in particular at the stage where the African Commission recommends remedial action by states after finding a violation. The question has, however, been largely canvassed within the context of the admissibility procedure, hence seems to have dictated, as we note later, the main focus of Commission's commentary on national remedies. This paper does

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<sup>4</sup> See eg J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa' (1995) 35 *California Western International Law Journal* 1; M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; C Heyns 'The African human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155; S Gutto 'The reform and renewal of the African regional human and peoples' rights system' (2001) 1 *African Human Rights Law Journal* 175; KA Acheampong 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights' (2001) 1 *African Human Rights Law Journal* 185; CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 225.

<sup>5</sup> See M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002). Pleadings relate mainly to the Commission's contribution in elaborating standards.

<sup>6</sup> See C Heyns (n 3 above) 688-689. Some of the landmark decisions include *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (elaborating a number of rights, but notably the right to the environment; a number of Constitutional Rights Project cases against Nigeria (concerning fair trial guarantees, the right to life and self-determination among others); *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997) (respecting the right to political participation); and *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) (in respect of the interpretation of the African Charter).

not, however, delve into a detailed examination of the admissibility procedure, which has received able and comprehensive comment elsewhere.<sup>7</sup>

Before the African Commission, as is the case for any international forum adjudicating a state's human rights performance through individual complaints, the question of exhaustion of local remedies, among other factors,<sup>8</sup> is often the subject of inquiry at the preliminary stage. During this process, when the Commission has to consider whether to admit a complaint for further consideration on merits, domestic mechanisms are subjected to scrutiny to establish, among other things, how effective they are (or have been) as avenues of recourse for the alleged human rights violations. Apart from the admissibility inquiry, as used in this paper, the concept of effective remedy can be considered in the light of two components: as a substantive right in its own right, and as a constituent element of other rights enshrined under the African Charter.

## 2 The right to an effective remedy

While the protection of human rights is a primary aim of modern international law, terminological uncertainty bedevils the subject of remedies in international law generally.<sup>9</sup> Additionally, questions abound largely with respect to the lack of adequately theorised jurisprudence from international as well as national tribunals on the subject of remedies.<sup>10</sup> Given the number of international oversight bodies disposing different mandates, with limited 'cross-fertilization', the existing *corpus* of jurisprudence on the question of remedies is for the most part uncoordinated and incoherent.<sup>11</sup> At the regional level, although the African Commission has repeatedly pronounced itself on the question of effective remedies, demonstrably, it has not usefully illuminated it, a fact that perhaps has led commentators to afford but fleeting attention to the question in the African regional human rights context.<sup>12</sup>

<sup>7</sup> On the African Commission's practice regarding the admissibility procedure generally, see F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (n 5 above) 61-99. See also generally NJ Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 1.

<sup>8</sup> In terms of art 56 of the African Charter, a matter will only be admitted for consideration if it is compatible with the Charter; its authors are not anonymous; it is not written in disparaging language; is submitted within a reasonable time; and does not deal with cases which have been settled by the state(s).

<sup>9</sup> D Shelton *Remedies in international human rights law* (2003) 1-4; SL Haasdijk 'The lack of uniformity in the terminology of the international law of remedies' (1992) 5 *Leiden Journal of International Law* 245, cited in Shelton 4.

<sup>10</sup> Shelton (n 9 above).

<sup>11</sup> For a discussion of the various mandates, see Shelton (n 9 above) 177-237.

<sup>12</sup> As part of her study on remedies in international law, Shelton substantially considers the Inter-American and European regional experiences, but affords only cursory treatment of the African human rights system. See Shelton (n 9 above) 219-216.

Generally, the term 'remedy', often used interchangeably with 'redress', can be understood to refer to 'the range of measures that may be taken in response to an actual or threatened violation of human rights'.<sup>13</sup> It entails substantive as well as procedural facets.<sup>14</sup> In its substantive sense, remedy connotes the outcome of proceedings, and the relief afforded to the claimant.<sup>15</sup> In this sense, it covers a range of measures which includes, but which is not limited to, declarations, compensation and reparations.<sup>16</sup> The avenues and enabling processes by which claims relating to human rights violations are articulated fulfil its procedural element. These may include courts, administrative tribunals, commissions or other competent bodies.<sup>17</sup> For our purposes, the focus is on the African Commission.

In *Jawara v The Gambia*,<sup>18</sup> the African Commission set out the three elements of a remedy that stand Charter muster: availability, effectiveness and sufficiency. The Commission proceeded to elucidate:

A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

Although the African Commission has elaborated three aspects of a remedy, distinguishing effectiveness from availability (accessibility) and sufficiency, it is submitted that all three elements should be considered, as used in its literature and jurisprudence, constitutive of a remedy that is 'effective' for human rights violations under the African Charter.<sup>19</sup> As is evident from this jurisprudence, for a remedy to be considered effective, substantive as well as procedural benchmarks must be met. As reiterated here, the Commission has repeatedly stated that domestic avenues of recourse adopted must 'vindicate a right',<sup>20</sup> speaking to 'sufficiency' of the remedy, and that the path to securing such remedial measures should not be riddled with procedural hindrances, whether calculated or incidental to an otherwise proper process.<sup>21</sup> Another element that merits special mention as a constituent of an effective remedy is the question of time. In terms of article 56(5), as

<sup>13</sup> Shelton (n 9 above) 4.

<sup>14</sup> Shelton (n 9 above) 7.

<sup>15</sup> As above.

<sup>16</sup> A range of measures exist both at national as well as international law (in the latter case, based on the law of state responsibility).

<sup>17</sup> Shelton (n 9 above) 7.

<sup>18</sup> (2000) AHRLR 107 (ACHPR 2000) para 32.

<sup>19</sup> In the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Guidelines) Part C(b), the Commission notes that the right to an effective remedy includes access to justice, reparation for the harm suffered and access to the factual information concerning the violations. See Guidelines [http://www.justiceinitiative.org/db/resource2?res\\_id=101409](http://www.justiceinitiative.org/db/resource2?res_id=101409) (accessed 31 July 2006).

<sup>20</sup> *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 8.

<sup>21</sup> As above.

reiterated by the Commission, one does not need to exhaust local remedies if these are unduly prolonged,<sup>22</sup> clearly demonstrating that time is an important factor and that a delayed remedy cannot be regarded as an effective one.

### 3 The substantive basis of the right to remedy

As noted in the introduction, the African Charter does not provide specifically for the right to an effective remedy, a fact decried in literature.<sup>23</sup> This 'omission' can be explained by at least two factors. One could take the view that it is one of the many substantive rights that should have been included in the Charter but were not, especially when the regional initiative is seen within the context of the general character of the Charter as a tentative, sparsely drafted instrument described variously as 'opaque' and 'difficult to interpret'<sup>24</sup> and which was perhaps the best that could be achieved, considering the prevailing political realities at the time of its adoption.<sup>25</sup> It is also possible that the drafters of the African Charter could have considered it superfluous to include such a right, which would be considered as an implied right. This is reflected in the Latin maxim *ubi jus ibi remedium*: For the violation of every right, there must a remedy. In this regard, the view is that in a justiciable regime of rights such as that established by the Charter,<sup>26</sup> the right to a remedy is so self-evident that it need not be specifically enshrined.<sup>27</sup> In a human rights treaty such as the African Charter, the right is constituent of the general obligation requiring state parties to give effect to the norms contained therein.<sup>28</sup> In some cases, as is the

<sup>22</sup> n 10 above, paras 28-30.

<sup>23</sup> See G Naldi 'Future trends in human rights in Africa: The increased role of the OAU?' in M Evans & R Murray (n 5 above) 1, citing KO Kufuor 'Safeguarding human rights: A critique of the African Commission on Human and Peoples' Rights' (1993) 18 *Africa Development* 18 (1993) 65 66-69 and W Benedek 'The African Charter and the Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25 31.

<sup>24</sup> Odinkalu (n 4 above) 398.

<sup>25</sup> See generally C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (n 5 above), alluding to substantive inadequacies of the Charter in this regard. See also Acheampong (n 4 above) and Heyns (n 4 above).

<sup>26</sup> *Commission Nationale v Chad* (n 6 above), noting that the rights enshrined in the African Charter are not mere platitudes, but impose obligations that have to be implemented.

<sup>27</sup> See N Roht-Arriaza (ed) *Impunity and human rights in international law and practice* (1995) 17, noting that the idea that violations should be redressed, that reparation should be made to the injured is 'among the most venerable and most central of legal principles'.

<sup>28</sup> Art 1 of the African Charter provides: 'The member states of the Organisation of African Unity [AU], parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.'

case for the African Charter, it is bolstered by references to remedies in the formulation of certain rights.<sup>29</sup> Apart from the general obligation contained in article 1, two other provisions in the Charter are relevant to remedies. Article 7 enshrines the right of an individual to have their cause heard, including the right of recourse 'to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force'. For its part, article 26 obliges states to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights enshrined in the Charter.<sup>30</sup>

Despite the apparent lack of express normative sanction in the African Charter relating to remedies, the African Commission has based its mandate to order remedies in part on the scattered provisions outlined above, in particular article 1,<sup>31</sup> and in part on its relevance as the sole oversight body established under the Charter and on the utility of the individual communications procedure. Indeed, the Commission's jurisprudence reviewed further below has arisen largely out of the need by the Commission to justify itself as a relevant institution relating to all Charter rights, after the initial view that its relevance was limited to gross human rights violations. In *Free Legal Assistance Group and Others v Zaire*,<sup>32</sup> the African Commission stated:

The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of . . .

In the wake of this decision, one commentator observed that the Commission 'thus recognises that the bottom line of the communications procedure is the redress of the violations complained of'.<sup>33</sup> The ever-burgeoning body of jurisprudence is a result of its continued assertion of this power.

This lack of clarity as to a specific substantive basis of the right to an effective remedy does not obtain with respect to other major international human rights instruments, both of regional and universal reach, which have specific stipulations in this regard. The Universal Declaration

<sup>29</sup> Eg arts 7(1) & 21(2) of the Charter which provide for recourse to national tribunals for human rights violations and compensation for spoliation of natural resources respectively; art 10 of the Charter establishes expressly the right to compensation for miscarriage of justice; art 7 of the Charter on the right to freedom and security of the person prohibiting arbitrary arrest and illegal detention provides for a right to remedies such as compensation where this right is infringed.

<sup>30</sup> Art 26 African Charter.

<sup>31</sup> For an elucidation of general state obligations under the African Charter, see generally *SERAC* (n 6 above); *Commission Nationale v Chad* (n 6 above).

<sup>32</sup> (2000) AHRLR 74 (ACHPR 1995) para 37.

<sup>33</sup> Odinkalu (n 4 above) 374.



of Human Rights (Universal Declaration) provides that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.<sup>34</sup> For its part, the International Covenant on Civil and Political Rights (CCPR)<sup>35</sup> similarly obliges states to provide an effective remedy to any person whose rights have been violated.<sup>36</sup> Under the European Convention, the right to an effective remedy is equally separately justiciable.<sup>37</sup> Similarly, the American Convention on Human Rights,<sup>38</sup> as well as the American Declaration of the Rights and Duties of Man,<sup>39</sup> are explicit in this regard. Even, at the African level, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa departs from the approach of the African Charter by providing for an effective remedy as a free-standing right, requiring states to 'provide for appropriate remedies to any woman whose rights or freedoms . . . have been violated'.<sup>40</sup> Save for the Universal Declaration, which is not binding as a matter of treaty law,<sup>41</sup> the inability to obtain a remedy through national mechanisms for an infringement of protected rights is therefore a free-standing and separately actionable breach of these treaties. Pursuant to these specific stipulations, both the Inter-American and European systems have accumulated sizeable case law.<sup>42</sup>

<sup>34</sup> Art 8 Universal Declaration.

<sup>35</sup> Art 2(3). See also arts 9(5) & 14(6) of CCPR 999 UNTS 171 (1967).

<sup>36</sup> M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 58, noting that art 2(3) refers to both judicial and non-judicial remedies. See eg Communication 821/98 *Rodger Chongwe v Zambia* CCPR/CAO/D/84/1998 (2000) para 7.

<sup>37</sup> Art 13 European Convention for the Protection of Human Rights and Fundamental Freedoms ECHR 213 UNTS 22, as reaffirmed by art 47 of the Charter of Fundamental Rights of the European Union have provisions providing similarly that everyone whose rights and freedoms as set forth in the instruments are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

<sup>38</sup> Art 25 American Convention of Human Rights 1144 UNTS 123, as elaborated in the celebrated case *Velasquez Rodriguez v Honduras (Preliminary Exceptions)* (1987) 1 Inter-Am Ct HR (ser C), para 91 requires that states 'have an obligation to provide effective judicial remedies to victims of human rights violations' and in *Genie Lacayo v Nicaragua* (1998) 30 Inter-Am Ct HR (ser C) relating to the procedural elements of the right.

<sup>39</sup> Art XXIV American Declaration on the Rights and Duties of Man.

<sup>40</sup> Art 25(a) Protocol to the African Charter on the Rights of Women.

<sup>41</sup> The right to a remedy codified in the Universal Declaration may have crystallised into customary international law, as the other main provisions of the declaration. See art 18 of the Namibian Constitution which suggests as such.

<sup>42</sup> See Shelton (n 9 above) 122-143 discussing some of the cases.

#### 4 Forum and redress: What remedies?

The question as to what remedies are envisaged under the African Charter is an essential one. To compound the lack of a free-standing right to an effective remedy under the African Charter, neither the Charter nor the rules of procedure specifies what remedy or range of remedies may be ordered on a finding of a violation of a Charter right, which remedies may be relevantly applicable domestically in terms of Charter standards. The jurisprudence of the African Commission has so far focused almost entirely on national remedies.<sup>43</sup> Indeed, the criteria established in *Jawara* relates to national remedies. As a consequence, little has been said about how specific substantive rights in the African Charter relate to remedies discourse at international law. The paper returns to this question later.

The African Commission has in its admissibility jurisprudence adopted the view that national mechanisms that meet the effectiveness yardstick for admission of a matter must be of judicial provenance. Apparently, remedies not of a judicial character, including of a quasi-judicial nature, will not suffice.<sup>44</sup> What seems to be the operating principle can be teased out of some of its decisions. In clarifying what is a 'local remedy' in terms of admissibility requirements, the Commission has ruled many communications inadmissible for failure to exhaust local remedies. In one such case, the matter was not admitted for consideration on merits on account that the complainant had *only* approached the Commission on Human Rights and Administrative Justice of Ghana, (CHRAJ) although the CHRAJ had ruled in his favour and awarded him compensation. It stated in *Cudjoe v Ghana*<sup>45</sup> that:

It should be clearly stated, the internal remedy to which article 56(5) refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not.

This view resonates with earlier decisions which regard favourably complainants who have made an attempt to go to the courts for redress. In *Cudjoe*, which we return to shortly, the complainant had not seized any court to appeal the state's failure to implement the decision of the administrative commission before approaching the African Commission. In the *Jawara* case, perhaps the most important pronouncement on the subject of admissibility thus far, the Commission reiterated the need to exhaust judicial remedies:<sup>46</sup>

The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effec-

<sup>43</sup> See analysis at section 5 below.

<sup>44</sup> Viljoen (n 7 above) 84.

<sup>45</sup> (2000) AHRLR 127 (ACHPR 1999) para 13.

<sup>46</sup> n 18 above, para 35 (my emphasis).

tiveness. Therefore, if the applicant cannot turn to the *judiciary* of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.

Similarly, in *Constitutional Rights Project*,<sup>47</sup> the African Commission granted an exception to the exhaustion of local remedies rule because the domestic process related to 'a discretionary, extraordinary remedy of a *non-judicial* nature'. It is contended here that the insistence on judicial remedies is unduly narrow and injudicious as it does not contemplate all possible deployable measures as disclosed by state practice. This 'rigidity' excludes other avenues of redress that may satisfy state obligations relating to the right to an effective remedy. In fact, the African Commission's insistence on remedies of a judicial nature, while the Commission has favoured amicable settlement of complaints lodged with it, is paradoxical. A court of law or any institution of that nature with its onerous procedural prescriptions, especially in the adversarial tradition, is hardly the forum before which to conduct an amicable discussion. On the African continent, as elsewhere, experience teaches that the dealings between an all-powerful state and victims who seek to 'tarnish' its name internationally by complaining about human rights breaches at home can hardly be described as amicable.<sup>48</sup>

Recognising that victims can never really be restored fully to the *status quo ante*, an effective remedy for harm caused should imply any measure taken to 'wipe out', as far as possible, the injury and satisfy the victim of the violation by effectively and adequately addressing the alleged violation.<sup>49</sup> It should not matter whether such measures are judicial or otherwise. Increasingly on the continent there are initiatives, prompted by the need to address the question of access to justice, to consider other institutions not necessarily of a judicial character to which human rights violations can be referred for redress. In a number of countries, national human rights commissions are vested with various powers relevant to redress human rights breaches, including adjudicatory powers with substantial weight attached to their properly determined findings and decisions.<sup>50</sup> Administrative tribunals and other commissions that may not satisfy the current Charter standard have been, or are widely in use. If one adopts the position, informed by practice, that a particular remedy need not be judicial to be suitable, the conclusion would be that the Commission missed an opportunity to

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<sup>47</sup> n 20 above, paras 10-11 (my emphasis).

<sup>48</sup> Communications to the Commission recount variously of victims who had to go into exile, and were tortured and generally subjected to ill-treatment on this account.

<sup>49</sup> See Viljoen (n 7 above) 83 referring to the general principle.

<sup>50</sup> See eg sec 116 of the Constitution of South Africa, read together with the Human Rights Commission Act 54 of 1994. The Ugandan National Human Rights Commission has quasi-judicial powers and has been instrumental in addressing fundamental rights violations in that country. The Kenyan National Human Rights Commission, though largely inactive, is vested with similar powers.

pronounce itself comprehensively on the question of acceptable remedies. It is argued that to the extent that all disputes and cases in general end up in the courts, the Commission's position relating to judicial remedies would be correct, if it relates *only* to domestic avenues to be exhausted before recourse to the Commission or any other relevant international forum, and not as a general rule relating to what remedies are acceptable to remedy violations of African Charter rights.

This position is supported by the African Commission's own view espoused in the Fair Trial Guidelines<sup>51</sup> and the recent addition to the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which compliments the Charter with respect to women's rights. The Protocol recognises the variety of remedies that may be used appropriately to provide redress:

The parties shall undertake to (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

The emphasis here is on the appropriateness of the remedy and the competence of the relevant body. The Commission may be said to defeat its articulated purpose — to furnish redress for human rights violations, by insisting on avenues that may not be peremptory under relevant domestic law, or otherwise futile, therefore denying complainants the opportunity to obtain a remedy before it. While it is true that a 'domestic remedy', as contemplated by article 56 of the African Charter, includes all avenues of appeal or review,<sup>52</sup> in *Cudjoe* it is not clear on the facts whether the domestic human rights commission's decision was final (which would render recourse to 'mainstream' courts legally untenable and unnecessary). The African Commission seems to have assumed that merely because the body pronouncing itself on the remedy was administrative in nature, an option remained available before the courts and that failure to seize such meant local remedies remained. The Commission should have seized the opportunity to clarify this question. A sampling of domestic experiences, together with a study of international practice, may be necessary to assist the Commission in formulating proper guidelines globally applicable under the African Charter and supplementary instruments.

## 5 Analysing the jurisprudence

Although the early years of the African Commission were marked by

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<sup>51</sup> Part C(c)(1) stating that 'any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities'.

<sup>52</sup> Viljoen (n 7 above) 83 citing *Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997) para 57.

want of confidence, and to an extent a measure of self-interested hesitancy,<sup>53</sup> the absence of clarity in the African Charter regarding remedies has not prevented it from making orders necessitated by a need to remedy violations which it has found. While the Commission has clarified its role with regard to the complaints procedure, its stand and approach have been for the most part inimical to its articulated function. It has in most, if not all, its dealings attempted to steer clear from confrontation with governments, even when not warranted. Unfortunately, this stance has affected negatively its ability and willingness to make firm orders relating to remedial measures to be undertaken by states for human rights violations. Its almost demure approach applied in almost all cases is exemplified in *Free Legal Assistance Group and Others v Zaire*.<sup>54</sup>

Further, as a review of its jurisprudence discloses, the recognition of its main role has largely not been backed by concrete action. Perhaps attributable to the fact that state parties were reluctant to vest real adjudicatory powers in any oversight body (having rejected the idea of a court altogether at the drafting stage of the African Charter),<sup>55</sup> the African Commission has had to grow hesitantly into its quasi-judicial role by, so to speak, 'testing the waters' and seeking universal approval and acceptance. Consequently, where there has been the slightest indication after a complaint was lodged with it that the respondent state was prepared to settle the matter domestically, the Commission has been more than happy to adopt and endorse what in many cases has been a false promise aimed at avoiding the Commission's public attentions and injurious publicity.<sup>56</sup> As a consequence, victims have been 'robbed' of the opportunity, in some cases, the only one available, to obtain justice.<sup>57</sup>

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<sup>53</sup> See V Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in Evans & Murray (n 5 above) 335-352; A Motala 'Non-governmental organisations in the African system' in Evans & Murray (n 5 above) 246-279.

<sup>54</sup> n 32 above.

<sup>55</sup> See F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 1-4-5, discussing the circumstances of the abandonment of the idea of an African human rights court.

<sup>56</sup> American Convention on Human Rights, under which the conciliation procedure specifically provided for in art 48(1)(f) is applied when it proffers a real prospect of success. *Velásquez Rodríguez* (n 38 above) paras 44-45 (1987). See also Odinkalu (n 4 above) 402.

<sup>57</sup> See eg *Modise v Botswana* (n 6 above) where the African Commission invited the government of Botswana to consider amicable settlement prompting a lengthy and unsuccessful process at the Commission even after the state had failed to resolve the matter at hand for 16 years. See also *International Pen (on behalf of Senn & Another) v Côte d'Ivoire* (2000) AHRLR 70 (ACHPR 1995) and *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000).

Contrary to the lack of a specific provision on effective remedies, there is clarity with respect to the question of protective measures,<sup>58</sup> which the African Commission has administered liberally. Pursuant to this, the Commission has made orders almost as a matter of routine for preservative measures ranging from the stay of an execution,<sup>59</sup> torture and degrading treatment,<sup>60</sup> release of illegally detained persons,<sup>61</sup> among others, pending final determination of relevant communications.<sup>62</sup> A cursory reading of decisions relating to provisional measures discloses the same difficulties in implementation which affect its substantive case law.<sup>63</sup> As is argued below, the creativity and relative boldness of the Commission with respect to remedies, though not entirely satisfactory, have been demonstrated in the unsure zone beyond sanctioned provisional measures.

Substantively, it appears that none of the communications presented to the Commission has alleged specifically the violation of a right to an effective remedy. Should this have been the case, however, it is unlikely that the Commission would have entertained such complaint on its merits for lack of compatibility with the African Charter, as this requires that the particular provision breached be cited.<sup>64</sup> Expecting the Commission to make orders for remedies as a matter of routine, complainants have rarely motivated requests for remedies. As argued below, this means that the Commission has had limited if no assistance in developing proper jurisprudence on remedies.

Orders made for remedies have either been immediate, as in the case of provisional measures, or long-term and permanent. As noted above, while the Commission has been willing to make orders for provisional measures as a matter of routine when requested, its record in the latter case is less than impressive. Beyond provisional measures, it has been

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<sup>58</sup> Rule 111(1) of the Rules of Procedure of the Commission provides that '[b]efore making its final views known to the Assembly on the communication, the Commission may inform the state party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation. In so doing, the Commission shall inform the state party that the expression on its views on the adoption of those provisional measures does not imply a decision on the substance of the communication.'

<sup>59</sup> *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (ACHPR 2000).

<sup>60</sup> As above.

<sup>61</sup> n 57 above.

<sup>62</sup> The African Commission has made varying orders for measures to be taken by defendant states depending on the complaint at hand so that the Commission's process is not rendered void.

<sup>63</sup> Problems arise from the African Commission's deferential attitude and lack of an effective verification mechanism.

<sup>64</sup> For a complaint to be compatible with the African Charter, it must, among other things, allege a breach of a right set out in the Charter. See art 56(2); Viljoen (n 7 above) 69.

more inclined to order for remedies couched in broad formulations lacking generally in specificity, for instance requiring that the respondent state adopt relevant legislation,<sup>65</sup> or bordering on the vague or 'futuristic', requiring that the state undertakes 'measures to see the full respect of the Charter'.<sup>66</sup> In the case of specific individual remedies, such as compensation, when requested, the Commission has, in an approach similar to the Inter-American Court and Commission,<sup>67</sup> rightly left it to the state to make the final determination as to *quantum* of damages in terms of domestic law after finding a violation of a Charter right.<sup>68</sup> Rarely the Commission has defied what appears as practice to make specific orders with respect to individuals, especially where the violation has been particularly blatant.<sup>69</sup>

While the African Commission's efforts to shed its initial image as a mere 'talk shop' and transform it to a forum where an attempt to tackle human rights violations is made, the Commission has not interrogated the ease with which complainants can obtain ordered remedies, especially where the trend has been to defer to the state concerned without follow-up and to trust that it will act accordingly. While complainants have to furnish proof that remedies at the domestic level are either unavailable or ineffective before their complaint can be heard, the Commission has let states 'off the hook' on the slightest indication that they are prepared to address the situation. Having found during the admissibility procedure that domestic remedies are either ineffective or not available, one can rightly conclude that a failure to take a firmer

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<sup>65</sup> *Haye v The Gambia* (2000) AHRLR 102 (ACHPR 1995), in which the Commission requested 'the government of The Gambia to bring its laws in conformity with the provisions of the Charter'.

<sup>66</sup> See *Avocats Sans Frontières v Burundi* (n 53 above), requesting Burundi 'to draw all the legal consequences of this decision; and to take appropriate measures to allow the reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and the pertinent provision of the African Charter on Human and Peoples' Rights [and] calls on Burundi to bring its criminal legislation in conformity with its treaty obligations emanating from the African Charter'.

<sup>67</sup> n 38 above.

<sup>68</sup> *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995).

<sup>69</sup> See *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) consisting perhaps of the most concrete and specific recommendations by the Commission yet; *Pagnouille (on behalf of Mazou) v Cameroon* (2000) AHRLR 55 (ACHPR 1995), requiring the reinstatement of a judge and the release from prison of a detained person (in the latter instance, the release had already been effected by the time of the order). See also *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001), where the Commission, holding that Burkina Faso was in violation of arts 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter, recommended that the Republic of Burkina Faso draws all the legal consequences of this decision, in *particular*, by identifying and taking to court those responsible for the human rights violations cited above; accelerating the judicial process of the cases pending before the courts; and compensating the victims of the human rights violations stated in the complaint (my emphasis).

stand when deciding on remedies has been one of the main shortcomings of the Commission, as reflected below.

## 6 The Commission process as a 'remedy'

To make a holistic assessment regarding the achievements of the African Charter, one must look not just at how well standards have been elaborated, but also how supervisory mechanisms established under the Charter function to achieve their mandate — for our purposes, providing effective recourse under the communications procedure where domestic systems have failed. This section looks at the performance of the African Commission processes (in this case, the communications procedure) as an avenue of recourse available to victims of human rights violations. The reason is evident: if the forum to which an appeal for recourse is made does not work, the reason for doing so is negated.

At least three elements are important in assessing the Commission process as an effective avenue for human rights violations: the provision of a substantive right that enables individuals or relevant organisations to approach it for redress; procedural facility in realising this right; and mechanisms of implementing decisions rendered, especially given that it is a supra-national entity bereft of the usual enforcement capabilities available to states. In the first instance, one of the most significant contributions of the Commission since it was constituted in 1987 is, in spite of doubt in the text,<sup>70</sup> determining that the African Charter permits individual complaints (communications) and that the Commission has a mandate to examine them.<sup>71</sup> The fact that a major part of the Commission's work (and indeed any meaningful international oversight mechanism) relates to the implementation of this protective procedure points to its significance.

As regards implementation mechanisms and procedure, a number of factors have impeded pursuit of remedies before the Commission. First, by strictly applying the admissibility criteria, access to the Commission for many deserving cases has been difficult.<sup>72</sup> Second, the communications procedure (with respect to decisions elaborated) lacks an effective verification process, with the Commission relying solely on the good faith of governments, even where this has been demonstrably absent.<sup>73</sup> This raises issues of conformity with state obligations under article 1 of the African Charter. While the Commission firmly embraces the principle recognising that one of its main functions is to endeavour to provide

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<sup>70</sup> See art 55 captioned 'other communications'. This is now settled position. Decisions by the Commission reiterate this point.

<sup>71</sup> See Heyns (n 3 above) 694.

<sup>72</sup> On admissibility, see Viljoen (n 7 above).

<sup>73</sup> See Viljoen (n 55 above) 15.



a remedy for *all* violations, its implementation has been wanting.<sup>74</sup> A number of communications bear this out. In the matter *Kalenga v Zambia*,<sup>75</sup> as has been the case for matters involving an amicable settlement (urged without fail by the Commission), the Commission failed to take measures to establish the veracity of a letter from a government minister stating that the complainant had been released from administrative detention, and proceeded to declare the matter amicably resolved.<sup>76</sup> A similar scenario played itself out in *Comité Culturel pour la Démocratie au Bénin and Others v Benin*,<sup>77</sup> where a settlement was presumed, merely because the political environment within which violations complained of no longer existed on a change of government.<sup>78</sup> Despite this, the Commission has on some occasions tried to acquit itself by requiring states to report, though belatedly, on measures taken to implement its decisions through the state reporting mechanism<sup>79</sup> noting rightly in one case that 'the release of the alleged victims does not nullify any violation of the victims' rights' and that the reply of the government concerning the release of the complainant did 'not absolve it of the liability in respect of any violations that may have occurred'.<sup>80</sup> Third, the Commission process has in many instances been so long as to negate the purpose of recourse to it. In lamenting that 'delay has characterised findings on admissibility' (where the most delays have been incurred), Viljoen<sup>81</sup> seems to apportion blame largely to the Commission and its Secretariat. It seems apparent that the Commission appears not to uphold standards that it strictly applies to states with regard to effectiveness of remedies, and to complainants regarding the exhaustion of local remedies. While it has repeatedly affirmed that where domestic remedies are unduly prolonged, it would be needless for a victim to pursue them, it has not lived by this creed. Perhaps because of its insistence on dialogue even when states have not been enthusiastic to engage in constructive talk, complaints have not been

<sup>74</sup> Odinkalu (n 4 above) 375.

<sup>75</sup> (2000) AHRLR 321 (ACHPR 1994).

<sup>76</sup> The communication had been filed with the Commission in 1986, the letter was written in 1990 stating that he had been released in 1989.

<sup>77</sup> (2000) AHRLR 22 (ACHPR 1994).

<sup>78</sup> Odinkalu (n 4 above) 376 in a commentary on the case notes that there was no evidence that the Commission made sufficient effort to verify from the authors whether they considered the steps taken by the new government to be sufficient.

<sup>79</sup> See *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001), where the Commission requested Zambia 'to report back to the Commission when it submits its next country report in terms of article 62 on measures taken to comply with [its] recommendation'.

<sup>80</sup> See *Civil Liberties Organisation v Nigeria* (2000) AHRLR 179 (ACHPR 1994). See also *International Pen* (n 57 above) para 7, stating that the release of victims does not extinguish the responsibility of the government for any violations that it may have committed in respect of their imprisonment. A cause of action may still stand for reparations for the prejudice suffered by imprisonment.

<sup>81</sup> Viljoen (n 7 above) 64.

addressed in time, rendering the communication procedure an ineffective remedy.<sup>82</sup>

Related to, though distinct from verification of decisions, the normative standing of decisions of the African Commission is another important factor. While there is growing consensus on the acceptance of the Commission's determinations as binding decisions, the lack of firm judicial imprint must have something to do with states failing to implement them.<sup>83</sup> States have largely ignored or dragged their feet when it comes to giving effect to the Commission's decisions, which are mere recommendations until they are formally adopted through the formal structures of the African Union (AU) with its attendant political baggage.<sup>84</sup> For this reason, commentators consider the Protocol to the African Charter on Human and Peoples' Rights Relating to the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol)<sup>85</sup> as a major development in the enforcement of human rights on the continent on account that the decisions of the African Court will be judicial in nature, thus directly binding.<sup>86</sup> Before considering the African Court Protocol, and how it may change the regime on remedies, a brief sketch of the issues the African Commission could have dealt with in its decisions in the context of remedies is given.

## 7 Sketching the real substantive issues

The remedies jurisprudence of the African Commission can be said to be a case of redundant elaboration. First, by focusing largely on admissibility, specifically on the rule on exhaustion of local remedies, its jurisprudence relates, and is restricted to, national remedies.<sup>87</sup> Nothing has been said of the remedies possible under the African Charter and international human rights law generally. Second, no analysis whatso-

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<sup>82</sup> *Modise v Botswana* (n 6 above), which took 16 years in domestic courts and another 16 years before the Commission made a decision. In this, inconsistency is evident as the Commission has been willing in some cases to proceed where co-operation from the state has been wanting. See for instance *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (n 6 above) para 25, where the Commission decided that 'where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given'. See also *Modise* (n 6 above) para 95.

<sup>83</sup> See generally GM Wachira & A Ayinla 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system' in International Commission of Jurists (Kenya Chapter) *Judicial Watch Report* (2006).

<sup>84</sup> As above.

<sup>85</sup> Protocol to the African Charter on Human and Peoples' Rights Relating to the Establishment of the African Court on Human and Peoples' adopted in Addis Ababa, Ethiopia, in June 1998; entered into force in January 2004.

<sup>86</sup> Viljoen (n 55 above).

<sup>87</sup> See Udombana (n 7 above).

ever has been undertaken of the relevant provisions on remedies, (specifically article 7) and no links have been established at the Charter and international level between these and provisions enshrining specific substantive rights. In *Jawara*, as in a number of other cases, the Commission has indicated that the local remedies rule must be applied in tandem with article 7, which guarantees the right to a fair trial.<sup>88</sup> Third, the Commission has in its decisions on remedies rightly left it to states to supply redress within their laws and domestic processes after finding a violation. While the Commission has elaborated the general state obligations under the African Charter as entailing the duties to respect, protect, promote and fulfil,<sup>89</sup> it has not proffered much jurisprudential guidance to states on this important question. The result is that the Commission's jurisprudence, to the extent that it can be discerned, is lacking in theorisation. Of the four constituent state obligations enunciated by the Commission, the secondary duty to protect, perhaps the most relevant to this debate, requires that the state 'protect right-holders against other subjects by legislation and the provision of effective remedies'<sup>90</sup> which necessitates, as per the Commission, 'the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms'.<sup>91</sup> The Commission has nevertheless not, in any of its decisions or elsewhere, clarified the broad principles or what specific remedies would be applicable generally under the Charter. Where reference has been made to international law, this has mostly been general, as in *Amnesty International and Others v Sudan*, a case alleging, among others, summary executions during war, in which the Commission stated that '[t]he state [Sudan] must take all possible measures to ensure that they are treated in accordance with international humanitarian law'.<sup>92</sup>

Considering that previously the African Commission has found a violation but failed to pronounce itself on remedies,<sup>93</sup> the Commission's current enunciation on remedies can be said to be an improvement. This is, however, still largely inadequate as the formulation is in the main both exhortatory and general.<sup>94</sup> Typically, the Commission's conveniently brief 'holding' to communications variously 'urges', 'requests',

<sup>88</sup> *Jawara* case (n 18 above) paras 33-34.

<sup>89</sup> See generally *SERAC* case (n 6 above).

<sup>90</sup> *SERAC* case (n 6 above) para 47. On the general obligations under the African Charter, see generally NJ Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2005) 40 *Stanford Journal of International Law* 105.

<sup>91</sup> As above.

<sup>92</sup> (2000) AHRLR 297 (ACHPR 1999) para 48.

<sup>93</sup> See eg *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000); *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

<sup>94</sup> See Introduction, *Compilation of decisions of the African Commission* (2001) 13.

'invites' or 'recommends' for states: 'to draw all legal consequences of [its] decision[s]';<sup>95</sup> 'to take necessary steps';<sup>96</sup> 'draw necessary legal conclusions'.<sup>97</sup> The African Commission (and the African Court, once operational) needs to be firmer, clearer and less ambiguous when specifying remedies.<sup>98</sup>

Granted that the Commission cannot supervise or interfere with the national implementation of the African Charter and remedies ordered in vindication of protected rights, as the Commission has on various occasions reiterated,<sup>99</sup> failure to provide broad theoretical direction on possible non-compliance of various measures and state practice in this regard reflects a lack of depth in its decisions that may as well be viewed as a major failure in its duties. The inadequacy of its jurisprudence is cast in stark relief by the particularistic and untheorised pronouncements on remedies ordered by it. Consequently, the impact of universally contested issues such as amnesties widely deployed in post-conflict Africa and other situations entailing gross human rights violations on effective remedies have but received a fleeting mention.<sup>100</sup> The dynamism of remedial aspects respecting gross violations of which it was thought the Commission had an original mandate remains unexplored.<sup>101</sup> While 'fishing' for cases by an already burdened institution is not urged here, pronouncing itself on what is internationally impermissible in terms of specific remedies and circumstances is hardly remote from the gist of its mandate at any given time. It flows from a finding of a violation of the African Charter. In fact, it would be perfectly consistent with its ample Charter mandate requiring it to<sup>102</sup>

<sup>95</sup> Eg *Avocats Sans Frontières* (n 59 above).

<sup>96</sup> Eg *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

<sup>97</sup> Eg *Pagnouille* (n 69 above).

<sup>98</sup> In one of its latest decisions, despite the complexity of the case and the wide-ranging violations alleged, the Commission merely urged the respondent states 'to abide by their international obligations' (including under the UN Charter) and recommended 'that adequate reparations be paid, according to the appropriate ways to the complainant state for and on behalf of the victims of the human rights'. See Communication 227/97, *DRC v Uganda, Rwanda & Burundi* 20th Activity Report 96-111.

<sup>99</sup> In *Legal Resources Foundation v Zambia* (n 79 above) para 59, the Commission stated that 'an international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead a body like the Commission may examine a state's compliance with the treaty in this case the African Charter . . . [T]he point of the exercise is to interpret and apply the African Charter rather than to test the validity of domestic law for its own sake'.

<sup>100</sup> See *Malawi African Association* (n 69 above). See also cursory references to amnesty in the Commission's Fair Trial Guidelines, Part C(d).

<sup>101</sup> In *Malawi African Association* (n 69 above), the opportunity was missed by the Commission to pronounce itself on the question.

<sup>102</sup> Art 45 African Charter; *Legal Resources Foundation v Zambia* (n 79 above) para 61.

give its views or make recommendations to governments . . . to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation . . . and interpret all the provisions of the present Charter.

Complainants may also be to blame for the skeletal and unco-ordinated state of the Commission's remedies jurisprudence because of their failure to specifically articulate themselves adequately or at all with respect to remedies. Shelton notes that in only one complaint to the Commission has an applicant specifically requested compensation.<sup>103</sup> Lack of input from complainants may be said to have stunted remedies jurisprudence.

Without going into detail, one can for instance sketch a few scenarios that have previously begged for authoritative comment by the Commission. These are mere sketches and necessarily warrant a more profound scrutiny. For instance, on the question of applicable remedies, a declaration of rights alone can hardly be sufficient for most violations. Prosecutions may be mandatory in certain circumstances, especially with regard to human rights violations that amount to international crimes. While in the *Mouvement Burkinabé* case,<sup>104</sup> the Commission prescribed the prosecution of persons involved in alleged human rights breaches, no underpinning reasons were proffered in the light of international law generally. Compensation may only be legally proper and adequate for certain crimes.<sup>105</sup> Although relevant cases have been brought to it, the Commission has not, in the context of remedies, interrogated issues related to 'massive violations', which involve more than the complainant(s) and do require innovative remedies beyond individualised relief and the concerns of an individual victim.<sup>106</sup>

## 8 Future prospects: Enter the African Court

It is argued here that the adoption of the African Court Protocol, which has now entered into force, is likely to change the question of remedies

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<sup>103</sup> Shelton apportions blame to complainants and their representatives for not addressing the question of remedies in their communications, considering it as a given once a violation is found. The relevant bodies have thus been denied an informed opinion on the question.

<sup>104</sup> n 69 above.

<sup>105</sup> For a study of the compatibility of national amnesties with the African Charter, specifically with respect to effective remedies, see generally GM Musila 'Whistling past the graveyard: Amnesty and the right to an effective remedy under the African Charter: The case of South Africa and Mozambique' unpublished LLM thesis, University of Pretoria, 2004.

<sup>106</sup> Massive violations may involve the violation of several rights (with respect to a single complainant) or violations involving many people. In *Free Legal Assistance Group & Others v Zaire* (n 32 above), the Commission did appreciate that massive violations, especially where many people are involved, require special attention.

in a number of respects by addressing some of the weaknesses of the African Commission.<sup>107</sup> This is, however, dependent on two main factors considered — institutional and contextual. To begin with, unlike the African Charter, the African Court Protocol brings necessary clarity and specificity to the question of which remedies are applicable under the Charter. While reiterating the substantive basis for provisional measures,<sup>108</sup> the African Charter clarifies the African Court's power relating to remedies:<sup>109</sup>

If the Court finds that there has been a violation of human and peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

While this legal sanction to make an order on compensation, as well as reparation orders, is addressed to the African Court, in view of the Court's complementary relationship with the African Commission,<sup>110</sup> it is particularly useful in clarifying the power of the Commission in this regard, should the Commission continue to receive and determine complaints even after the African Court becomes fully operational.<sup>111</sup> By mandating the Court to make 'appropriate' orders, article 27 codifies a wide discretion that can, and should be, invoked to make orders other than compensation and reparations, drawing from the experience of other international human rights oversight bodies such as the Inter-American and European Courts of Human Rights. In its continued role, the African Commission should, as it has done previously, draw on the facility in the African Charter allowing it to draw from the experience of other regional and international human rights oversight bodies as well as domestic jurisdictions to develop progressive jurisprudence.<sup>112</sup> This argument is pursued further in the concluding sections of this paper.

It has been suggested that the African Court is better equipped than the African Commission to meet its protective mandate under the African Charter.<sup>113</sup> Apart from the qualifications of the judges of the African Court (who are required to have legal and human rights backgrounds), to the extent that they are not — as in the case of the commissioners of

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<sup>107</sup> On the possible benefits the African Court will bring to the African regional human rights system, see generally Viljoen (n 55 above).

<sup>108</sup> On this, art 27 provides that, in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

<sup>109</sup> Art 27 African Court Protocol.

<sup>110</sup> Arts 2, 5 & 6 African Court Protocol.

<sup>111</sup> On the dynamics of the relationship between the Court and the Commission, see Heyns (n 4 above) 162-173. It has been suggested that with both bodies operational, the Court should handle 'the most important cases' with the Commission reserved for the role of receiving and 'sieving' complaints.

<sup>112</sup> Arts 60 & 61 of the African Charter provide a normative sanction.

<sup>113</sup> Viljoen (n 55 above).

the Commission — diplomats and civil servants with the tendency to lean in favour of (nominating) governments, they will enjoy greater independence.<sup>114</sup> One may take the view that the African Court has come to fruition at a time when there is renewed commitment to human rights within the AU, whose Constitutive Act now implants human rights squarely on the agenda of the continental body.<sup>115</sup> Whilst some commentators have expressed their optimism about the possible gains of the transition on the human rights and democracy fronts,<sup>116</sup> others, drawing on history, are not as positive.<sup>117</sup> While the universal acceptance of the African Court by all members of the AU is not expected,<sup>118</sup> the current political context creates an environment favourable for the operation of the African Court which should take with zeal to its mandate of further elaborating the African Charter and other relevant standards, including the right to an effective remedy, which, as argued, has not received much reasoned attention from the African Commission.

## 9 Conclusion

This paper argued that the remedies jurisprudence of the African Commission is wanting in three basic respects — depth, consistency and co-ordination. In its 'practice', the Commission has oscillated between rigidity, perhaps explained by the lack of a substantive basis for this right as well as its questionable standing as an oversight body, and a somewhat hesitant, barely positive situational response to the need to fulfil its general protective mandate under the African Charter by which it has recognised that no violation should go without redress. While it has not developed any meaningful jurisprudence of its own in this regard, it has equally been unprepared to deploy the facility in the Charter that sanctions the application of more progressive jurisprudence from other relevant international oversight bodies which, though not entirely satisfactory, is more advanced.<sup>119</sup> Even where the Commis-

<sup>114</sup> Judges appointed with the input of various stakeholders are elected in their personal capacities.

<sup>115</sup> See art 3 of the Constitutive Act of the African Union adopted 11 July 2000, entered into force 26 May 2001.

<sup>116</sup> See generally VO Nmeihelle 'The African Union and African Renaissance: A new era for human rights protection in Africa?' (2003) 7 *Singapore Journal of International and Comparative Law* 412.

<sup>117</sup> See eg NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1177.

<sup>118</sup> So far, only 15 states have ratified the African Court Protocol. For the African Court to entertain individual complaints, a declaration is required in terms of art 36(4) of the Protocol.

<sup>119</sup> Shelton (n 9 above), lamenting the lack of co-ordination in jurisprudence from the European and Inter-American Courts of Human Rights.

sion has pronounced itself on remedies, its undue 'deference' to states has stunted its ability to objectively and fearlessly execute its mandate, hence its overemphasis on dialogue, amicable settlement and good faith. In this regard, it was concluded that while the African Court Protocol changes the situation normatively by expressly enshrining for remedies, more is required in order to ensure that rhetorical commitment to human rights are matched by gains by victims of human rights violations.<sup>120</sup>

One thing to reiterate here is that, while other regional experiences have their specific problems with respect to remedies, the depth of available jurisprudence is inspiring. While the African Commission still grapples with 'getting off the blocks', the bodies mandated with the implementation of those regional instruments have made some strides in developing reasoned jurisprudence in this regard. Though largely scattered and lacking in a theorisation, important issues have been addressed, including possible remedies applicable in various circumstances such as in cases of massive violations. Notably, the Inter-American Court (and Commission) have been bold enough to order states to take specific actions and have developed innovative means to structure damage awards, such as establishing trust funds.<sup>121</sup> The African Commission (and Court) can learn from the shortcomings of their regional counterparts: failure by litigants as well as the institutions themselves to draw meaningful lessons from each others' failures; the adoption of a narrow reading of existing international and national jurisprudence, thus 'refusing to recognise that both bodies of law offer support for far broader remedies'; a failure to understand (as the African Commission has) the importance of their role in remedying human rights violations and that this goes beyond individual complainants, a fact disclosed by their rigidity in the interpretation of their remedial mandates.<sup>122</sup> If resources were all it takes, one can be confident that the African Court and African Commission, to the extent that it will retain its relevant mandate once the African Court is operational, have a rich pool from which to craft a well-reasoned jurisprudence on remedies.

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<sup>120</sup> See Heyns (n 3 above) 700-702.

<sup>121</sup> Shelton (n 9 above) 181.

<sup>122</sup> See generally RB Bilder & B Stephens 'Remedies in international law: Book review and note' (1995) 95 *American Journal on International Law* 258; Shelton (n 9 above) 37.



# Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy

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## Summary

*It has been two decades since the African Commission was inaugurated and still its effective execution of its mandate is debatable. While it has undoubtedly made some progress, particularly in its protective mandate of considering communications from individuals, the recommendations it has hitherto issued have largely been ignored by state parties. This paper, written from an insider's perspective — the authors having worked with the African Commission — argues for a review of the system in practice in a bid to ensure the enforcement of the Commission's recommendations. It calls on the Assembly of Heads of State and Government of the African Union to adopt the recommendations of the African Commission as its binding decisions, whose breach attracts sanctions. The paper finally examines the possible role of the newly established African Court on Human and Peoples' Rights in the enforcement of the decisions of the African Commission.*

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## 1 Introduction

A human rights guarantee is only as good as its system of supervision. The African Commission on Human and Peoples' Rights (African Commission)<sup>1</sup> is the only institution charged with the promotion and protection of human and peoples' rights in Africa, as articulated in the African Charter on Human and Peoples' Rights (African Charter).<sup>2</sup> Under its protective mandate, the African Commission considers cases of alleged violations of the African Charter, known as 'communications'.<sup>3</sup> Where it makes a finding of violations of the Charter, it often<sup>4</sup> issues decisions and 'recommendations' on the appropriate remedies.<sup>5</sup> However, the attitude of state parties,<sup>6</sup> since the Commission's inception two decades ago, by and large has been generally to ignore these

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<sup>1</sup> The African Commission (established under article 30 of the African Charter) was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. See African Commission Information Sheet 1 [http://www.achpr.org/english/information\\_sheets/ACH-PR%20inf.%20sheet%20no.1.doc](http://www.achpr.org/english/information_sheets/ACH-PR%20inf.%20sheet%20no.1.doc) (accessed 20 July 2006).

<sup>2</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981 in Nairobi, Kenya, OAU Doc CAB/LEG/67/3 Rev 5, entered into force on 21 October 1986 art 30.

<sup>3</sup> The communications are either from states (arts 47-54 African Charter) or non-state entities (NGOs, national human rights institutions) or individuals (arts 55-59 African Charter). By the 39th ordinary session of the African Commission, the Commission's database puts this number at 320 communications, all but one of which are from individuals and NGOs, namely Communication 227/99, *DRC v Burundi, Rwanda & Uganda* Twentieth Activity Report 2006.

<sup>4</sup> It is noted that the African Commission's practice of issuing of recommendations pursuant to communications is a practice of the Commission that has taken several years to develop, as its earlier decisions were characterised by findings of admissibility of violations or not, without anything more. See generally Institute for Human Rights and Development *Compilation of decisions on communications of the African Commission on Human and Peoples' Rights: 1994-2001* (2002) 3-7.

<sup>5</sup> The mandate of the African Commission in accordance with art 45 of the African Charter is four-fold: the promotion, protection and interpretation of the African Charter and the performance of any other task assigned by the Assembly of Heads of State and Government.

<sup>6</sup> The few instances of compliance with the African Commission's recommendations would include *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994) (V Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 345; *Pagnouille (on behalf of Mazou) v Cameroon* (2000) AHRLR 57 (ACHPR 1997) (comments made by the state representative of Cameroon during the delivery of its initial state report at the 31st ordinary session of the African Commission on 6 May 2002 in Pretoria, South Africa).

recommendations,<sup>7</sup> with no attendant consequences.<sup>8</sup> As a result, victims of human rights violations often find themselves without any remedy, even after resorting to the African Commission, which erodes and undermines its credibility and authority as an effective protector of the rights enshrined in the African Charter.<sup>9</sup>

The weary debate on the binding nature or otherwise of the recommendations of the African Commission constitutes a major cause of states' failure to abide by them.<sup>10</sup> This paper therefore examines this

<sup>7</sup> See 'Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach' 24th ordinary session, OAU DOC/OS/50b (XXIV), para 2 (1998), reprinted in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights, on compliance of state parties to adopted recommendations of the African Commission: A legal approach* (2001) 355. (Please note that the legal status of this document is uncertain as it is not available in the archives of the African Commission, neither is it reflected in the relevant Twelfth Annual Activity Report of the Commission. The reference made also to Agenda 11(b) of the 24th session is inconsistent with the records of the Commission.) See also SBO Gutto 'The compliance with regional and international agreements and standards by African governments with particular reference to the rule of law and human and peoples' rights' in P Anyang'Nyongo *et al* (eds) *New Partnership for Africa's Development (NEPAD): A new path?* (2002); F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 2.

<sup>8</sup> Instances of states' disregard of the Commissions recommendations resonate in Africa. A typical example of a continued violation of human rights is *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003), whereby 11 detainees and victims of human rights violations, whom the African Commission had ordered to be released immediately, at its 34th session in November 2003, remain *incommunicado*. See Ensuring the Implementation of ACHPR Rulings, Amnesty International Seminar, The Gambia, 10 May 2006; states also blatantly disregard provisional measures, as exemplified in *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998). The Nigerian state disregarded the African Commission's provisional measures and executed Ken Saro-Wiwa. Recently also the Kenyan state has disregarded interim measures issued pursuant to Communication 276/2003, *CEMIRIDE (on behalf of the Endorois community) v Kenya* [http://www.minorityrights.org/news\\_detail.asp?ID=342](http://www.minorityrights.org/news_detail.asp?ID=342) (accessed 22 May 2006). Some token public relations measures have at times been taken by states, but lacking proper political backing, as demonstrated by the Nigerian state pursuant to *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). (The Nigerian government had established, *inter alia*, the Niger-Delta Development Commission (NDDC) pursuant to the African Commission's decision (this may not be directly attributed to the Commission's decision in view of other loud calls for government action in the Niger-Delta.) The NDDC was established to address the environmental and other socially related problems in the Niger Delta area and other oil-producing areas of Nigeria. Notwithstanding this, there are continued media reports of human rights violations in this region, leading to unrest. See the Niger-Delta Development Commission (Establishment etc) Act 6 of 2000 [http://www.nigeria-law.org/Niger-DeltaDevelopmentCommission\(Establishment%20etc\)Act2000.htm](http://www.nigeria-law.org/Niger-DeltaDevelopmentCommission(Establishment%20etc)Act2000.htm) (accessed 21 July 2006).

<sup>9</sup> Non-Compliance of States Parties (n 7 above).

<sup>10</sup> F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13; see also R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights (1997) 46 *International and Comparative Law Quarterly* 428; EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 24 74-5; 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.

debate and argues that, notwithstanding the hitherto contestable nature of the Commission's recommendations, states are bound to respect and implement them in view of the principle of *pacta sunt servanda* under the Vienna Convention on the Law of Treaties,<sup>11</sup> and article 1 of the African Charter.<sup>12</sup>

Another contributor to the non-compliance by states of the African Commission's recommendations is that the Commission, unlike some other regional and global human rights bodies, does not have an institutionalised<sup>13</sup> follow-up system to ensure the implementation of its recommendations and decisions, 'even though some *ad hoc* follow-up and inconsistent measures had been initiated on few occasions'.<sup>14</sup> The Commission has in a variety of forums attempted to follow up on the implementation of its recommendations through promotional and protective missions to state parties or by incorporating follow-up measures as part of its findings on individual communications.<sup>15</sup> It has also enquired about the status of implementation of its past recommendations during the presentation of state reports, and during the consideration of other communications affecting the same states.<sup>16</sup> These efforts have yielded few, if any, concrete results. The paper therefore proposes the establishment of an institutionalised follow-up mechanism by the African Commission for monitoring the implementation of its decisions and issuance of specific recommendations.

Furthermore, noting that the regional human rights regime lacks actual enforcement tools *per se*, the paper examines the norms and institutions developed under the auspices of the African Union (AU) in relation to human rights, and the possibilities they offer to the Commission to solve the nagging problem of non-compliance with its decisions. This is especially in view of article 23(2) of the Constitutive Act of the AU (Constitutive Act),<sup>17</sup> which holds the main key to the infusion of the necessary bite into the human rights enforcement system, by providing for sanctions against state parties which fail to implement the decisions of the AU. The paper argues that through the submission of the African

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<sup>11</sup> The Vienna Convention on the Law of Treaties, entered into force on 27 January 1980.

<sup>12</sup> Art 1 of the African Charter provides: 'The member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall *undertake to adopt legislative or other measures to give effect to them* (our emphasis).

<sup>13</sup> See eg Rules of Procedure of the Inter-American Commission (2003) art 46; the UN Human Rights Committee and the UN Committee against Torture sourced at [http://193.194.138.190/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a6878e3a2-f04e466c125703b002db52a/\\$FILE/CERD\\_C\\_67\\_FU\\_1\(E\).doc](http://193.194.138.190/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a6878e3a2-f04e466c125703b002db52a/$FILE/CERD_C_67_FU_1(E).doc) (accessed 22 July 2006).

<sup>14</sup> Viljoen (n 10 above) 15.

<sup>15</sup> Dankwa (n 6 above).

<sup>16</sup> As above.

<sup>17</sup> Constitutive Act of the African Union OAU Doc CAB/LEG/23 15 (11 July 2000), entered into force 26 May 2001.

Commission's recommendations via its Annual Activity Reports to the Assembly of Heads of State and Government of the AU (AU Assembly), and their consequent adoption by the Assembly, they should become 'binding decisions' of the AU, within the context of article 23(2) of the Constitutive Act, which attract sanctions where they are not implemented; and implores the AU to adopt such a pro-human rights interpretation of article 23(2). The paper also explores the possible role that the Peace and Security Council of the AU (PSC) can play in view of the recommendations of the African Commission in cases of serious or massive violations of human rights in view of article 58 of the African Charter, and article 19 of the Protocol establishing the Peace and Security Council (PSC Protocol).<sup>18</sup>

Finally, the paper examines the role of the newly established African Court on Human and Peoples' Rights (African Court) in the enforcement of the decisions of the African Commission, and as the long-awaited medium for having legally binding and enforceable decisions under the regional human rights regime.

## 2 The African Charter and its implementing mechanism

The adoption of the African Charter in 1981 and subsequent establishment of the African Commission<sup>19</sup> to promote and protect the Charter-guaranteed rights occurred at a time when African leaders were still reluctant to fully incorporate human rights into the political discourse.<sup>20</sup> It came at a time when the African political community — the Organisation of African Unity (OAU) and its component states — adhered to a strict interpretation of the principle of non-interference, even at the expense of the lives and rights of their citizens.<sup>21</sup> Consequently, unlike their European and Inter-American contemporaries, African leaders at the time shunned the idea of a supra-national human rights court, and opted for the African Commission, vested with wide promotional and protective functions with very restrictive room for manoeuvring in the enforcement of its decisions.<sup>22</sup>

<sup>18</sup> Protocol relating to the Establishment of the Peace and Security Council of the African Union, adopted on 10 July 2002; entered into force on 26 December 2003 <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 26 May 2006).

<sup>19</sup> The African Commission is the only mechanism created under the African Charter to monitor state parties' compliance. Its mandate includes promotional activities, protective activities (including complaints), the examination of state party reports and the interpretation of the African Charter; art 45 African Charter.

<sup>20</sup> See further Ankumah (n 10 above) 4-8; G Naldi 'Future trends in human rights in Africa: The increased role of the OAU' in Evans & Murray (n 6 above) 1.

<sup>21</sup> Naldi (n 20) above.

<sup>22</sup> As above.

Although caught between these hard African realities and the soft African Charter,<sup>23</sup> the African Commission has made some commendable achievements, particularly in the exercise of its protective mandate of considering communications, where it has developed the practice of making recommendations,<sup>24</sup> which now form an important case law, supplementing and considerably developing the original treaty text.<sup>25</sup> The African Commission makes recommendations notwithstanding that it is not clear from the African Charter what kind of findings it is able to make after the consideration of individual communications,<sup>26</sup> or indeed whether it can make a finding at all, and what the possible remedies are.

However, this innovativeness falls short of a measure for ensuring compliance with these recommendations, and most state parties have disregarded these recommendations with no attendant consequences. Hence, the African Commission's finding of a violation on the part of a state party does not necessarily afford a remedy to the victim, and despite wide ratifications of the African Charter,<sup>27</sup> many states continue in the wanton violation of rights. This state of affairs has earned the Commission numerous criticisms as a toothless outfit operating at the will and whim of its political master, the AU Assembly.<sup>28</sup>

Consequently, and notably, without the requisite enforcement mechanisms to ensure states' implementation of such recommendations, human rights protection on the continent remains elusive<sup>29</sup> and the lack of implementation calls for an evaluation of the system in practice, the subject of this paper. Some of the reasons advanced for the non-implementation of the African Commission's recommenda-

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<sup>23</sup> See generally C Odinkalu 'The role of the case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 225, on how the African Commission has largely reinvented the seemingly weak African Charter.

<sup>24</sup> I Österdahl 'Implementing human rights in Africa: The African Commission on Human and Peoples' Rights and individual communications' (2002) 15 *Swedish Institute of International Law Studies in International Law*, noting that the issuing of recommendations by the Commission is an innovative way of fulfilling its protective mandate.

<sup>25</sup> C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 685-686; n 23 above.

<sup>26</sup> See art 52 of the African Charter in respect of findings in non-state communications, which is not clear either. See Österdahl (n 24 above).

<sup>27</sup> The African Charter has been ratified by all members of the AU.

<sup>28</sup> See Naldi (n 20 above) 12; Ankumah (n 10 above) 9; Viljoen (n 10 above) 6; UO Umzurike *The African Charter on Human and Peoples' Rights* (1997) 78; Organization of African Unity 'Making human rights a reality for Africans' August 1998 (AI Index IOR63/01/98).

<sup>29</sup> At present, the African Commission's follow-up to ensure the enforcement of its recommendations is made through *note verbales*, during field missions and during its ordinary sessions when state delegates are present. In view of the results achieved, this approach has proven to be unsatisfactory. See also K M'baye 'Keynote address on the African Charter on Human and Peoples' Rights' *ICJ Nairobi Conference Report* 2-4 December 1985, ICJ Geneva (1986) 27.

tions include the lack of political will on the part of state parties, a lack of good governance, outdated concepts of sovereignty,<sup>30</sup> a lack of an institutionalised<sup>31</sup> follow-up mechanism for ensuring the implementation of its recommendations, weak powers of investigation and enforcement<sup>32</sup> and the non-binding character of the Commission's recommendations,<sup>33</sup> the last of which is the most cited reason why states have not been inclined to enforce its recommendations. The next section therefore examines the debate on the nature of the Commission's recommendations.

## 2.1 The nature of the Commission's recommendations

The authors note that while the African Charter gives the African Commission express powers to make 'recommendations' in respect of state communications under article 53, the in-depth study that the AU Assembly may ask it to undertake in cases of serious and massive violations of human and peoples' rights under article 58(2), and its promotional mandate,<sup>34</sup> there is nothing in the Charter that suggests that the Commission may make 'recommendations' to the states as a result of its consideration of individual communications.<sup>35</sup> Therefore, the authors reiterate that the issuing of recommendations by the African Commission on individual communications is an innovative way of fulfilling its protective mandate. However, neither the African Charter nor the Rules of Procedure of the African Commission define the status of the Commission's recommendations.

Nevertheless, it is trite that by signing and ratifying the African Charter, states signify their intention to be bound by and adhere to the obligations arising therefrom, even if they do not enact domestic legislation to effect domestic incorporation.<sup>36</sup> This principle is expressed in article 14 of the Vienna Convention on the Law of Treaties of 1969.<sup>37</sup>

<sup>30</sup> Viljoen & Louw (n 7 above) 9-10.

<sup>31</sup> Rules of Procedure of the Inter-American Commission (n 13 above) art 46.

<sup>32</sup> Naldi (n 20 above).

<sup>33</sup> As above.

<sup>34</sup> Art 45(1)(a) African Charter.

<sup>35</sup> African states vested the African Commission with neither judicial nor quasi-judicial powers, their original intent being to create a body for promoting rather than protecting human rights.

<sup>36</sup> See the Botswana case of *Attorney General V Dow* 1964 6 BCLR 1 *per* Ammisah JP 27-30 and Aguda JA 43-47; *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46; the *Saro-Wiwa* case (n 8 above) para 113. See also J Dugard *International law: A South African perspective* (1992) 266. See also DJ Harris *Cases and materials on international law* (1991) 747.

<sup>37</sup> Art 14 of the Vienna Convention provides that '[t]he consent of a state to be bound by a treaty is expressed by ratification when, *inter alia*, the treaty provides for such consent to be expressed by means of ratification, or the consent of a state to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification'.

Therefore, while it is true that African states were not keen to surrender their sovereignty to a regional quasi-judicial body like the African Commission,<sup>38</sup> by ratifying the Charter it is obvious that they were aware that they were required to abide by its provisions.<sup>39</sup> Article 27 of the Vienna Convention further provides that a state 'cannot [consequently] plead provisions of its own law or deficiencies in that law' in answer to a claim it is in breach of a treaty obligation.<sup>40</sup>

The African Commission has adopted this position by stating that the effective implementation of the African Charter is based on the principle of *pacta sunt servanda*,<sup>41</sup> which is to the effect that agreements are binding on parties, and are to be implemented in good faith.<sup>42</sup> Under this principle, an African state's ratification of the African Charter creates for that state an obligation that demands concrete results.<sup>43</sup> Therefore, irrespective of whatever system of governance may be in place, a state is constrained by norms prescribed in a treaty and must discharge the duties established thereunder.<sup>44</sup> As a result, a state cannot invoke the provisions of its domestic legislation, including its constitution, to evade its treaty obligations.<sup>45</sup> The African Commission adopts the view that when a state ratifies the African Charter, it is obligated to uphold the fundamental human rights contained therein, even if it does not enact domestic legislation to effect the Charter's incorporation.<sup>46</sup> The Commission has reiterated that 'international treaties which are not part of domestic law and which may not be directly

<sup>38</sup> n 20 above.

<sup>39</sup> Naldi (n 20 above) 2; Viljoen (n 10 above) 6.

<sup>40</sup> See the Inter-American Court's decision in *Caso Loayza Tamayo v Peru* <http://www.wcl.american.edu/hrbrief/v7i2/newsasystem.htm> (accessed 21 July 2006).

<sup>41</sup> Art 26 of the Vienna Convention on the Law of Treaties explains the principle of *pacta sunt servanda* as meaning that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Art 31(1) of the Vienna Convention on the Law of Treaties further stipulates that a treaty must be interpreted in good faith in the light of its objects and purpose. The protective purpose of the African Charter will be realised optimally if the Commission's findings constitute legal obligations.

<sup>42</sup> Art 26 Vienna Convention (n 41 above). See *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 75; *Jawara v The Gambia* (n 36 above) para 46.

<sup>43</sup> As the Permanent Court of International Justice articulated, 'A state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken'; *Advisory Opinion No 10, Exchange of Greek and Turkish Populations*, 1925 PCIJ (ser B) 10 at 20; see *Media Rights Agenda* (n 42 above) para 75.

<sup>44</sup> *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) para 26.

<sup>45</sup> Art 27 Vienna Convention: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' See also Draft Declaration on Rights and Duties of States art 13 [1949] *Year Book of the International Law Commission* 286 UN Doc A/CN.4/SER A/1949; IA Shearer *Starke's international law* (1994) 22.

<sup>46</sup> See *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 43. See art 27 Vienna Convention and *Caso Loayza Tamayo v Peru* (n 37 above).



enforceable in the national courts nonetheless impose obligations on state parties'.<sup>47</sup>

The Commission's view has, however, been criticised by various authors<sup>48</sup> who argue that the findings of the Commission are not legally binding and that states consequently are not legally bound.<sup>49</sup> Murray, for example, notes that the Commission 'considers its decision as an authoritative interpretation of the Charter and thus binding on states despite having been established as "little more than a subcommittee" of the political OAU'.<sup>50</sup> Naldi also argues that the 'recommendations of the African Commission lack the formal binding force of a ruling of a court of law but have a persuasive authority akin to the opinions of the United Nations Human Rights Committee and as such an expectation of compliance appears to have been engendered'.<sup>51</sup>

Some states have indeed questioned the African Commission's assumption of a quasi-judicial function,<sup>52</sup> in response to which the Commission has tried to define the extent of its mandate and the status of its decisions. In *Civil Liberties Organisation v Nigeria*,<sup>53</sup> the African Commission found the Federal Republic of Nigeria to have violated articles 7 and 26 of the African Charter, when its military government suspended the Charter as domesticated, and ousted the jurisdiction of the courts in Nigeria to adjudicate the legality of any of its decrees, through the use of ouster clauses. The Commission held categorically that the obligations of the Nigerian government remained unaffected by the purported revocation of the domestic effect of the Charter; and that the decisions of the African Commission are legally binding on the government of Nigeria, as are the provisions of the Charter itself.<sup>54</sup>

The government of Nigeria, in response, criticised the African Commission and asserted that such a recommendation was an affront to its sovereignty because the Commission lacked the judicial capacity to make such a recommendation.<sup>55</sup> The Commission consequently replied

<sup>47</sup> *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) paras 59-60.

<sup>48</sup> See eg G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 684; R Murray *The African Commission on Human and Peoples Rights and international law* (2000) 54-55.

<sup>49</sup> Österdahl (n 26 above) 154-155; E Enonchong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197.

<sup>50</sup> See Murray & Evans (n 7 above) 758.

<sup>51</sup> Naldi (n 20 above) 10.

<sup>52</sup> See submissions by the Federal Republic of Nigeria to the 2nd extraordinary session of the African Commission held 18-19 December 1995, Kampala, Uganda, ACHPR Documentation, Banjul, The Gambia.

<sup>53</sup> (2000) AHRLR 188 (ACHPR 1995) para 20.

<sup>54</sup> n 53 above, paras 19 & 20. See further C Anyangwe 'Obligations of state parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.

<sup>55</sup> African Commission on Human and Peoples' Rights 'Account of Internal Legislation of Nigeria and the Dispositions of the African Charter on Human and Peoples' Rights' Doc II/ES/ACHPR/4; n 53 above.

that it is bound by the African Charter to consider communications fully, carefully, and in good faith.<sup>56</sup> It added that when the Commission concludes that a communication finds a state in violation of the African Charter, its duty is to make such clearly and indicate what action the government must take to remedy the situation. With regard to the allegations of its lack of judicial capacity, the African Commission held that<sup>57</sup>

the communications procedure as set out in article 55 of the Charter is quasi-judicial, in that communications are not necessarily adversarial. Complainants are complaining against some act or neglect of a government, and the Commission must ultimately, if it is unable to effect a friendly settlement, decide for one side or the other.

From the foregoing, the authors note that states are bound by their obligations under the African Charter, including the quasi-judicial jurisdiction of the African Commission, and the resultant recommendations and decisions.<sup>58</sup> In effect, notwithstanding the undefined and debated nature of the Commission's decisions, the authors argue that the 'legal' or 'moral' nature of the recommendations is not so much the question, but rather the fact that parties simply have an obligation to implement them in view of the cited principle of *pacta sunt servanda*, and the provisions of article 1 of the African Charter,<sup>59</sup> among others. The authors therefore submit that the binding nature of the recommendations of the African Commission is more of a political question than a legal one, because the implementation of the recommendations of the African Commission in the respondent state is dependent on political will.

Also related to the discourse on implementation is the issue of provisional measures issued by the African Commission in emergency cases. This is not provided for in the Charter, but in the Commission's Rules of Procedure, which provide that it may inform a state party on the 'appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of [an] alleged violation before a decision has been finalised on a communication'.<sup>60</sup> For example, in *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>61</sup> the African Commission called on Nigeria not to execute the complainant, pending the final outcome of the communication before it. The state, however, executed the complainant in total disregard of the provisional

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<sup>56</sup> As above.

<sup>57</sup> As above.

<sup>58</sup> That is, a reading of arts 14, 26, 27 & 31(1) of the Vienna Convention and art 1 of the African Charter combined.

<sup>59</sup> Art 1 of the African Charter states that member states shall recognise the rights under the Charter and shall undertake to adopt legislative or other measures to give effect to them.

<sup>60</sup> Rule 111 of the African Commission's Rules of Procedure 1998.

<sup>61</sup> *Saro-Wiwa* case (n 8 above).

measures issued by the Commission. The Commission subsequently found that the death penalty imposed and execution of the complainant violated the African Charter, and held that the execution in the face of the Commission's provisional measures under its rule 111 defeated the purpose of the rule.<sup>62</sup>

Provisional measures allow a meaningful consideration of the Commission's eventual findings and states should consider them as binding.<sup>63</sup> It is the authors' position that by ratifying the African Charter, state parties undertook to fulfil the obligations thereunder, including an undertaking not to do anything that would undermine the objective of the Charter.<sup>64</sup> Notwithstanding the fact that even provisional measures are not considered legally binding, state parties are obliged to comply with them and to the bare minimum refrain from inflicting irreparable damage, pending the finalisation of the case before the Commission.<sup>65</sup>

However, notwithstanding the argument by the Commission that state parties are obliged to respect and implement its decisions, the authors note that there has not been any authoritative move on the part of the African Commission to develop a 'consistent follow-up system to gather information about states' responses to its recommendations'<sup>66</sup> and ensure the implementation of same,<sup>67</sup> and has thus remained passive with respect to the consequences of its recommendations.<sup>68</sup> Accordingly, there is a need to institutionalise an enforcement system to ensure that the Commission's recommendations are implemented, in order that the Commission may rise up to meet the expectations of complainants who have entrusted it with their complaints and grievances.<sup>69</sup>

In accordance with article 59 of the African Charter, the African Commission has, since its Seventh Annual Activity Report, included a separate annexure dealing with communications, naming the states against which communications had been filed, and stating its findings and recommendations where it had found violations of the Charter.

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<sup>62</sup> n 8 above, paras 114, 115 & 116.

<sup>63</sup> As above.

<sup>64</sup> Art 31(1) Vienna Convention.

<sup>65</sup> The ICJ has, however, held that the provisional measures are binding. See the judgment of the ICJ in the *La Grande case (Federal Republic of Germany v United States)* Case 104 of 27 June 2001, ICJ at 506 para 109) where the Court held that orders indicating provisional measures are (legally) binding.

<sup>66</sup> Viljoen (n 14 above) 15.

<sup>67</sup> See Draft Resolution on the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights, annexed to Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach, 24th session OAU DOC/OS/50b (XXIV) (1998).

<sup>68</sup> n 56 above.

<sup>69</sup> See the European Convention art 46; the American Convention on Human Rights art 68; art 30 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

These reports are then published and are available to the public after adoption by the AU Assembly. This process of publicising or naming and shaming has tended to make some states take the recommendations of the African Commission seriously,<sup>70</sup> but without proper follow-up by the Commission, states continue to ignore them. Therefore, within its own structure, it is suggested that the Commission also adopts a strategic approach to follow-up. More importantly, the Commission should complement its findings of violations of the African Charter and sound reasoning with unambiguous specification of the appropriate remedies. This primary suggestion is because, while improving on its practice of making recommendations,<sup>71</sup> it has been observed that the Commission has not always been explicit or clear in its findings and indication of remedial measures.<sup>72</sup> In many situations, the Commission finds that a victim is entitled to compensation, but fails to determine what the compensation should be, thus leaving it to the state in question to configure the appropriate remedial measures.<sup>73</sup> Such open-ended remedies do not make it clear to states what they are required to do, and that the lack of clarity would as well impede any follow-up or implementation as the form and nature of the remedy is

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<sup>70</sup> Notably, some states have recently even taken to pressuring the AU Assembly through the Executive Council to suspend the publication of the African Commission's Annual Activity Report for incorporating unfavourable resolutions and recommendations. See Assembly/AU/Dec 49 (III). The AU Assembly suspended the publication of the African Commission's Seventeenth Annual Activity Report, at its 4th Summit in Addis Ababa, Ethiopia. The report was suspended at the behest of Zimbabwe, since it incorporated a report on a fact-finding mission to that country. See also Assembly/AU/Dec 101(VI) para 1. The AU Assembly sought the deletion of certain aspects of the Nineteenth Activity Report before publication, at the Assembly's 6th Summit in Khartoum, Sudan. The report had, among others, resolutions on the human rights situation in Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe. While this development has been criticised for its perceived interference with the independence of the African Commission, it is also illustrative of the fact that states are wary of being adversely mentioned in reports of the African Commission. Consequently, the authors note that the 'naming and shaming approach' is effective, even though minimally so, and urge the AU Assembly to be more supportive of the Commission by not yielding to states' demands that lead to the suspension of, or deletion of, parts of the Commission's Activity Reports; more so because this approach compromises the independence and effectiveness of the Commission.

<sup>71</sup> Eg, the African Commission made notably concrete and specific recommendations in its decisions in *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) and *SERAC* (n 8 above).

<sup>72</sup> Odinkalu (n 23 above) 242. The most common formulation at the conclusion of decisions is the 'urging' of states to 'draw the necessary legal conclusions' (eg *Pagnouille* (n 6 above); *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001); *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi* (2000) AHRLR 48 (ACHPR 2000)) or 'take the necessary steps' to bring their practice in conformity with the African Charter (eg *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996); *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998)). See also Harrington (n 4 above) 5.

<sup>73</sup> See *Embaga Mekongo v Cameroon* (2000) AHRLR 567 (ACHPR 1995).

bound to be contested. Sometimes, the Commission makes a finding only of a violation of the victim's rights, without anything further.<sup>74</sup>

It is therefore suggested that the African Commission adopts a standard approach to its findings, specifying the violations, remedies recommended and time limit for implementation. It is further suggested that the Commission includes reports on the status of compliance by states in its activity reports, which report is in turn submitted to the AU Assembly,<sup>75</sup> which then adopts them in line with article 59 of the African Charter. This will be similar to the practice of the United Nations (UN) Human Rights Committee which 'provides an annual report noting the status of state compliance with its findings'.<sup>76</sup>

Such an institutionalised follow-up mechanism would also be akin to the position under the Inter-American human rights system where the General Assembly and the Permanent Council of the Organization of American States are charged with the primary political responsibility for monitoring compliance with decisions of the Inter-American Commission and the Inter-American Court of Human Rights.<sup>77</sup> In the European human rights system, the Council of Europe's Committee of Ministers fulfils similar obligations of monitoring compliance of the decisions of the European Court of Human Rights.<sup>78</sup>

The authors, however, note that, notwithstanding the importance of a follow-up system within the structure of the African Commission to ensure the implementation of its decisions, the latter is still not imbued with enforcement powers. This assertion requires an explanation of the present authors' conception of the term 'enforcement' which has been defined as 'comprising all measures intended and proper to induce respect for human rights'.<sup>79</sup> Enforcement therefore involves securing compliance by all necessary means. For instance, the only use of the term 'enforcement' in the UN Charter occurs in relation to the enforcement under chapter VII of decisions of the Security Council;<sup>80</sup> which has led to some international lawyers equating enforcement with the use of,

<sup>74</sup> *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000); *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

<sup>75</sup> Draft Resolution on Compliance (n 67 above).

<sup>76</sup> Viljoen (n 10 above) 15 fn 81, citing Report of the Human Rights Committee, UN Human Rights Committee 57th session CH 6, Follow-up activities under the Optional Protocol 118, UN Doc A/57/40 (vol 1) (2002).

<sup>77</sup> C Heyns *et al* 'A schematic comparison of regional human rights systems: An update' (2006) 4 *SUR International Journal on Human Rights* 168.

<sup>78</sup> As above. See also art 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222, entered into force 3 September 1953 (as amended by Protocols 3, 5, 8, & 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998 respectively).

<sup>79</sup> R Bernhardt 'General report' in R Bernhardt & JA Jolowicz (eds) *International enforcement of human rights* (1985) 5.

<sup>80</sup> Art 45 Charter of the United Nations, 1945.

or threat of use of, economic or other sanctions or armed force.<sup>81</sup> The African Commission lacks such powers of 'actual' enforcement, and what it does is merely to promote and protect human rights, with the necessary co-operation of concerned states rather to enforce human rights.<sup>82</sup> The AU Constitutive Act, on the other hand, makes provision for the enforcement of the AU's decisions.<sup>83</sup> Consequently, the next section examines the effect of the adoption of the African Commission's recommendations by the AU Assembly, and the possible enforcement mechanism for such within the political framework of the AU.

### 3 Possible enforcement mechanisms under the African Union

#### 3.1 The relationship between the African Commission and the African Union

Antecedent to an analysis of the possible enforcement of the African Commission's recommendations through the AU, it is important to attempt to clarify the relationship between the two institutions. The extent to which the AU mechanisms can be employed to enforce the Commission's recommendations would largely depend on whether the latter is an institution of the AU, or a subsidiary organ, or if the two are parallel institutions with the duty to co-operate in the enforcement of human rights in Africa.

It is important to note that, while the African Union's Constitutive Act makes reference to human rights and the African Charter, it specifically failed to list the African Commission as an AU institution under its relevant article 5. This has led to debate as to whether the African Commission is an organ of the AU and to what extent the Constitutive Act envisions human rights and their protection and promotion of importance. Therefore, consequent to the uncertainty about their relationship, the AU Assembly, at the Durban Summit, incorporated the African Commission and other existing human rights institutions into

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<sup>81</sup> HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (1996) 347. Compliance with international law generally takes place within a state and depends on its legal system, on its courts and other official bodies but as with other international obligations, the international system can exert influence on the state to comply.

<sup>82</sup> As was earlier stated, the African Commission's enforcement powers and that of other relevant bodies lay with the Assembly of Heads of State and Government of the OAU; which power was not used.

<sup>83</sup> Unlike the OAU Charter, which made no provision for the enforcement of its principles. See art 23(2) of the AU Constitutive Act (n 17 above).

the AU structure under article 5(2) of the AU Constitutive Act<sup>84</sup> to 'operate within the framework of the African Union'.<sup>85</sup> In this regard, Kindiki<sup>86</sup> has contended that on a literal interpretation of article 5(2), the AU Assembly could not have acted under this provision because the institutions in question already existed. Instead, the institutions should have been integrated into the AU through article 3(h) of the AU Constitutive Act, which provides that the AU will promote and protect human rights 'in accordance with the African Charter and other relevant human rights instruments' under which these institutions were created.<sup>87</sup>

Some analysts believe that this express omission was deliberate,<sup>88</sup> while others think the non-inclusion of the African Commission into the Constitutive Act illustrates its ineffectiveness and a desire by the AU to sideline it.<sup>89</sup> The latter hold the view that 'had the Commission been very active in the field of human rights to make its impact felt on the continent or to be seen as a very important tool for socio-economic and political development, such impact would not have escaped the mind of the drafters of the Act'. Rather, it is the opinion of the authors that the omission of such an important institution in the treaty establishing the African political body is reflective of the status of human rights on the agenda of the body, notwithstanding that the African Commission is perceived as being efficient or otherwise. It is a body whose continued existence cannot be compromised, except if the AU had a better alternative in mind to safeguard the rights of the African people on a continent rife with human rights violations.

It is also important to note relevant long-standing arguments on the status of the African Commission, pre-dating the AU. In this regard, some analysts have considered the Commission as having been established as 'little more than a subcommittee' of the political OAU.<sup>90</sup> On

<sup>84</sup> See AU 'Decision on interim period' 1st ordinary session of the AU Assembly of Heads of State and Government AU DOC ASS/AU/Dec 1(1) para 2(XI) [http://www.africa-union.org/official\\_documents/Decisions\\_Declarations/durban%202002/Durban%202002%20Assembly%20of%20the%20African%20Union.pdf](http://www.africa-union.org/official_documents/Decisions_Declarations/durban%202002/Durban%202002%20Assembly%20of%20the%20African%20Union.pdf) (accessed 28 July 2006).

<sup>85</sup> As above.

<sup>86</sup> K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97.

<sup>87</sup> n 86 above, 103.

<sup>88</sup> See generally GM Wachira 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively to meet the needs of the African population' (2006) 3 *Judiciary Watch Report* 12.

<sup>89</sup> MK Hansungule, addressing NGOs at the 31st session of the African Commission on Human and Peoples' Rights held in Pretoria, South Africa, from 2 to 16 May 2002, in RW Eno 'The promotion of human rights in the new African dispensation' (2006) (draft article on file with the authors).

<sup>90</sup> See eg Murray & Evans (n 7 above) 758.

the other hand, the Commission has also been considered as not being *stricto sensu* an organ of the AU, but 'a non-political and independent institution',<sup>91</sup> which is designed to operate within the structure of the AU and collaborate with the AU Assembly in the execution of its function to promote and protect human rights in Africa.<sup>92</sup>

Notwithstanding this debate, it is the authors' view that the AU has indeed recognised the African Commission by way of incorporation, and has assumed the African Charter obligations of the former OAU<sup>93</sup> in the appointment of members of the Commission,<sup>94</sup> and in its funding<sup>95</sup> There is, however, an imperative need for further clarification of the nature of the relationship between the two institutions, especially in view of recent incidents of perceived interference with the Commission's functional independence by the AU Assembly.<sup>96</sup>

Notably, the AU Assembly at its 2nd ordinary session<sup>97</sup> in July 2003, had asked the African Commission<sup>98</sup>

to continue, in concert with the Commission of the African Union, to enhance interaction and co-ordination with the different organs of the African Union in order to strengthen the African Mechanism for the Promotion and Protection of Human and Peoples' Rights and report to Council at its next session.

In essence, the African Commission is required to clarify its relationships with African human rights bodies, the organs of the AU and other initiatives with human rights components. However, the Commission is yet to do so formally, although before its 39th ordinary session in Banjul in May 2006, the Commission held a brainstorming session with other organs of the AU and a few invited stakeholders on their relation-

<sup>91</sup> K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 284-285.

<sup>92</sup> Arts 45(4) & 59 African Charter.

<sup>93</sup> Art 33 of the Constitutive Act (n 17 above) provides that the AU 'shall replace the Charter of the [OAU]'. See generally PR Myers *Succession between international organisations* (1993). See also Ayinla (n 96 below).

<sup>94</sup> Art 33 African Charter. See also AU Decision on the Appointment of Members of the African Commission on Human and Peoples' Rights Doc EX/CL/57 (III), Assembly/AU/Dec 23 (II), <http://www.africa-union.org/root/au/Documents/Decisions/hog/12HoGAssembly2003.pdf> (accessed 27 July 2006). See also Ayinla (n 96 below).

<sup>95</sup> Art 41 African Charter. See also Ayinla (n 96 below).

<sup>96</sup> n 70 above. See also A Ayinla 'From Durban to Maputo: An interim assessment of the state of human rights under the African Union' (unpublished article on file with the authors).

<sup>97</sup> Held in July 2003 in Maputo, Mozambique.

<sup>98</sup> Assembly/AU/Dec 11 (II) para 3. See also Decision on the Fifteenth Annual Activity Report of the African Commission AHG/DEC 171 (XXXVIII) decisions 38th ordinary session of the Assembly of Heads of State and Government of the OAU 8 July 2002 Durban, South Africa AHG/decisions 171-184 (XXXVIII). The Assembly *inter alia* called on the African Commission to propose ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the African Union, and submit a report thereon at the next session of the Assembly.



ship and ways of strengthening the African human rights system.<sup>99</sup> It is hoped that this initiative will produce the desired results since similar forums and activities had been conducted with little if any implementation.<sup>100</sup>

It is crucial that the African Commission develop concrete strategies and make proposals to the AU Assembly on their relationship in effectively protecting and promoting human rights on the continent. These will range from its status as an organ of the AU, its functional independence, financial and administrative issues and the implementation of its recommendations.

### 3.2 Enforcing the recommendations of the African Commission through the African Union

The African Commission holds bi-annual ordinary sessions for a period of two weeks each,<sup>101</sup> to consider, *inter alia*, communications on alleged violations of the African Charter. Thereafter, it produces a report of its activities during the year, known as the Annual Activity Report,<sup>102</sup> which includes a separate annexure dealing with communications and its recommendations thereon. These reports are submitted to the AU Assembly for consideration and adoption.<sup>103</sup> It is worth noting that the current practice is that the report is first considered by the Executive Council before it is tabled for adoption by the AU Assembly, despite the fact that the African Charter only envisages the submission of such reports to the AU Assembly.<sup>104</sup> While the consideration by the Executive Council is a welcomed development, given that it could lead to more concrete considerations of the Commission's decisions, which the AU Assembly did not have the time for, it has nevertheless had the negative effect of eroding the independence of the Commission and undermining the finality of its decisions in respect of its mandate. Consequently,

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<sup>99</sup> Report of the Brainstorming Session on the African Commission on Human and Peoples' Rights 9-10 May 2006, Banjul, The Gambia (on file with the authors).

<sup>100</sup> Other such forums and activities include a 2002 Evaluation Report, 2003 Addis Ababa Retreat and the Uppsala International Conference on June 2004.

<sup>101</sup> Rules 1 & 2(1) of the Rules of Procedure of the African Commission (n 60 above).

<sup>102</sup> It is noted that there has been a recent departure from the 'Annual' Activity Report practice when the Commission in January 2006 was required to and therefore submitted an Activity Report to the AU Assembly, only after its 38th session, that is, the Nineteenth Activity Report (2006). Thereafter, the African Commission has submitted its Twentieth Activity Report only after its 39th session. This change has been attributed to the fact that the AU Assembly now meets twice a year.

<sup>103</sup> Arts 54 & 59(1) African Charter.

<sup>104</sup> n 103 above. Indeed, at the 6th Summit of the AU Assembly in Khartoum, Sudan in January 2006, the Assembly instructed the African Commission to submit its reports to the Executive Council and or to the Assembly (n 102 above).

the publication of a report has once been suspended,<sup>105</sup> and on two occasions the Executive Council has recommended the deletion of certain aspects<sup>106</sup> of a report, in what has been interpreted as political interference by the political organs of the AU.

It is therefore hoped that the ongoing consultations between the African Commission and the other organs of the AU will result in the necessary clarification of their relationship, especially as it relates to the functional independence of the former.

In relation to the enforcement of the African Commission's recommendations, it is noted that article 59 of the African Charter only requires that the Commission's Activity Reports are submitted to the AU Assembly for the latter's adoption. The Charter does not expressly specify the effect of the adoption of such recommendations by the AU Assembly, nor does it oblige the latter to take any action thereafter. This is particularly significant because the African Charter specifies the African Commission's powers to make recommendations to the AU Assembly in respect of inter-state communications under article 53 and in cases of serious or massive human rights violations under article 55, but does not specify the effect of those recommendations, nor does it oblige the Assembly to take any action thereon. However, it could be inferred that once the Commission makes recommendations to the AU Assembly, it is the latter's prerogative to determine appropriate ways and means of enforcing them.

The authors submit that on the adoption of the African Commission's recommendations by the AU Assembly, they become the latter's decisions, in view of article 9(1)(b) of the Constitutive Act, which provides that one of the functions of AU Assembly shall be to receive, consider and take decisions on reports and recommendations from other organs of the Union.<sup>107</sup> Also, rule 33 of the Rules of Procedure of the AU Assembly<sup>108</sup> categorises the decisions of the Assembly as follows:

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<sup>105</sup> Assembly/AU/Dec 49 (III). The decision to suspend the publication of the Seventeenth Annual Activity Report at the 4th Summit of the Assembly in Addis Ababa, Ethiopia was made after Zimbabwe protested that the report did not incorporate its response to the findings of the Commission on a fact-finding mission which was part of the Annual Activity Report's annexes. This is despite the fact that the African Commission had solicited time and again the said response to no avail before its inclusion in the Annual Activity Report.

<sup>106</sup> The AU Assembly at its 6th Summit in Khartoum, Sudan in January 2006, decided 'to adopt and authorise, in accordance with article 59 of the African Charter on Human and Peoples' Rights (the Charter), the publication of the Nineteenth Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe'.

<sup>107</sup> On the status of the African Commission in the AU, the AU Assembly, at its 1st (Durban) Summit, incorporated the Commission into the AU structure under art 5(2) of the AU Act. See AU 'Decision on interim period' 1st ordinary session of the AU Assembly of Heads of State and Government AU DOC ASS/AU/Dec 1(1) para 2(XI).

<sup>108</sup> These Rules of Procedure are made pursuant to art 8 of the Constitutive Act.

- 1 The Decisions of the Assembly shall be issued in the following forms:
  - (a) Regulations: these are applicable in all member states which shall take all necessary measures to implement them.
  - (b) Directives: these are addressed to any or all member states, to undertakings or to individuals. They bind member states to the objectives to be achieved while leaving national authorities with power to determine the form and the means to be used for their implementation.
  - (c) Recommendations, Declarations, Resolutions, and Opinions etc. These are not binding and are intended to guide and harmonise the viewpoints of member states.
- 2 The non-implementation of Regulations and Directives shall attract appropriate sanctions in accordance with article 23 of the Constitutive Act.

Rule 34 of the Rules of Procedure of the AU Assembly also provides that Regulations and Directives shall be automatically enforceable 30 days after the date of the publication in the official journal of the AU or as specified in the decision. Recommendations of the African Commission, on adoption by the AU Assembly, thus far, have been in the category of recommendations, since they are not classified on adoption as directives or regulations. They are adopted as part of the Activity Report of the Commission, but are neither published in the official journal of the AU, nor is there any time specified for their enforcement. This means that the adopted Annual Activity Report of the Commission and recommendations therein at present fall within the ambit of recommendations of the AU Assembly which are not legally binding.<sup>109</sup>

Notwithstanding the foregoing deductions on the status of the African Commission's recommendations, a reading of articles 45(1)(c)<sup>110</sup> and 59(2) of the African Charter, article 3(h) of the Constitutive Act<sup>111</sup> and rule 77 of the Rules of Procedure of the African Commission implies that the AU Assembly is the ultimate body with the primary political responsibility<sup>112</sup> of monitoring compliance with recommendations.<sup>113</sup>

<sup>109</sup> Wachira (n 88 above).

<sup>110</sup> Art 45(1)(c) of the African Charter, which requires the African Commission to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights', also emphasises a relationship of co-operation and collaboration with all the relevant organs of the OAU (now AU).

<sup>111</sup> This provides that one of the objectives of the AU is to promote and protect human and peoples' rights in accordance with the African Charter.

<sup>112</sup> Quashigah (n 91 above) 284 notes that the African Commission is designed to operate within the structure of the OAU and collaborate with the Assembly of Heads of State and Government in the execution of its function to promote and protect human rights in Africa.

<sup>113</sup> It is undisputed that under the African Charter, the African Commission has no enforcement powers and that its decision is not 'formally' binding irrespective of its stated opinion or follow-up measures. These are all still subject to the political will of states. However, it is submitted that the binding nature or otherwise of the decisions of an international body is not sufficient to ensure compliance unless the appropriate mechanisms are in place to ensure compliance. Eg, without an efficient enforcement mechanism, which is being proposed, the prospective binding decisions of the proposed Court can also be flouted.

More importantly, under the AU Constitutive Act,<sup>114</sup> the functions of the AU Assembly include not only receiving, considering and taking decisions on reports and recommendations from the other organs of the Union,<sup>115</sup> but also monitoring the implementation of policies and decisions of the Union as well as ensuring compliance of all member states.<sup>116</sup> This demonstrates a commitment on the part of the AU to monitor the implementation of all its decisions, generally notwithstanding their sub-classifications into regulations, directives or recommendations. Furthermore, there is a determination by the AU to take all necessary measures to strengthen [the] common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively.<sup>117</sup>

From the foregoing, the AU structure latently provides a political framework for the enforcement of the recommendations of the African Commission. 'The regional political organisation is the primary body through which peer pressure must be channelled.'<sup>118</sup> Shame or peer pressure can be mobilised against recalcitrant states, which can change behaviour by inducing shame.<sup>119</sup> If that does not work, the AU can mobilise stronger forms of sanctions against states, in view of article 23(2) of its Constitutive Act, which vests the AU with the power to impose sanctions on any member state that fails to comply with the decisions and policies of the AU, 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. A pro-human rights interpretation<sup>120</sup> of article 23(2) of the Act will extend the application of this provision to recommendations, notwithstanding the provision of rule 33(2), which restricts its application to regulations and directives of the AU alone. In this regard, it is argued that the provision of the Constitutive Act overrides that of the rules made thereunder, and in itself is overarching and covers recommendations, as it refers to decisions and policies of the AU, generally speaking.

Besides, it is also suggested that the recommendations of the African Commission to the AU Assembly should be considered separately from

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<sup>114</sup> Constitutive Act (n 17 above). The African political community has recently reiterated and made fresh commitments to human rights in Africa under the auspices of the AU as the AU Constitutive Act makes firm commitments to human rights integrating 'political, economic, and human rights priorities'.

<sup>115</sup> Art 9(1)(b) Constitutive Act.

<sup>116</sup> Art 9(1)(e) Constitutive Act.

<sup>117</sup> Preambular para 10 Constitutive Act.

<sup>118</sup> C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 701.

<sup>119</sup> n 70 above.

<sup>120</sup> Human rights might, inadvertently, not have been intended to be covered by the provision. However, the implementation of these provisions can be broadened to cover the enforcement of human rights, the promotion and protection of which are two of the main objectives of the AU.

its general Activity Report and adopted as directives.<sup>121</sup> It would be invaluable to attach legally binding value to the decisions of the AU Assembly on recommendations of the African Commission and classifying them as directives, which would bring them within the purview of rule 33(2) and remove any doubt as to whether or not non-compliance with them can attract appropriate sanctions in accordance with article 23 of the Constitutive Act.

The power of the AU Assembly to sanction in this manner could be compared with that under article 8 of the Statute of the Council of Europe which confers on the Committee of Ministers the power to sanction non-compliant member states. Although it is noted that the Committee of Ministers has only once invoked this article, in what could be termed as 'special circumstances' in the *Greek case*,<sup>122</sup> this ever-existent, although remote, possibility of expulsion from the Council of Europe provides some modicum of compulsion, and a political supervisory structure within the European system. The relevant article 8 of the Statute of the Council of Europe provides as follows:

Any member of the Council of Europe, which has seriously violated article 3, may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from date as the Committee may determine.

Article 3 mentioned therein provides as follows:

Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter 1.

Although the Constitutive Act of the AU did not go as far as the Statute of the Council of Europe in its prescription of expulsion as a sanction, it is argued that that a pro-human rights interpretation of article 23(2) of the Act will achieve similar results. It is worth remarking that the suggested AU political enforcement mechanism has been tested, for example, in Madagascar, which was barred from the AU inauguration summit in the year 2002 because of doubts over the legitimacy of its president, in accordance with article 4(p) of the Constitutive Act of the

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<sup>121</sup> According to Ben Kioko, the Legal Counsel of the African Union, in a discussion held with one of the authors on 10 May 2006 in Banjul, The Gambia, during a brainstorming on the African Commission and AU organs. He said that a decision was still pending on which decisions would fall under which category as per rule 33. It is hereby submitted that the African Commission should motivate and make a case for its recommendations on communications being categorised as directives.

<sup>122</sup> See Case 3321/67 *Denmark v Greece*, Case 3322/67 *Norway v Greece*, Case 3323/67 *Sweden v Greece* and Case 3344/67 *Netherlands v Greece*, in (1969) 12 *Yearbook of the European Convention on Human Rights*. See also NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1205.

AU on the condemnation and rejection of unconstitutional changes of government<sup>123</sup> and in Togo, by suspending and urging its members to impose economic and travel sanctions on the Togolese government during an unconstitutional change of leadership.<sup>124</sup> It was a success as the Togolese leadership realised the impact of the suspension and sanctions and reverted to the rule of law and conducted elections.

From the foregoing, it is submitted that the above-listed provisions of the AU Constitutive Act clearly provide a political framework for the enforcement of human rights norms within the AU structure. Nonetheless, the AU human rights enforcement mechanism is latent and has to be activated by the African Commission and other existing human rights institutions. In this respect, it is suggested that the Commission, in view of its powers under article 53 of the African Charter and rule 41, should make a formal recommendation to the AU Assembly to use its political framework to ensure compliance with the Commission's recommendations.

Also related to the possible enforcement mechanism under the AU is the proposed co-operation between the Peace and Security Council of the AU and the Commission.<sup>125</sup> The Council has the mandate to anticipate and prevent conflicts, and promote peace, security and stability in Africa, in order to guarantee *inter alia* the protection of human rights and fundamental freedoms of the African people by member states.<sup>126</sup> The Council also has the power to follow up, within the framework of its conflict prevention responsibilities, the progress towards, *inter alia*, the promotion and protection of human rights and fundamental freedoms of the African people by member states.<sup>127</sup> For reasons of anticipating and preventing conflicts, the Council established a 'continental early warning system'<sup>128</sup> and article 19 of the Protocol obliges the Council to seek close co-operation with the African Commission in all matters relevant to its objectives and mandate, and also obliges the Commission to bring to the attention of the Peace and Security Council any information relevant to its objectives and mandate.

A reading of the foregoing relevant provisions of the Protocol establishing the Council creates a picture of mutual co-operation between the Commission and the Council, whereby the Commission, in view of

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<sup>123</sup> R Cornwell 'Madagascar: First test for the African Union' (2003) 12 *African Security Review* 1.

<sup>124</sup> After the death of President Gnassingbe Eyadema of Togo in February 2005, his son was quickly unconstitutionally installed as the president, a move widely condemned by the AU and the international community, which imposed sanctions on Togo; <http://www.un.org/av/radio/unandafrica/transcript36.htm> (accessed 6 July 2005).

<sup>125</sup> PSC Protocol (n 18 above).

<sup>126</sup> Arts 3, 6 & 7 PSC Protocol.

<sup>127</sup> Art 7(m) PSC Protocol.

<sup>128</sup> Art 12 PSC Protocol.

its mandate under article 58 of the Charter, in drawing the attention of the AU Assembly to cases of serious or massive violations of human rights, extends such reporting to the PSC. Besides, in terms of article 58 of the Charter, the early warning signals of conflict may be detected by the Commission through its communications procedure, for example, where a chain of communications reveals a systematic violation of human rights by a state.<sup>129</sup> The PSC, on the other hand, in this symbiotic relationship, may employ its structure to follow-up, within the framework of its conflict prevention responsibilities, the progress towards a state's implementation with the recommendations of the Commission, which relates to its mandate.

Having analysed the possible political enforcement framework within the AU Assembly and the PSC, the next section of the paper examines the significance of the newly established African Court on Human and Peoples' Rights for the enforcement of the recommendations of the African Commission, and for the creation of a legally enforceable human rights regime in Africa.

#### **4 Implementation through the proposed African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights<sup>130</sup>**

Many have sought a structural solution to the problem of enforcement of human rights in Africa in the form of an African Court on Human and Peoples' Rights<sup>131</sup> whose judgments would indisputably be binding,<sup>132</sup> hence the establishment of the African Court.<sup>133</sup> The first judges of the Court were sworn in on 2 July 2006, at the 7th AU Summit, and the Court is expected to take off in the near future.

The establishment of the African Court is an indispensable component of an effective regime for the protection of human rights, as norms prescribing state conduct are not meaningful unless they are anchored in functioning and effective institutions such as courts. The African

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<sup>129</sup> Eg. *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) which preceded the Rwandan Genocide of 1994.

<sup>130</sup> AU decision EX CL/Dec 237 (VIII), adopted by the 8th ordinary session of the Executive Council held in Khartoum, Sudan, January 2006.

<sup>131</sup> n 69 above.

<sup>132</sup> Harrington (n 4 above) 6.

<sup>133</sup> Adopted by the Assembly of Heads of State and Government of the OAU in Ougadougou, Burkina Faso, on 9 June 1998 OAU/LEG/MIN/AFCHPR/PROT (111), and came into force on 25 January 2004. However, the 3rd ordinary session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec 45 (111).

Court will deliver legally authoritative and conclusive decisions,<sup>134</sup> and state parties to the African Court Protocol specifically undertake to implement the findings of the Court, including ordered remedies.<sup>135</sup> Besides, states will no longer hide under the cover of the non-binding nature of decisions as the reason for their non-compliance. The African Court will also provide remedies and bring the African human rights system at par with its regional contemporaries and develop African human rights jurisprudence.

Besides state parties and African intergovernmental organisations, which can go to the African Court directly, individual cases will reach the Court mainly in two ways: Direct access to the African Court by individuals is possible only in respect of states that have made a declaration in terms of article 34(6) of the African Charter.<sup>136</sup> The other route would be when the African Commission refers a case to the Court after considering the communication.<sup>137</sup> It is therefore hoped that the African Commission and the African Court will work out some complementary arrangement and avoid duplications. The African Commission consequently will remain a tribunal of first and last instance in respect of most of the individual cases. In terms of enforcement, interestingly, rule 118 of the draft new Rules of Procedure of the Commission<sup>138</sup> provides that it may refer cases of non-compliance to the African Court where the respondent state party concerned has ratified the African Court Protocol, and such state 'has not complied with its recommendations made in accordance with article 59 of the African Charter within 120 days'. This means that the decisions of the African Commission that remain unenforced by respondent states can be referred to the African Court for enforcement via legally binding measures, as far as they relate to state parties to the African Court Protocol. This is, however, the prerogative of the African Commission, as it may not refer a case of non-compliance where 'there is a reasoned decision by the majority of its members to the contrary'. More so, this is a provision of a draft of the Rules of Procedure, which is subject to modifications in light of the ongoing discourse on the 'complementarity' of the African Court and the African Commission.

Notwithstanding this unique possibility, there is no complementary provision in the yet to be drafted rules of procedure of the African Court, obliging it to enforce the recommendations of the Commission.

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<sup>134</sup> Art 30 Protocol to the African Charter; Viljoen (n 10 above) 14.

<sup>135</sup> Art 30 Protocol to the African Charter.

<sup>136</sup> Thus far, only the Republic of Burkina Faso has made the declaration.

<sup>137</sup> Like in the Inter-American human rights system; see American Convention on Human Rights 1969 art 51. See also Inter-American Commission's Rules of Procedure (2003) art 44.

<sup>138</sup> Draft Rules of Procedure of the African Commission, presented to the 39th ordinary session of the African Commission, by the Working Group on Specific Issues Relating to the Work of the Commission, May 2006 (on file with authors).



While the Court is obliged under the Protocol to consider cases brought by the Commission, this does not necessarily translate into an obligation to enforce the recommendation of the Commission as it comes, without reopening the case. It is the authors' view that a progressive approach by the African Court towards this provision would be to enforce such referred recommendations. The authors, however, consider it necessary that the African Commission should still have its own implementation mechanism, for its integrity's sake, because having to wait for the Court to enforce its decisions would inevitably delay the availability of relief to victims, especially those who cannot approach the Court directly. Besides, this possibility of referral to the Court for enforcement relates only to the few state parties. Hence, the Commission remains with the daunting task of giving and enforcing relief for human rights violations to the majority of victims.

The African Court Protocol provides for institutional control of the enforcement of its judgments. It provides in article 30 that states are bound to execute its decisions, and that the Executive Council shall be notified of judgments and shall monitor their execution thereof on behalf of the Assembly.<sup>139</sup> This is akin to the positions under the European and Inter-American systems, where enforcement is vested in an organ of the political body.<sup>140</sup> Furthermore, the African Court is required to specify instances of states' non-compliance with its decisions in its annual report to the AU Assembly.<sup>141</sup> Therefore, such reports, once adopted by the AU Assembly, will also assume the status of AU decisions, as earlier analysed,<sup>142</sup> in which case, the indicated non-compliance by states may in turn attract sanctions under article 23(2) of the AU Constitutive Act, as envisaged in respect of the African Commission's recommendations.<sup>143</sup>

There is, however, a new development in relation to the African Court. The AU has decided to merge the human rights court, that is, the African Court, and the African Court of Justice<sup>144</sup> through the adoption of an instrument fusing both courts<sup>145</sup> (the draft merger instrument). The draft instrument would replace the initial Protocols establishing the two individual courts.<sup>146</sup> The Court, named the African

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<sup>139</sup> Art 29(2) Protocol.

<sup>140</sup> nn 77 & 78 above.

<sup>141</sup> Art 31 Protocol.

<sup>142</sup> That is, in respect of the African Commission.

<sup>143</sup> Constitutive Act (n 17 above).

<sup>144</sup> Protocol on the Court of Justice of the African Union, 2nd ordinary session of the AU, Maputo, Mozambique, July 2003.

<sup>145</sup> Draft Protocol on the Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex II Rev submitted to the 9th ordinary session Executive Council of the AU, 25-29 June 2006, Banjul, The Gambia (on file with authors). See art 1.

<sup>146</sup> n 145 above, art 1.

Court of Justice and Human Rights (ACJHR)<sup>147</sup> will comprise of two sections, that is, a General Section and a Human Rights Section.<sup>148</sup> Consequently, the draft merger instrument stipulates a transitional period of one year from its entry into force, for the African Court to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the new ACJHR. After that, the former ceases to exist.<sup>149</sup>

Under the proposed merged court, that is, the ACJHR, *locus standi* has been broadened to include individuals and relevant human rights organisations accredited to the AU or any of its organs. Accordingly, the old requirement of an additional declaration to allow individual and NGO petitions has been dispensed with, and the majority of victims can approach the ACJHR directly. Similar to the African Court, the proposed ACJHR will issue final and binding decisions<sup>150</sup> and the Executive Council will be charged with the responsibility of monitoring the execution of its decisions, on behalf of the AU Assembly.<sup>151</sup> As novel provisions and, quite specifically, the merger instrument, requires that the ACJHR refers cases of non-compliance with its judgments to the AU Assembly, which shall decide upon measures to be taken to give effect to that judgment, and which may thereby impose sanctions by virtue of paragraph 2 of article 23 of the Constitutive Act.<sup>152</sup>

This newly proposed role of the AU in relation to the enforcement of the decisions of the ACJHR quite confirms the previous analyses of the authors in relation to the enforcement of the recommendations of the African Commission and the decisions of the African Court. It brings to the fore, once again, the fact that the AU is the ultimate enforcer of the decisions of the human rights bodies, whatever form they may assume. Hence, without the requisite political will by member states, which is only achievable within the AU structure, even the decisions of the ACJHR are open to blatant disregard by state parties, notwithstanding their acceptance of the binding nature of its decisions.

Consequently, the effectiveness of a human rights court, either in the form of the new African Court or the proposed ACJHR, hinges on the effectiveness of the current African Commission. It is therefore imperative to improve the decision-making process of the African Commission, as well as the processes of adopting and enforcing its decisions. The assertion that a court will render binding decisions and thus give some credence to the human rights system is true. However, if the political will to promote and protect human rights on the continent is there, states can abide by recommendations taken even by quasi-judicial insti-

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<sup>147</sup> n 145 above, art 2.

<sup>148</sup> n 145 above, arts 5 & 16.

<sup>149</sup> n 145 above, art 7.

<sup>150</sup> n 145 above, arts 47(1) & (2).

<sup>151</sup> n 145 above, art 44 (6).

<sup>152</sup> n 145 above, arts 47(4) & (5).

tutions such as the African Commission. In the same vein, if the requisite political will is absent, the binding nature of the decisions will not make any difference. Whereas this paper advocates the use of sanctions to ensure compliance, the authors note that it is more important for states to voluntarily respect their human rights obligations, and the decisions of the Commission and the Court(s).

## 5 Conclusion

The respect for and compliance by states with any decision by a supranational (human rights) body do not necessarily derive from the judicial or quasi-judicial nature of the decision-making body and the consequent nature of its decision, but depend on the presence of the requisite political will to honour its international treaty obligations. This is the case with state parties' response to the African Commission, and even their anticipated response to the human rights court, be it the new African Court or the proposed ACJHR. However, to encourage such political will, there is a need for the relevant decision-making body to have an institutionalised follow-up mechanism to encourage and monitor compliance and where, despite this, there is an absence of the requisite political will, then there is need for an enforcement mechanism to ensure compliance through the effective use of sanctions, whether within the framework of the body or by co-operating with relevant enforcement bodies or authorities. Consequently, a case has been made for the creation of an institutionalised follow-up mechanism within the African Commission structure, and for ultimate enforcement measures through co-operation with the AU Assembly and the PSC, within their political norm enforcement frameworks, as expounded. This proposal is in view of the fact that any regional human rights system worth its name requires strong in-built control systems to encourage states to honour their human rights obligations; and drawing inspiration from the European experience, this is realisable within the political structure of the AU.

Notwithstanding its possible political enforcement mechanism, there is still a need by the AU, through its regular policies and deliberations, to aid its member states in the realisation of the necessity, responsibility and benefits of compliance with human rights, especially without its intervention. More so, although the proposed hybrid<sup>153</sup> enforcement framework is feasible under the AU structure as a possible solution to the problem of non-compliance with human rights in Africa, its utilisation largely remains an aspiration. This is because, in order for this political framework to have the desired impact on the African Commis-

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<sup>153</sup> That is, the combination of the legal, Charter-based human rights enforcement mechanism with the AU political norm enforcement mechanism.

sion's decisions and recommendations, there must be a willingness on the part of the component members of the AU<sup>154</sup> to adopt a pro-human rights stance to the provisions, and interpret such to extend to the recommendations of the Commission, as explicated in this paper. Thus, the question of political will comes to the fore once again. Experience has shown that treaties and regional institutions by themselves do not necessarily translate into better protection of human rights, unless accompanied by the necessary political will. Thus, the actualisation of the proposed co-operation is largely hinged on the sincerity or otherwise of the architects of the AU — whether the political will finally and formally expressed in respect of human rights is genuine.

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<sup>154</sup> A point to stress is that the promising norms and institutions developed under the auspices of the AU should offer opportunities to the NGO community and the civil society in general to lobby for a stronger human rights regime under the AU than it was able to achieve under the Charter regime. That is the only way to ensure that the human rights mandate of the AU is not pushed to the back burner. See CAA Parker & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365.

# Poverty reduction strategies and the rights to health and housing: The Malawian and Ugandan experiences

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## Summary

*This article examines the poverty reduction strategies of Malawi and Uganda, namely, the Malawi Poverty Reduction Strategy Paper (2002) and the Uganda Poverty Eradication Action Plan (1997). This is done with a view to assessing the extent to which these strategies act as tools towards the progressive realisation of the rights to health and housing in the two countries. The article provides this analysis from a human rights-based approach. The paper argues that the poverty reduction strategies of the two countries under examination are seriously lacking from a rights-based perspective as they fail to address these two rights sufficiently. They even fall short of recognising health and housing as human rights. Against the backdrop of the overarching economic policies of the World Bank and the International Monetary Fund, the paper demonstrates how these strategies address the issue of poverty reduction as mere programmatic rather than a human rights issue, and largely directed by the dictates of the International Monetary Fund and the World Bank. The result is that, notwithstanding some levels of popular participation in their drafting, particularly evident in the case of Uganda, the countries under study cannot assume full ownership of their strategies and this undermines the basic ethos behind the principle of national sovereignty and the right to self-determination.*

## 1 Introduction

Poverty Reduction Strategy Papers (PRSPs) were born out of the policies

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of the World Bank (WB) and the International Monetary Fund (IMF).<sup>1</sup> They were introduced 'in the wake of the failure of Structural Adjustment Programmes (SAPs) to reduce the incidence of poverty'.<sup>2</sup> PRSPs are linked to the IMF's and WB's Heavily Indebted Poor Countries (HIPC) debt relief initiative.<sup>3</sup> In order to have access to debt relief, countries have had to draw up PRSPs and start moving towards their effective implementation.<sup>4</sup> PRSPs are meant to be the national guide informing almost every facet of the human development framework. They are being used as benchmarks for the prioritisation of the use of public and external resources for poverty reduction.<sup>5</sup> Further, multilateral as well as bilateral donors and lending institutions are using them as an overarching framework from which the development policies and actions of developing countries are to be gauged and decisions on further assistance or loans are made.<sup>6</sup>

In that light, PRSPs have become pivotal to the social fabric of the countries concerned as they affect the daily undertakings of the people through, among other things, their allocative and redistributive roles.<sup>7</sup>

It has been argued, however, that what is sad about the policies is that they are imposed on African countries, leaving them with the agonising choice of either bowing to the demands or risking the freezing of financial assistance.<sup>8</sup> As Mathews aptly puts it:<sup>9</sup>

The PRSP, as a key vehicle for donor lending and aid disbursements, wields power and influence and for this reason tends to overwhelm and subsume other strategies at other levels, leaving participants little choice but to tag onto 'the only game in town'. Any look at poverty reduction strategies and human rights needs to focus on PRSPs, as it comes in tow with a number of ramifications and impacts, both in terms of process and content that deserve assessment and response from a human rights perspective.

<sup>1</sup> These institutions are collectively referred to as the Bretton Woods Institutions. It was agreed at the September 1999 Annual Meetings of the World Bank Group and the IMF that nationally-owned participatory poverty reduction strategies should become the basis for concessional lending and debt relief under the enhanced Heavily Indebted Poor Countries (HIPC) Initiative. See World Bank Group Overview of poverty reduction strategies <http://www.worldbank.org/poverty/strategies/index.htm> (accessed 16 August 2004).

<sup>2</sup> J Oloka-Onyango *Economic and social rights in the aftermath of Uganda's fourth Constitution: A critical reconceptualisation* CBR Working Paper No 88 (2004) 24.

<sup>3</sup> n 1 above.

<sup>4</sup> S Mathews *Poverty reduction strategies and human rights* Position paper presented at the World Social Forum, Mumbai, India, 2004 2.

<sup>5</sup> Mathews (n 4 above) 1.

<sup>6</sup> Mathews (n 4 above) 2.

<sup>7</sup> MEJN *Economic governance — Budget Literacy Project* <http://www.mejn.org/econ-govnc.htm> (accessed 29 March 2004).

<sup>8</sup> J Oloka-Onyango & D Udagama *The realisation of economic, social and cultural rights: Globalisation and its impact on the full enjoyment of human rights* E/CN 4/Sub 2/2000/13 para 22.

<sup>9</sup> Mathews (n 4 above) 1.

Thus, the importance of an examination of PRSPs in relation to economic and social rights cannot be overemphasised.

Malawi and Uganda, on which this paper focuses, are bound by their Constitutions as well as various international treaties to which they are party, such as the African Charter on Human and Peoples' Rights (African Charter)<sup>10</sup> and the International Covenant on Economic, Social and Cultural Rights 1966 (CESCR),<sup>11</sup> to ensure the realisation of economic and social rights and, in particular, the rights to health and housing.

This study is not just about drawing a theoretical paradigm within which to locate poverty and human rights; it is geared towards influencing policy-makers to adopt a well-balanced integrative and practical approach. Such an approach should highlight the value of human rights entitlements as an important lever in pro-poor change, whilst at the same time ensuring the sustenance of a measure of flexibility that is necessary for policy change and prioritisation within a democratic framework.

## 2 Conceptualising poverty

### 2.1 The meaning of poverty

The defining feature of poverty is that it entails the restriction of opportunities for a person to pursue his or her well-being.<sup>12</sup> Sen states that poverty entails 'the failure of basic [human] capabilities to reach certain minimally acceptable levels'.<sup>13</sup> The Office of the High Commissioner for Human Rights (OHCHR) argues that, since poverty denotes an extreme form of deprivation, only those capability failures that are deemed to be basic in order of priority would count as poverty.<sup>14</sup> As much as it is recognised that there is a degree of relativity in the concept of poverty from community to community, the OHCHR states that there are certain basic capabilities that are common to all. These include adequate nutrition, adequate health, adequate clothing and adequate housing.<sup>15</sup> The OHCHR approach rejects the idea of viewing poverty narrowly as a lack of adequate income.<sup>16</sup> It is thus argued that instead of simply identifying the poor as those who fall below a certain minimum income level, commonly called the poverty line, there is need to come up with

<sup>10</sup> Malawi ratified the African Charter on 23 February 1990, whereas Uganda ratified it on 18 August 1986. See <http://www.africa-union.org/home/welcome.htm> (accessed 11 October 2004).

<sup>11</sup> Malawi ratified CESCR on 22 March 1994, whereas Uganda ratified it on 21 April 1987. See <http://www.unhchr.ch/pdf/report.pdf> (accessed 11 October 2004).

<sup>12</sup> OHCHR *Human rights and poverty reduction: A conceptual framework* (2003) 7.

<sup>13</sup> A Sen *Inequality re-examined* (1992) 109.

<sup>14</sup> n 12 above.

<sup>15</sup> As above.

<sup>16</sup> As above.

innovative mechanisms that use qualitative as well as quantitative methods to define the minimum level of capability attributes below which a person is to be deemed poor.<sup>17</sup>

This study agrees with this approach and argues that a system of indicators, akin to those used by the UNDP to measure the level of human development, as stated in the UNDP Human Development Reports, be adopted in that regard. The UNDP characterises as Least Developed Countries (LDCs) those countries that fall below the Human Development Index (HDI) value of 0,5.<sup>18</sup> This study argues that it would be appropriate to define the poor in terms of a similar index rather than with reference to the so-called income poverty line.

## 2.2 Poverty as a human rights issue

A number of commentators have identified poverty as a serious human rights issue. Former UN High Commissioner for Human Rights, Mary Robinson, has said: 'I am often asked what is the most serious form of human rights violations in the world today, and my reply is consistent: extreme poverty.'<sup>19</sup>

Haug and Ruan state that poverty, particularly in its extreme forms, amounts to a violation of not only virtually all social and economic rights, 'but also — through marginalisation and discrimination — of civil and political rights'.<sup>20</sup> According to Mazengera, poverty has the effect of nullifying economic and social rights like health, adequate housing, food and safe water.<sup>21</sup>

The Committee on Economic, Social and Cultural Rights (ESCR Committee) has affirmed these propositions, stating that:

Although the term is not explicitly used in the International Covenant on Economic, Social and Cultural Rights, poverty is one of the recurring themes in the Covenant and has always been one of the central concerns of the Committee.<sup>22</sup>

There thus seems to be no doubt that poverty is a serious human rights issue.

<sup>17</sup> OHCHR *Draft guidelines: A human rights-based approach to poverty reduction strategies* (2002) para 48.

<sup>18</sup> UNDP *Human Development Report* (2004) 141.

<sup>19</sup> UNDP *Poverty and human rights: A practice note* (2003) iv.

<sup>20</sup> R Haug & E Ruan *Integrating poverty reduction and the right to food in Africa* (2002) <http://www.nlh.no/noragric/publications/reports/NoragricRep2B.pdf> (accessed 8 November 2006).

<sup>21</sup> S Mazengera 'Making rights of poor people practical in Malawi through a rights-based approach to development' unpublished LLM dissertation, University of Pretoria, 2001.

<sup>22</sup> See Statement of the Committee on Economic, Social and Cultural Rights to the Third United Nations Conference on the Least Developed Countries, adopted at the 25th session (20th meeting) 4 May 2001.



### 3 The Washington Consensus

#### 3.1 The advent of Structural Adjustment Programmes

As stated before, PRSPs came about in the wake of the failure of SAPs to reduce the incidence of poverty.<sup>23</sup> According to Oloka-Onyango, SAPs emerged out of a concern that sub-Saharan African countries had failed to come out of abject poverty and marginalisation during the 1970s and early 1980s. They were thus geared to remove 'structural and institutional impediments standing in the way of effective development'.<sup>24</sup>

Some of the essential characteristics of SAPs are:<sup>25</sup>

- deep cuts to social programmes, usually in the areas of health, education and housing and massive lay-offs in the civil service;
- currency devaluation measures which increase import costs while reducing the value of domestically produced goods;
- liberalisation of trade and investment and high interest rates to attract foreign investment; and
- privatisation of government-held enterprises.

These measures, commonly referred to as the Washington Consensus, were intended to operate as a 'shock therapy' aimed at jumpstarting these ailing economies.<sup>26</sup>

After years of experimentation, it became apparent that the SAPs were not achieving the desired results. Deep cuts in social spending, trade liberalisation and privatisation of government-held enterprises, among others, only perpetuated the poverty situation of most African people, thus drawing heavy criticism on the Bretton Woods Institutions (BWIs). The critics argue that decreases in social expenditure as required by the SAPs have had an adverse impact on the fulfilment of human rights obligations, particularly economic and social rights, of developing countries.<sup>27</sup>

#### 3.1.1 The Poverty Reduction and Growth Facility and Poverty Reduction Strategy Papers

In reaction to the damaging criticism leveled at SAPs, the BWIs came

<sup>23</sup> Oloka-Onyango (n 2 above).

<sup>24</sup> Oloka-Onyango (n 2 above) 22.

<sup>25</sup> Halifax Initiative 'What are structural adjustment programmes (SAPs)?' <http://www.chebucto.ns.ca/current/P7/bwi/cccsap.html> (accessed 28 August 2004).

<sup>26</sup> See C Jakobeit 'The World Bank and human development: Washington's new strategic approach' *Development and Co-operation No 6*.

<sup>27</sup> See S Akermark 'International development finance institutions: The World Bank and the International Monetary Fund' in A Eide *et al Economic, social and cultural rights: A textbook* (2001) 516.

with the Poverty Reduction and Growth Facility (PRGF) framework that marked a shift from SAPs to PRSPs.<sup>28</sup>

According to the IMF, the PRSP approach is intended to be a comprehensive country-based strategy for poverty reduction. It is aimed at providing<sup>29</sup>

the crucial link between national public actions, donor support, and the development outcomes needed to meet the United Nations' Millennium Development Goals (MDGs),<sup>30</sup> which are centred on halving poverty between 2000 and 2015. PRSPs provide the operational basis for Fund and Bank concessional lending and for debt relief under the HIPC Initiative.

The BWIs state that the core principles of PRSPs are that they should be:<sup>31</sup>

- country-driven, promoting national ownership of strategies through broad-based participation of civil society;
- result-oriented and focused on outcomes that will benefit the poor;
- comprehensive in recognising the multidimensional nature of poverty; and
- partnership-oriented, involving co-ordinated participation of development partners (government, domestic stakeholders, and external donors).

However, the PRSP process has still attracted criticism as a new form of SAPs in so far as the BWIs stick to rigid requirements that must be met for a PRSP to pass the debt relief test.<sup>32</sup> Oloka-Onyango observes as follows:<sup>33</sup>

There is a thread of continuity between the old policy stipulations and the new, in that the 'fundamentals' (including the liberalisation of the economy and rapid privatisation and deregulation) have remained intact.

This study examines the extent to which, if at all, PRSPs operate within the framework of the Washington Consensus.

#### **4 Poverty Reduction Strategy Papers and the human rights-based approach to poverty reduction**

At present, there is a growing emphasis on the need for governments

<sup>28</sup> n 1 above.

<sup>29</sup> IMF *Poverty Reduction Strategy Papers: A fact sheet* <http://www.imf.org/external/npr/exr/facts/prsp.htm> (accessed 26 August 2004).

<sup>30</sup> See UNGA *UN millennium development goals (MDGs)* <http://www.un.org/millennium-goals/> (accessed 27 August 2004).

<sup>31</sup> As above.

<sup>32</sup> F Cheru *Foot-dragging on foreign debt* <http://www.southcentre.org/info/southbulletin/bulletin10/bulletin10web-03.htm> (accessed 26 August 2004).

<sup>33</sup> Oloka-Onyango (n 2 above) 24.

and development agencies to adopt a human rights-based approach to human development. Thus, the UNDP Human Development Report 2000 was devoted to this issue.<sup>34</sup> The World Bank has argued previously that there is no need for an explicit human rights-based approach in PRSPs, as the goals of human rights and poverty reduction in PRSPs are the same.<sup>35</sup> Haugh and Ruan, however, argue that there is a need for a more thoroughly developed and explicit link between poverty reduction strategies and rights-relevant policies and measurements. They state that what rights-based thinking can add to development thinking is that rights are legal and can be claimed. In other words, they state, rights-based approaches include an accountability system on duty bearers in order to ensure the effective implementation of economic and social rights. In their analysis, rights can be regarded as the legal basis for the poor to claim their rights and poverty reduction strategies as the operational policy instrument for action.<sup>36</sup>

According to the OHCHR:

One of the most distinctive features of a human rights based approach to poverty reduction is that it is explicitly based upon the norms and values set out in the international law of human rights.<sup>37</sup>

The office advises that, when beginning to prepare a PRSP, a state should expressly identify national human rights law and practice in its jurisdiction; the international and regional human rights treaties; other important human rights instruments such as the Universal Declaration of Human Rights (Universal Declaration), and commitments entered into at recent world conferences in so far as they bear upon human rights.<sup>38</sup> The OHCHR has further observed that under a rights-based approach, the issue of poverty reduction is<sup>39</sup>

a matter of right rather than charity. Essential to the very definition of human rights is the existence of claims and corresponding obligations at various levels of government and society.

Osmani furthers the debate by arguing that, although the primary obligation to fulfil the rights lies on states, the broader obligation lies on the whole international community.<sup>40</sup>

<sup>34</sup> UNDP *Human Development Report 2000: Human Rights and Human Development* (2000).

<sup>35</sup> Mathews (n 4 above) 6.

<sup>36</sup> See Haugh & Ruan (n 20 above).

<sup>37</sup> n 12 above, 1.

<sup>38</sup> n 17 above.

<sup>39</sup> See Opening Statement of the High Commissioner for Human Rights, 2nd Inter-Agency Workshop 'Implementing a human rights-based approach in the context of UN reform' 5-7 May 2003, Stamford, USA in Mathews (n 4 above) 8-9.

<sup>40</sup> See World Vision & World Bank *PRSP Conference Report* (September 2002) [http://www.worldbank.org/poverty/events/092502\\_session1b.pdf](http://www.worldbank.org/poverty/events/092502_session1b.pdf) (accessed 29 March 2004).

Gibbons states that many PRSPs have adopted the Washington Consensus, which is in many ways diametrically opposed to the idea of a state having redistributive or regulatory roles, and that this is one reason why there is a gap between PRSPs and human rights.<sup>41</sup>

In this respect, it is essential that if PRSPs are to be compatible with the human rights-based approach to development; they must be clearly premised on the understanding that poverty reduction is a state obligation. A PRSP must come out clearly that it embodies entitlement-based strategies. It must be made express that the PRSP is not merely a policy instrument that seeks to guide the state in its allocative and redistributive roles of public resources, but that, more importantly, it is an instrument that seeks to further the enjoyment of human rights.

Liebenberg conceptualises a human rights-based approach to development as entailing, among other things, the recognition that all public and private actors in society have a duty to respect and promote human rights. She argues that the rights-based approach embraces the creation of open and transparent institutions and processes for participation by civil society in the political, economic, social and cultural life of the country, and that it prioritises the needs of vulnerable and disadvantaged groups, and the adoption of special measures to assist these groups to gain access to opportunities, resources and social services. She goes further to state that this approach provides for the creation of a range of effective mechanisms of accountability to ensure human rights observance and that these mechanisms include public accountability through the monitoring of human rights commitments by an independent media and organs of civil society as well as legal accountability through the courts, other independent and impartial tribunals, and institutions such as national human rights commissions.

It is submitted that an effective PRSP that complies with the demands of a human rights-based approach to development must incorporate and meet these essential standards.

## 5 Participation in the PRSP process

### 5.1 Participation in the PRSP process and national ownership

As noted above,<sup>42</sup> one of the essential features of an appropriate PRSP is that it should be country-driven and promote national ownership through the broad-based participation of civil society.<sup>43</sup> It is thus critical to analyse the level of civil society and public participation in the Malawi Poverty Reduction Strategy Paper (MPRSP) process. The MPRSP's self-

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<sup>41</sup> See E Gibbons *Democratising development: Deepening social accountability through PRSPs* [http://www.worldbank.org/poverty/events/092502\\_session1b.pdf](http://www.worldbank.org/poverty/events/092502_session1b.pdf) (accessed 29 March 2004).

<sup>42</sup> n 30 above.

<sup>43</sup> n 35 above.

proclaimed attribute is that it was achieved through 'a highly consultative process involving a broad range of stakeholders over the course of 15 months'.<sup>44</sup> It further states that 'stakeholders in all the 27 districts and 4 cities and municipalities were consulted'.<sup>45</sup> The BWIs, however, whilst observing that 'the MPRSP process in Malawi was highly participatory', state that the participatory momentum was not sustained throughout the process.<sup>46</sup>

Fozzard and Simwaka are more critical. They state that '[t]he rushed timetable, the secretive negotiations between government and IMF/World Bank and the lack of opportunities for comprehensive consultation were criticised from the start'.<sup>47</sup> They conclude that the small but vocal Malawi Economic Justice Network (MEJN), a civil society organisation that actively participated in the PRSP process, has lamented government's reluctance to engage in meaningful consultation and participation in the poverty planning process.<sup>48</sup>

McGee *et al* similarly state that government has not been open to civil society involvement and that it has been up to civil society to push itself into the process as well as showing that it can add value to it.<sup>49</sup> What emerges is that it was largely through the vigour of the MEJN that a segment of civil society was consulted in the process. It further appears that only the MEJN can be said to have meaningfully participated rather than just having been consulted in the process.<sup>50</sup> Public participation, and even consultation, was very minimal. Thus, although the MPRSP boasts of stakeholders in all 27 districts and four cities and municipalities having been consulted, Fozzard and Simwaka state that 'consultations [were] held at the national level ... through *half-day* meetings' in all the districts.<sup>51</sup> Further, the PRSP was not and has not yet been translated into local languages.<sup>52</sup> Considering the high levels of illiteracy,<sup>53</sup> and the fact that even some of the fairly literate people cannot easily follow the PRSP's technical language, the necessity of such translation cannot be overemphasised. In light of the foregoing, it is

<sup>44</sup> MPRSP xi.

<sup>45</sup> MPRSP 2.

<sup>46</sup> IMF & IDA *Malawi Poverty Reduction Strategy Paper — Progress report: Joint staff assessment* (2003) 4.

<sup>47</sup> A Fozzard & C Simwaka *How, when and why does poverty get budget priority: Poverty reduction strategy and public expenditure in Malawi* ODI Working Paper 166 (2002) 9.

<sup>48</sup> n 47 above.

<sup>49</sup> R McGee *et al* *Assessing participation in Poverty Reduction Strategy Papers: A desk-based synthesis of experience in sub-Saharan Africa* (2002) 50 51.

<sup>50</sup> McGee *et al* (n 49 above) 49-54.

<sup>51</sup> Fozzard & Simwaka (n 47 above).

<sup>52</sup> This was confirmed during the author's interview with DK Kubalasa, Programme Manager for PRSP and Budget Monitoring, MEJN, at the MEJN offices in Lilongwe on 22 July 2004.

<sup>53</sup> The UNDP 2004 HDR puts the adult literacy rate Malawi at 61,8%. See UNDP *Human Development Report 2004* (2004) 142.

submitted that if there was public participation at the national level at all, then it was at best largely purely cosmetic. Worse still, the PRSP was not even taken for debate and approval to parliament, as the people's elected representatives.<sup>54</sup> It is submitted that this is a serious weakness and puts a serious dent on the idea of national ownership of the MPRSP.

## 5.2 Participation in the Poverty Eradication Action Plan process and national ownership

It has been said that Uganda's PRSP (Poverty Eradication Action Plan (PEAP)) 'undoubtedly presents one of the most comprehensive and country-owned participatory process[es] to date'.<sup>55</sup> Gariyo states that the 1997 PEAP was developed after two years of extensive consultation with, and participation by, civil society.<sup>56</sup> Leading the civil society groups that participated was the Uganda Debt Network (UDN), which is Uganda's leading civil society organisation in the area of economic justice.<sup>57</sup> Of course, just like in the experience of Malawi, civil society groups had to lobby their way into the process that was initially viewed as being the domain of government and its donor partners.<sup>58</sup> Thus, by the time the need arose to revise the PEAP with a view to transforming it into a PRSP under the PRGF, there was already an array of highly empowered civil society groups ready to participate and a pre-existing understanding by government of the need for broad civil society participation.<sup>59</sup>

McGee *et al* state that in Uganda<sup>60</sup>

[t]he participatory process has been higher quality, more sustained, much more country-owned, higher-profile and influential than in any other country, not least because of the favourable conditions which existed and substantial donor support.

However, these impressive observations notwithstanding, it is worth noting that the PEAP, just like the MPRSP, has not been translated into any local language.<sup>61</sup> As in Malawi, the relatively high levels of illiteracy as well as the lack of technical literacy for the PEAP language did not and do not bode well with the concept of popular public participation.<sup>62</sup> Further, as with the MPRSP, the PEAP was not put to

<sup>54</sup> Fozzard & Simwaka (n 47 above).

<sup>55</sup> McGee *et al* (n 49 above) 69.

<sup>56</sup> See Z Gariyo *Participatory Poverty Reduction Strategy Papers: The PRSP process in Uganda* (2002) 7. See also generally Z Gariyo *Civil society in the PRSP process: The Uganda experience* (2002) [http://www.trocaire.org/policyandadvocacy/Civilsociety %20inthe PRSP processtheUgandaexperience.ht](http://www.trocaire.org/policyandadvocacy/Civilsociety%20inthePRSPprocesstheUgandaexperience.ht) (accessed 6 October 2004).

<sup>57</sup> See Gariyo (n 56 above); McGee *et al* (n 49 above).

<sup>58</sup> McGee *et al* (n 49 above) 69.

<sup>59</sup> Gariyo (n 56 above).

<sup>60</sup> McGee *et al* (n 49 above).

<sup>61</sup> Confirmed during the author's interview with Zie Gariyo on 12 October 2004.

parliament for debate and approval and this casts some doubt on its legitimacy as a popular, people-owned strategy.

### 5.3 Comparative analysis of participation in the MPRSP and PEAP processes

The discussion in this part of the article shows that there is a striking conceptual difference in the forces that drove Malawi and Uganda into adopting PRSPs. Whilst the example of Malawi clearly falls into the category of those countries that adopted PRSPs primarily in order to access debt relief under HIPC, Uganda had in the 1997 PEAP a type of PRSP that pre-dated the PRGF. Thus, instead of simply being pushed by the BWIs into adopting the PRSP, Uganda was rather cajoled into revising its PEAP to suit the PRGF framework for PRSPs. This was done so that Uganda could be used as a showpiece for donors to stem the increasing tide of criticism that the HIPC Initiative was becoming another BWIs farce.<sup>63</sup>

The fact that there was broad participation in the formulation of the PEAP might be part of the explanation as to why it has been better implemented in Uganda as compared to other countries such as Malawi. This is because popular participation and a clear sense of national ownership are critical to garner commitment for implementation. It is still clear from this discussion, though, that the role of the BWIs has been pervasive in both processes. The PRSP process and some of the flaws as identified notwithstanding, it is a given fact that the PRSPs are here and that they wield power and influence that subsume other strategies at other levels.<sup>64</sup> As Mathews states, any look at poverty reduction strategies and human rights needs to focus on both process and content.<sup>65</sup> It is therefore very essential to examine the content of the PRSPs with a view to establishing whether they offer an effective conceptual framework that is requisite for enhancing the welfare and development of the people of the two countries through the advancement of economic and social rights. Thus, the discussion that follows in the next section focuses on the content of the PRSPs of Malawi and Uganda, with special focus on health and housing.

## 6 An overview of the rights to health and housing

### 6.1 Scope of the right to health

The right to health has been recognised in a number of international and regional human rights instruments, as well as in some national

<sup>62</sup> UNDP 2004 HDR puts the adult literacy rate in Uganda at 68,9%. See UNDP (n 53 above) 141.

<sup>63</sup> Gariyo (n 56 above).

<sup>64</sup> Mathews (n 4 above).

<sup>65</sup> As above.

constitutions, such as that of the Republic of South Africa. On the international plane, the right has been provided for under article 25 of the Universal Declaration, article 12 of CDESCR and article 24 of the Convention on the Rights of the Child (CRC), among other instruments. Under article 25(1) of the Universal Declaration, the right is covered within the broader context of the right to an adequate standard of living. That provision states as follows:

Everyone has the right to a standard of living *adequate for health* and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right has, however, received more detail under CDESCR. Article 12 guarantees the right to the highest attainable standard of physical and mental health. Further elaborating on the right is General Comment No 14 of the ESCR Committee, where the Committee unpacks the content of the right.

In the African regional context, the right receives expression in article 16 of the African Charter. That provision states that:

- 1 Every individual shall have the right to enjoy the best attainable state of physical and mental health.
- 2 States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The World Health Organisation (WHO) conceptualises health as a 'state of complete physical, mental and social well-being and not merely the absence of disease and infirmity'.<sup>66</sup> It thus embraces a wide range of socio-economic factors that constitute the underlying determinants of health such as nutrition, housing, safe and potable water, and a healthy environment.<sup>67</sup>

Mzikenge-Chirwa argues that the WHO definition is problematic as it presupposes that the state can ensure the complete good health of an individual. He states that one's good health is dependent on many variables, including actions of other persons, society as a whole and one's own behaviour and habits, as well as the limitations of nature.<sup>68</sup>

It is submitted, though, that this view misses one point, namely that WHO here defines 'health' rather than 'the right to health'. The main plank of the argument, it is submitted, should be that it is the term 'the

<sup>66</sup> See ESCR Committee General Comment No 14 (2000): The right to the highest attainable standard of health (art 12 of the Covenant) para 4.

<sup>67</sup> n 66 above.

<sup>68</sup> See D Mzikenge-Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19 *South African Journal on Human Rights* 545.



right to health' itself that presents problems if the interpretation of the right is that the state is obliged to guarantee 'a state of complete physical, mental and social well-being' of all people. Perhaps a better definition is that which is given by the ESCR Committee in General Comment No 14, where the Committee states that:<sup>69</sup>

[t]he 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.

This formulation does not necessarily imply that the state is under an obligation to ensure that people subject to its jurisdiction enjoy a state of complete well-being, but it places emphasis on ensuring the enjoyment of a variety of things and conditions necessary to ensure the full realisation of the highest attainable standard of health. This is where this paper agrees with Mzikenge-Chirwa that:<sup>70</sup>

[t]he right to health, despite the differences in formulation, consists of both curative and preventive health care services and the protection of the underlying determinants of health.

In the case of *Free Legal Assistance Group and Others v Zaire*, the African Commission held that:<sup>71</sup>

The failure of the government [of Zaire] to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine constituted a violation the right to enjoy the best attainable state of physical and mental health and the obligation of the State to take the necessary measures to protect the health of its people as set out in Article 16 of the Charter.

Just like any other socio-economic right, the right to health admits of progressive realisation within the available resources of the state.<sup>72</sup> Some scholars have argued that, in light of the absence of the words 'progressive realisation' in the African Charter, the social and economic rights guaranteed thereunder impose unqualified immediate obligations. Odinkalu, for instance, argues that<sup>73</sup>

unlike the ICESCR, the African Charter avoids the incremental language of progressive realisation in guaranteeing . . . economic, social and cultural rights . . . Instead, the obligations that states parties assume with respect to these rights are clearly stated as being of immediate application.

This debate, however, seems to have been settled finally by the African

<sup>69</sup> Para 9.

<sup>70</sup> Mzikenge-Chirwa (n 68 above).

<sup>71</sup> Centre on Housing Rights and Evictions ESC Rights Litigation Programme — Working Paper No 1 (2003); see also *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

<sup>72</sup> See art 2(1) of ICESCR and General Comment No 3 of CESCR.

<sup>73</sup> See C Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 178.

Commission. In *Purohit and Another v The Gambia*,<sup>74</sup> the Commission considered the argument and held that:<sup>75</sup>

[M]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of states party to the African charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all aspects without discrimination of any kind.

The right to health has four interrelated essential elements, namely, availability, accessibility, acceptability and quality.<sup>76</sup>

The requirement of *availability* entails that public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantities within the state. These include the availability of the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs.

*Accessibility* means that health facilities, goods and services have to be accessible to everyone. Accessibility includes physical, economic as well as information accessibility. Physical accessibility entails that facilities for health care must be available within a reasonable geographical distance. Information accessibility means the right of every person to seek, receive and impart information and ideas concerning health issues, without prejudice to the essential need for confidentiality in health matters.<sup>77</sup> On the other hand, is generally understood to mean affordability.<sup>78</sup> Thus, the ESCR Committee has stated that:<sup>79</sup>

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

*Acceptability* brings a cultural dimension to the right to health. It connotes, among other things, that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate.<sup>80</sup>

<sup>74</sup> (2003) AHRLR 96 (ACHPR 2003).

<sup>75</sup> Para 84.

<sup>76</sup> General Comment No 14 (n 66 above) para 12.

<sup>77</sup> General Comment No 14 para 12(b).

<sup>78</sup> As above.

<sup>79</sup> As above.

<sup>80</sup> General Comment No 14 para 12(c).

*Quality* demands strong adherence to issues of safety and the upholding of high standards, both ethical as well as technical and scientific, in order to ensure that the highest attainable state of health is achieved. Thus, this element demands, among other things, the availability of skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.<sup>81</sup>

An effective strategy to reduce poverty through the improvement of the health status of the people must be tailored towards ensuring the effective guarantee of these elements.

Further, like other socio-economic rights, the right to health is amenable to minimum core obligations, notwithstanding the applicability of the notion of progressive realisation in their implementation. These obligations are designed 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.<sup>82</sup> The ESCR Committee has stated that if the rights were to be interpreted in a way that does not impose these minimum obligations, CESCR would be deprived of its *raison d'être*.<sup>83</sup> In this regard, it is imperative to note what have been identified as the core minimum obligations in respect of the right to health. These core obligations include ensuring the following:

- (a) equal access to primary health services, especially for vulnerable and marginalised groups;<sup>84</sup>
- (b) access to minimum essential nutrition for everyone;<sup>85</sup>
- (c) access to basic shelter, sanitation, safe and potable water;<sup>86</sup> and
- (d) access to essential drugs as defined by WHO from time to time.<sup>87</sup>

Thus, where it is shown that the state is not ensuring the realisation of these minimum core obligations, then the state is in violation of the right.

## 6.2 Scope of the right to housing

The right to housing means the right to live somewhere in security, peace and dignity and not just the shelter provided by merely having a roof over one's head.<sup>88</sup> In the leading South African case of *Government of South Africa and Others v Grootboom and Others* (Grootboom case),<sup>89</sup> the Constitutional Court held that '[h]ousing entails more

<sup>81</sup> General Comment No 14 para 12(d).

<sup>82</sup> General Comment No 3 (n 72 above) para 10.

<sup>83</sup> n 55 above.

<sup>84</sup> General Comment No 14 para 43(a).

<sup>85</sup> General Comment No 14 para 43(b).

<sup>86</sup> General Comment No 14 para 43(c).

<sup>87</sup> General Comment No 14 para 43(d).

<sup>88</sup> CESCR General Comment No 4 (1991): The right to adequate housing (art 11(1) of the Covenant) para 7.

<sup>89</sup> 2000 11 BCLR 1169 (CC).

than bricks and mortar . . . For a person to have access to adequate housing . . . there must be land, there must be services, there must be a dwelling.<sup>90</sup>

The Commission on Human Settlements has stated that '[a]dequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities — all at a reasonable cost'.<sup>91</sup>

The right to housing has also been linked to the right to life. In the Indian case of *Shakti Star Builders v Naryan Khimali Tatome and Others*,<sup>92</sup> the Indian Supreme Court held that:

The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. For a human being [the right to shelter] has to be a suitable accommodation which would allow him to grow in every aspect — physical, mental and intellectual. A reasonable residence is an indispensable necessity for fulfilling the constitutional goal in the matter of development of man and should be taken as included in 'life'.

The right to housing is also closely intertwined and implied in the right to human dignity. Thus, in the case of *Social and Economic Rights Action Centre and Another v Nigeria (SERAC case)*,<sup>93</sup> it was held that forced evictions without proper compensation were not only a violation of the right to human dignity, but also the right to housing that is implied in human dignity.

The ESCR Committee has spelt out the following interrelated factors that characterise the right to housing:

### 6.2.1 Legal security of tenure

This implies that the state should take immediate measures aimed at conferring legal security of tenure upon persons and households currently lacking such protection. This is to be done in consultation with affected persons.<sup>94</sup> It includes rental accommodation, whether private or public, and informal settlements, and is closely related to the issue of forced evictions.<sup>95</sup> In the celebrated Indian case of *Olga Tellis v Bombay Municipal Corporation*, the Indian Supreme Court held that evictions from shelter places without following appropriate procedures and ensuring alternative accommodation would result in the deprivation of the right to a livelihood.<sup>96</sup>

<sup>90</sup> n 89 above, para 35.

<sup>91</sup> General Comment No 4 para 7.

<sup>92</sup> (1) SC 106, Civil Appeal No 2598 of 1989 (JT 1990).

<sup>93</sup> (2001) AHRLR 60 (ACHPR 2001) para 46.

<sup>94</sup> General Comment No 4 para 8(a).

<sup>95</sup> General Comment No 7 (1997): art 11 para 1 of the Covenant: Forced evictions.

<sup>96</sup> (3) SCC 545 (1985).

The issue of forced evictions is so pertinent that the ESCR Committee has devoted its General Comment No 7 to the subject.

### **6.2.2 Availability of services, materials, facilities and infrastructure**

This entails sustainable access to such resources as safe drinking water, energy for cooking, lighting, sanitation and washing facilities, and refuse disposal, among others.<sup>97</sup>

### **6.2.3 Affordability**

This enjoins the state to take steps to ensure that the percentage of housing-related costs, such as for some of the services mentioned in 6.2.2 above, is, in general, commensurate with income levels. It requires states to establish housing subsidies for those unable to obtain affordable housing.<sup>98</sup> States are further enjoined to protect tenants against excessive rent levels or increases.<sup>99</sup>

### **6.2.4 Habitability**

This means that housing must be habitable. Inhabitants must be protected from such hazards as excessive cold or heat, rain and disease vectors, among others.<sup>100</sup>

### **6.2.5 Accessibility**

This enjoins the state to fully take into account the special needs of such vulnerable groups as the elderly and the physically disabled in formulating its housing policy and law. It further requires states to ensure, as a central policy goal, the increased access to land by the landless or impoverished segments of society.<sup>101</sup>

### **6.2.6 Location**

This entails that housing should be made accessible in locations that are within reasonable reach of employment options, health care services, schools and other social facilities.<sup>102</sup>

In terms of core minimum obligations, the ESCR Committee's General Comment Nos 4 and 7 respectively, that address this right, do not offer any concrete guide. In the *Grootboom* case, the Court considered the issue of core minimum content in respect of the right and decided not to apply it to South Africa. The Court argued that 'the [ESCR]

<sup>97</sup> General Comment No 4 para 8(b).

<sup>98</sup> General Comment No 4 para 8(c).

<sup>99</sup> n 95 above.

<sup>100</sup> General Comment No 4 para 8(d).

<sup>101</sup> General Comment No 4 para 8(e).

<sup>102</sup> General Comment No 4 para 8(f).

Committee developed the concept of minimum core over many years of examining reports by reporting states' and that it did not have comparable information.<sup>103</sup> The Court then held that it simply had to direct itself to the principle of reasonableness, although there might be cases where the content of minimum core obligations would help in determining reasonableness.<sup>104</sup>

The Court emphasised that the state is obliged to take measures, including legislation and programmes, and that the 'policies and programmes must be reasonable both in their conception and their implementation'.<sup>105</sup> On the particular facts of the case, the Court held that, although the government of South Africa had adopted legislation and devised programmes intended at the progressive realisation of the right to housing, these measures failed the reasonableness test in so far as they did not make provision for measures to be taken in respect of people in desperate need. These included those with no access to land, the homeless, and those in crisis because of natural disasters or because their houses were under threat of demolition. The Court held that these groups needed immediate attention and that their immediate needs could be met by relief, short of housing, which fulfils the requisite standards of durability, habitability and stability.<sup>106</sup>

On critically examining *Grootboom*, it is submitted that the Court did impliedly accede to the concept of a minimum core content. This is so in light of its holding that for persons in desperate need, as identified under paragraph 52 of the judgment, the state is bound to take *immediate interim measures of relief*, even if they do not constitute housing, provided they fulfil the requisite standards of durability, habitability and stability. This paper argues that these measures constitute the minimum core content of the right to housing.

## **7 The PRSP and the rights to health and housing in Malawi and Uganda: A critical appraisal**

### **7.1 The Malawi Poverty Reduction Paper and right to health in Malawi**

#### **7.1.1 Constitutional measures**

In Malawi, health finds expression in sections 13(c) and 30(2) of the Constitution. Section 13(c) states that the state shall actively adopt and implement policies and legislation aimed at providing 'adequate health commensurate with the health needs of Malawian society and international standards of health care'. This provision is supported by a binding

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<sup>103</sup> n 89 above, para 32.

<sup>104</sup> n 89 above, para 33.

<sup>105</sup> n 89 above, para 42.

<sup>106</sup> n 89 above, para 52.

obligation on the state in section 30(2) of the Constitution that states that:

The state shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, *health services*, food, shelter, employment and infrastructure.

Section 30(4) of the Constitution goes further and enjoins the state 'to justify its policies in accordance with this responsibility'.

Malawi therefore is not only bound by international law to justify its policies in accordance with its responsibilities on this right; it is equally bound by its own Constitution. Thus, the content of the MPRSP must accordingly be justified in respect of this right.

### 7.1.2 Health under the MPRSP

The MPRSP identifies poor health as one of the key causes of poverty.<sup>107</sup> Health is covered under pillar 2 of the MPRSP on human and capital development. It recognises that the health of an individual is directly related to economic and social well-being.<sup>108</sup> It gives a very gloomy picture of the state of poverty in Malawi in relation to health, noting, among other things, that life expectancy dropped in the country from 43 years in 1996 to 39 years in 2000, and that the deaths of infants under five as well as maternal mortality rates had been on the increase during the same period.<sup>109</sup> This was so notwithstanding a progressive increase in budgetary allocations to the health sector.<sup>110</sup>

To address the various health problems that the country faces, the MPRSP has framed what is termed an Essential Healthcare Package (EHP). The EHP is described as a 'bundle of health services provided at community, primary and secondary levels, supported by the necessary administrative, logistics and management systems'.<sup>111</sup> The MPRSP places the EHP under three main objectives. These objectives are the improvement of the quality and availability of essential health care inputs; the improvement of access to, and equity of essential health care; and the strengthening of administration and finance of essential health care services.<sup>112</sup> These objectives are examined in turn.

<sup>107</sup> Malawi Poverty Reduction Strategy Paper 2002 (MPRSP) (2000) x.

<sup>108</sup> MPRSP 58.

<sup>109</sup> These are said to be the most important indicators to measure the health status of a nation. See South African Human Rights Commission, *4th Economic and Social Rights Report: The Right to Health* <http://www.sahrc.org.za> (accessed 10 July 2004).

<sup>110</sup> MPRSP (n 107 above).

<sup>111</sup> n 107 above, 59.

<sup>112</sup> n 107 above, 60.

*Improving quality and availability of health care*

The MPRSP observes that a major problem leading to the country's poor health indicators is the shortage of adequately compensated medical staff.<sup>113</sup> It attributes this to a number of factors, including the brain drain due to poor remuneration and career prospects, as well as the death of staff exacerbated by the HIV/AIDS pandemic.<sup>114</sup> It also identifies the problem of a shortage of drugs, particularly in rural areas as a result of, among other factors, low and inefficient drug allocations, and pilferage.<sup>115</sup> It stresses that drugs and medical supplies required in an EHP must be constantly present in health facilities both in adequate quantities and of appropriate quality.<sup>116</sup>

To reduce the shortage of health personnel, the EHP seeks to increase the number of locally-trained health personnel, and to review remuneration and career structures for health personnel.<sup>117</sup>

To reduce the shortage of drugs, the EHP seeks to ensure the review of the procurement, logistics, management, distribution and prescription of drugs so that all drugs procured reach the intended patients and are prescribed properly.<sup>118</sup> It also seeks to ensure a gradual increase in budget allocations to drugs and medical supplies. Annex 2 to the MPRSP under Goal 2.3 shows the strategised phased costing of the budget for financial years 2002-2003 through to 2004-2005. The costing thereunder is demonstrably incremental.

*Improving access to and equity of essential health care*

The MPRSP identifies the lack of access to essential health care as another serious poverty problem.<sup>119</sup> It notes, among other things, that health centres, particularly in rural areas, are not adequate.<sup>120</sup> It further notes that even existing health structures need to be rehabilitated and modernised.<sup>121</sup> The MPSRP therefore makes provision for increased access to health care facilities through the rehabilitation of existing infrastructure and increase in mobile health services. It emphasises the need for health centres to have functioning support systems such as potable water, electric energy, including back-up supplies, and communication systems.

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<sup>113</sup> n 107 above, 58.

<sup>114</sup> n 107 above.

<sup>115</sup> n 107 above, 59.

<sup>116</sup> n 107 above, 61.

<sup>117</sup> n 107 above.

<sup>118</sup> n 107 above, 58.

<sup>119</sup> n 107 above, 60.

<sup>120</sup> n 107 above, 59.

<sup>121</sup> n 107 above, 61.



*Strengthening the administration and financing of essential health care services*

The MPRSP notes that weak financial and managerial capacity in health centres also contributes to inefficiency and poor service delivery.<sup>122</sup> It therefore makes provision for the training and retraining of financial and management health staff.

In terms of a lack of sufficient finances to run health institutions, the MPRSP states that the financing strategy 'will take full account of the fact that many Malawians can afford to contribute to better health care', and justifies this statement by arguing that in 1999 to 2000, the richest 40% of the population spent MK822 million (about US \$14,95 million at the time) on health care.<sup>123</sup> It therefore states that

operational research will guide the decision as to whether the EHP will be free at the point of entry, or subject to user fees charges with an exemption mechanism for poor or targeted groups.<sup>124</sup>

The MPRSP further calls for the strengthening of essential health care services through the development of a Sector Wide Approach (SWA) in the health sector.<sup>125</sup> The role of the SWA is to ensure the co-ordination, strengthening and effecting of donor and government financing on the EHP.<sup>126</sup> It states that this will largely leave private sources of finance to develop the rest on the non-EHP health sector.<sup>127</sup>

### 7.1.3 Critique of measures instituted

#### *Positive developments*

It is significant that the MPRSP has identified health as one of the key causes of poverty in Malawi. It rightly concludes that health is directly related to the general economic and social well-being of an individual. This is in accord with the conceptualisation of health as 'a state of complete physical, mental and social well-being and not merely the absence of physical infirmity'.<sup>128</sup> It is also significant to note that the MPRSP recognises some of the interrelated essential elements of the right to health as identified by the ESCR Committee under General Comment No 14. The EHP expressly mentions availability, accessibility and quality, although it is conspicuously silent on acceptability.

Further, the MPRSP strategises a phased increase in budgetary allocations. This is in line with the demands of, among others, article 2(1) of CESCR as read with General Comment No 14 of the ESCR Committee,

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<sup>122</sup> As above.

<sup>123</sup> As above.

<sup>124</sup> As above.

<sup>125</sup> n 107 above, 62.

<sup>126</sup> n 107 above, 61-62.

<sup>127</sup> n 107 above, 62.

<sup>128</sup> General Comment No 14 (n 66 above) para 4.

in terms of progressive realisation of the right. It is also clear that health is one of the key priority areas under the MPRSP. An examination of Annex 2 to the MPRSP shows that, apart from education, health is apportioned the biggest funding. These, it is submitted, are positive measures that are in line with the duty of the state to 'take steps' with a view to ensuring the progressive realisation of the right.

### *Weaknesses*

The positive measures above notwithstanding, the MPRSP has a number of weaknesses in relation to the right to health.

Firstly, it is conspicuous that the MPRSP is not expressly based on the norms and values set out in the international law of human rights.<sup>129</sup> Its conceptualisation of health is not premised on health as a right that imposes duties on the state. As observed in the literature, in order to comply with the human rights-based approach to poverty reduction strategies, a PRSP should expressly identify national human rights law and practice in its jurisdiction; the international and regional human rights treaties; other important human rights instruments such as the Universal Declaration; and commitments entered into at recent world conferences in so far as they have a bearing upon human rights.<sup>130</sup> The MPRSP makes literally no mention of any of these instruments and the obligations thereunder. Thus, without any explicit reference to underlying legal norms, there is a disconnect between law and policy that creates room for the state to view the MPRSP strategies as mere programmatic aspirations and not policies targeted at giving effect to legal rights.<sup>131</sup> Further, the MPRSP does not even mention the principles of national policy enshrined in section 13 of the Constitution that are supposed to be the overarching framework guiding government's policy formulation. It is therefore submitted that the MPRSP has a major weakness in that respect.

Secondly, the MPRSP makes no reference to the concept of core minimum content of the right to health so as to ensure, at the very least, satisfaction of the minimum essential levels of the right.<sup>132</sup> Indeed, an examination of the discussion on health under Pillar 2 of the MPRSP shows that not only is this concept not mentioned, it is also not given any implied effect. Thus, for instance, the MPRSP does not state that every person is entitled to primary health care 'as of right'. As demonstrated above, the right to primary health care is a minimum core content obligation.<sup>133</sup> Thus, the MPRSP, in its analysis of issues,

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<sup>129</sup> See the recommendation of the OHCHR (n 37 above) that PRSPs must be explicitly based on the norms and values set out in international human rights law.

<sup>130</sup> n 38 above.

<sup>131</sup> See the remarks of the OHCHR (n 37 above).

<sup>132</sup> General Comment No 3 (n 72 above).

<sup>133</sup> n 84 above.

ought to have clearly borne this fact out and stated the mechanisms of accountability against which the state is to be held in this respect. This is another major weakness of the MPRSP, bearing in mind, as Mzikenge-Chirwa succinctly puts it, that<sup>134</sup>

for a continent characterised by widespread corruption, misallocation of resources and mismanagement, a principle requiring the state to consider provision of minimum essential levels of economic, social and cultural rights as a matter of priority is most commendable.

It is therefore submitted that the MPRSP lacks conceptual reasonableness under the *Grootboom* test in this regard.

Another weakness of the MPRSP relates to the strategies that it puts in place with a view to addressing the challenge of insufficiency of finances. As shown above, the MPRSP states that many Malawians can afford to contribute to better health care and uses this as a justification to introduce user fees in hospitals under the EHP as part of a cost-sharing mechanism.<sup>135</sup> It must be stressed here that hitherto, essential health care services in Malawi have remained free for everyone at entry point, with the exception that those who have needed more expensive forms of health care have had the option to access the 'private wards' of hospitals.<sup>136</sup> It is submitted that statements in the MPRSP like<sup>137</sup>

operational research will guide the decision as to whether the EHP will be free at the point of entry, or subject to user fees charges with an exemption mechanism for poor or targeted groups

and that development of the rest of the non-EHP health sector should be left to private sources of finance,<sup>138</sup> can only be construed as a resurrection through the back door of the failed SAPs. It must be recalled that the cost-sharing scheme in social services is an essential component of SAPs.<sup>139</sup>

This study argues that the statement that many Malawians can afford to contribute finances towards better health care goes against the weight of evidence. The MPRSP itself concedes that poverty in the country is widespread, deep and severe, and that as at 1998, 65,3% of the population was poor.<sup>140</sup> The poor were categorised as those whose consumption for basic needs was below MK10,47 (US \$0,34)

<sup>134</sup> D Mzikenge-Chirwa '*Minister of Health and Others v Treatment Action Campaign and Others: Its implications for the combat against HIV/AIDS and the protection of economic, social and cultural rights in Africa*' (2003) 9 *East African Journal of Peace and Human Rights* 174.

<sup>135</sup> n 124 above.

<sup>136</sup> Partnerships for Health Reform *Health reform policy issues in Malawi: A rapid assessment* (1998) 16.

<sup>137</sup> n 107 above.

<sup>138</sup> See n 127 above.

<sup>139</sup> n 25 (first bullet) above.

<sup>140</sup> n 107 above, 5.

per day.<sup>141</sup> It goes without saying that this is a shocking indicator. Worse still, successive indicators of the UNDP HDR indicate that the level of poverty in the country has since deepened.<sup>142</sup> It is therefore submitted that this statement in the MPRSP is just one of the subtle ways of rolling back the role of the state in the health sector and re-introducing the SAPs with a view to impressing the BWIs. Studies in other LDCs have shown that, whilst the idea of cost sharing through user fees is possible in the developed or middle-income world, this is not practicable in LDCs.<sup>143</sup> The studies demonstrate that the impact of user fees is actually minimal on the health budget expenditure and that the fees, however minimal, substantially discourage people from seeking health services in the formal sector.<sup>144</sup>

This study argues that such a policy is inconsistent with the duty of the state to ensure economic accessibility and availability of health services as expounded by the ESCR Committee, as it will have a negative impact on the affordability of health services. It is further submitted that this measure is likely to lead to a breach of the obligation on the state to respect the right to health by taking away entitlements that were already being enjoyed under the pre-existing free essential health-care services policy.<sup>145</sup> It is also inconsistent with the duty to fulfil in that, instead of moving its machinery towards the actual realisation of the right through the direct provision of basic health needs or resources,<sup>146</sup> the state is proposing to shirk this obligation.

Another weakness of the MPRSP is that it does not place emphasis on preventive health care strategies, including the critical role of public health education. Such a strategy is very essential and constitutes one of the measures of discharging the duty of the state to promote the right to health through raising awareness of healthcare issues.<sup>147</sup> Emphasis on public health education ensures information accessibility of health information by the poor that is an essential element of the right to health.

Further, the MPRSP falls short of proposing the enactment of legislation with a view to stressing that health is a right and clearly identifying who the duty bearers and the claim holders are in that regard, as well as clearly stating their respective roles.

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<sup>141</sup> n 125 above.

<sup>142</sup> UNDP (n 53 above) 142 146.

<sup>143</sup> RK Quaye *Paying for health services in East Africa: A research note* (2004).

<sup>144</sup> Quaye (n 143 above) 97 99.

<sup>145</sup> *SERAC* case (n 93 above) para 46.

<sup>146</sup> n 93 above, para 48.

<sup>147</sup> n 93 above, para 47.

## 7.2 The Poverty Eradication Action Plan and the right to health in Uganda

### 7.2.1 Constitutional measures

In Uganda, the right to health finds expression as a non-binding aspiration in the national objectives and directive principles of national policy. Principle XIV(b) provides, in part, that the state shall ensure that

all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

Further, principle XX states that ‘the state shall take all practical measures to ensure the provision of medical services to the population’. The right to health is not mentioned at all in the Bill of Rights.

It is submitted, though, that article 45 of the Uganda Constitution that states that the rights and freedoms specifically mentioned in the bill of rights are not to be regarded as excluding others not specifically mentioned, should be read to imply into the Constitution the full scope of all economic and social rights, including the right to health.

It follows therefore that, just like Malawi, Uganda is bound by its own Constitution as well as international law, to justify its policies in accordance with its responsibilities on this right. Thus, similarly, the content of the PEAP must accordingly be justified in respect of this right.

### 7.2.2 Health under the PEAP

The PEAP recognises health as a central concern of the poor and emphasises the need to address it effectively.<sup>148</sup> Health is specifically addressed under Pillar 4 which deals with actions which directly improve the quality of life of the poor.<sup>149</sup> It is also addressed in part 2 of the PEAP that addresses the national vision and overall goals.<sup>150</sup> Quite unlike the MPRSP, the PEAP paints a rather positive picture of the trend of health indicators in the country. Indications from the PEAP, as corroborated by the UNDP *HDR 2004*, are that life expectancy has been on the increase throughout the past decade, and that the death rates of infants under five as well as maternal mortality rates have been on the decrease.<sup>151</sup>

The PEAP still recognises, though, that the indicators are very poor and hence the need for a special focus on the health sector in the PEAP.<sup>152</sup> It also recognises the specific challenges posed by the HIV/AIDS pandemic and, quite unlike the Malawi situation, indicators are

<sup>148</sup> Uganda Poverty Eradication Action Plan 2000 (PEAP) 8.

<sup>149</sup> n 148 above, 13.

<sup>150</sup> n 148 above, 10.

<sup>151</sup> n 148 above, 10; also UNDP (n 53 above) 141.

<sup>152</sup> n 148 above.

that the pandemic has at least been contained and that infection rates are decreasing.<sup>153</sup> It stresses the link between education, access to information and health, especially in the primary health care sector.<sup>154</sup> It thus emphasises the enormous importance of sending out simple health messages to the public as a way of addressing the wider issue of health.<sup>155</sup>

Just like in the MPRSP, the PEAP frames the Minimum Health Package (MHP) to address the poverty-related health challenges that the country faces.<sup>156</sup> However, quite unlike the MPRSP that clearly identifies the specific challenges being faced and the respective strategies under the EHP to address them, the PEAP outlines the challenges very briefly. It states that the MHP seeks to improve service delivery through better remuneration and training, better infrastructure, and better accountability to consumers.<sup>157</sup> It also identifies the pro-poor implementation of cost recovery measures through the successful identification of targeting mechanisms.<sup>158</sup>

### 7.2.3 Critique of measures adopted

#### *Positive measures*

The PEAP, just like the MPRSP, clearly identifies health as a central concern in the poverty reduction drive.<sup>159</sup> This is in line with the position of the ESCR Committee that has stated that poverty reduction is one of the central concerns in the discourse on economic, social and cultural rights.<sup>160</sup> By giving health specific attention in the PEAP, the government of Uganda is, at least in part, complying with its obligation to take steps through, at a minimum, the adoption of policies aimed at progressively achieving the full realisation of the right.<sup>161</sup>

Further, just like the MPRSP, the PEAP strategises a phased increase in budget allocations to the health sector that is a positive measure in line with the duty of the state to fulfil the right to health.

Furthermore, and quite unlike the MPRSP, the PEAP identifies public education with a view to enhance public awareness of necessary health issues as a key strategy in ensuring the enhancement of good health in

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<sup>153</sup> n 148 above.

<sup>154</sup> n 148 above, 10 11.

<sup>155</sup> n 148 above, 12.

<sup>156</sup> The MHP is described as a co-ordinating framework of the new health strategic plan; n 148 above, 17).

<sup>157</sup> n 148 above, 17.

<sup>158</sup> n 148 above.

<sup>159</sup> n 148 above.

<sup>160</sup> n 22 above.

<sup>161</sup> Art 2(1) of CESCR and General Comment No 3 of the ESCR Committee.

the country.<sup>162</sup> This is very critical and in compliance with the duty to promote the right to health.<sup>163</sup>

### *Weaknesses*

The PEAP has a number of weaknesses as well in relation to the right to health.

Firstly, just like the MPRSP, the PEAP is not expressly premised on the norms and values of international human rights law.<sup>164</sup> The measures adopted under the PEAP are not conceived as legal obligations, but rather as programmatic aspirations.<sup>165</sup> The lack of an expressed sense of legal obligation leaves the state to view health, and indeed all other areas covered under the PRSP, as pure matters of policy that may be disregarded without legal sanction. It is interesting that the PEAP does not even mention the constitutional national objectives and directive principles of national policy. One would have thought that these should have provided the overarching framework within which the PEAP would be formulated. Thus, just like the MPRSP, the PEAP has a major weakness in this regard.

Secondly, the PEAP similarly makes neither express reference of Uganda's core minimum obligations as identified by the ESCR Committee, nor is there any implied provision for the same. The conceptual weakness of the PEAP in this respect is thus as discussed in relation to the MPRSP.<sup>166</sup>

Further, again as mirrored in the Malawi experience, the PEAP makes an implied suggestion of the introduction of user fees for essential primary healthcare. By stating that 'the pro-poor implementation of cost-recovery will require successful identification of targeting mechanisms',<sup>167</sup> it is apparent that the PEAP is impliedly proposing the introduction of user fees. This rings in consonance with the language of introduction of user fees 'with an exemption mechanism for the poor or targeted groups' as used in the MPRSP.<sup>168</sup> Thus, the argument raised under the MPRSP discussion in this respect similarly applies to the PEAP. In the case of Uganda, the situation is probably even worse because the country once introduced and later abolished targeted user fees in public hospitals after observing the disadvantages of such fees.<sup>169</sup> This PEAP proposal thus comes notwithstanding the studies discussed above that show that user fees in public hospitals in LDCs have negative conse-

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<sup>162</sup> n 148 above.

<sup>163</sup> n 68 above.

<sup>164</sup> n 148 above.

<sup>165</sup> n 148 above.

<sup>166</sup> n 132 above.

<sup>167</sup> n 148 above, 17.

<sup>168</sup> n 124 above.

<sup>169</sup> Quayle (n 143 above) 98-100.

quences on access to healthcare.<sup>170</sup> It is submitted that the subtle proposed re-introduction of this SAPs measure is inconsistent with Uganda's obligations to respect and fulfil the right as discussed above.

Lastly, the PEAP similarly falls short of making legislative proposals with a view to stressing that health is a right and clearly identifying who the duty bearers and the claim-holders are in that regard, as well as clearly stating their respective roles.

### **7.3 PRSPs and the right to housing in Malawi and Uganda**

#### **7.3.1 Constitutional measures**

There is a sharp contrast in the manner in which the right to housing is provided for under the Malawian and Ugandan Constitutions. Whereas in Malawi housing is not even mentioned in the principles of national policy, it finds expression as a binding right in section 30(2) of the Bill of Rights. In Uganda, on the other hand, the right finds no mention in the Bill of Rights, whereas it is provided for in principle XIV(b) of the national objectives and directive principles of national policy.

It is submitted, however, that the clarity with which this right is covered under these two Constitutions is substantially the same as that in relation to the right to health as discussed above, particularly in view of the fact that article 45 of the Uganda Constitution indirectly guarantees the right.

#### **7.3.2 Housing under the MPRSP and PEAP**

The MPRSP does not address housing as a poverty issue. The closest that it comes to it is to address issues of access to land.<sup>171</sup> An examination of these land issues, though, reveals that they are discussed in the context of agriculture and not housing.<sup>172</sup> Similarly, the PEAP does not address the issue of housing in any serious way. It merely mentions it in passing, stating that 'housing is a private sector responsibility, but the state can encourage the availability of low cost housing'.<sup>173</sup>

#### **7.3.3 A critique of the MPRSP and PEAP approach to housing**

Shelter is indisputably one of the basic needs of humanity.<sup>174</sup> It has been argued that as a basic need, housing should be placed along

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<sup>170</sup> As above.

<sup>171</sup> n 107 above, 65 67.

<sup>172</sup> n 107 above, Pillar III, 65 67.

<sup>173</sup> n 148 above, 17.

<sup>174</sup> See A Nuwagaba *The impact of macro-adjustment programmes on housing investment in Kampala City, Uganda: Shelter implications for the urban poor* <http://www.ajol.info> (accessed 22 September 2004).



the same priority lines as education and health.<sup>175</sup> Indeed, the ESCR Committee has emphatically stated that the right to housing is of central importance to the enjoyment of all economic, social and cultural rights.<sup>176</sup>

Thus, the fact that the PRSPs of Malawi and Uganda have not addressed the issue of housing in any meaningful way is as surprising as it is disturbing. It goes without saying that poor housing in the two countries is widespread and the lack of adequate housing has severe implications for the enjoyment of other rights, including the right to health.<sup>177</sup> In both countries, problems of lack of access to safe drinking water, energy for cooking, lighting, washing facilities and refuse disposal facilities, among others, are very commonplace.<sup>178</sup> Affordability of housing, particularly in urban areas such as Blantyre and Lilongwe in Malawi and Kampala in Uganda, is another big problem that affects the poor quite severely.<sup>179</sup>

Problems relating to affordability extend from arbitrary rent increases to related costs such as those for basic services like water, and energy for lighting and cooking.<sup>180</sup> Related to this is the problem of the lack of security of tenure from unreasonable evictions that is common among the poor.<sup>181</sup> Accessibility to housing for vulnerable groups, such as orphaned street children and those who are in extreme poverty and have no habitable shelters, is yet another problem. There is a growing problem of homeless street children in both countries.<sup>182</sup>

The foregoing problems are certainly key poverty issues. Malawi and Uganda are therefore under an obligation to provide clear plans in their PRSPs on how these issues are to be addressed. For instance, the ESCR Committee states that steps should be taken to ensure that housing-related costs are, in general, commensurate with income levels. It states that subsidies should be provided to those unable to find affordable housing and that forms and levels of housing finance should reflect housing needs. Further, in accordance with the principle of affordabil-

<sup>175</sup> See M Kasekende in Summit Communications 'Cheaper and better housing is a priority' <http://www.summitreports.com/uganda/housing.htm> (accessed 22 September 2004).

<sup>176</sup> General Comment No 4 para 1.

<sup>177</sup> n 67 above; also see T Benson *et al* *Malawi: An atlas for social statistics* (2002) 67-74; Malawi National Statistical Office 1998 Population and Housing Census [http://www.nso.malawi.net/data\\_on-line/demography/census\\_98/census\\_results.html](http://www.nso.malawi.net/data_on-line/demography/census_98/census_results.html) (accessed 4 September 2004).

<sup>178</sup> n 177 above.

<sup>179</sup> Nuwagaba (n 174 above).

<sup>180</sup> See 'Why Ugandans don't take housing loans' *The Monitor* <http://allafrica.com/stories/200409200349.html> (accessed 22 September 2004).

<sup>181</sup> n 180 above.

<sup>182</sup> See UNICEF *Bellamy urges attention on Uganda's displaced people crisis; calls on LRA to release children* [http://www.unicef.org/media/media\\_21136.html](http://www.unicef.org/media/media_21136.html) (accessed 8 October 2006).

ity, the right to housing entails that tenants should be protected from unreasonable rent levels or increases as well as illegal evictions. In respect of people with physical disabilities, the state is under an obligation to ensure that planning laws and regulations that ensure that housing structures comply with their special needs are in place.

Further, minimum core content obligations in respect to the right to housing require the state to take immediate interim measures of relief for persons in desperate need, such as the homeless. By not making provision for immediate strategies to address the problems facing those in desperate need, such as homeless street children, the PRSPs of Malawi and Uganda are unreasonable in conception and fall below the minimum requisites of the right to housing.

## 8 Conclusion

Poverty reduction is a critical process aimed at achieving the full enjoyment of economic and social rights. Therefore, policy documents such as PRSPs have to be firmly premised on human rights norms. They need to define all people subject to the jurisdiction of the state, particularly the poor, as the claim-holders and the state as the duty-bearer.

This study has demonstrated that the PRSPs of Malawi and Uganda, whilst they may in some measure be viewed as tools indirectly targeted at the realisation of economic and social rights, such as the right to health, they are lacking in many respects. They are not explicitly premised on human rights norms and fall short of addressing all the necessary essential elements of the rights. In some instances, they propose retrogressive measures from an economic and social rights perspective within the framework of LDCs, such as their proposals to introduce cost sharing user-fees in primary health care.

Further, in some areas, such as housing, they are either completely silent or, worse still, propose the complete rolling-back of the state through relegation of the housing responsibility to the private sector and privatising institutions that provide public housing. This is a characteristic of the SAPs that, notwithstanding the introduction of the PRSPs through the PRGF, continues to hold sway. The involvement of the BWIs in the PRSP process, both directly and indirectly, has had very negative implications, not only impairing the sovereignty and autonomy of the LDCs concerned, but also, through the timelines attached to accessing debt relief under the HIPC initiative, negatively affected the time available for genuine public participation. Public participation is important for a number of reasons. Among other things, it is a variant of the exercise by peoples of their right to self-determination through their involvement in the determination of their economic and political destiny. Further, public participation instills a sense of ownership that is critical to elicit the will to faithfully implement the strategies.

This discussion shows that, whilst in the case of Uganda, the adoption of the PEAP as a PRSP was the culmination of both an internal drive as well as pressure from the BWIs, the situation in Malawi, although reflecting a pre-existing will through the adoption of such policies as the Poverty Alleviation Paper, was largely dictated by the demands of the BWIs. These attributes do not augur well for the need of PRSPs to act as effective tools for the full realisation of human rights. The fact that they are not readily accessible to many people, for instance because they are not available in vernacular languages, is an impediment to people's empowerment as they cannot make informed claims on the state that are premised on the PRSPs. Further, the fact that PRSPs are not put to the legislature for debate and adoption reduces their legitimacy and authoritative status.

## Bumps on the road: A critique of how Africa got to NEPAD

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### Summary

*This paper explores the notion of 'political independence without economic independence' in the context of the ground-breaking decision made by African states to embrace the neo-liberal economic path to development. This market-based economic agenda is expressed in the New Partnership for Africa's Development (NEPAD). The paper analyses, in a rights-based context, the ideological battle that has been waged between Western powers and African states (through the now defunct Organization of African Unity, and the United Nations) in terms of defining and controlling the agenda for the economic development of Africa. Among others, the work examines the economic policies developed by African and other developing states, such as the New International Economic Order (NIEO); the Right to Development; the Revised Framework for NIEO; the Lagos Plan of Action; the Structural Adjustment Programme; Africa's Programme for Economic Recovery 1986-1990 (APPER, later converted into the United Nations Programme of Action for Africa's Economic Recovery and Development (UN-PAAERD)); the African Charter for Popular Participation and finally, NEPAD. It concludes, among others, that the decision by African leaders to design and adopt NEPAD as its framework for economic development is a further confirmation of the entrenched economic dependence of African states and reveals the extent to which Western states continue to dictate, control and overrule attempts by African states to set their own economic agenda. Also, the implementation of NEPAD in its present shape and form will not necessarily foster a climate of respect for human rights and fundamental freedoms.*

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## 1 Introduction

In 2001, African leaders took the unprecedented step of endorsing and initiating the process of implementing the New Partnership for Africa's Development (NEPAD), as well as setting up a new political-economic institution, the African Union (AU). In contrast to the militant, uncompromising stance initially adopted by African and other developing states in the 1960s at the United Nations (UN) and through the Organization of African Unity (OAU), the means towards attaining economic emancipation for Africa, as represented in the NEPAD document, marks a radical shift in position. While these developments have attracted the attention of scholars, so far no rights-based analysis of the historical trajectory which Africa followed to get to NEPAD has been done. Another missing dimension is a critical review of the forces and factors that have shaped the traversing of this route and their role in the evolution of a human rights-based democratic culture in Africa.

The paper seeks to fill this gap. It first discusses the two principal economic theories that shaped the initial positions that Western states, on the one hand, and African states (as well as the then Soviet Union and other developing countries, particularly from Latin America) took in defining the economic agenda for Africa. This is followed by a step-by-step review of the various economic agendas that Western states sought to impose on African states, Africa's reaction to those policies and the human rights and democracy implications in those policies.

## 2 Modernisation and dependency theories: A brief overview

Two main positions, founded on the modernisation and dependency theories which dominated the world stage between the 1950s and 1970s, have been influential in shaping the economic fortunes of Africa. Similar to the situation in Latin America, these theories dominated discussions on the causes for, and sources of, underdevelopment in Africa. Through the modernisation theory, Western states<sup>1</sup> contended that the obstacles to development in Africa were internal and culture-related, while African leaders laid the blame on external factors. African states articulated this position through their 'Africanised' version of the dependency theory in African socialism.<sup>2</sup>

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<sup>1</sup> 'Western states' is used with particular reference to the United States and the former colonial powers of Western Europe.

<sup>2</sup> African socialism had many different faces, but generally it represented an economic-political framework that independent African leaders formulated as an alternative to capitalism, in order to propel their countries towards economic independence, which did not materialise with the gaining of political independence in the late 1950s and early 1960s. K Nkrumah 'African socialism revisited' paper read at the Africa Seminar held in Cairo; published in *Africa: National and social revolution* (1967).

The modernisation theory evolved in the 1950s. The theory claims to have found the cause for the lack of development in the then colonised and emerging independent states. It postulates that the problem of underdevelopment is internal and related to the cultural values of colonised people or underdeveloped and developing countries. The supposed solution was for these states to struggle to reach the glorious heights of industrialisation and economic development through a process of change that would take them on a progressive linear path.<sup>3</sup>

Opposed to this concept was the Marxist-influenced model of development, *dependencia* or dependency theory. Largely originating in Latin America through the influence of scholars such as Prebisch<sup>4</sup> and Frank,<sup>5</sup> this theory examined the issue of underdevelopment from the opposite end: the external. Proponents of the theory argued that the external dependency of the periphery (the former colonies) leads to an internal structural deformation, which in turn fuels and swells a cycle of external dependency. Thus, underdevelopment was not a phase or process that would ultimately lead to industrialisation, but rather a consequence of capitalism (the external factor). In other words, the historical process of the spread of capitalism (the centre) was responsible for the underdevelopment of the less industrialised world (the periphery). Hence, until a solution was found around capitalism, underdeveloped states could only chase the shadow of industrialisation.

Among the solutions outlined by dependency theorists to the problem of underdevelopment in developing countries was for periphery states to extricate themselves from the clutches of capitalist exploitation and undergo an internal process of industrialisation. This period of inward development was to enable the periphery states to catch up with the West before re-emerging to join the international forum and compete on a more or less equal footing. The focus would therefore be

<sup>3</sup> T Spybey *Social change, development, and dependency: Modernity, colonialism and the development of the West* (1992); W Schelkle et al *Paradigms of social change: Modernisation, development, transformation, evolution* (2000); ME Latham *Modernisation as ideology: American social science and 'nation building' in the Kennedy era* (2000); O Mehmet 'Globalisation as Westernisation' in BS Ghosh (ed) *Contemporary issues in development economics* (2001).

<sup>4</sup> R Prebisch *Towards a dynamic development policy for Latin America* (1963); R Prebisch 'The Latin American periphery in the global system of capitalism' (1981) *UNCLA Review*. See also D Yergin & J Stanislaw *The commanding heights: The battle for the world economy* (2002) for a general review of *dependencia*, 232.

<sup>5</sup> See eg AG Frank *Capitalism and development in Latin America: Historical studies in Chile and Brazil* (1967); AG Frank 'The development of underdevelopment' in JD Cockcroft et al (eds) *Dependence and underdevelopment* (1972); see also S Chew & R Denmark (eds) *The underdevelopment of development: Essays in honor of Andre Gunder Frank* (1996). See S Amin *Delinking: Towards a polycentric world* (1990); G Myrdal *An international economy, problems and prospects* (1956); G Myrdal *Beyond the welfare state; economic planning and its international implications* (1960); AY So *Social change and development, modernisation, dependency and world systems theory* (1990); O Sunkel 'National development policy and external dependence in Latin America' (1969) 6 *The Journal of Development Studies* 23.

on a resort to import-substitution industrialisation as the main means for transforming their economies.<sup>6</sup>

While fundamentally opposed to each other, one factor, however, united the two camps. That is the political framework that was to facilitate the realisation of the lofty goals of industrialisation and development. In both theories, human rights and democracy were considered stumbling blocks to development, and were relegated to the background.<sup>7</sup> Development was to be realised through the adoption of a strong hand to deal with dissent. However, in the case of the modernisation theory, this was done in a more subtle fashion under the banner of promoting 'law and development',<sup>8</sup> camouflaging its true colours. This means of achieving development led to the idealisation and ideologisation of the two economic theories, with consequent negative consequences for human rights and democratic governance. Thus, according to Schuster, '[n]ot only were they seen as an explanation for the process of development and underdevelopment, they also became programmatic for global politics and social strategies'.<sup>9</sup>

### 3 African states at independence

The objective of using the OAU<sup>10</sup> to achieve a better life for African people and to promote respect for human rights received only lip service from African leaders at the time of independence. In reality, the activities of the OAU were overshadowed by the purposes relating to unity, territorial integrity and liberation.<sup>11</sup> The laudable objectives in the OAU Charter therefore served merely as a façade behind which egregious abuses became the order of the day. There was limited reference to human rights in the OAU Charter. Moreover, they were located in contexts which limited their effective enjoyment. One could therefore legitimately observe that the founders of the OAU merely adopted a

<sup>6</sup> T dos Santos 'The structure of dependence' in KT Fann & DC Hodges (eds) *Readings in US imperialism* (1971).

<sup>7</sup> D Apter 'Some economic factors in the political development of the Gold Coast' (1954) 4 *The Journal of Economic History* 409; D Apter *The politics of modernisation* (1965); A Organski *The stages of political development* (1965); V Randal & R Theobald *Political change and underdevelopment: A critical introduction to third world politics* (1985); SP Huntington & JM Nelson *No easy choice: Political participation in developing countries* (1976).

<sup>8</sup> J Gardner *Legal imperialism: American lawyers and foreign aid in Latin America* (1980).

<sup>9</sup> M Schuster 'Modernisation theory and *dependencia*: Why did they fail?' <http://tiss.zdv.uni-tuebingen.de/webroot/sp/barrios/themeA1a.htm> (accessed 31 July 2006).

<sup>10</sup> On this day, 32 newly independent African leaders and representatives signed the Charter; 22 other states joined gradually over time; South Africa became the youngest member in 1994. The OAU was replaced by the AU in 2002.

<sup>11</sup> El-Obaid A El-Obaid & K Appiagyei-Atua 'Human rights in Africa: A new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 819.

half-hearted attitude towards respect for human rights. Indeed, 'human rights' was mentioned only once in the Preamble<sup>12</sup> and in the Charter itself. Naturally, the attitude of African leaders towards human rights defined the place of democracy in the shaping of the political culture of the newly independent states. For many African countries, the elections that preceded independence were the last to be held until the 1990s. For others, it still remains an illusive dream.<sup>13</sup>

By harping on the rhetoric of development, politicians found a sure way to maintain political legitimacy with the people. As noted by Ake:<sup>14</sup>

For one thing, development was an attractive idea for forging a sense of common cause and for bringing some coherence to the fragmented political system. More important, it could not be abandoned because it was the ideology by which the political elite hoped to survive and to reproduce its domination. Since development was the justification for rallying behind the current leadership, for criminalising political dissent, and for institutionalising the single-party structure, to abandon it would undermine the power strategy of the elite.

Hence there was a leaning towards modernisation theory as a vehicle to attain development. Modernisation theory was premised on, and promised, the delivery of aid, loans and technology transfer which would transform backward economies overnight to be on even keel with the West. According to Esteva, the United States opened the era of development when, on 20 January 1949, President Truman, on assumption of office, declared, amongst others:<sup>15</sup>

We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. The old imperialism — exploitation for foreign profit — has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair dealing.

African leaders, attracted by the bait, promised their citizens that they would transform Africa into paradise within a few years of assuming office.

However, the former colonial powers had no new economic agenda to kick-start the economies of African states after years of exploitation. Thus, Ake contends that 'the problem [of Africa] is not so much that

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<sup>12</sup> Para 8 of the Preamble to the OAU Charter reads: 'Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States.'

<sup>13</sup> M Bratton & N van de Walle *Democratic experiments in Africa: Regime transition in comparative perspective* (1997); H Bienen & J Herbst 'The relationship between political and economic reform in Africa' (1996) 29 *Comparative politics* 23.

<sup>14</sup> C Ake *Democracy and development in Africa* (1996) 7.

<sup>15</sup> Harry S Truman, Inaugural Address, 20 January 1949 in *Documents on American foreign relations* (1967) quoted in G Esteva 'Development' in W Sachs (ed) *The development dictionary: A guide to power as knowledge* (1992) 6.



development has failed as that it was never really on the agenda in the first place'.<sup>16</sup> Any development that occurred was incidental.

The downward spiral of the economies of newly independent states, as well as increased political repression, created a state of demoralisation and agitation in many African countries. In response to this crisis, African leaders sought a scapegoat for their inability to deliver on their promises. The dependency rant, anti-colonial slogans and anti-imperialistic rhetoric became easy routes to political escapism; telling the people that the elite were doing their best to promote their well-being but were frustrated by 'external forces'.

As a result, African socialism was born. African socialists argued, amongst others, that a lack of resources and the slow economic development of the continent were not conducive towards the pursuit of a free market economy. Building on the premise that African societies were communitarian, it was contended that capitalism would produce a class structure that would defeat the goal of pan-Africanism. These and other arguments were used to justify the institutionalisation of a planned and controlled economy and the nationalisation of industries, projects, parastatals, import-substitution measures, the promotion of large-scale industrialisation, the adoption of protectionist measures, and so on.

The dependency theory gained practical expression at international level in the New International Economic Order (NIEO), which was espoused by less industrialised states and the communist bloc at the United Nations (UN).

#### 4 The New International Economic Order

The NIEO was an attempt by less developed states to highlight the inequalities, injustices and imbalances inherent in the economic relations between the North and the South, and to call for radical reforms to redress these inequities.<sup>17</sup> The NIEO was embodied in three main

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<sup>16</sup> Ake (n 14 above) 1. The 'agenda' refers to the one African leaders set for their various countries at the time of independence, and not that of the former colonialists for their colonies. According to Ake, the following issues became the principal preoccupations of African leaders at the dawn of political independence: the struggle over which of the nationalist groups that had joined forces to negotiate an end to colonialism should take over the colossal power structure left by the colonial power; increased competition and conflict among elements of 'civil society' and nationalities and ethnic groups at independence; the tendency to use state power for accumulation of profit by individuals and groups; and alienation of leaders from followers in the post-colonial era.

<sup>17</sup> For a detailed discussion on the subject, see JN Bhagwati (ed) *The new international economic order: The North South debate* (1977); C Murphy *Emergence of the NIEO ideology* (1984); T Waelde 'A requiem for the "New International Economic Order"'. The rise and fall of paradigms in international economic law' (1995) 1-2; *Internet Journal of the Centre for Energy, Petroleum and Mineral Law and Policy*—CEPMLP, <http://www.dundee.ac.uk/cepmlp/journal/html/about.html> (accessed 7 January 2006).

declarations adopted by the UN in 1974: the Declaration on the Establishment of a New International Economic Order, the Programme of Action on the Establishment of a New International Economic Order<sup>18</sup> and the Charter of Economic Rights and Duties of States (CERDS).<sup>19</sup>

Building on the twin concepts of sovereignty and territorial integrity, the NIEO conceived a '*dirigiste*' international economic system, working in favour of states characterised by national and regional economic planning.<sup>20</sup> Multinational companies were identified as exploiting and perpetuating developing states in a subordinate stage of underdevelopment. They were also seen as challenging the concept of sovereignty held dear by developing states, hence the policy of nationalisation of industries that was adopted.

The NIEO affirmed and strengthened common article 1 of the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) regarding the right of peoples to freely dispose of their 'natural wealth and resources'. It modified this right in CERDS to include the right to 'full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities'.<sup>21</sup>

Apart from the above, the NIEO identified traditional concepts of international law as being supportive of capitalism, and responsible for provoking the injustices of the international economic order. These international law concepts included the principle regarding the protection of alien property against nationalisation (through application of the Hull doctrine of paying 'prompt, adequate and effective compensation'<sup>22</sup> and international arbitration to resolve international commercial disputes) and the principle of commercial freedom<sup>23</sup> as handmaidens of this exploitative mechanism.

Thus, in an attempt to change the lopsided rules, article 2(2) of CERDS was proposed. It reads as follows:<sup>24</sup>

- 2 Each State has the right:
  - (a) to regulate and exercise authority over foreign investment within its

<sup>18</sup> Proclaimed by the General Assembly in its Resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974.

<sup>19</sup> Adopted by the General Assembly in its Resolution 3281 (XXIX) of 12 December 1974.

<sup>20</sup> Waelde (n 17 above) 3.

<sup>21</sup> Art 2(1) CERDS.

<sup>22</sup> See eg the *Norwegian Ships* case (1921) UNRIIAA I 307 338, *Arabian-American Oil Co v Saudi Arabia* (1958) 27 *International Law Reports*; and *Texaco Overseas Petroleum Co v Libyan Arab Republic* (1979) 53 *International Law Reports* 389.

<sup>23</sup> The right of multinationals to invest, disinvest, repatriate profits, enter into binding contracts, etc.

<sup>24</sup> It is equally important to note that it was to offset the Hugo doctrine that developing states fought against the inclusion of the right to property in both international covenants; contrasted with its incorporation in the Universal Declaration which was drafted with virtually no contribution from developing states. A Cassese *International law in a divided world* (1989).

- national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
- (b) to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies;
  - (c) to nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Other demands embodied in the NIEO included increased exports from the developing to the industrialised world; transfers of capital and technology to the developing world; and provisions to increase aid and to change the international monetary system.<sup>25</sup>

Western reaction to the NIEO was swift and steadfast. Led by the US, Western opposition to the NIEO resulted in the 7th Special Session of the UN General Assembly in September 1975. This resulted in UN General Assembly Resolution 3362 in which the US noted detailed reservations. The US proposal ensured that the existing economic system was maintained while making room for the provision of development assistance by way of increased trade liberalisation, transfer of aid and technology, and so on. Ultimately, when it came to voting on the Resolution in 1976, the US and West Germany voted against the NIEO.<sup>26</sup>

Critics of the NIEO are right in pointing to the massive borrowings that developing country governments engaged in to support state projects. These did not contribute to the development of national wealth, but to waste.<sup>27</sup> Indeed, the NIEO was in some respects a set of demands, without any real economic foundation for a deal with the West.

However, these are not enough to justify a dismissal of the analysis done by NIEO which exposed the injustices and imbalances in the international economy. There is some justification for criticism of the role of international law in the perpetration of economic injustice. It is

<sup>25</sup> G Verges *The New International Economic Order legal debate* (1983).

<sup>26</sup> For a detailed analysis and critique of anti-US moves to torpedo the NIEO, see M Hudson *Global fracture: The New International Economic Order* (1977).

<sup>27</sup> A Adedeji 'From the Lagos Plan of Action to the New Partnership for African Development and the Final Act of Lagos to the Constitutive Act: Wither Africa?' Keynote address prepared for presentation at the African Forum for Envisioning Africa, held in Nairobi, Kenya 26-29 April 2002 <http://www.worldsummit2002.org/texts/AdebayoAdedeji2.pdf> (accessed 30 June 2006) 14.

held that aspects of international law were used to perpetrate abuses and injustices against 'non-civilised' states. In that respect, the NIEO rightly exposed and challenged such international concepts as the payment of 'full, prompt and adequate' compensation.

From a rights perspective, the major criticism against the NIEO is that governments of developing countries overlooked the internal factors that favoured exploitation by the local ruling elite and impeded the development of their people. Much as the international system needed structural modifications, the internal issues relating to human rights and democracy could not be ruled out of the development question. Thus, the problems of the developing world could not simply be resolved through the NIEO. Also, even if the lofty goals imagined in the NIEO could have been attained, there is no guarantee that these gains would have been shared equitably among the citizenry, absent a thriving human rights regime. In sum, the diagnostics were generally right, but the solutions were largely faulty.

## 5 Post-NIEO African economic policies and Western reactions

The NIEO served as the basis for defining development policies and programmes formulated by African states. Thus, these policies contained half-hearted, unbalanced Western-biased analyses of the economic morass Africa was engulfed in.

Yet, it is significant to note that such policies and programmes still posed 'major threats' to capitalist interests.<sup>28</sup> Therefore, in response to each programme designed by African states, a counter-policy was developed by the West. Thus, the stage was set for a battle of policy and counter-policy formulations. Yet still, what was common to both camps was the lack of, or at best cosmetic attention to, human rights, civil society and democratic principles.

The NIEO came into being at the time of the second UN development decade.<sup>29</sup> This decade had resorted to the basic needs approach, after the failures of the growth-oriented approach which characterised the first decade.<sup>30</sup> In reaction to the NIEO, Western states re-introduced the growth-oriented approach to development plus the negative conditionality regime in aid disbursement to the developing world.<sup>31</sup> While denying aid to egregious human rights violating regimes was seen as a

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<sup>28</sup> While developing countries saw the NIEO as legally binding, the industrialised world saw it differently. See Verges (n 25 above) 42-43.

<sup>29</sup> 1970 to 1980.

<sup>30</sup> 1960 to 1970. See CIDA *Strategy for international development corporation 1975-1980* (1975).

<sup>31</sup> See D Marantis 'Human rights, democracy and development: The European Community model' (1994) 7 *Harvard Human Rights Journal* 1.

step in the right direction, it was in reality a face-saving measure by Western states to be seen to be concerned about human rights. Aid and soft loans continued to pour in to support dictatorial regimes. In reality, the negative conditionality regime was used as a strategy to shift the blame for human rights abuses and the lack of development to African leaders.

The externalisation of the sources of Africa's problems continued in each policy and counter-policy formulation by African and Western leaders, until Africa began to admit that some internal factors were responsible for its state of underdevelopment and made an almost complete capitulation in the new millennium through NEPAD.

### 5.1 The right to development

While the NIEO debate continued, in 1972 a prominent African jurist, Keba M'Baye of Senegal, initiated the process towards the postulation of the right to development. During his thought-provoking lecture at the International Human Rights Institute in Strasbourg, he remarked that 'every man has a right to live and a right to live better'.<sup>32</sup>

Set in the emerging framework of the NIEO, the right to development was initially proposed as a normative concept by M'Baye. However, the right to development captured the attention of developing states at the UN. They sought legal justification for it in the UN Charter, the Universal Declaration on Human Rights (Universal Declaration) and CCPR and CESC. For example, reference was made to articles 1(3),<sup>33</sup> 55<sup>34</sup> and 56<sup>35</sup> of the UN Charter, and article 28<sup>36</sup> of the Universal Declaration. The UN High Commissioner for Human Rights, in supporting this relationship between rights and development, states:<sup>37</sup>

The Universal Declaration on Human Rights contains a number of elements

<sup>32</sup> K M'Baye 'Le Droit au Developpement comme un Droit de l'Homme' (1972) 5 *Revue des Droits de l'Homme* 503.

<sup>33</sup> 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

<sup>34</sup> 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

<sup>35</sup> 'All Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.'

<sup>36</sup> 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.'

<sup>37</sup> <http://www.unhchr.ch/development/right-01.html> (accessed 30 June 2006).

that became central to the international community's understanding of the right to development. It attaches importance, for example, to the promotion of social progress and better standards of life and recognizes the right to non-discrimination, the right to participate in public affairs and the right to an adequate standard of living. It also contains everyone's entitlement to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized.

Through informal discussions, working groups and the like, the right to development was finally formulated and came before the UN General Assembly for a vote in 1981. Western opposition to the right to development was vehement. Led by the US, Western states feared that the right was a means for developing states to bolster their claim and resuscitate attempts to obtain full recognition and implementation of the NIEO. US opposition ensured that the Declaration of the Right to Development, adopted by the General Assembly on 4 December 1986, did not create 'any entitlement to a transfer of resources; and was a matter of sovereign decision of donor countries and could not be subject to binding rules under the guise of advancing every human being's RTD'.<sup>38</sup> According to Marks, US rejection of the right to development were based on the underlying political economy, the relation of the right to economic, social and cultural rights, conceptual confusion, conflicts of jurisdiction, and general resistance to international regulation.<sup>39</sup>

It was not until the Vienna World Conference on Human Rights in 1993 that the world achieved consensus and agreed to recognise the right to development as 'a universal and inalienable right and integral part of fundamental human rights'.<sup>40</sup>

It is important to note that the right to development was first approved by African states. The concept was incorporated in the African Charter on Human and Peoples' Rights (African Charter) in article 22(2).<sup>41</sup>

- 1 All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- 2 States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The African Charter was adopted by the OAU in June 1981 and came

<sup>38</sup> S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 138 144.

<sup>39</sup> As above.

<sup>40</sup> Para 10 of the Vienna Declaration and Programme of Action A/CONF 157/23 12 July 1993.

<sup>41</sup> Also, part of the Preamble reads: 'Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.'

into force in October 1986, while the UN General Assembly adopted the right to development two months later.

## 5.2 The Revised Framework for the NIEO

In response to criticism, and to tailor the NIEO to the specific needs of Africans, the Revised Framework of Principles for the Implementation of the New International Economic Order in Africa (Revised Framework) was proposed by the Economic Commission for Africa (ECA)<sup>42</sup> in 1976. The Revised Framework was built on four fundamental principles as the way towards attaining credible and appropriate development for Africa: self-reliance, self-sustainment, democratisation of the development process<sup>43</sup> and a fair and just distribution of the benefits of development through the progressive eradication of unemployment and mass poverty.<sup>44</sup> The Revised Framework fed into the Monrovia Strategy and the Lagos Plan of Action for the Economic Development of Africa (1980-2000) and the Final Act of Lagos. It is important to note that the Revised Framework incorporated elements of democratisation and a welfare approach to development, which form the basis of our analysis below.

## 5.3 The Lagos Plan of Action (LPA) and structural adjustment

The LPA and the Final Act of Lagos were initiated by the ECA to revise the development paradigm and strategies pursued since the time of independence in the 1960s. The Preamble to the LPA made reference to the fact that '[t]he effect of unfulfilled promises of global development strategies has been more sharply felt in Africa than in the other continents of the world'. It admitted that

rather than result in an improvement in the economic situation of the continent, successive strategies have made it stagnate and become more susceptible than other regions to the economic and social crises suffered by the industrialised countries.

Therefore it 'resolved to adopt a far-reaching regional approach based primarily on collective self-reliance'.<sup>45</sup>

Paragraph 2 of the Preamble recalls the adoption in July 1979<sup>46</sup> of the

<sup>42</sup> ECA is the regional arm of the UN, mandated to support the economic and social development of Africa.

<sup>43</sup> It is important to note, however, that 'democratisation' here is not democratisation of the political framework, but of the development process.

<sup>44</sup> Adedeji (n 27 above) 7.

<sup>45</sup> Para 1 to Preamble, Lagos Plan of Action for the Economic Development of Africa, 1980-2000 [http://www.uneca.org/itca/ariportal/docs/lagos\\_plan.PDF](http://www.uneca.org/itca/ariportal/docs/lagos_plan.PDF) (accessed 8 May 2003). Adopted by the OAU Assembly in 1980.

<sup>46</sup> During the 16th ordinary session of the OAU in Monrovia, Liberia.

Monrovia Declaration of Commitment<sup>47</sup> with the preceding paragraphs highlighting some of the salient features of the Declaration. They include the '[n]eed to take action to provide the political support necessary for the success of measures to achieve the goals of rapid self-reliance and self-sustaining development and economic growth'.

Among individual and collective commitments were promoting 'economic integration of the African region';<sup>48</sup> establishing 'national, sub-regional and regional institutions which will facilitate the attainment of objectives of self-reliance and self-sustainment';<sup>49</sup> human resource development through the elimination of illiteracy; and ensuring that development policies reflect Africa's socio-cultural values adequately.

In the view of Adedeji, the cause for this turn of events was 'Africa's persistent failure to decolonise its political economy . . . [b]y trying to march into the future 'hand-in-hand with its colonial, monocultural, low-productivity and excessively dependent and open economy, Africa ensured no dignified future for itself'.<sup>50</sup> As a derivative of the Revised Framework, the LPA is argued as having been premised on the Revised Framework's four principles<sup>51</sup> and the attainment of regional integration by 2000. In essence, the LPA, continuing in the mode of *dependencia* framework, prescribed the withdrawal of African countries from the world economy.

Again, following along the lines of *dependencia*, in the 104-page document there is no mention of 'human rights', 'democracy' or 'rule of law', apart from references to 'rights' in relation to women.<sup>52</sup> It is stated thus:<sup>53</sup>

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<sup>47</sup> Full title Monrovia Declaration of Commitment of the Heads of State and Government of the OAU on the Guidelines and Measures for National and Collective Self-reliance in Economic and Social Development for the Establishment of a New International Economic Order.

<sup>48</sup> Para 3(ii).

<sup>49</sup> Para 3(iii).

<sup>50</sup> Adedeji (n 27 above) 6.

<sup>51</sup> Self-reliance, self-sustainment, democratisation of the development process and equitable distribution.

<sup>52</sup> See 2 paras under ch XII on 'Women and development'.

<sup>53</sup> Para 325, 92 & 93. At the same session during which the Monrovia Declaration was made, the Assembly of Heads of State and Government called on the OAU Secretary-General to organise a meeting of experts to prepare a preliminary draft for an 'African Charter on Human and Peoples' Rights'. What the Charter came up with on the rights of women was a paragraph in art 18(2). The inclusion of women in the document was a reflection of the Women in Development paradigm, which has been criticised as being entrenched in the World Bank policy of exclusion of women in the development process. See eg N Visvanatan *The women, gender and development reader* (1994). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted by the 2nd ordinary session of the Assembly of the AU in Maputo in 2003; [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html) (accessed 30 June 2006).



- (c) One of the reasons why many women shy away from enforcing their rights is fear of intricacies and expenses involved. Free legal aid centres, staffed by lawyers who are committed to the principle of equality between the sexes, should be established in low-income urban and rural areas. These should include free consultations and discussions. Such offices should inform women of their rights.
- ...
- (e) Publication of rights and duties of both men and women in society and as husbands, wives, fathers, mothers at home. This should be done through campaigns in the mass media as well as through wide circulation of booklets on these issues.

The democratisation process in the LPA generally was limited to participation, in turn reflected in the following objectives/processes expressed in the LPA: physical infrastructural development and the improvement of social facilities to be undertaken through voluntary self-help participation;<sup>54</sup> the full participation of all segments of the population in gainful and productive employment; and provision of all essential services for the enrichment of the life of the community and the mobilisation of the masses for the development of public works and community services, and so on.<sup>55</sup>

These forms of participation are categorised as 'defective' participation. They are among those developed under the modernisation theory to promote the concept of community development. They include the 'ceremonial' or 'supportive',<sup>56</sup> the 'pseudo',<sup>57</sup> 'the unreal',<sup>58</sup> or 'partial' types.<sup>59</sup> Participation under the modernisation theory typically involved the management of a community development project by government officials and the insertion of citizens into the projects as employees or volunteers.<sup>60</sup>

The question arises as to the way in which the development process could be democratised when a state was not democratic, civil society was not functional and one-party dictatorships were the order of the day. To own the development agenda, people have to be able to enjoy their right to freedom of expression, both at the community and national levels. It is thus important to note that, in the entire document's analysis of the causes and effects of Africa's underdevelopment, no reference was made to human rights violations, including indigenous rights abuses and the lack of respect for democratic principles and

<sup>54</sup> With respect to food production, para 29.

<sup>55</sup> Para 93.

<sup>56</sup> Where citizens 'take part' by expressing support for the government marching in parades. S Vettivel *Participation and sustainable development: Theory and practice in government and NGOs* (1993) 15.

<sup>57</sup> The situation in which members are induced to agree to decisions already taken.

<sup>58</sup> Where participation is a mere smokescreen due to the decisional outcome being structurally predetermined.

<sup>59</sup> The process by which the final power to decide rests with one party only.

<sup>60</sup> D d'Abreo *From development worker to activist: A case study in participatory training* (1983) 164.

the rule of law as major factors impeding development in Africa; nor to human rights, democracy and rule of law as factors necessary in the promotion and sustaining of development. Adedeji and others who have expressed much confidence in the LPA overlooked the political/human rights angle to development. Ake contends rightly that:<sup>61</sup>

The crisis is, to my mind, primarily a crisis of politics, from which the economic crisis derives. We do not see it as such because we have always regarded development as an autonomous process not significantly mediated by cultural or political factors . . . Development always occurs in the context of a state system and a political leadership committed to development.

Full and effective participation should include mobilising the people, involving them in the consultation, planning and decision-making processes regarding what project to undertake and how to go about it, implementation and evaluation of the project, and the realisation, equitable sharing and protection of the benefits from the projects.

Another significant borrowing of the LPA from the NIEO is the blame it lays on an external factor — Western imperialism. Paragraph 6 of the LPA states that 'Africa, despite all efforts made by its leaders, remains the least developed continent'. The economic woes of the continent were attributed to Africa's position as a 'victim of settler exploitation arising from colonialism, racism and apartheid'. It was asserted in the document that this process of exploitation was inherited from the colonial period and continued through 'the past two decades [and was] carried out through neo-colonialist external forces which seek to influence the economic policies and directions of African states'.<sup>62</sup> In this document it was stated further that this 'colonial and racist domination and exploitation' have resulted in 'political constraints on the development of our continent'.<sup>63</sup>

However, African states cannot escape blame for internal factors, such as egregious violations of human rights, exploitation of ethnic divisions and their escalation into inter-ethnic conflicts, mismanagement, corruption, over-bureaucratisation, political instability, political cronyism, militarisation of politics, and so on.

Unique and indicating a serious sign of attempts by African states to put together an economic agenda, was the call for self-reliance and self-sustainment. However, this was mere rhetoric, considering the fact that the LPA, like the NIEO, was to be built on technology, aid and technological assistance to Africa on Africa's own terms. This approach was tantamount to rejecting modernisation theory with one hand and receiving it with the other. Thus, paragraph 275 of the document states:<sup>64</sup>

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<sup>61</sup> Ake (n 14 above) 72.

<sup>62</sup> Para 6.

<sup>63</sup> Para 11.

<sup>64</sup> LPA.

The summit therefore endorses the following recommendations:

- (a) that the volume of Official Development Assistance (ODA) to African least developed countries should immediately increase substantially, in real terms, so that these countries can realise economic and social changes and make real progress in the present decade. In that context, donors should:
  - (i) make commitments to give financial and technical assistance to individual least developed African countries on a continuous and automatic basis and on highly concessional terms;
  - (ii) streamline procedures of aid in order to reduce delays in approving projects and in disbursing funds;
  - (iii) adopt criteria for project evaluation and selection based on the conditions and needs of African least developed countries.

In spite of its flaws such as not linking human rights and development, the LPA represented an improvement over the NIEO and the Revised Framework. At least it recognised the importance of participation, though limited to implementation. Yet, in spite of its inherent weaknesses, the LPA was opposed, and rejected by the World Bank and the International Monetary Fund (IMF).<sup>65</sup>

#### 5.4 The classical Structural Adjustment Programme

In place of the LPA, the Structural Adjustment Programme (SAP) was proposed and foisted on Africa and other developing countries by the World Bank and the IMF. In diagnosing the economic morass that most developing countries found themselves in, the IMF came to the realisation in the late 1970s — after the granting of huge loans for ideological reasons — that the less industrialised states were no longer in a position to remedy their balance of payment problems through short-term loans. In an attempt to resolve this crisis, the World Bank and the IMF devised conditionality clauses in loan granting which culminated in the designation of SAPs in the economies of African states.<sup>66</sup>

As the modernisation theory dictates, the practical application of classical SAPs under the direction of the World Bank and the IMF prompted serious abuses of human rights in Africa in order to pave the way for the liberal economic reforms to be implemented.

#### 5.5 Africa's Programme for Economic Recovery/United Nations Programme of Action for Africa's Economic Recovery and Development and neo-Structural Adjustment Programme

In response to the first stage of the SAP, African states designed Africa's Programme for Economic Recovery 1986-1990 (APPER), later converted into the United Nations Programme of Action for Africa's Economic

<sup>65</sup> Adedeji (n 27 above).

<sup>66</sup> A Steele 'The past and future of the World Bank and the International Monetary Fund' (1995) 11 *International Insights* 27.

Recovery and Development (UN-PAAERD).<sup>67</sup> The basic tenets of the UN-PAAERD were an inward-looking development strategy based on collective self-reliance, requiring the existence of an alternative model of world economic order. The state and public sectors would be the main economic actors. Again, the programme called for the participation of African peoples, with special mention made of women, the youth and the private sector. The self-reliant economy envisaged would produce mainly for the national and regional markets, finally resulting in the effective transformation of African economies. The implementation of the programme seemed to favour a redistributive system and governmental intervention as a convenient and indirect attempt to maintain some elements of the dependency theory.

In any case, the prevailing capitalist material capabilities, together with the world economy and globalisation, were able to prevail over Africa's attempts to adopt alternative policies towards the attainment of sustainable development. As contended by Ratsinbaharison:<sup>68</sup>

Indeed, in order to prosper, each country must produce for the world market, promote domestic and foreign investment, welcome the implantation of MNCs, adopt the latest and highest technologies (the information technology, for example), and participate in the globalisation process. Failing to follow these prescriptions may automatically lead to marginalisation from the world economy, which may generate disastrous consequences for any country in the world. Marginalisation may deprive the country of the hard currencies it needs to purchase any kind of goods it cannot produce. Marginalisation may also keep the country, in the long run, in a state of total backwardness.

Thus, to 'help' African states find their feet and integrate into the world economy in order to 'enjoy its benefits', the neo-SAP was introduced. The neo-SAP was also meant to give a human face<sup>69</sup> to the orthodox SAP, whose implementation went hand in hand with rights abuse and corruption. An additional goal for the neo-SAP was to pave the way for the institutionalisation of the 'new international order' or the post-Cold War order.<sup>70</sup> As noted by Adedeji, '[t]heir objectives were less to help African countries than to "discipline" them, and above all, reorient their economic policies to the market economy model'.<sup>71</sup>

<sup>67</sup> S-13/2 of 1 June 1986. UN Programme of Action for Africa's Economic Recovery and Development (UNPAAERD) called for \$82,5 billion to be raised through African resource mobilisation and a further \$46 billion by external actors.

<sup>68</sup> A Ratsinbaharison 'The United Nations and development: Explaining the failure of the UN Development Programs for Africa in the 1980s and 1990s' <http://www.angelfire.com/mi/ratsimbah/chapter5.htm> (accessed 28 February 2005).

<sup>69</sup> And such related programmes as the Programme of Action to Mitigate the Social Cost of Adjustment (PAMSCAD).

<sup>70</sup> Steele (n 65 above).

<sup>71</sup> *African alternative framework of structural adjustment programs for socio-economic recovery and transformation* 6 [http://www.uneca.org/eca\\_resources/Publications/ESPD/old/aaf\\_sap.pdf](http://www.uneca.org/eca_resources/Publications/ESPD/old/aaf_sap.pdf) (accessed 31 December 2005).

The implementation of the neo-SAP equally entailed untold hardships for Africans:<sup>72</sup>

Instead, SAPs simply led to the postponement or total abandonment of development programs . . . As the 1980s drew to a close, it became clear that economic turnaround had not occurred in almost all of the countries that had tried SAPs . . . In several instances, the installation of structural adjustment programs were met with popular discontent, riots and political instability . . . By imposing the terms of adjustment programs from the outside, the SAPs undercut the development of national leadership and indigenous economic management capabilities . . . The package of fiscal reforms spelled out a tight austerity policy bringing pain and suffering for the people and political risks for governments.

## 5.6 The African Alternative Framework to SAP

In response to the SAP, the Africa Alternative Framework to Structural Adjustment Programs for Socio-Economic Recovery and Transformation (AAF-SAP) was drawn up.<sup>73</sup> While still relating to, and drawing on, the recommendations for Africa's recovery noted in the LPA, the AAF-SAP identified two crucial components for Africa's recovery which had been missing in all previous African alternative programmes. These are the social and political circumstances Africa finds itself in. Thus, the report asserts:<sup>74</sup>

The social structures also fundamentally contribute to Africa's persistent crisis. First, Africa has very distinct and deeply rooted types of social differentiations. These relate to linguistic affinities, gender, ancestral origins or blood relations such as those that result in ethnic groups or nationalities or clans. This has many implications on social mobilisation for development; on efficient and objective economic management; on the proper functioning of national institutions; and, on political stability in general.

Regarding political conditions, the report had this to say:<sup>75</sup>

The political environment is also a major cause of African problems. Basic rights, individual freedom and democratic participation are often lacking in African countries. Yet, without them people feel alienated and are unable to devote their energies to development and productivity. Indeed, in a place where injustices are the norm rather than the exceptions, it is almost impossible to expect a momentum of progress. What you often find is disillusion, lethargy, repression, civil strife and an environment where fear and man's inhumanity against man prevail. Given such circumstances, people do not work hard or produce optimally and, naturally if people do not work hard, the pace of development, if any, is at snail's speed.

<sup>72</sup> As above.

<sup>73</sup> The project originated from studies by Adedeji in July 1989. It was accepted at the UN as a 'basis for constructive dialogue' in November 1989. Only the US voted against it. ECA, Addis Ababa 1991.

<sup>74</sup> *African alternative framework* (n 71 above) 2.

<sup>75</sup> As above.

### 5.7 The African Charter for Popular Participation/United Nations New Agenda for the Development of Africa and globalisation

The AAF-SAP was followed, in 1990, by the African Charter for Popular Participation (Charter)<sup>76</sup> and the United Nations New Agenda for the Development of Africa (UN-NADAF) in 1991.<sup>77</sup> Both documents made significant inroads. The Charter, for instance, identified factors such as the over-centralisation of power in the state and impediments to the effective participation of people in development as having contributed to the curtailing, under-utilisation and under-valuing of creativity. It founded the basis for Africa's development on the AAF-SAP and on endogenous, people-centred development.

UN-NADAF, for its part, recognised the need to, and committed itself to, 'press ahead with the democratisation of development and the full implementation of' the African Charter on Human and Peoples' Rights, the African Charter for Popular Participation and the OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World.<sup>78</sup>

Yet, the UN-NADAF still called for an inward-looking approach to development for Africa. It proposed, among others, bypassing the World Bank and the IMF, and adopting the UN as its principal source of funding and relying on the UN to play the role of the Fund and Bank in maintaining and supervising the NIEO.<sup>79</sup>

However, about this time, with the fall of communism and the end of the Cold War, globalisation had begun to bloom. No wonder these programmes were also jettisoned. Again, as observed by Ratsimbaharison:

In sum, the liberal ideas of the late 20th century constrain all international actors to respect the basic principles of capitalism and democracy. The constraints imposed by these liberal ideas can also explain the rejection and failure of the two UN development programs [the UN-PAAERD and UN-NADAF], which promoted ideas related to collectivism and substantial government intervention in the economy. Furthermore, the Bretton Woods institutions, as the most powerful institutions of the late 20th century world economic order, also imposed constraints, which contributed to the failure of the two UN development programs.

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<sup>76</sup> The African Charter for Popular Participation in Development and Transformation was adopted in Arusha, Tanzania, in February 1990, at the end of the International Conference on Popular Participation in the Recovery and Development Process in Africa. The Charter emerged from suggestions by non-governmental organisations to the 1988 mid-term review of the UN Programme of Action for African Economic Recovery and Development, 1986-1990 (UN-PAAERD).

<sup>77</sup> GA Res 46/151.

<sup>78</sup> Para 13.

<sup>79</sup> Ratsimbaharison (n 68 above) 15.

## 6 The African Economic Community/The African Union

As noted in the LPA, the commitments made in the Monrovia Declaration 'will lead to the creation, at the national, sub-regional and regional levels, of a dynamic and interdependent African economy and will thereby pave the way for the eventual establishment of an African Common Market leading to an African Economic Community'.<sup>80</sup>

The commitments made in the Lagos Plan of Action and the Final Act of Lagos resulted in the Treaty Establishing the African Economic Community (AEC), which was adopted in Abuja, Nigeria, in June 1991 during the 27th ordinary session of the OAU Heads of State and Government (AEC or Abuja Treaty). The AEC Treaty came into force in May 1994, following the deposit of the required number of ratifications. This process culminated in changing the official name of the OAU to OAU/AEC.

Article 6 of the Treaty sets out the implementation of the Treaty through a gradual process covering six stages within a 34-year time frame, by which time the AEC is supposed to be in full bloom, that is by 2028. The regional economic communities (RECs) would serve as the building blocks of the AEC.<sup>81</sup>

The AEC represent perhaps the most comprehensive and far-reaching attempt by African states to get their act together. The AEC, however, has not been without its implementation difficulties. Among the concerns raised by Babarinde are the numerical size of the AEC, the nature of the African leadership, the disparate economies of member states, entrenched national traditions which are an aberration to democracy, human rights and minority rights protection, and the short time frame envisaged to bring the AEC to fruition.<sup>82</sup>

While African leaders continued to review the externalisation of the sources of the continent's woes, the West never did. Their view was, and remains, that the problem is solely with Africa. Thus, under globalisation, Western states sought to impose, with full force, their ideas of how the world political and economic order ought to be run. Thus, as expected, the AEC did not meet the expectations of Western states either. It became the next victim to undergo revision or relegation to the background. African states felt they had no choice but to shed their

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<sup>80</sup> Kinshasa Declaration by the Council of Ministers in December 1976 concerning the ultimate establishment of an African Economic Community.

<sup>81</sup> Examples of existing RECs are the Arab Maghreb Union (AMU); Economic Community of Central African States (ECCAS); Common Market of Eastern and Southern Africa (COMESA); Southern African Development Community (SADC); and Economic Community of West African States (ECOWAS).

<sup>82</sup> OA Babarinde 'Analysing the proposed African Economic Community: Lessons from the experience of the European Union' Paper prepared for the Third ECSA-World Conference on The European Union in a Changing World, Brussels, Belgium, 19-20 September 1996 <http://www.ecsanet.org/conferences/ecsaworld3/babarinde.htm> (accessed 9 May 2003) 5.

'socialist/*dependencia* past' which was still reflected in the OAU, and to fully embrace the neo-liberal capital economic model of development embodied in NEPAD.

Consequently, an extraordinary session (the 4th) of the OAU was convened and held in Libya in September 1999. There, African Heads of State, based on their 'conviction that our continental Organisation needs to be revitalised in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances',<sup>83</sup> decided to '[e]stablish an African Union, in conformity with the ultimate objectives of the Charter of our continental Organisation and the provisions of the Treaty establishing the African Economic Community'.<sup>84</sup> It was agreed that the 34-year transitional period, agreed on in Abuja towards the ultimate establishment of an AEC, was too long. Therefore, the session decided to 'accelerate the process of implementing the [Abuja] Treaty' by 'shorten[ing] the implementation periods of the Abuja Treaty', and to ensure 'the speedy establishment' of the institutions provided for in the Abuja Treaty.<sup>85</sup> This was to be followed by the drafting of the Constitutive Act of the African Union. The AU Constitutive Act came into effect on 26 May 2001,<sup>86</sup> and became operative in July 2002 during the 76th ordinary session of the OAU in Durban, South Africa.

NEPAD is the brain child and the handmaiden of the AU.<sup>87</sup> It is described as<sup>88</sup>

[a] pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic. The programme is anchored on the determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalising world.

Central to NEPAD is the African Peer Review Mechanism (APRM), a self-monitoring mechanism which governments of African states agree to accede to voluntarily. It seeks to help African states improve, among others, governance, the rule of law, democracy and a respect for human rights.

<sup>83</sup> Para 6 Sirte Declaration. The paragraph concluded: 'We are also determined to eliminate the scourge of conflicts, which constitutes a major impediment to the implementation of our development and integration agenda.'

<sup>84</sup> Para 8(i).

<sup>85</sup> Para 8(ii); such as the African Central Bank, the African Monetary Union, the African Court of Justice and, in particular, the Pan-African Parliament.

<sup>86</sup> Thirty days after ratification by the 36th state, Nigeria, upon depositing its instruments of ratification.

<sup>87</sup> NEPAD is a new vision and strategic plan designed to address the current challenges facing the African continent. Its priorities include establishing conditions for sustainable development by ensuring peace and security; democracy and good, political, economic and corporate governance; regional co-operation and integration; capacity building. The 37th Summit of the OAU in July 2001 formally adopted the strategic framework document.

<sup>88</sup> Para 1 of the NEPAD Document, Introduction.



Like the Lagos Plan of Action, NEPAD contrasts Africa and the developed world by highlighting the 'poverty and backwardness of Africa [which] stand in stark contrast to the prosperity of the developed world'.<sup>89</sup> However, under NEPAD one sees a complete change in direction.<sup>90</sup> For the first time, African leaders admit that the economic malaise has an internal element to it, that<sup>91</sup>

[p]ost-colonial Africa inherited weak states and dysfunctional economies, which were further aggravated by poor leadership, corruption and bad governance in many countries. These two factors, together with the divisions caused by the Cold War, hampered the development of accountable governments across the continent.

Also, unlike previous development programmes, which were inward-looking and based on self-reliance and self-sustainment, NEPAD calls for partnership with the Western world. Again, NEPAD embraces democracy and, to some extent, human rights. The human rights dimension, unlike before, is skewed in favour of civil and political rights while sidelining economic, social and cultural rights.

It is not in doubt that the NEPAD concept borrows heavily from Western neo-liberal economic theories on development. The NEPAD document therefore reflects pronouncements of Western states, theories and policy papers presented by neo-liberal Western scholars, various pieces of legislation passed by Western states, UN declarations and the like. For example, one could discern from the 'Washington Consensus' position on market reforms, which was proposed by John Williamson in 1989<sup>92</sup> and included a list of 10 policy recommendations as the gateway to the attainment of market-economies for the developing world:<sup>93</sup>

Fiscal discipline, redirect public expenditure, tax reform, financial liberalisation, adopt a single, competitive exchange rate, trade liberalisation, eliminate barriers to foreign direct investment, privatise state owned enterprises, deregulate market entry and competition, ensure secure property rights.

One may also refer to America's African Growth and Opportunity Act

<sup>89</sup> Para 2 of the NEPAD Document.

<sup>90</sup> The document itself admits in para 59 that '[t]he New Partnership for Africa's Development differs in its approach and strategy from all previous plans and initiatives in support of Africa's development, although the problems to be addressed remain largely the same'.

<sup>91</sup> Also, read para 42: 'The New Partnership for Africa's Development recognises that there have been attempts in the past to set out continent-wide development programmes. For a variety of reasons, both internal and external, including questionable leadership and ownership by Africans themselves, these have been less than successful. However, there is today a new set of circumstances, which lend themselves to integrated practical implementation.'

<sup>92</sup> J Williamson (ed) *Latin American adjustment: How much has happened* (1990).

<sup>93</sup> M Naim 'Fads and fashion in economic reforms: Washington consensus or Washington confusion?' (1999) *Foreign Policy Magazine*. Eg, compare with para 154 of the NEPAD Document: 'The first priority is to address investors' perception of Africa as a "high risk" continent, especially with regard to security of property rights, regulatory framework and markets.'

(AGOA), signed into law on 18 May 2000 by President Clinton.<sup>94</sup> The Act offers tangible incentives for African countries 'to continue their efforts to open their economies and build free markets'. The Act sets out criteria that are supposed to be met by African states or to show that they are making continual progress toward meeting, in order to receive the benefits of AGOA. These are market-based economies; the rule of law and political pluralism; the elimination of barriers to US trade and investment; the protection of intellectual property; efforts to combat corruption; policies to reduce poverty; increasing availability of health care and educational opportunities; the protection of human rights and worker rights; and the elimination of certain child labour practices. President George Bush also signed amendments to AGOA, also known as AGOA II, into law on 6 August 2002.<sup>95</sup>

Also, in February 2003, to affirm the US position, US President George Bush unveiled his Millennium Challenge Account (MCA) before Congress. According to the White House, MCA represents a new approach to providing and delivering development assistance.<sup>96</sup> Ghana qualified to access the MCA this year following its generally positive showing at the APRM.<sup>97</sup>

These goals largely mirror those expressed in the NEPAD document, though they are not as detailed and comprehensive as those laid down in the Millennium Development Goals (MDGs). Further similarities are expressed in the Millennium Compact outlined in the Human Development Report 2003.

NEPAD is indeed an amalgamation of policies borrowed from or influenced significantly from sources other than African. NEPAD was planned, designed and put into effect without consultation with the people who are supposed to own it, but first and foremost with the potential financiers of the plan. African leaders seek to justify their sidelining of the people in the decision-making process thus:<sup>98</sup>

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<sup>94</sup> Title 1 of The Trade and Development Act of 2000. Sec 3108 of the Trade Act of 2002 AGOA II substantially expands preferential access for imports from beneficiary sub-Saharan African countries [http://www.agoa.gov/agoa\\_legislation/agoa\\_legislation.html](http://www.agoa.gov/agoa_legislation/agoa_legislation.html) (accessed 30 June 2006).

<sup>95</sup> Sec 3108 of the Trade Act of 2002 AGOA II substantially expands preferential access for imports from beneficiary sub-Saharan African countries.

<sup>96</sup> <http://www.usaid.gov/mca> (accessed 14 May 2003). The report also states that '[g]iven this commitment, and the link between financial accountability and development success, special attention will be given to fighting corruption. The goal of the Millennium Challenge Account initiative is to reduce poverty by significantly increasing economic growth in recipient countries through a variety of targeted investments.'

<sup>97</sup> Ghana was the first country to accede to the APRM in 2004, and also the first to be peer-reviewed. The review took place at the 4th Summit of the African Peer Review Forum held on 22 January 2006 in Khartoum, Sudan.

<sup>98</sup> Para 47 (my emphasis). Compare to art 4 of the Declaration on the Right to Development: 'States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development.'

The New Partnership for Africa's Development centres on African ownership and management. Through this programme, African leaders are setting an agenda for the renewal of the continent. The agenda is based on national and regional priorities and development plans that must be prepared through participatory processes involving the people. *We believe that while African leaders derive their mandates from their people, it is their role to articulate these plans and lead the processes of implementation on behalf of their people.*

The lack of democratic participation in the drawing up of the NEPAD document permeates the democratic process that African leaders have designed for implementation. In the NEPAD document, African states undertake 'to respect the global standards of democracy'.<sup>99</sup> These seem to find expression in the Declaration on Principles Governing Democratic Elections in Africa. One does not see any elements of traditional African political systems incorporated therein. It is a wholesale adoption of the majoritarian vision of the liberal international orthodoxy, which does not, for instance, take into account the multi-ethnic composition of societies, such as Africa's. Judging by Africa's past record on the lack of recognition of minority rights and also the fact that the new Constitutive Act of the AU does not deal with minority rights issues, unless indirectly when a situation degenerates into a crisis.<sup>100</sup> This type of democratic arrangement does not bode well for the future stability and democratic development of Africa.<sup>101</sup>

The lack of serious attention on the part of African leaders to promote democracy is exemplified by the fact that the criteria for membership of the AU did not include the fundamental principle of democracy. Even though at the Durban Summit that gave birth to the AU, a Declaration on the Principles Governing Democratic Elections in Africa<sup>102</sup> was made, it was not incorporated into the Constitutive Act, nor used as criteria for membership, unlike the EU. Incidentally, the primary criterion for membership of the AU is simply being an African state.<sup>103</sup>

Like previous development agendas, a cursory glance at the NEPAD initiatives indicates that the proper place of human rights has been downplayed. The human rights equation in NEPAD cannot simply be considered as forming part of such concepts as 'good governance', 'political governance', 'economic governance' and 'civil society', not even in the concept of 'democracy'. Such terms are not only vague,

<sup>99</sup> NEPAD Document para 47.

<sup>100</sup> Genocide, crimes against humanity, etc.

<sup>101</sup> K Appiagyei-Atua 'The African Union and minority rights' Paper presented at Minority Rights Summer School 2003, organised by the Irish Centre for Human Rights, National University of Ireland, Galway.

<sup>102</sup> OAU/AU Declaration on The Principles Governing Democratic Elections In Africa — AHG/Decl 1 (XXXVIII) 38th ordinary session of the Assembly of Heads of State and Government of the OAU 8 July 2002, Durban, South Africa AHG/Declarations 1-2 (XXXVIII).

<sup>103</sup> Art 29 on Admission to Membership. Art 27(1) also states: 'This Act shall be open to signature, ratification and accession by the Member States of the OAU in accordance with their respective constitutional procedures.'

but concepts that tend to play into the hands and in the interests of corporate bodies and foreign investors.

African leaders have failed to articulate an effective concept of rights that positively link human rights to development in relation to their culture and history. The development agenda should therefore be placed in the hands of the people. For a true, holistic and sustainable African initiative for development to be realised through NEPAD, the concept of human rights that should be used to examine the viability of NEPAD needs to be derived from the traditional roots of human rights in African political systems that tend to draw the proper balance between human rights and development.

## 7 Conclusion

This paper sought to establish that the evolution of the OAU into the AU, and the adoption of NEPAD in place of the NIEO and the Lagos Plan of Action did not happen out of the blue. It was a culmination of events in which the mighty hand of Western powers in dictating the economic fortunes of African states was clearly manifest. Relying on the principle that human rights and democracy are fetters to development, the former were supposedly traded for the latter. However, it turned out that the latter was not pursued either. Or even if it was, it could not attain a level of development that is sustainable, without effective exercise and enjoyment of rights. While the dependency theory may have lost support, at least one fundamental precept of the theory continues to manifest itself and influence the so-called success story of modern day modernisation, which is globalisation, namely, the continued spread of poverty, the entrenchment of poverty and the widening of the poverty gap between the haves and have-nots.

Even though through the NIEO African and other developing states were able to make a proper diagnosis of the economic quagmire they found themselves in, their analyses were lopsided. In the same way, Western states' analysis of the causes of underdevelopment was unbalanced. What proponents of the NIEO failed to do, or do rightly, was to diagnose the internal stumbling blocks impeding development in Africa and other decolonised states. These include the question of democracy and respect for human rights: how to disaggregate and share power and adopt a holistic approach to the problem of underdevelopment in Africa, which calls for, among others, the adoption of a multi-ethnic/pluralistic notion of democracy; an indigenous conception of human rights; reliance on alternative forms of development; and culturally-sensitive and appropriate notions of alternate conflict resolution. This approach, combined with some of the *dependencia* internal and insular economic policy arrangements as noted in particularly the Lagos Plan of Action, could have saved the day for African states and put the continent on the true path to effective and sustainable development.

# The African Committee of Experts on the Rights and Welfare of the Child: An update

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## 1 Introduction and background

The African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>1</sup> is the first comprehensive regional children's rights treaty specifically dedicated to the protection of children in Africa. A number of reasons, which could stand scrutiny, are forwarded to justify the need for a separate regional instrument,<sup>2</sup> given the existence of the

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<sup>1</sup> African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990).

<sup>2</sup> Some of the reasons for the need for an African Charter include the fact that during the drafting process of CRC, Africa was underrepresented. Only Algeria, Egypt, Morocco and Senegal participated meaningfully. Furthermore, specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument. Some of the peculiarities of the African situation were omitted from CRC, such as the situation of children living under the (then prevailing) apartheid regime in South Africa; practices and attitudes having a negative effect on the life of the girl child; and widespread harmful cultural practices in African society, such as female genital mutilation. Other issues not considered by CRC were problems of displaced persons arising from internal conflicts, the African concept relating to the community's responsibilities and duties and, most pertinently, the particularly difficult socio-economic conditions on the continent. See eg D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127; D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157; A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' 2002 (10) *The International Journal of Children's Rights* 179; M Gose 'The African Charter on the Rights and Welfare of the Child' (Community Law Centre, University of the Western Cape) 2002.

widely ratified and acclaimed United Nations (UN) Convention on the Rights of the Child (CRC).<sup>3</sup>

In any case, at a macro level, it was in order to give CRC specific application within the African context that the African Children's Charter was adopted by the Organization of African Unity (OAU) (now African Union (AU)) Heads of State and Government on 11 July 1990. The African Children's Charter and CRC complement each other. The African Children's Charter also complements the African Charter on Human and Peoples' Rights (African Charter).<sup>4</sup> The African Children's Charter came into force on 29 November 1999 when the fifteenth instrument of ratification was deposited.<sup>5</sup> Currently, the Children's Charter enjoys ratification by 38 AU member states.<sup>6</sup>

The implementation and monitoring of the Children's Charter is supervised by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).<sup>7</sup> The African Children's Charter provides for an independent 11-member committee, appointed by the Assembly of Heads of State and Government of the AU.<sup>8</sup> Article 33 of the African Children's Charter maps out the criteria that need to be met by committee members for selection. Accordingly, committee members must be nationals of a state party to the African Children's Charter. They must be individuals of high moral standing, integrity, impartiality and competence in matters relating to the rights and welfare of the child.<sup>9</sup>

The African Children's Committee has both advisory and contentious jurisdiction over the rights in the African Children's Charter. Under article 43, it has the mandate to receive state party reports. It also has the power to receive communications.<sup>10</sup> Parties that have standing before the African Children's Committee are individuals, groups or non-governmental organisations (NGOs) recognised by the AU, a member state, or the UN.<sup>11</sup> The Children's Committee also has the power to

<sup>3</sup> United Nations Convention on the Rights of the Child (adopted November 1989 and entered into force September 1990).

<sup>4</sup> OAU Doc OAU/CAB/Leg/67/3/Rev 5; C Heyns (ed) *Human rights law in Africa 1996* (1996) 7.

<sup>5</sup> In terms of art 47(3) of the Children's Charter, it came into force 30 days after the reception by the Secretary-General of the OAU/AU of the instrument of ratification or adherence of the 15th member state of the OAU/AU.

<sup>6</sup> For a list of the countries that have ratified and signed the African Children's Charter, see [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf) (accessed 22 July 2006). The last countries that ratified the Charter are Ghana and Madagascar on 30 March 2005 and 10 June 2005 respectively.

<sup>7</sup> Art 32(1) African Children's Charter.

<sup>8</sup> Arts 33-36 African Children's Charter. See also art 11(2) of the Rules of Procedure of the Committee.

<sup>9</sup> Art 33(1) African Children's Charter.

<sup>10</sup> Art 44 African Children's Charter.

<sup>11</sup> Art 44 African Children's Charter.

undertake studies and investigations and may, like the UN Committee on the Rights of the Child (UN Committee), issue general comments.<sup>12</sup>

Subsequent to the coming into force of the African Children's Charter, the African Children's Committee was established when its first 11 members were elected in July 2001 during the 37th session of the Assembly of Heads of State and Government in Lusaka, Zambia. The African Children's Committee had its inaugural meeting in May 2002,<sup>13</sup> and by the end of 2005, it had held seven ordinary sessions (meetings). Thus, the African Children's Committee, together with the African Commission on Human and Peoples' Rights (African Commission) and the new African Court on Human and Peoples' Rights (African Court)<sup>14</sup> represent the foundational pillars of the African human rights system within the framework of the AU.

This paper aims to support the promotion of the African Children's Charter and the dissemination of knowledge about the African Children's Committee's work and to update the reader on recent developments and activities of the Children's Committee. Focus falls on the work undertaken by the Children's Committee from the time of its 5th meeting, which was held in Nairobi, Kenya from 8 to 12 November 2004, up to the time of its 7th meeting, which was held in Addis Ababa, Ethiopia, from 19 to 21 December 2005. However, in the process of updating the reader, this article also attempts to highlight the challenges faced by the African Children's Committee. Real opportunities for the Children's Committee in the protection and promotion of children's rights on the continent are also explored.

In writing this paper, I rely on personal knowledge gathered while participating in some of the African Children's Committee meetings. I also solicited information from the reports of the Children's Committee, staff members of the AU, academic writings and information gathered from members of NGOs and inter-governmental organisations, who are actively involved in the Children's Committee's work.

Here it should be mentioned that this work does not tout itself to provide a comprehensive and full description of the duties and activities of the African Children's Committee and, for that matter, the AU, in

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<sup>12</sup> Rules 73, 74 & 77 of the Rules of Procedure of the Committee.

<sup>13</sup> The 1st, 2nd and 3rd ordinary meetings of the African Committee were reported on by Lloyd. See A Lloyd 'The first meeting of the African Committee of Experts on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 320; A Lloyd 'Report of the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2003) 3 *African Human Rights Law Journal* 329; A Lloyd 'The third ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2004) 4 *African Human Rights Law Journal* 139.

<sup>14</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (entered into force 25 January 2004) <http://www.africa-union.org.innopac.up.ac.za:80/home/welcome.htm> (accessed 23 July 2006).

children's rights matters in Africa.<sup>15</sup> More could be said on the complicated procedures, the political intricacies, of the insufficient financial resources allocated to the general human rights programmes of the AU and other related 'sensitive' matters that tamper with the availability of basic facilities and a conducive environment necessary to optimise the work of the African Children's Committee and the promotion and protection of the rights and welfare of the African child. However, those issues are beyond the scope of this work. Finally, it should also be pointed out at the outset that I am under no illusion that my views and ideals on the challenges, opportunities and overall progress of the African Children's Committee will be shared by everyone.<sup>16</sup>

## 2 New committee members (and a renewed optimism?)

As mentioned above, the African Children's Charter provides for an independent 11-member committee who are appointed by the Assembly of Heads of State and Government. According to article 37(1) of the African Children's Charter:

The members of the Committee shall be elected for a term of five years and may not be re-elected. However, the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.

This article means that, following the 6th ordinary session in July 2005, the terms of office of six of the committee members (who were elected for a four-year term in July 2001) came to an end. The outgoing committee members were the Chairperson of the Children's Committee, The Hon Justice Joyce Alouch (Kenya), the first Vice-Chairperson, Mr Rodolphe Soh (Cameroon), the second Vice-Chairperson, Prof Lullu Tshiwulu (South Africa), the Rapporteur, Mr Startson Nsanzabaganwa (Rwanda) and Mr Robert Ahnee (Mauritius).

The term of office of Mrs Nانيتom Motoyam, the member from Chad, who resigned from her seat when joining UNICEF<sup>17</sup> in 2002, also came to an end in July 2005. It is to be recalled that, according to article 39 of the African Children's Charter, Chad should have nomi-

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<sup>15</sup> The AU also has other projects on child rights, such as the activities on 'Accelerating Action for Child Survival and Development in Africa' to meet the Millennium Development Goals.

<sup>16</sup> Eg, there is the view that the AU should not have created the African Committee, but rather strengthened the work of the African Commission on Human and Peoples' Rights to also address effectively the rights of children. Some believe that the appointment of a Special Rapporteur for children's rights within the African Commission would have been enough to cater for the special needs and rights of children.

<sup>17</sup> Lloyd 'Second ordinary session' (n 13 above) 332.



nated another member 'from among its nationals to serve for the remainder of the term — subject to the approval of the Assembly'. To the knowledge of the author, such appointment never took place.

A similar state of affairs surfaced in connection with the vacant seat left by Mrs Dior Fall Sow of Senegal. Mrs Sow was elected for a five-year term, though she left her post when she joined the International Criminal Court of Rwanda in 2001. Senegal, like Chad, failed to appoint another member, which forced the African Children's Committee to operate short of two members until July 2005.<sup>18</sup>

The problem of vacant seats on the Children's Committee continued in spite of the clear rules and procedure laid down by article 39 of the Children's Charter and rule 14 of the Rules of Procedure of the Children's Committee under the caption 'Filling of casual vacancies'. In particular, rule 14(2) provides:

If a member of the Committee dies or resigns or declares, for any other cause, that he/she can no longer perform his/her duties as member, the Chairperson of the Committee shall notify the Chairperson of the Commission who shall then declare vacant the seat of that member.

Furthermore, in reinforcing this rule, rule 14(4) provides:

Pursuant to the provisions of article 39 of the Children's Charter and paragraphs 1 and 2 of this rule, the Chairperson of the Commission shall request the state party which had nominated that member to appoint another expert from among its nationals within two months to serve for remainder of his/her predecessor's term.

Here it can be inferred that, although the Rules of Procedure of the African Children's Committee clearly attempt to address the problem of vacant seats that may arise within the Children's Committee, they are not comprehensive. It would have been better if the Rules of Procedure had gone one step further and provided for an avenue to be taken in the case of the failure of a state party to nominate a replacement.

In a related matter, the committee member from Nigeria, Prof Peter Onyekwere Ebigbo, who was elected at the Maputo Summit in July 2003, was not sworn in until November 2004. Therefore, during the 5th ordinary session, Prof Ebigbo was called to take his oath of office by reading and signing the oath in the presence of the committee members, representatives of the AU Commission on Labour and Social Affairs, the AU Legal Counsel and observers. Prof Ebigbo was elected to serve a five-year term, which will expire in 2008.

In an effort to replace the outgoing committee members mentioned above, the 7th ordinary session swore in six new members of the African Children's Committee. The new members were elected by the 5th session of the Assembly of Heads of State and Government in Sirte, Libya, in July 2005. The new committee members were called to take an oath

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<sup>18</sup> As above.

of office, in accordance with rule 15 of the Rules of Procedure of the Children's Committee, by reading the oath and signing it under the guidance of the representative of the AU Legal Counsel.

The new committee members are Ms Seynabou Ndiaye Diakhate (Senegal), Mrs Koffi Appoh Marie-Chantal (Côte d'Ivoire), The Hon Lady Justice Martha Koome (Kenya), Mrs Mamosebi T Pholo (Lesotho), Ms Boipelo Lucia Seitlhano (Botswana) and Mr Moussa Sissoko (Mali).<sup>19</sup>

After the opening ceremony and the swearing in of the new members of the African Children's Committee, members of the Children's Committee held an informal closed consultative meeting to discuss some procedural and administrative matters.<sup>20</sup> Among other things, the committee members, according to rule 16 of the Rules of Procedure of the African Children's Committee, elected 'from among its members a Chairperson, three Vice-Chairpersons, a Rapporteur and a Deputy Rapporteur'. These officers of the Children's Committee were elected for a term of two years and are eligible for re-election.<sup>21</sup>

Accordingly, the current composition of the Children's Committee (still short of one member) is as follows:

Name	Country	Appointment/expiry
Mr Jean-Baptiste Zoungrana Chairperson	Burkina Faso	5 years/2008
Mrs Mamosebi T Pholo 1st Vice-Chairperson	Lesotho	5 years/2010
Mrs Marie Chantal Appoh Kofi 2nd Vice-Chairperson	Côte d'Ivoire	5 years/2010
The Hon Justice Martaha Koome 3rd Vice-Chairperson	Kenya	5 years/2010
Mr Mousa Sissoko Rapporteur	Mali	5 years/2010

<sup>19</sup> The Executive Council elected the six members of the African Committee and recommended the members to the Assembly for appointment. See Decision on the Election of Members of the African Committee of Experts on the Rights and Welfare of the Child Doc EX CL/202 (VII). The Assembly, after taking note of the election by the Executive Council, appointed the six new Committee members. See Decision on the Appointment of Members of the African Committee of Experts on the Rights and Welfare of the Child Doc EX CL/202 (VII). The names and titles of the new Committee members are provided in here as they appear in the official document of the AU Doc EX CL/202 (VII).

<sup>20</sup> This was done in accordance with rule 33 of the Rules of Procedures on Closed Sessions which determines that at the beginning of every ordinary session, the Committee shall convene a closed session.

<sup>21</sup> Rule 17 of the Rules of Procedure of the Committee.

Name	Country	Appointment/expiry
Ms Boipelo Lucia Seithlamo <sup>22</sup> Deputy Rapporteur	Botswana	5 years/2010
Dr Assefa Bequele	Ethiopia	5 years/2008
Mrs Seynabou N Diakhate	Senegal	5 years/2010
Prof Peter O Ebigbo	Nigeria	5 years/2008
Ms Nakpa Polo	Togo	5 years/2008

Here, a setback is the fact that, unlike the commissioners of the African Commission, the committee members cannot be re-elected after serving one term. In this regard, under Decision EX/CL/233(VII), paragraph 8, the Executive Council of the AU requested the AU Commission to study measures to renew the terms of office of committee members for another term.

The process, both at the national and AU level, that culminated in the nomination and appointment of these committee members is not very clear.<sup>23</sup> In the context of the African Commission, referring to the 2005 *note verbale* of the AU Commission, Viljoen rightly comments that<sup>24</sup>

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.

Be it as it may, the new committee members, just like the outgoing and continuing committee members, bring on board a range of expertise which is crucial for the protection and promotion of the rights and welfare of the African child. Nothing has surfaced that calls into question the independence and suitability of the new committee members for the position. Actually, on the question regarding the independence of committee members, Murray notes that<sup>25</sup>

unlike the African Commission on Human and Peoples' Rights, the issue of

<sup>22</sup> Although the surname of the newly elected Committee member from Botswana is spelled as 'Seithlamo' in the AU official document Doc EX CL/202 (VII), it was spelled as 'Seithlamo' during the 7th meeting of the Committee.

<sup>23</sup> The same could be said for the existing and previous Committee members.

<sup>24</sup> F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 248.

<sup>25</sup> R Murray 'Children's rights in the OAU' in R Murray (ed) *Human rights in Africa* (2004) 168.

independence and incompatibility of the members of the Committee appears to have been taken seriously by the AU, due in part to the fact that the provisions in the Rules of Procedure were much clearer on this point. Two members of the Committee were thus requested by the AU to leave when they changed positions in their home states which rendered their position as Committee members incompatible.

Out of the 10 current committee members, there are six women and four men. Unlike the previous Children's Committee, the present Children's Committee is dominated slightly by women. Should the eleventh seat, which remains open, be filled by a woman, the gender balance would be even more tipped toward woman members.

In the context of geographic and linguistic distribution, it could be said that the new Children's Committee is more or less evenly distributed. However, as was the case with the two previous committees, it is apparent that there is an absence of a member from Arabic speaking/Northern African countries. This happens despite the fact that Algeria,<sup>26</sup> Egypt<sup>27</sup> and Libya<sup>28</sup> have ratified the African Children's Charter. The reason for the absence of at least one committee member from the Arabic speaking Northern African region is not clear. However, for the purpose of ensuring continent-wide involvement, geographical representation is important.<sup>29</sup>

### 3 Establishment of a secretariat

As has been said before by others, there is a need for the institutional empowerment of human rights supervisory organs on the continent to enable them to function effectively. Nevertheless, in the context of the African Children's Committee, the lack of a functioning secretariat has been mentioned time and again as one of the major reasons for the lack of progress of its work.<sup>30</sup> This is against the clear requirement under article 40 of the African Children's Charter that '[t]he Secretary-General of the Organization of African unity shall appoint a secretary for the Children's Committee'. As early as 2002, the Assembly of Heads of State and Government at the Durban Summit called upon the Secretary-General to urgently appoint a secretary to the Children's Committee,

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<sup>26</sup> Ratified on 8 July 2003.

<sup>27</sup> Ratified on 9 May 2001.

<sup>28</sup> Ratified on 23 September 2000.

<sup>29</sup> See Viljoen (n 24 above) 238, highlighting the need for geographical representation in the context of the African Commission.

<sup>30</sup> The lack of sufficient finances and, later on, the cumbersome procedure of staff recruitment within the AU which needs to take into account linguistic, gender and geographic distribution have been mentioned as the main causes for the lack of a functioning secretariat.

so that the Children's Committee could function effectively.<sup>31</sup> The same obligation and even the detailed duties of the Secretariat are unequivocally provided for in the Rules of Procedure of the African Children's Committee.<sup>32</sup>

Between July and December 2004, thanks to the African Network for the Protection and Prevention Against Child Abuse and Neglect (ANPPCAN), a temporary co-ordinator, Mr Deogratias Yiga from Uganda, was seconded to the African Children's Committee. During his time in the office, Mr Yiga has done much to promote and facilitate the work of the Children's Committee,<sup>33</sup> for which he was publicly commended for during the 5th meeting by the Chairperson of the Children's Committee. Because Mr Yiga's secondment was coming to an end in December 2004, the urgent need to recruit a permanent replacement was stressed.

In this regard, during the 5th meeting of the African Children's Committee, the AU Commissioner for Social Affairs briefed the meeting on the recruitment process going on within the AU Commission. It was noted that the recruitment process was delayed due to the need for regional distribution and gender balance, but the Commissioner assured the Children's Committee that she would do everything in her capacity to get the posts necessary filled as soon as possible. The committee member highlighted the need for the co-ordinator to be bilingual. The same issue was reiterated during the 6th meeting.

Taking notice of the fact that the long-overdue secretary for the African Children's Committee had still not been recruited by July 2005, which as a result kept on delaying the work of the Children's Committee, the Executive Council urged the AU Commission to strengthen the Children's Committee.<sup>34</sup> In an unequivocal manner, it requested the AU Commission 'to urgently ensure the full and effective functioning of its secretariat'.<sup>35</sup>

Following this, during the 7th meeting, a more promising and concrete announcement about the Secretariat of the African Children's Committee from the AU Commissioner for Social Affairs was made. The attention of the meeting was drawn to the fact that the AU Commission was finalising the recruitment of a secretary to the Children's Committee and that UNICEF had approved the funds to assist the Secretariat of the Children's Committee with a Senior Policy Officer

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<sup>31</sup> It should be recalled that in 2002, a temporary secretary was appointed on a three-month contract basis to oversee the 2nd ordinary session and the follow-up work of the Committee.

<sup>32</sup> Rule 23 of the Rules of Procedure of the Committee.

<sup>33</sup> Among other things, the website of the Committee was made operational, reporting guidelines were distributed to state parties, a draft document for the consideration of state party reports was prepared, and the 5th meeting was well organised.

<sup>34</sup> EX CL/Dec 233 (VII).

<sup>35</sup> n 34 above, para 9.

(Legal) and an Administrative Secretary. In addition, it was indicated that UNICEF would enhance the capacity of the Department of Social Affairs by sponsoring a Senior Policy Officer to follow up on the implementation of the African Common Position on Children and the programme on children infected and affected by HIV/AIDS.

It looks as if the ongoing issue of a permanent secretary for the African Children's Committee will be put to rest soon.<sup>36</sup> A functioning Secretariat is the 'minimum core' that any treaty monitoring body needs. Its absence is inconsistent with the AU's determination 'to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively'.<sup>37</sup> Especially because the Children's Committee comes close to the stage of effective engagement with state parties, the need for a secretariat upgrades itself from the level of urgency to emergency.

#### **4 Monitoring and implementation of the provisions of the African Children's Charter and the role played by the African Children's Committee**

The expression by a country of its commitment to a treaty's goals need not necessarily be consistent with the country's actual course of action. Therefore, establishing a mechanism of monitoring the implementation of the obligations state parties have undertaken becomes crucial. The process of treaty implementation — in particular the preparation of reports, follow-up measures to recommendations and responses to individual complaints — is a critical mechanism for legislative, policy and programmatic change at the national level. Treaty implementation under the African Children's Charter takes the form of state reporting, individual complaints, lobbying and fact-finding missions and other related activities undertaken by the African Children's Committee according to its mandate under the African Children's Charter.<sup>38</sup> The discussion now turns to these aspects.

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<sup>36</sup> When the author last visited the AU Commission in July 2006, Ms Sadequa Rahim of the Department of Social Affairs was serving as the Secretary for the Committee along with her other responsibilities in the Department.

<sup>37</sup> Constitutive Act of the African Union, adopted at the 36th ordinary session of the Assembly of Heads of State and Government of the OAU, 11 July 2000 at Lomé, Togo. See Decisions on the Establishment of the African Union and the Pan African Parliament, OAU Doc AHG/Dec 143 (XXXVI) Preambular para 11.

<sup>38</sup> Here, it is imperative to mention that under the five-year work plan (2005-2009), the Committee has prepared and adopted, popularising the Children's Charter and ensuring follow-up and enforcement of the Charter are the areas given specific priority.

#### 4.1 State reporting

The preparation and examination of the reports of state parties allow for a comprehensive and periodic review of national legislation and administrative rules, procedures and practices that can be assessed against the benchmarks established in the treaties.<sup>39</sup> Ideally, the process provides a platform for national dialogue on human rights among the stakeholders in a state party and an opportunity for public scrutiny of government policies, encouraging the involvement of various sectors of society in formulating, evaluating, and reviewing policies.<sup>40</sup>

Against this backdrop, article 43 of the African Children's Charter provides as follows:<sup>41</sup>

Every state party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:

- (a) within 2 years of the entry into force of the Charter for the State Party concerned; and
- (b) thereafter, *every 3 years*.

It also requires that the report should<sup>42</sup>

- (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and
- (b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.

In addition, it is provided that<sup>43</sup>

[a] state party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1(a) of this article, repeat the basic information previously provided.

To supplement this, the African Children's Committee has drafted and distributed a document entitled Guidelines for Initial Reports of State

<sup>39</sup> This is reiterated in the Guidelines for Reporting under arts 3 and 4.

<sup>40</sup> Through their recommendations, treaty bodies evaluate the extent to which state parties meet treaty obligations and identify specific human rights problems, which may help set national priorities. Together with the state party report, the recommendations in the concluding observations of treaty bodies may be a framework for joint action by governments, UN agencies, NGOs and other partners.

<sup>41</sup> Art 43(1)(a) African Children's Charter (my emphasis).

<sup>42</sup> Arts 43(2)(a) & (b) African Children's Charter.

<sup>43</sup> Art 43(3) African Children's Charter.

Parties.<sup>44</sup> In recognition of the dual reporting burden that states may need to shoulder, article 24 of the Guidelines provides that

[a] state party that has already submitted to the UN Committee on the Rights of the Child a report based on the provisions of the CRC may use elements of that report for the report that it submits to the Committee as required by the Children's Charter. The report shall, in particular, highlight the areas of rights that are specific to the Children's Charter.

In spite of this, by June 2005, during the 6th meeting, the number of state party reports overdue had reached 33.<sup>45</sup> Although the African Children's Committee, as well as the Social Affairs Department of the AU, tried to use all opportunities to lobby governments to report to the Children's Committee, apart from promises, a concrete positive response remained out of sight.

This is a clear indication that countries seem to have taken their reporting obligation under the African Children's Charter very lightly and only continue to 'boast' about the fact that they are parties to the African Children's Charter, thereby indicating their 'commitment' to children's rights.<sup>46</sup> Even Ethiopia, which is the seat of both the African Children's Committee and the AU, and, ironically, the only country in Africa (and one of 16 countries in the world) that has reported to the UN Committee on the Rights of the Child three times,<sup>47</sup> is already more than two years overdue with its initial report to the African Children's Committee.

Disappointingly, even countries of which nationals are members of the African Children's Committee have not reported, though it is notable that the respective members of the African Children's Committee

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<sup>44</sup> Cmttee/ACRWC/2II Rev2. For a detailed description of the paragraphs of the Guidelines, see Lloyd 'Second ordinary session' (n 13 above) 341-343.

<sup>45</sup> These countries are Algeria, Angola, Benin, Botswana, Burkina Faso, Cameroon, Cape Verde, Chad, Comoros, Egypt, Equatorial Guinea, Eritrea, Ethiopia, The Gambia, Guinea, Kenya, Lesotho, Libya, Malawi, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Uganda and Zimbabwe.

<sup>46</sup> Such is the case, eg, when countries report to the UN Committee on the Rights of the Child under the CRC. Countries mention that their governments have further shown their commitment to children's rights by ratifying the African Children's Charter. A case in point is recent reports submitted from Benin, Ethiopia and Senegal, whose reports are to be considered by the UN Committee during its 43rd session from 11 to 29 September 2006. Here, one possibility for reminding state parties of their reporting obligations under the Children's Charter is to inquire into the possibility if the UN Committee can use the opportunity, while considering state party reports from African countries that have ratified the Charter, to recommend to them that they should also report to the African Committee.

<sup>47</sup> The 3rd periodic report of Ethiopia under the CRC was submitted in 2006 and is scheduled for consideration in the September 2006 session of the UN Committee.



are serving in their personal capacities.<sup>48</sup> These countries include Botswana, Burkina Faso, Kenya, Lesotho, Mali and Togo, which are all overdue for more than four years.

At this juncture, however, it should be noted that this reluctance was signaled already during the ratification process. This is because, although African countries were overall speedy in their accession to CRC, member states have been slow to ratify the African Children's Charter, and it was not until 1999 that the fifteenth country ratified the Children's Charter, thereby allowing the treaty to enter into force.

However, this stalemate of non-reporting to the African Children's Committee ended officially during the 7th meeting of the Children's Committee, when the AU Commissioner for Social Affairs informed the meeting that the AU Commission had received the initial reports from Egypt and Mauritius. In connection with this, the AU Commissioner for Social Affairs has called on the Children's Committee to finalise the procedures for considering state parties' reports so that at its next meeting it could start examining the reports.

The 'Procedures for Considering State Parties' Reports' is a document that has been presented before the African Children's Committee several times. The same document was the subject of discussion during the 5th and 6th meetings of the Children's Committee. However, due to some amendments incorporated into the document, it was presented again during the 7th meeting. This created the opportunity for new committee members to familiarise themselves with the document.

It was also highlighted that the Mauritius report was in English, while the one from Egypt was in Arabic. In this regard, the AU representative indicated that the reports could not be translated into the other working language of the African Children's Committee because of the workload of the AU conference services. Here, it was questioned if it was possible to request countries to submit their reports in English and French. Accordingly, after a protracted debate, it was agreed that the AU Commission should have reports of state parties translated into the working language of the African Children's Committee. Once initial

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<sup>48</sup> Here it should be mentioned that, during the 5th meeting, Mr Robert Ahnee, the Committee member from Mauritius, informed the meeting that he was in contact with the relevant Ministry regarding the submission of the country report. He stated that the draft report was ready but had to be cleared by the State Law Office, after which it would be forwarded to the Chairperson of the Committee. As discussed below, Mauritius submitted its report in the second half of 2005 and this is a clear example that Committee members could at least lobby their own governments to comply with their obligations under the Children's Charter. However, during the 5th meeting, it was stressed that, in order to maintain the independence of the Committee members, the responsibility of urging member states to submit reports should be left to the AU Commission. While Committee members could informally follow up, they should not have the primary responsibility of reminding their member states to submit reports.

reports had been submitted by state parties, the possibility of providing a page limit for periodic reports was also entertained.

It was also proposed and agreed that supplementary reports to be submitted by state parties should be entitled 'additional reports' while 'complementary reports', according to rule 69 of the Rules of Procedure of the African Children's Committee, would be the preserve of NGOs.<sup>49</sup>

The African Children's Committee nominated Rapporteurs for state party reports. Accordingly, Mme Pholo (to be assisted by Prof Ebigbo) was appointed for the report from Mauritius, while Mrs Seithamo (to be assisted by Dr Bequele) for the report from Egypt. The AU Commission was requested to translate the reports into the working languages of the Children's Committee and to send these to committee members by February 2006. It was agreed that the reports would be examined at the pre-session of the next meeting of the African Children's Committee.

An important issue that was raised, but which was not given the attention it called for, was whether a committee member could assist his or her country in preparing a report. The first and best port of call in this regard is to look into the practice of the African Commission. Therefore, to maintain the independence and integrity of committee members, it is not advisable that committee members assist any country for that matter in the preparation of a state party report.

Finally, this section would be incomplete without briefly touching on recent developments in the UN human rights system and its possible implications on reporting to the African Children's Committee. Thus, as the newly established Human Rights Council took over from the Commission on Human Rights (abolished on 16 June), the first session in June 2006 served the main purpose of deciding on working procedures. Therefore, as yet, the manner of reporting to the UN Committee, for that matter to all treaty bodies, is somewhat uncertain. In the event of a decision that a separate and detailed report to the UN Committee is no longer necessary, it will be better for the African Children's Committee to look into the detailed situation of African children and making recommendations.

#### 4.2 Consideration of communications

Article 44 of the African Children's Charter provides that<sup>50</sup>

the Committee may receive Communications from any person, group or non-governmental organisation recognised by the Organization of African

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<sup>49</sup> Rule 69(1) of the Rules of Procedure provides that '[t]he Committee may invite RECs, the AU, specialised agencies, the United Nations organs, NGOs and CSOs, in conformity with article 42 of the Children's Charter, to submit to it reports on the implementation of the Children's Charter and to provide it with expert advice in areas falling within the scope of their activities'.

<sup>50</sup> Art 44(1) African Children's Charter.

Unity, by a member state, or the United Nations relating to any matter covered by this Charter.

Moreover, '[e]very communication to the Committee shall contain the name and address of the author and shall be treated in confidence'.<sup>51</sup>

From this, it is logical that the right to present individual communications is afforded to a larger number of physical persons and entities. 'Physical persons' would then include any child, its parents or its legal representatives, alleging a violation of a right recognised by the Charter, and presented by or on behalf of the child victim.<sup>52</sup> This provision means that anyone could bring a communication before the African Children's Committee.<sup>53</sup> Notably, the fact that the Children's Committee can receive communications, sometimes also called complaints, is one of the most significant mandates the Children's Committee enjoys over the UN Committee.

During the 6th meeting, it was indicated that the AU Commission had received its first communication under article 44. The communication related to the plight of children in Northern Uganda. It highlighted the dire situation of the children in the area, the manner by which their rights were being violated as a result of the 20 year-old civil war between the Ugandan government and the Lord's Resistance Army (LRA), and underscored the obligation of the Ugandan government under the African Children's Charter.

Therefore, as agreed during the 6th meeting, the advice of the AU Legal Counsel with regard to this communication was sought and the memo as well as the communication itself was distributed to committee members. Furthermore, during the 7th meeting, Mrs Polo explained that she had distributed to committee members draft guidelines on the consideration of communications which was prepared by the Institute on Human Rights and Development in Africa.

Thus, after some discussion, it became apparent that the feeling shared among committee members was that members should compare the documents and come up with a draft on the procedures to be followed in the consideration of a communication. Therefore, the AU Legal Counsel was requested to come up with a draft procedure which would be forwarded to all committee members for their consideration and input. The draft was requested to be ready by the end of February

<sup>51</sup> Art 44(2) African Children's Charter.

<sup>52</sup> Soboka provides that '[I]f likewise, one could imagine that the guidelines which will be adopted by the Committee on the Rights and Welfare of the Child would consider it possible for a communication to be submitted in the name or on behalf of a child victim of a violation of the rights recognised by the Charter, including without its consent, on condition that this is justified by the child's best interest principle. However, it would be useful for the child who can communicate to express its views on a communication that would be submitted on its behalf.' T Soboka 'Article 43: Reporting procedure under the African Charter on the Rights and Welfare of the Child' (2005) (unpublished) (Institute for Human Rights and Development in Africa) 3.

<sup>53</sup> As above.

2006. Mrs Diakhate, the committee member from Senegal, was requested to harmonise all inputs sent to her by committee members and to send them back to the AU Commission so that the draft would be considered in the forthcoming (8th) meeting.

The next immediate concern was what to do with the communication already received. It was considered only reasonable to acknowledge receipt of the communication and await the finalisation of the procedures for consideration of communications.

Here the role communications have played and continue to play in the African human rights system in general cannot be overemphasised. The African Children's Committee, both during its 6th and 7th meetings, has devoted time to debate issues surrounding communications. Therefore, the attention the Children's Committee gave to the communication it received is a clear signal of the considerable importance it attaches to it, and which, by any standards, is commendable.

### 4.3 Fact-finding mission

Article 45(1) of the African Children's Charter mandates the African Children's Committee to<sup>54</sup>

resort to any appropriate method of investigating any matter failing within the ambit of the present Charter, request from the states parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the state party has adopted to implement the Charter.

The situation of children in Northern Uganda should alarm any society.<sup>55</sup> The African Children's Committee is acutely aware of the dire situation of these children who are stuck in a vicious circle of war. A thematic presentation on children and armed conflict by ANPPCAN during the 5th meeting of the Children's Committee put the issue in the spotlight.

The mandate of the African Children's Committee under article 45(1) of the African Children's Charter, coupled with the scourge of war on children in Northern Uganda, led to a fact-finding mission to the country from 15 to 19 August 2005. A document containing the back-

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<sup>54</sup> Here it should be mentioned that the mandate of the Committee under art 45(1) needs further clarification, perhaps by adopting rules governing the implementation of the mandate. The overarching question that needs to be clarified is the way in which the implementation of the mandate is to be undertaken. Would it be visits *in loco*? Would sub-committees or working groups be constituted? Or would the procedure be carried out by appointing Special Rapporteurs? Would such experts be independent? See, generally, A Fall 'The inquiry procedure under article 45 of the African Charter on the Rights and Welfare of the Child' (2005) (unpublished) (Institute for Human Rights and Development in Africa).

<sup>55</sup> The 2005 *Country Report on Human Rights Practices* for Uganda by the US State Department states that approximately 38 000 children have been abducted by the LRA during the past 20 years and forced into roles as soldiers, labourers and sex slaves.

ground of the mission, the objectives, activities undertaken, but more importantly, clear recommendations, was submitted by the two committee members who undertook the mission. The role of the Peace and Security Department of the AU in implementing the recommendations was raised and it was agreed that it would only be appropriate that the African Children's Committee liaise with the Department. The need to be cautious and abide by AU rules and procedures followed by a labeling of the situation in Northern Uganda as 'sensitive' dominated the subsequent discussion. In the end, it was agreed that the AU Commission should take note of the report and take appropriate measures to implement the recommendations contained in the report.

Here it is important to comment. Indeed, rules and procedures should be followed; however, attention to procedures should not detract one from the main issue. Although the AU Commission was requested to take appropriate measures to implement the recommendations contained in the report, it was not clearly requested to come back to the African Children's Committee and inform on the actions taken. This should be considered a serious issue that the Children's Committee needs to follow up on at its next meeting.

Here, we need once again to be reminded that one of the reasons that necessitated the transformation of the old OAU to the new AU was progress in the field on human rights on the continent. It is believed that the AU inaugurates a new era that promises better human rights promotion and protection in Africa. Therefore, it will be disappointing to allow for fact-finding missions and then undermine the implementation and follow-up of a report from a mission.

#### **4.4 Promotional activities of the African Children's Committee**

##### **4.4.1 Promotional missions**

During 2004, members of the African Children's Committee have concluded advocacy visits to four African countries. The reports of the visits were communicated during the 5th meeting. The purpose of the visits was to, among other things, lobby for the ratification and implementation of the African Charter as well as to build links with relevant stakeholders on the ground in the respective countries. The countries visited were Burundi, Madagascar, Namibia and Sudan. These missions have already yielded some positive results. In 2004, two countries, namely Burundi<sup>56</sup> and Namibia,<sup>57</sup> ratified the African Children's Charter. Although the mission to the Sudan was informed that ratification of the Children's Charter would take place before the end of 2004, to date this has not materialised.

During these visits, delegated committee members have held talks

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<sup>56</sup> Ratified on 28 June 2004.

<sup>57</sup> Ratified on 23 July 2004.

with government officials, parliamentarians, civil society members, international NGOs, the media and the children themselves.

In order to follow up further ratification and implementation of the Charter, during the 5th meeting, the committee members agreed on lobbying visits to the Central African Republic, Congo, Djibouti, Gabon, Ghana, Liberia, São Tomé and Príncipe, Swaziland, Zambia and Zimbabwe. Committee members were nominated from specific countries to undertake the missions. However, until the 7th meeting in December 2005, there was no report that any of the countries listed above were visited. Such failure could possibly be attributed to a lack of finances.

#### 4.4.2 Day of the African Child

The Day of the African Child marks the 1976 march in Soweto, South Africa, when thousands of black school children took to the streets to protest the inferior quality of their education and to demand their right to be taught in their own language. Hundreds of young boys and girls were shot down; and in the two weeks of protest that followed, more than a hundred people were killed and more than a thousand injured.

Fifteen years later, in 1991, the Organization of African Unity immortalised the Soweto uprising by declaring 16 June the Day of the African Child.<sup>58</sup> This declaration marked an official recognition of children's contributions to the struggle against apartheid.

The Day of the African Child also draws attention to the lives of African children today. This day has also become an opportunity to examine progress towards health, education, equality and security for all African children and on the implementation of the African Children's Charter.

The African Children's Committee has been selecting themes for the celebration of the Day of the African Child.<sup>59</sup> The theme for 2005 was 'African orphans: Our collective responsibility' — chosen by the Children's Committee in recognition of the impact of HIV/AIDS on Africa's children. As part of the day's celebrations, the AU Commission also organised a workshop on Social Protection for Orphans and Vulnerable

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<sup>58</sup> In South Africa, 16 June is a national holiday celebrated as 'Youth Day'.

<sup>59</sup> In 2003, the theme was 'Right to Registration' while in 2004, it was 'The African Child and the Family'. For a review of some of the activities undertaken in the Eastern and Southern Africa region for the 2003 Day of the African Child, see <http://www.unicef.org/newsline/2003/dac2003inesaro.doc> (accessed 23 July 2006). In 2005, across the West African region, for instance, Plan joined forces with partner organisations and communities to help create a visible and audible platform for the region's children, helping to give voice to their thoughts and feelings around the lives of orphans. In nearly all countries, debates with children and youth were held on the rights of the child. Similarly, a number of high profile media events were conducted using radio, video, poetry and drama to raise awareness on what has been a growing phenomenon in sub-Saharan Africa. For a further review of some of the activities in Burkina Faso, Ghana, Niger, Senegal and Sierra Leone, see <http://www.plan-international.org/wherework/westafrica/publications/africanday05/> (accessed 23 July 2006).

Children in line with the theme. This workshop was part of the 6th meeting of the Children's Committee. At the continental level, governments were lobbied to put in place statutory, developmental and governance interventions<sup>60</sup> to address the plight of children and youth.

In 2006, the theme selected was 'The right to protection: Stop violence against children'. This theme was selected by the African Children's Committee in view of the UN Secretary-General's Global Study on Violence against Children undertaken by the independent expert Prof Paulo Sergio Pinheiro. The Children's Committee decided that countries should be free to choose sub-themes that would be in line with the overall theme.

A disappointing reality pointed out at the 5th meeting was that only seven member states' reports were received on the celebrations of the Day of the African Child in 2004. It was agreed that the reports did not constitute a sufficient basis for a comprehensive assessment on the activities at the continental level.

The importance of the Day of the African Child as an advocacy tool to promote children and children's rights issues is clear to the African Children's Committee. The AU Commission and the Children's Committee should do everything to lobby governments to celebrate the day and to submit reports. In order to enhance clarity and expand on the theme of the Day of the African Child, it is pointed out that an explanatory note should always be prepared and forwarded to member states amplifying the rationale for the selection of the theme, its relevance and its meaning.

## **5 The link between the African Children's Committee, partners/donors and civil society**

### **5.1 The African Children's Committee and other AU Organs**

The African Children's Committee falls under the AU Commission in the Department of Social Affairs. The Department tries its best to push forward the work of the Children's Committee and the cause of children in general.<sup>61</sup> The Children's Committee also has a good

<sup>60</sup> Millennium Campaign voices against poverty African's Orphans <http://www.millenniumcampaign.org/site/apps/nl/content3.asp?c=grKVL2NLE&b=190470&ct=915249> (accessed 23 July 2006).

<sup>61</sup> Eg, in 2006 the AU Commission established and awarded the first ever 'African Union Award for Children's Champions in Africa'. The award honours and celebrates the initiatives taken by organisations and recognises leadership, dedication and commitment to improve the life chances of children throughout the continent. It will serve as an instrument to encourage other individuals or organisations to take similar exemplary initiatives in promoting the rights and improving the wellbeing of children. For further details on the purpose and objectives of the award, see [http://www.africa-union.org/root/au/Conferences/Past/2006/June/award/Children\\_announcement.htm](http://www.africa-union.org/root/au/Conferences/Past/2006/June/award/Children_announcement.htm) (accessed 22 July 2006). Another award entitled the 'Nkosi Johnson' award, with special emphasis on HIV/AIDS, was also established.

working relationship with other departments, notably the office of the Legal Counsel. In addition, in April 2004 a committee member attended the last meeting of the Labour and Social Affairs Commission (LSAC), held in Benin. The Children's Committee has also been represented at the AU Commission's Day of the African Child celebrations, at the first AU Conference of national human rights institutions, and at the sessions of the AU Executive Council.

Clearly, the African Commission and the newly established African Court are two institutions the African Children's Committee should have a close working relationship with. The Children's Committee is given standing before the African Court.<sup>62</sup>

The relationship between the African Commission and the African Children's Committee has been discussed at a number of previous meetings, including the 5th meeting. However, during the 7th meeting, the relationship was stressed when the Chairperson of the African Commission made a presentation to the participants of the meeting. During her presentation, the Chairperson emphasised that both institutions are waging the same struggle and should develop a strategic partnership that would comprise the exchange of information and experiences on human rights promotion and protection. It was recommended that the scope of such a partnership, as well as the financial implications thereof, be studied by both institutions.

In the area of children involved in armed conflict, as highlighted above, the involvement or leading role of the Peace and Security Council is inevitable. In the meantime, establishing a good working relationship between the African Children's Committee and the Economic, Social and Cultural Council of the AU is also very important.

In conclusion, to have better co-ordination, minimise costs and avoid a duplication of efforts, stronger links should be forged between the Children's Committee and the AU. Links that do not exist need to be established and those that exist need to be strengthened further. Some of these problems are expected to be alleviated once a permanent secretary is put in place.

## 5.2 The African Children's Committee and UN agencies

The African Children's Committee has links with UNICEF and benefits also from its financial support. As mentioned above, UNICEF has agreed to contribute some of the funding for the establishment of a permanent secretariat for the African Children's Committee.<sup>63</sup> Other UN agencies also participate in African Children's Committee meetings. Moreover, the UN Commission for Human Rights is to facilitate a visit by three

<sup>62</sup> Art 5(1)(e) of the Protocol Establishing the African Court explicitly provides that the African Commission has standing and can bring a case before the African Court.

<sup>63</sup> UNICEF was involved during the early days of the drafting of the African Charter.



members of the Children's Committee to attend a session of the UN Committee in Geneva.

### 5.3 The African Children's Committee and NGOs

The role of NGOs in the African human rights system, generally, cannot be overemphasised. Although it lacks the same level of involvement as the one that exists for the African Commission, proof exists that NGOs are now engaging more with the African Children's Committee than before. In time, the number of NGOs participating at the Children's Committee meetings has increased.

NGOs, among other things, have undertaken promotional work under the Charter and lobbied governments to ratify the Children's Charter, and those that have done so, to report to the African Children's Committee. During promotional visits, NGOs play a crucial role in alerting committee members to the situation of children on the ground. This is just one proof that the partnership with NGOs in the field of children's rights is particularly important to the success of the work of the Children's Committee in protecting and promoting the rights and welfare of the child.

The AU Commissioner for Social Affairs, at the occasion of the Larissa Award organised by the African Child Policy Forum, addressed the necessity to work with civil society to promote the work of the African Children's Committee and, in effect, to promote the rights and welfare of children. In the words of the Commissioner:<sup>64</sup>

In implementing our programmes we will indeed need to work in collaboration with our partners, including civil society organisations, hence the establishment of the Economic, Social, and Cultural Council. The AU is guided by the philosophy of being a people's organisation and it takes serious the issue of promoting their active involvement in the work of the AU.

A few examples of the involvement of NGOs in the work of the African Children's Committee are mentioned by name. Those that call for specific mention include Save the Children Sweden,<sup>65</sup> the African Child Policy Forum,<sup>66</sup> the Institute for Human Rights and Development in

<sup>64</sup> Speech by Adv Bience Gawanas, AU Commissioner for Social Affairs, on the occasion of the presentation of the Larissa Award <http://www.africanchildforum.org/speech/contentarea.asp?ID=4> (accessed 23 July 2006).

<sup>65</sup> Among others, it funds sections of the ordinary sessions of the Committee and also supports NGOs working on the African Charter.

<sup>66</sup> Among others, it organised the 1st (2004) and 2nd (2006) International Policy Conference on the African Child and helped to popularise the African Children's Charter, the Committee and other issues facing African children. The Forum has also organised the Larissa Award, to coincide with the Day of the African Child in 2005.

Africa<sup>67</sup> and, as highlighted above, ANPPCAN.<sup>68</sup> These NGOs, and others, have also sent representatives to the meetings of the African Children's Committee.

Nevertheless, the participation of NGOs in the meetings of the Children's Committee so far has been *ad hoc* and needs to be formalised. During the 5th meeting, in order to streamline the participation of non-committee members in the meetings of the Children's Committee, it was recommended that the Secretariat follow up the preparation of guidelines on granting observer status for the Children's Committee's consideration during its 6th meeting. However, these guidelines did not materialise.

The revised programme outline/plan of action of the African Children's Committee (2005-2009) drafted during its 6th meeting also alludes to the need to streamline NGOs in the work of the Children's Committee. It provides that

the Committee will nurture systematic and structured processes of engaging with civil society and other non-governmental institutions and organisations so as to diffuse good practices on the continent and influence action at national and international level to protect the rights of Africa's children.

During the 7th meeting, the issue of observer status was again raised. The representative from the Legal Counsel made it clear that the criteria for granting observer status were formally adopted by the Sirte Summit in July 2005.<sup>69</sup> However, it was submitted that the African Children's Committee could adopt its own criteria for observer status as was done by the African Commission. As a result, the possibility of NGOs attending the next meeting of the Children's Committee and taking part in the consideration of state party reports is uncertain.

## 6 Conclusion

The African Children's Committee is a young institution. Therefore, its modest achievements are cause enough for optimism. The awakening of a renewed spirit after new committee members were elected, the submission of the first state party reports by Egypt and Mauritius, the receipt of the first communication on the situation of children in Northern Uganda, and the progress in the finalisation of the establishment of a permanent secretary, provide more than a glimmer of hope.

Assessed against the magnitude of the obstacles facing children in

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<sup>67</sup> It initiated and helped in drafting some of the official documents of the Committee and organised the 1st (2004) and 2nd (2005) Workshop on the Procedures before the African Committee. Members of the Institute are also regular participants at the Committee's meetings.

<sup>68</sup> ANPPCAN was involved in the drafting of the Charter and continues to be involved in the work of the Committee. Eg, during the 5th meeting, a thematic paper on the effect of armed conflict on children was presented by ANPPCAN.

Africa on a daily basis, the African Children's Committee has hard work ahead. In future sessions, as they descend into detail and wrestle with state party reports and communications received, they need to keep constantly in mind the noble aims that brought them together. They should never allow the Children's Committee to become caught up in political point-scoring or petty manoeuvrings.

As the saying has it, 'there is no second chance to make a first impression'. Therefore, as the Children's Committee comes close to engaging meaningfully with state parties for the first time, it should undertake its activities in a more organised and well thought-out manner. If the Children's Committee begins well and makes its presence felt, it may widen its financial and technical support base. This will make it increasingly confident and it will gain respect from states in its promotion and protection of the rights of the child. In this regard, the postponement of the 8th meeting, which was scheduled initially for 29 May to 2 June 2006, in order to give the Children's Committee time to finalise the groundwork necessary for the proper consideration of state party reports, is a mature move.

Admittedly, problems persist and there is room for improvement. The Children's Committee should aggressively pursue discussions with all role-players, including governments, in its endeavours to help create conditions to ensure the maintenance and protection of human rights of children. More links with other AU organs, UN agencies and NGOs need to be facilitated. The process of granting observer status to NGOs should be expedited. Focus in enforcing the rights of children should not be lost by the need to 'abide by AU rules and procedures'.

Finally, some have questioned the desirability of creating new organs on human rights and the AU's real commitment to them in the light of the lack of resources.<sup>69</sup> However, five years after the Children's Committee has been established, this issue should no longer be raised. Questions and concerns should surround its work and be constructive. Now that the Children's Committee is on its feet, with internal and administrative matters sorted out, stakeholders should work on how to get it to 'run'. Strengthening the Children's Committee to realise its potential will definitely yield fruit. As shown above, against all the odds, the African Children's Committee is moving ahead.

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<sup>69</sup> To my knowledge, at least one observer status application has been made to the Committee, by the Community Law Centre of the University of the Western Cape.

<sup>70</sup> Murray (n 25 above) 163.

# Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights

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## 1 Introduction

Publicity and freedom of information play an important role in the effective promotion and protection of human rights. This is for a number of reasons. Individuals, non-governmental organisations (NGOs) and inter-governmental organisations need reliable information to put pressure on governments. Publicity is also important as it increases the visibility of an organisation. The African Commission on Human and Peoples' Rights (African Commission) is a good example of an institution where a lack of visibility has been to the detriment of the important work that the Commission is undertaking under difficult circumstances.

As has often been pointed out, the African Commission has during its almost 20 years of existence faced serious constraints with regard to human and financial resources. Over the last few years, the Commission has also come under increased pressure from the political bodies of the African Union (AU). This is ironical, since the AU Constitutive Act makes the promotion and protection of human rights 'in accordance with the African Charter' one of the objectives of the new continental body.<sup>1</sup>

One of the functions of the African Commission is to 'disseminate information'.<sup>2</sup> The Commission achieves this through promotional visits, participation in seminars and conferences and publishing reports on its work. It is the last of these activities that is the focus of this article. Most information that concerns the work of the African Commission is in the archives of the Commission in Banjul, and therefore not easily

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<sup>1</sup> Art 3 Constitutive Act of the African Union.

<sup>2</sup> Art 45(1)(a) African Charter.

accessible. This article considers the different reasons why many reports and other documents of the Commission are not publicly available.

## 2 Article 59 and the role of the OAU/AU Assembly and Executive Council

### 2.1 Background to article 59

Article 54 of the African Charter on Human and Peoples' Rights (African Charter) provides that the 'Commission shall submit to each ordinary session of the Assembly of Heads of State and Government a report on its activities'.<sup>3</sup> This is in line with the requirements of other international human rights instruments adopted by the United Nations (UN), the Organization of American States and the Council of Europe.

In sharp contrast to other international human rights treaties, a restrictive reading of article 59 of the African Charter gives the Assembly the power to decide what the Commission can publish:<sup>4</sup>

- 1 All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
- 2 However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
- 3 The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Article 59 leaves much open for interpretation. 'The present chapter'<sup>5</sup> is chapter III with the heading 'Procedure of the Commission'. The first

<sup>3</sup> Art 54 African Charter. This is the last article under the heading 'Communication from states' (arts 47-54). It is thus possible that it should be interpreted to apply only to the activities undertaken by the African Commission with regard to inter-state complaints. However, this is not how the article has been interpreted by the Commission.

<sup>4</sup> Sub-paras 1 and 2 were included *verbatim* in the draft African Charter prepared by the Dakar Meeting of Experts in December 1979. The draft prepared ahead of this meeting by Kéba M'baye did not contain any similar provision. The M'baye draft required the African Commission to submit an annual report to the Assembly, and also made provisions for confidentiality with regards to individual complaints. The Monrovia proposal on an African Commission on Human Rights, adopted in September 1979 by a meeting convened by the United Nations, did not make any reference to confidentiality. It provided that the Commission should 'make reports with appropriate recommendations' to the OAU concerning alleged violations'. The Commission should also submit an annual activity report to the Assembly. See drafts of the African Charter reprinted in C Heyns (ed) *Human rights law in Africa 1999* (2002). See also BG Ramcharan 'The *travaux préparatoires* of the African Commission on Human Rights' (1992) 13 *Human Rights Law Journal* 307.

<sup>5</sup> Many reprints of the African Charter wrongly refer to 'Charter' rather than 'Chapter'. As pointed out by Benedek, this could lead to 'serious misunderstandings'; W Benedek 'The 9th session of the African Commission on Human and Peoples' Rights (1993) 12 *Human Rights Law Journal* 217.

article in this chapter is article 46, which states that the Commission 'may resort to any appropriate method of investigation'. The rest of the chapter deals with 'communications from states' (articles 47-54) and 'other communications' (articles 55-59). State reports are regulated in article 62 and thus clearly falls outside the ambit of article 59. When it comes to mission reports the situation is less clear, as will be discussed further below.

The Assembly adopted the First Activity Report of the Commission in 1988. Concerns that article 59 would be applied restrictively by the OAU Assembly were not realised for many years. The Assembly resolutions on the Activity Reports of the Commission were most of the time drafted by the Commission itself.<sup>6</sup> The reports were 'adopted without debate, usually late in the evening, after other, more high-profile, business was done'.<sup>7</sup>

The lack of debate over the findings of the Commission by the AU political organs was criticised by some observers.<sup>8</sup> It was a report on a fact-finding mission to Zimbabwe that finally made the AU political bodies take more than cursory note of the Activity Reports of the Commission.

## 2.2 Article 59 and mission reports

The Seventeenth Annual Activity Report was presented before the AU Executive Council in June 2004. This followed a decision by the Assembly in July 2003 to mandate the Executive Council to consider the Activity Report at future summits and report to the Assembly.<sup>9</sup> In its decision, the Executive Council took note of the Seventeenth Annual Activity Report and recommended the Assembly to:

- 3 URGE all Member States to cooperate with the ACHPR, and the various mechanisms it has put in place, and implement its decisions in compliance with the provisions of the African Charter on Human and Peoples' Rights;
- 4 NOTE that some [ACHPR] reports on the State Parties are presented in the form of observations; and INVITE ACHPR to ensure that in future its mission reports are submitted together with the comments of the State Parties concerned and to indicate the steps taken in this regard during the presentation of its annual activity report;
- 5 SUSPEND the publication of the 17th Annual Activity Report in accor-

<sup>6</sup> R Murray *Human rights in Africa* (2004) 60.

<sup>7</sup> n 6 above, 58 citing Ben Kioko, AU legal counsel.

<sup>8</sup> n 6 above, 57-62. Murray notes one instance of interference from the Assembly: the suspension of the review of NGO observer status in 1996; n 6 above, 66.

<sup>9</sup> Decision on the Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 11 (II). At its meeting in June 2006, the Executive Council did not make any recommendation to the Assembly, but adopted the Twentieth Activity Report of the Commission itself. The Executive Council thus does not follow the provision of the African Charter itself, as article 59 explicitly provides that decisions shall be taken by the Assembly.

dance with paragraph 4 above pending the possible observations by the Member States concerned;

The decision of the Executive Council was subsequently endorsed by the Assembly.<sup>10</sup> Sub-paragraph 3 represents the first time that a political organ of the AU urged the member states to comply with the decisions of the Commission,<sup>11</sup> but the decision also had negative consequences, as discussed further below. At its next summit in January 2005, the Assembly adopted the Seventeenth Annual Activity Report,<sup>12</sup> after having ensured that the response of Zimbabwe to the Commission mission report had been included.

The reason for the suspension of the publication of the Seventeenth Annual Activity Report was that the Commission in the draft report had included an executive summary of the report of a fact-finding mission undertaken by members of the Commission to Zimbabwe in 2002, without including any comments on the report from the government of Zimbabwe.<sup>13</sup>

The basis for missions of the Commission can be said to fall under the provisions of the mandate of the Commission (article 45, outside chapter III) or as a procedure of the Commission (article 46, first article in chapter III). The Commission has sometimes drawn a distinction between promotional missions and fact-finding missions.<sup>14</sup> However, the Commission has not always drawn a clear distinction between the two types of missions.<sup>15</sup> The Rules of Procedure of the Commission, adopted in 1995, do not solve the problem, as they do not regulate the missions of the Commission.

The first fact-finding mission of the Commission was an election observation mission to Mali in 1992 at the request of the govern-

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<sup>10</sup> Decision on the Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 49 (III).

<sup>11</sup> This appeal was not repeated in the second decision on the Seventeenth Annual Activity Report or in the decisions on the Eighteenth, Nineteenth and Twentieth Activity Reports. However, the Assembly in its 'Banjul Declaration on the 25th Anniversary of the African Charter on Human and Peoples' Rights' urged member states to 'take the necessary steps to fulfil their obligations under the African Charter and other human rights instruments to which they are parties, in particular, the implementation of decisions and recommendations of human rights treaty bodies'. See Assembly/AU/Decl 3(VII), July 2006.

<sup>12</sup> Decision on Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights (ACHPR), Assembly/AU/Dec 56 (IV).

<sup>13</sup> That the Zimbabwean government had been given the opportunity to respond to the report after it was adopted by the Commission is clear from the response by Zimbabwe in the Seventeenth Annual Activity Report as finally adopted by the Assembly. See para 5.4.

<sup>14</sup> On fact-finding missions, see T Mutangi 'Fact-finding missions or omissions? A critical analysis of the African Commission on Human and Peoples' Rights' (2006) 12 *East African Journal of Peace and Human Rights* 1.

<sup>15</sup> There is no reference to missions in the Commission's Rules of Procedure. See below on the practice of the Commission with regard to missions.

ment.<sup>16</sup> The Commission sent a mission to Togo to discuss alleged human rights violations in January 1995.<sup>17</sup> The same year, the Commission decided to send missions to Mauritania, Nigeria, Senegal, Sudan and Zaire, but all of these did not take place.<sup>18</sup> The clear connection between these suggested missions and the consideration of communications submitted to the Commission can be seen from the case law of the Commission,<sup>19</sup> and from mission reports.<sup>20</sup>

However, in the decisions on the cases against Mauritania and Sudan, decided in 2000 and 1999 respectively, the Commission emphasised that the missions, both fielded in 1996, should be seen as promotional.<sup>21</sup> This should be seen in the light of the Commission moving away from seeing missions as connected to the communications procedure. A 'reflection on the establishment of an early intervention mechanism in case of massive human rights violations' was discussed at the 24th session of the Commission in October 1998. It included a provision that '[t]he Commission should exercise its competence under article 45(i) to report on and make public its views on an emergency given that article 59 on confidentiality relates to chapter 3 of the Charter'.<sup>22</sup>

<sup>16</sup> Fifth Annual Activity Report para 26, Final communiqué of the 12th ordinary session of the African Commission on Human and Peoples' Rights, Banjul 12-21 October 1992, para 16.

<sup>17</sup> Press release 23 January 1995, reprinted in R Murray & M Evans *Documents of the African Commission on Human and Peoples' Rights* (2001) 417; Eighth Annual Activity Report para 13.

<sup>18</sup> Eighth Annual Activity Report para 24.

<sup>19</sup> *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 86-87; *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 14; *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995) para 16; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) paras 26 & 46; *Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 6; *Degli & Others v Togo* (2000) AHRLR 317 (ACHPR 1995) para 4. See also the request for a mission to Chad: *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 10. On the Senegal and Mauritania missions, see F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights* (2003) 634-638. See also the Final communiqués of the 16th and 17th ordinary sessions of the African Commission, where the Commission with regard to communications mentions the number of cases 'in which the Commission decided to send missions', reprinted in Evans & Murray (n 16 above) 414 423.

<sup>20</sup> *Rapport de mission de la Commission Africaine des Droits de l'Homme et des Peuples au Soudan* 1-7 Decembre 1996, undated, paras 165-181.

<sup>21</sup> *Malawi African Association & Others v Mauritania; Amnesty International & Others v Sudan* para 46. See also Ouguergouz (n 19 above) 638.

<sup>22</sup> Reprinted in Murray & Evans (n 17 above) 757. The discussion paper had been prepared by Commissioner Umozurike. See R Murray 'Report on the 1998 sessions of the African Commission on Human and Peoples' Rights — 23rd and 24th ordinary sessions: 20-29 April and 22-31 October 1998' (2000) 21 *Human Rights Law Journal* 374.



Mission reports were published on Mauritania and Senegal as annexes to the Tenth Annual Activity Report, without any comments by the respective states annexed to the reports. A mission report on Zimbabwe submitted by the Special Rapporteur on Prisons and Conditions of Detention was published in the same Activity Report. A report on the mission to Sudan was published separately without any mention in the Activity Reports that the mission report would be published. Though the mission took place in December 1996, the responses from the government of Sudan attached to the undated report are dated April 1999. In a decision contained in the Twelfth Annual Activity Report, the Commission decided to publish 'the mission reports on Mauritania together with the observations of the government'.<sup>23</sup> The Commission decided to send the mission report on Nigeria to the government for its comments.<sup>24</sup>

In the past, reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa have been published by Penal Reform International and are available on its website.<sup>25</sup> Most of these have been published without the explicit approval at a Commission session. At the 28th session in 2000, the Special Rapporteur, Professor Dankwa<sup>26</sup>

informed the Commission that his mission report to Benin had been published. He indicated that he had recommended that Government urgently address the problem of the health of the prisoners and was pleased to learn that the Government had allocated funds to address this problem. He informed the Commission that the report on his second visit to Mali was translated into Arabic and that the report on Central African Republic will soon be published. He also informed the Commission that he had received comments and observations on his reports from the relevant authorities in The Gambia and Mozambique.

Starting with the Sixteenth Annual Activity Report adopted in 2003, the Commission has adopted the reports of promotional and fact-finding missions and the reports of missions of Special Rapporteurs and working groups.<sup>27</sup> At its 36th session in November 2004, the Commission<sup>28</sup>

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<sup>23</sup> Para 32.

<sup>24</sup> Para 33.

<sup>25</sup> [http://www.penalreform.org/english/frset\\_pub\\_en.htm](http://www.penalreform.org/english/frset_pub_en.htm) (accessed 22 July 2006).

<sup>26</sup> Fourteenth Annual Activity Report, para 21.

<sup>27</sup> The Commission has adopted reports of fact-finding missions to Zimbabwe, Côte d'Ivoire ('High Level Mission') (Seventeenth Annual Activity Report), Sudan (Eighteenth Annual Activity Report), Sahrawi Arab Republic (Nineteenth Activity Report) and Togo (Twentieth Activity Report). The Commission has further adopted promotional mission reports on Burkina Faso, Côte d'Ivoire, South Africa, Senegal, Zambia (Sixteenth Annual Activity Report); Côte d'Ivoire, Seychelles, Djibouti, Niger, Libya (Seventeenth Annual Activity Report) DRC, Sierra Leone, Sudan, Nigeria, Congo (Eighteenth Annual Activity Report); Central African Republic, Mauritania, São Tomé and Príncipe, Guinea Bissau, Seychelles and Botswana (Nineteenth Activity Report).

<sup>28</sup> Fourteenth Annual Activity Report, para 21.

decided to adopt its mission reports before sending them for comments to the States Parties to which missions were made. The African Commission decided to give States Parties a three (3) month deadline to submit their comments. This deadline could be extended for three (3) extra months, if need be.<sup>29</sup>

This followed the decision by the AU Executive Council/Assembly on the Zimbabwe fact-finding mission report. Though it does not state so expressly, it seems to be implied in the Commission's decision that the reports should either be published or submitted for adoption to the Executive Council/Assembly after comments have been received or the deadline for comments has expired. However, since the Zimbabwe debacle, no mission report has been included in the Activity Reports of the Commission or published in any other way by the Commission.

### 2.3 Article 59 and individual communications

Communications are the category of measures that clearly fall within the ambit of article 59. In its early years, the Commission interpreted article 59 to mean strict confidentiality with regard to communications, somewhat akin to the 1503 procedure before the UN Commission on Human Rights. In its Second Activity Report, the Commission stated that it had settled ten cases, but that the decisions 'for the time being, remain confidential in conformity with Article 59 of the African Charter . . .'<sup>30</sup>

The Sixth Annual Activity Report adopted by the Assembly in 1993 included a confidential Annex XI on communications, which was not included in the published Activity Report. However, after a request from NGOs participating at the 5th NGO workshop, that preceded the 14th session of the Commission in December 1993, copies of the annex were made available to these NGOs.<sup>31</sup> Starting with the Seventh Annual Activity Report, adopted by the Assembly in 1994, the Commission has included the decisions it has taken with regard to communications.

That the Assembly's decision on the Zimbabwe mission report also had relevance to individual communications became clear when the Executive Council adopted the Twentieth Activity Report in June 2006 with the exception of a decision on a communication against Zimbabwe. In the decision the Executive Council

- 1 ADOPTS and, in conformity with Article 59 of the African Charter on Human and Peoples' Rights (African Charter), AUTHORIZES the publica-

<sup>29</sup> Eighteenth Annual Activity Report, para 56.

<sup>30</sup> Second Annual Activity Report of the African Commission on Human and Peoples' Rights, adopted on 14 June 1989, para 35. Reprinted in Murray & Evans (n 17 above) 177.

<sup>31</sup> W Benedek '14th session of the African Commission on Human and Peoples' Rights' (1994) 12 *Netherlands Quarterly of Human Rights* 86.

- tion of the 20th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and the Annexes with the exception of decision 245 on Zimbabwe;
- 2 INVITES Zimbabwe to communicate to the ACHPR, within two (2) months following the adoption of this decision, its observations on the said decision, and ACHPR to submit a report thereon at the next Ordinary Session of the Executive Council;
  - 3 ALSO INVITES Member States to communicate within two (2) months following the reception of ACHPR notification, their observations on the decisions that ACHPR is to submit to the Executive Council and /or the Assembly; . . .<sup>32</sup>

It is unclear what the need of this right to response is as states are encouraged to participate in the process leading up to a decision and their position on admissibility and merits are recorded in the decision taken by the Commission.<sup>33</sup>

## 2.4 Article 59 and resolutions

The Assembly took the following decision on the 19th Activity Report of the Commission:<sup>34</sup>

The Assembly:

- 1 ADOPTS and authorizes, in accordance with Article 59 of the African Charter on Human and Peoples' Rights (the Charter), the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe;
- 2 REQUESTS the concerned Member States to make available to the African Commission within three (3) months of the adoption of the present Decision, their views on the said Resolutions and the ACHPR to submit a Report thereon to the next Ordinary Session of the Executive Council;
- 3 CALLS UPON the ACHPR to ensure that in future, it enlists the responses of all States parties to its Resolutions and Decisions before submitting them to the Executive Council and/or Assembly for consideration;
- 4 REQUESTS States parties, within three (3) months of the notification by the ACHPR, to communicate their responses to Resolutions and Decisions to be submitted to the Executive Council and/or the Assembly . . .

This resolution seems to contradict a statement by the Commission in 1995, when the government of Nigeria complained that the adoption of a resolution on Nigeria was a breach of the confidentiality rule in article 59.<sup>35</sup>

<sup>32</sup> Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) EX.CL/Dec 310 (IX).

<sup>33</sup> It should be noted that in many cases, the African Commission has not received any response from the state concerned and has thus proceeded to decide the matter on the basis of the allegations of the complainant. See eg *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) para 46.

<sup>34</sup> Decision on the Nineteenth Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 101(VI).

<sup>35</sup> Account of internal legislation of Nigeria and the dispositions of the Charter of African Human and Peoples' Rights, 2nd extraordinary session, Kampala, 18-19 December 1995, DOC II/ES/ACHPR/4, reprinted in Murray & Evans ( n 17 above) 472.

The resolution on Nigeria . . . is not a 'measure taken' within the meaning of this article. The 'present chapter' refers to Chapter III of the Charter, dealing with communications. The resolution on Nigeria does not refer to communications in any way. There is no bar on resolutions of the Commission being disseminated however the Commission sees fit.

As a result of the Assembly decision on the Nineteenth Activity Report, the Twentieth Activity Report included the resolutions on Ethiopia, Sudan, Uganda and Zimbabwe together with the at times lengthy responses from these states.<sup>36</sup> The resolution on Eritrea was not included. The fact that the Commission did not include any new resolutions is instructive of its deference to the AU political bodies.

Resolutions and statements by the Commission are adopted as response to violations. They clearly do not fall within the ambit of article 59. It is unclear if the decision of the Assembly is also applicable to statements issued by the Special Rapporteurs and working groups of the Commission. These Special Rapporteurs sometimes make joint statements together with other international mechanisms.<sup>37</sup> This practice could be jeopardised if the Commission were to adopt a wide interpretation of the Assembly decision.

### 3 Freedom of information and the reclaiming of the independence of the African Commission

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.<sup>38</sup>

The quote above is taken from the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission in 2002. The question raised by this article is why should this principle only apply to states and not the body that has adopted the resolution?

It is clear that some states want to curtail the powers of the Commission. It is time for the Commission to stand up against this attack and reclaim its independence. The Commission has not been restrictive in its interpretation of the substantive provisions of the Charter as exemplified by the recognition of implied rights in the *SERAC* decision.<sup>39</sup> This follows from articles 60 and 61 of the Charter, which states that the Charter shall be interpreted in the light of international standards. There

<sup>36</sup> In particular one could take note of the long response from Ethiopia, a state that has never submitted a state report under art 62 of the African Charter.

<sup>37</sup> See eg UN and African Commission experts on the situation of human rights defenders concerned over removal of head of Nigerian rights body, United Nations press release, 28 June 2006.

<sup>38</sup> Declaration of Principles on Freedom of Expression in Africa, para 4(1).

<sup>39</sup> *Social and Economic Rights Action Centre (SERAC) & Another* (2001) AHRLR 60 (ACHPR 2001).

is no reason why the Commission and its Secretariat should make a narrow interpretation of the procedural provisions of the Charter. More and more African countries are adopting freedom of information laws. It is thus only fair that the principle of freedom of information should also apply to the African regional body, the AU, and its various institutions. The African Court on Human and Peoples' Rights (African Court) is now functional and the African Commission could request an advisory opinion on the meaning of article 59 and draft its Rules of Procedure accordingly. Political interference with the work of the Commission, as seen recently, would then become more difficult and the political bodies could focus on measures to ensure compliance with the decisions of the African Commission and the African Court.

The Commission and its Secretariat should also ensure that public documents are distributed timely and effectively. The recent initiative by the Commission to make state reports for the upcoming session available on its website is a step in the right direction. Other reports, such as those emanating from promotional and fact-finding missions, can be used to pressure governments to implement policy changes, but this cannot happen if they are not accessible.

Obviously, the personnel situation at the Commission leaves a lot to be desired. The AU does not want staff to be financed by donors and, on the other hand, does not want to give sufficient budgetary allocations for the Commission to do its work, despite repeated calls from the AU Assembly to the AU Commission to allocate more resources.

Much could be done with regard to publishing without any major expense. The Commission should more actively use its website to spread information. In addition, it should more actively spread information through the network of NGOs and national human rights institutions with observer status. These organisations could also help to publicise the work of the Commission if the Secretariat would supply them with the reports, etc that have been adopted.

The African Commission held ten years ago in the Mauritius Plan of Action (1996-2001) that '[t]he lack of informative documentation on the work of the African Commission is a problem which needs to be solved urgently'.<sup>40</sup> As is clear from this overview, the situation has not improved much.

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<sup>40</sup> The Mauritius Plan of Action 1996-2001 reprinted in Evans & Murray (n 17 above) para 7.

## Recent publication

### **JW de Visser & C Mbazira (eds) *Water delivery: Public or private?***

Institute of Constitutional and Administrative Law (Utrecht University) and Community Law Centre (University of the Western Cape) Centre for Environmental Law and Policy Utrecht (2006) 170 pages

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The book contains six chapters, based on presentations at a seminar that was held in Utrecht, the Netherlands, in March 2005. It is entitled 'Water delivery in South Africa and the Netherlands: Public or private?' The Institute of Constitutional and Administrative Law (Utrecht University) and the Community Law Centre (University of the Western Cape) organised the seminar.

Each of the chapters contains its own bibliography. The book lacks a central index, which would have assisted in illustrating the links between the various chapters. Barring a two-page foreword by the editors, the book does not contain a comprehensive introduction to the themes underlying the various chapters, neither does it contain a concluding chapter that draws the parts together. It is up to the reader to draw patterns and conclusions from the various contributions.

From this reviewer's perspective, the chapters share the following themes: a concern for conceptual clarity when discussing and analysing 'privatisation'; a healthy synergy between theory and practice; and a deep concern for the poor and downtrodden. The authors agree that the state ultimately remains the responsible party in ensuring access to water and lament the fact that the South African state seems to be institutionally incapacitated in this regard. An implicit argument in many of the chapters is that a purely instrumental or top-down approach to (water) legislation will not solve South Africa's lingering water crisis.

In the first chapter, 'Safe water: An enquiry into water entitlements and human rights', Bas de Gaay Fortman distinguishes between 'upstream' and 'downstream' human rights in discussing the privatisa-

tion of water delivery. 'Downstream' human rights encompass initiatives to move the protection of human dignity from international standards to the people. 'Upstream' human rights focus on the struggle of people at the grassroots level to realise their rights ostensibly belonging to them under the law. Fortman primarily focuses on upstream efforts and distinguishes between four types of human rights strategies: judicial, case-by-case action; legal literacy programmes; political dissent and protest against policies; and collective action addressing power relations that embody structural injustice. He argues that ultimately 'downstream' and 'upstream' actions must be connected to lead to real change.

Jaap de Visser examines the legal framework, policy developments and legal developments for water delivery in South Africa and the Netherlands in the second chapter, entitled 'Comparing water delivery in South Africa and the Netherlands'. He illustrates that, while the Netherlands has accepted the policy of the 'liberalisation' of network sectors (for example electricity and railways), it has identified water delivery as a public task. De Visser then shows that South African water legislation allows for 'liberalisation' of water services, although it would be subject to stringent procedures in terms of the Municipal Systems Act.<sup>1</sup> He argues that liberalisation of water services leads to more rigorous cost recovery and that municipalities are unable to effectively monitor performance by the service provider. He points out that the Constitutional Court may well strike down water delivery policies as unreasonable where such policies lead to mass cut-offs of the most vulnerable sections of South African society. The situation in the Netherlands is radically different, where unwillingness or inability to pay is not a serious problem and where municipalities are well-equipped and well-skilled. He accepts that liberalisation may well be necessary in South Africa, a water-poor country, where stringent cost recovery methods could assist in conserving water. Massive backlogs may also force South Africa's hand in harnessing private sector involvement in water delivery.

In chapter three, written by Christopher Mbazira and entitled 'Privatisation and the right of access to sufficient water in South Africa: The case of Luhkanji and Amahlati', the author analyses the legal framework for the right to water (international standards, the South African Constitution, legislation and case law) and then examines a privatisation scheme that was undertaken in the Eastern Cape. He argues that national government must adequately subsidise municipalities that have large numbers of indigent people. He criticises the current government policy of 6 000 free liters of water per household per month as being inadequate and argues that water restrictors and prepaid meters violate the Constitution and the Water Services Act. His arguments relating to water restrictors are not persuasive, as indigent people are

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<sup>1</sup> Local Government: Municipal Systems Act 32 of 2000.

still allowed to access the prescribed free amount of water. He acknowledges that municipalities are in a bind: on one hand having to ensure access to socio-economic rights; on the other having to provide sustainable services and having to ensure cost recovery.

Victoria Johnson authored the fourth chapter, 'Outsourcing of basic services: Contract analysis'. Johnson argues that privatisation initiatives are often driven by factors such as efficiency, skills transfer, risk transfer and value for money while dangers associated with such initiatives are loss of accountability, lack of public buy-in, inappropriate risk allocation, and insufficient asset protection. She analyses a number of long-term water service contracts and draws a number of conclusions from this analysis. The contracts are often inaccessible and very lengthy and she argues that contract monitoring would be problematic if the monitoring agents do not have the essential provisions of the contract at their fingertips. She points out that the contracts generally do not provide for skills transfer to municipalities, that risks are often inappropriately transferred, that many contracts purport to restrict the municipality's powers to set tariffs and that some contracts pay lip-service to monitoring obligations. She concludes by offering a number of suggestions on how to improve on the drafting of outsourcing contracts.

The last two chapters are largely empirical and offer relatively little in theoretical analysis. Tobias Smith summarises water management in South Africa as from 1652 and shows how the trend has been in favour of increasing state control over water in chapter five, 'Some for all forever? A policy analysis of the establishment of Johannesburg's new water utility'. He shows how the 'globalisation of local government' started in Western Europe and the United States of America in the 1970s. He then discusses in some detail the transforming of Johannesburg's water management as from 1997. He concludes that a number of gaps exist between the policy and implementation of Johannesburg's privatisation project and that in fact a private operator has *not* been contracted to manage water delivery.

Chapter six, authored by Bert Raven, Jeroen Warner and Cees Leeuwis, entitled 'Beyond the new South African Water Acts: Integrating water and society in the Lower Blyde', analyses contemporary thinking on multi-stakeholder participation (MSP) and integrated water resource management (IWRM) as concretised in South African water legislation. The authors identify stimulants and obstacles in realising MSP and IWRM, specifically in the Lower Blyde River area, in answering the question: 'How does the implementation of the concepts of IWRM and MSP work out in practice?' The picture that emerges is depressing: Conflicts and distrust between well-resourced white communities such as game farms, and poor black communities, have not been constructively addressed, and co-ordination and co-operation on crucial water issues between key actors, such as small and large farm owners, the municipality and the Department of Water Affairs and Forestry, have been



absent or strained. The authors suggest that an authoritative, neutral, mandated process leader on the ground be identified to get the various actors to cross established boundaries.

This collection of papers is a valuable addition to the growing literature on the privatisation of essential services. Access to water is perhaps the most critical component of a dignified life and has particular poignancy in South Africa, where up to 40% of the population may be unemployed and unable to realise socio-economic rights on their own. Many of the chapters contain constructive suggestions on how to improve on water delivery and should be compulsory reading for municipal managers as South Africa's future may well rely on effective municipal provision of services.



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- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.
- Use UK English.
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## CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2006

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 15 September 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 d'Ivoire	06/01/92	26/02/98	07/01/03		
Democratic Republic of Congo	20/07/87	14/02/73			
Djibouti	11/11/91				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	25/96/04
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		<b>09/03/06</b>
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	<b>07/02/06</b>	
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			<b>02/05/06</b>
Zimbabwe	30/05/86	28/09/85	19/01/95		
<b>TOTAL NUMBER OF STATES</b>	<b>53</b>	<b>45</b>	<b>38</b>	<b>23</b>	<b>19</b>

Ratifications after 31 December 2005 are indicated in bold