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Editorial

Three organs are responsible to supervise the African Union (AU) human rights system: the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court) and the Committee of Experts on the Rights of the Child (African Children's Rights Committee). Each of these organs is composed of eleven members.

This issue of the *African Human Rights Law Journal* appears as the African Commission, which first met in November 1987, prepares to celebrate 20 years of existence. During its June 2007 meeting, held in Accra, Ghana, the AU Executive Council elected five new members to serve on the African Commission. The terms of four commissioners were expiring, while a fifth position had to be filled because the AU declared the position of Commissioner Babana, from Mauritania, vacant, due to his consistent failure to attend sessions of the African Commission. Mr Babana would have served another two years of his term, had he not been replaced. This is a significant advance, as it represents the first time that article 39(2) of the African Charter has been given effect. According to this provision, upon a unanimous decision of the Commission that 'a member has stopped discharging his duties for any reason other than a temporary absence', the Chairperson of the Commission must inform the Chairperson of the AU Commission, 'who shall then declare the seat vacant'.

Only one of the five vacancies on the African Commission was filled by an incumbent commissioner, Dr Angela Melo, who has also been serving as the Commission's Special Rapporteur on the Rights of Women in Africa. The four newcomers are Ms Catherine Dupe Atoki (from Nigeria), Ms Zainabu Sylvie Kayitsemi (from Rwanda), Ms Soyata Maiga (from Mali), and Mr Yeung Kam John Yeung Sik Yuen (from Mauritius). With the exception of Ms Kayitsemi, who will serve a two-year term (as a replacement for Commissioner Babana), they will all serve full six-year terms.

The new commissioners will be inaugurated when the African Commission meets for its 42nd session in November 2007. A new era is set to begin. Not only will there be four new faces on the African Commis-

sion, but a new Chairperson and Deputy Chairperson will also have to be elected. The terms of both the Chairperson and Deputy Chairperson of the African Commission (together known as the 'Bureau'), who have served at the Commission's helm for two consecutive terms totalling four years, have expired. They have not made themselves available for re-election as commissioners.

When the AU Commission called for nominations, it reminded state parties to 'ensure adequate gender representation in their nominations and to bear in mind the need to continue to enhance the independence and operational integrity of the Human Rights Commission in the spirit of the Grand Bay Declaration of 1999 and the Kigali Declaration of 8 May 2003' (AU Doc BC/OLC/66/4/Vol.XX, 29 March 2007). According to available information, the new members fit the profile of independence from government: Ms Atoki is the commissioner responsible for gender issues in the National Human Rights Commission of Nigeria; Ms Kayitsesi is President of the National Human Rights Commission on Rwanda; Ms Maiga is Chairperson of the Association of Women Jurists of Mali; and Mr Sik Yuen is the Chief Justice of Mauritius.

For the first time, with seven women, there is a majority of female members serving on the African Commission. Before the 2007 election, the number of female commissioners stood at five. With the inauguration of the new members, the African Commission will become the first organ operating within the ambit of the AU to have a majority of female members. The African Commission has indeed come a long way since 1987, when it was an all-male body, and from 1993, when Ms Vera Duarte Martins was elected as the first female commissioner. It is a welcome and appropriate honour to befall the African Commission, not only because it is the primary body for the human rights of *all* Africans, but also because it counts the Protocol on the Rights of Women in Africa as one of the major normative frameworks that it needs to implement. The true challenge to the new Commission is to ensure that more female representation translates into improved human rights realisation – especially, but not exclusively, of those guaranteed under the Women's Protocol.

The African Commission's gender composition is all the more striking if compared with other quasi-judicial and judicial human rights bodies: The Inter-American Commission of Human Rights has no female member among its seven members; the Inter-American Court of Human Rights has three out of seven; the European Court of Human Rights 13 out of 47; and the African Court on Human and Peoples' Rights two female judges out of a total of 11.

Elected in January 2006, the 11 judges on the African Court serve terms of two, four and six years. These different terms were allocated by a draw of lots, and are aimed at ensuring continuity in membership. Since their election, the African Court had elected a President (Mr Ger-

ard Niyungeko from Burundi) and Vice-President (Mr Modibo Guindo from Mali). The judges had also held numerous meetings, mainly occupying themselves with the elaboration of the Court's Rules of Procedure. Hopefully, the judges will finalise the Court's operational framework before the terms of some of its members will expire, in January 2008.

The first African Children's Rights Committee was elected in May 2002. As Mezmur's contribution in this issue shows, this Committee at its meeting at the end of 2006 adopted some important documents, including its long-awaited rules for the consideration of individual communications and criteria for observer status of non-governmental organisations. The final versions of these documents will be published in the *African Human Rights Law Journal* as soon as they become officially available. The Guidelines for State Reporting have previously been published in the *Journal* ((2003) 3 *AHRLJ* 347).

Other contributions in this issue show concern for a wide variety of topics related to human rights in Africa, such as the attempts to undermine the International Criminal Court through bilateral agreements, legislation countering terrorism, economic partnerships and arbitration. Together, these contributions underscore the inevitability of a multi-disciplinary approach to human rights. Other contributions focus more squarely on issues of a legal nature, such as the need for a derogation clause in the African Charter, and the justiciability of socio-economic rights. The *Journal* hopes to maintain a balance between contributions that clearly deal with human rights *law*, and those that go beyond legal strictures.

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The magnificent seven: Africa's response to US article 98

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Summary

What are the motivating factors that enable certain states to withstand pressure from other states? To ensure that the International Criminal Court does not gain jurisdiction over its nationals, the United States is currently seeking to sign Bilateral Immunity Agreements (BIAs) with all countries under the rubric of the American Service Members' Protection Act. This article examines the debates over the BIAs and goes further by analysing responses to the BIAs of seven countries within the African region. It specifically examines the ways in which states are able to withstand the pressure to sign a BIA by taking advantage of internal and external institutional structures and mechanisms. It also fills a gap in the literature by examining one region's response to the BIAs relative to the US position concerning the International Criminal Court.

1 Introduction

What are the factors within the African region that explain how some states are able to withstand pressure from the United States (US), even at the cost of a loss of aid? This article examines how seven African countries are willing to sacrifice US military and economic aid by not signing a US article 98 Bilateral Immunity Agreement (BIA). To ensure that the International Criminal Court (ICC) does not gain jurisdiction

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over its nationals under any circumstance, the US is currently seeking to sign BIAs with all countries under the rubric of the American Service Members' Protection Act (ASPA), which was signed into law on 2 August 2002 by President George W Bush, codifying US opposition to the ICC and restricting US ability to co-operate with ICC investigations and trials.¹ The date 1 July 2003 marked the deadline set out in the ASPA for the end of US military assistance to ICC state parties that had not signed a BIA.² Additionally, under the ASPA, the administration is obliged to take away military aid from countries that have ratified the Rome Treaty to the ICC unless they are North Atlantic Treaty Organisation (NATO) allies or specially designated non-NATO allies.³ The Bush administration is also empowered to waive sanctions on countries if it serves the national interest.⁴ As of May 2007, 100 governments worldwide have reportedly signed BIAs, while 54 have publicly refused for varying reasons. In Africa, out of 47 countries (North Africa excluded),⁵ 37 have signed BIAs while seven have continued to hold out. These countries are Kenya, Lesotho, Mali, Namibia, Niger, South Africa and Tanzania. The countries tallied are in Table 1.⁶

¹ American Service Members' Protection Act 2002, USC 7422 sec 2001 (2002). Sec 2008 authorises the President to use all means necessary and appropriate to bring about the release of any US military, elected or appointed USG personnel, or other persons working for or employed by the USG who is being detained or imprisoned by, on behalf of, or at the request of the court. This also applies to the same named individuals with NATO countries, major non-NATO allies, and Taiwan. In addition, this applies to individuals detained or imprisoned for official actions taken while one of the above-mentioned eligible individuals. Note: On 31 March 2005, with 11 votes supporting, and four countries, including the US, abstaining, the UN Security Council referred the situation in Darfur, Sudan, to the ICC. Although the American Service Members' Protection Act of 2002 prohibits the US from co-operating with the ICC, this legislation contains broad waivers that permit co-operation. Sec 2015 reads: 'Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.' Sec 2011 also grants the President the capacity to co-operate with the ICC or provide national security information to the Court, requiring only a notification of Congress within 15 days.

² Coalition for the International Criminal Court 'US bilateral immunity or so-called article 98 agreements' 30 September 2003 <http://www.iccnw.org/documents/FS-BIAsSept2003.pdf> (accessed 23 December 2003).

³ Defence Institute of Security Assistance Management 'Security assistance legislation and funding allocations'. This includes Argentina, Australia, Egypt, Israel, Japan, Jordan, Philippines, New Zealand, South Korea and Taiwan.

⁴ J Lobe 'US punishes 35 countries for signing on to the International Criminal Court' *Inter-Press News Agency* 1 July 2004.

⁵ North Africa is included in the Middle Eastern region.

⁶ Coalition for the International Criminal Court *Status of US bilateral agreements* 14 April 2006. Note: North Africa includes Algeria, Egypt, Libya, Morocco, Sudan, Tunisia and Western Sahara, which represent the Middle Eastern region. Morocco has administrative control over Western Sahara.

Table 1**STATUS OF US BILATERAL IMMUNITY AGREEMENTS/AFRICA**

COUNTRY	NON-ICC STATE PARTY	ICC STATE PARTY	BIA STATUS BY COUNTRY	REFUSE TO SIGN A BIA
Angola	Signed		Ratified	
Benin		Ratified	Signed	
Botswana		Ratified	Signed	
Burkina Faso		Ratified	Signed	
Burundi		Ratified	Signed	
Cameroon	**Signed		**Signed	
Cape Verde	**Signed		**Ratified	
Central African Republic		Ratified	Signed	
Chad		Ratified	Reciprocal	
Comoros		Ratified	Executive	
Congo (Brazzaville)		Ratified	Signed	
Congo (DRC) (Kinshasa)		Ratified	Executive	
Côte d'Ivoire	Signed		Reciprocal	
Djibouti		Ratified	Signed	
Equatorial Guinea	Did Not Sign		Executive	
Eritrea	Signed		Reciprocal	
Ethiopia	Did Not Sign		Reciprocal	
Gabon		Ratified	Signed	
The Gambia		Ratified	Ratified	
Ghana		Ratified	Ratified	
Guinea		Ratified	Signed	
Guinea-Bissau	**Signed		**Exempt	
Kenya		Ratified		*
Lesotho		Ratified		*
Liberia		Ratified	Signed	

Madagascar	Signed		Signed	
Malawi		Ratified	Executive	
Mali		Ratified		*
Mauritania	Did not sign		Ratified	
Mauritius		Ratified	Signed	
Mozambique	Signed		Ratified	
Namibia		Ratified		*
Niger		Ratified		*
Nigeria		Ratified	Signed	
Rwanda			Reciprocal	
São Tomé & Príncipe	**Signed		**Executive	
Senegal		Ratified	Signed	
Seychelles	Signed		Reciprocal	
Sierra Leone		Ratified	Ratified	
Somalia	**Did not sign		** Exempt	
South Africa		Ratified		*
Swaziland	**Did not sign		**Exempt	
Tanzania		Ratified		*
Togo	Did not sign		Reciprocal	
Uganda		Ratified	Executive	
Zambia		Ratified	Signed	
Zimbabwe	Signed		Signed	
TOTAL (47)	17	29	37	7

** As of the publication date of this article, the aforementioned is not a state party to the Rome Statute; therefore, it is not prohibited by paragraph 2007 of the American Service Members' Protection Act of 2002 (22 USC 7421 et seq) from receiving military assistance: These countries are Cameroon, Cape Verde, Guinea-Bissau, São Tomé and Príncipe, Somalia and Swaziland.

BIA TERMS

STATE PARTY TO BIA (SP): Agreement of non-surrender to the ICC any US national or US military/government employee (past or present)

RECIPROCAL: US has agreed not to surrender nationals of this country to the ICC.

RATIFIED AND EXECUTIVE AGREEMENT: BIA has entered into force. Based on public news reports; it is possible that other agreements have also entered into force, especially all countries that have received permanent waivers.

EXEMPT: Exempted under the American Service Members' Protection Act; military assistance cannot be suspended.

WAIVED: President Bush has declared that the country will continue to receive aid, despite being an ICC member state.

UNCONFIRMED: Not disclosed by the state department/country requested that the agreement not be revealed.

Information updated 15 May 2007. Sources: Coalition for the International Criminal Court and Citizens for Global Solutions Status of US BIAs.

This research will not debate the merits or not of the ICC,⁷ albeit the implications within the domestic policy of certain African states do send a message that the ICC's purpose should not be hindered in any way through other legal instruments. The emphasis on the African region is important for three reasons: First, African proponents of the ICC argue that the BIAs undermine the legitimacy of the ICC, thereby affecting the Court's potential. Currently there are four referrals to the ICC: the Central African Republic, Democratic Republic of the Congo (DRC), Sudan and Uganda.⁸ Africa is therefore the litmus test as to the success of the ICC.⁹ Although the ICC is not the subject of this study, the BIA issue is of indirect significance in relation to the ICC, therefore, the response of the African states is of importance when examining the foreign policy behaviour of the BIAs between two separate actors who see the ICC from two extreme viewpoints. Also, since the US has withheld millions of dollars in military assistance from state parties to the ICC that refuse to sign the BIAs, those countries that refuse to sign the BIAs are at risk of losing the aid that would assist them in combating the very crimes for which the ICC was instituted.¹⁰

Second, for almost a decade, the US has sought to strengthen Africa's ability to tend to its own crises. According to a report from the World Policy Institute in June 2005, although the millions of dollars being spent on US military aid and sales to Africa pale in comparison to the billions being spent in the Middle East and South Asia, all of the major US bilateral aid and sales programmes have increased in recent years. Funding to sub-Saharan Africa under the largest US military aid pro-

⁷ See *CICC bibliographic sources* <http://www.iccnw.org/?mod=bibliography> (accessed 31 March 2007).

⁸ International Criminal Court 'Situation and cases' <http://www.icc-cpi.int/cases.html> (accessed 31 March 2007).

⁹ Côte d'Ivoire has also accepted the ICC's jurisdiction for specific crimes.

¹⁰ See 'Countries opposed to signing a US bilateral immunity agreement (BIA): US aid lost in FY04 and US aid threatened in FY05' http://www.iccnw.org/documents/CountriesOpposedBIA_AidLoss_16Dec05.pdf (accessed 31 March 2007).

gram, Foreign Military Financing (FMF), doubled from \$12 million in fiscal year 2000 to a proposed \$24 million in the FY 2006 budget proposal and the number of recipient nations has grown from one to nine. The Pentagon's International Military Education and Training (IMET) programme has increased by 35% from 2000 to the 2006 proposal, from \$8,1 million to \$11 million, and from 36 participating nations to 47. FMF more than quadrupled from \$9,8 million in the fiscal year 2000 to \$40,3 million in the fiscal year 2003 (the most recent year for which full statistics are available). The commercial sales of arms licensed by the state department grew from \$0,9 million to \$3,8 million over the 2000 to 2003 period. These bilateral programmes are just the tip of the iceberg in terms of overall US military aid commitments going forward. The US European Command (EUCOM) has requested \$125 million over five years for the Pan-Sahel Initiative, which provides training and exercises with Chad, Mali, Mauritania, Niger and other nations in the region. US engagement under the programme has gone far beyond traditional training to include involvement in combat operations.¹¹ Additionally:¹²

The US cut \$13 million for training and equipping troops in Kenya, where operatives of Al Qaeda killed 224 people when they bombed the American Embassy compound in Nairobi in 1998 . . . In 2003, the flow of \$309,000 annually was suspended to Mali, where Pentagon officials contend an Algerian separatist group with ties to Al Qaeda, known as the Salafist Group for Preaching and Combat, or GSPC had established a base.

Pentagon officials concur: 'It makes little sense to ask for Kenya's support in fighting terrorism while denying it the money it needs for training and equipping troops.'¹³ Therefore, the loss of aid would be detrimental to those struggling democracies the Bush administration is concerned with when it comes to training personnel in order to protect their borders against would-be terrorists.

Lastly, the loss of funds would not only consist of aid for regular military training which the US has given Africa throughout the years, but also through the Nethercutt Amendment, effective 26 November 2004.¹⁴ The amendment, originally included in the House version of

¹¹ F Berrigan & WD Hartung with L Heffel 'US weapons at war 2005: Promoting freedom or fuelling conflict? US military aid and arms transfers since September 11' World Policy Institute, June 2005 <http://www.worldpolicy.org/projects/arms/reports/waw-june2005.html> (accessed 3 July 2005).

¹² KJ Heller 'Article 98 agreements and the war on terror' *Opinio Juris* 25 July 2006.

¹³ As above.

¹⁴ US Congressional Record, House of Representatives debate on 15 July 2004, under the Heading H5881 and H5882 to Amend the Foreign Operations Appropriations Bill. Note: The countries in this study would be ineligible for assistance from this fund meant to help strengthen African countries' capabilities to impede the flow of terrorist finances, improve border and airport security and improve judicial systems. Also see Citizens for Global Solutions 'Nethercutt amendment: Cutting off our nose to spite our face' 23 July 2004.

the foreign aid spending bill in July 2004, prohibits assistance from the Economic Support Fund (ESF) for countries that refuse to sign a BIA. With a budget of over \$2,5 billion, ESF promotes the foreign policy interests of the US by assisting allies. The importance of this latest sanction is paramount as it would not only undermine the effectiveness of US counter-terrorism efforts in Africa, such as peace building, democratisation and counter-drug initiatives, but the frozen funds are intended to improve peacekeeping capacity and enhance border and maritime controls, thereby strengthening regional stability and decreasing reliance on US peacekeeping capabilities.¹⁵ In the 16 March 2006 testimony before the House Armed Services Committee concerning ASPA sanctions, General Bantz J Craddock, Commander of EUCOM, stated: 'Decreasing engagement opens the door for competing nations and outside political actors who may not share our democratic principles to increase interaction and influence within the region.'¹⁶ Similarly, Major General Jonathan S Gration, Director of Strategy, Policy and Assessments, US European Command, stated: 'We're severely restricted [by ASPA] in what we can do. The restrictions we've put on our ability to move in Africa may be hurting the very people we are trying to help.'¹⁷ US Secretary of State, Condoleeza Rice, has also suggested that withholding aid is self-defeating to countries that are co-operating with the US on combating terrorism or drugs, or that are assisting in the war efforts in Afghanistan or Iraq:¹⁸

We are looking at the issues concerning those situations in which we may have in a sense . . . [been] shooting ourselves in the foot . . . I think it is important from time to time to take a look to make sure we are not having a negative effect on the relationships that are really important to us.

Thus, withholding aid is paradoxical and detrimental in that it may further undermine the ability for some countries in Africa to tend to their own crises, not to mention assist the US strategically. These complaints have led the US Congress to re-examine its stance on the BIAs. In section 1222 of the John Warner National Defense (DOD) Authorisation Act for FY07 signed 17 October 2006 (PL 109-364), Congress amended

¹⁵ According to the State Department, the military co-operation programme reinforces democratising efforts, develops peacekeeping capabilities, enhances regional stability, institutionalises respect for human rights and combats terrorism; World Federalist Association 'Sanctioning allies: Effects of the article 98 Campaign' December 2003.

¹⁶ General Bantz J Craddock, United States Army Commander, United States Southern Command, Statement before the 109th Congress House Armed Services Committee 26. Note: The impact of art 98 has caused an increase in China's influence in the region. The impact of this is noted in D Cotton's forthcoming article 'China-Africa trade: Implications for the rule of law and good governance'.

¹⁷ P Hess 'Ungoverned areas threaten North Africa' *The Post Chronicle* 17 February 2006 http://www.postchronicle.com/news/security/article_2127155.shtml (accessed 6 April 2006).

¹⁸ A Gearan 'Rice: 'Administration needs to rethink some policies involving International Criminal Court' *Associated Press* 10 March 2006.

the ASPA to remove IMET from the definition of military assistance that is prohibited to a country that is a party to the ICC.¹⁹ Although ASPA restrictions still apply to FMF and Excess Defense Articles (EDF) programmes, this law removed IMET restrictions from all ASPA countries and a waiver is no longer required for countries by President Bush. Additionally, on 10 May 2007, Secretary Rice provided testimony before the Senate Appropriations Subcommittee on Foreign Operations and reiterated the importance of 'assisting those countries that need US funding through foreign assistance so that they may do their jobs well'.²⁰ Thus, 'the US government is beginning to re-evaluate its counterproductive BIA policy and work toward separating its ideological opposition to the ICC from its foreign aid policy with key allies and friends'.²¹ This is a great step forward. However, according to the USAID statutory checklist for FY 2007, ESF aid is not addressed by the aforementioned amendments. Fortunately, this prohibition only applies to ESF funds and does not apply to Millennium Challenge Act (MCA)²² assistance to MCA-eligible countries. Therefore, a country that is ineligible to receive ESF assistance under this provision can still be eligible for MCA assistance.²³

The spirited efforts of the US through the ASPA and the Nethercutt Amendment and the subsequent efforts of African countries to remain steadfast against tremendous pressure by the US, lay the groundwork for the following hypotheses:

- (1) The seven countries refuse to sign a BIA because of an alignment and/or obligation to regional organisations.
- (2) The countries refuse to sign a BIA because they are under pressure from civil society and non-governmental organisations (NGOs) that oppose signing a BIA.
- (3) Based upon domestic jurisprudence, the countries refuse to sign a BIA because they believe it will violate their obligations as state parties to the Rome Treaty and the Vienna Convention on the Law of Treaties (VCLT).
- (4) The countries refuse to sign a BIA because they believe the request by the US to sign a BIA violates state sovereignty.

¹⁹ US 109th Congress, Senate Report 109; J Warner *National Defence Authorisation Act for fiscal year 2007* 853.

²⁰ US Department of State 'Diplomacy, foreign assistance critical to national security secretary Rice' 10 May 2007.

²¹ Citizens for Global Solutions 'US recognises counterproductive BIA Policy' 10 October 2006.

²² The Millennium Challenge Corporation is a United States government corporation designed to work with some of the poorest countries in the world. Established in January 2004, MCC is based on the principle that aid is most effective when it reinforces good governance, economic freedom and investments in people. See <http://www.mcc.gov/about/index.php> (accessed 31 March 2007).

²³ These countries are Kenya, Lesotho, Mali, Namibia, Niger and Tanzania.

Our theory is that the countries in this study will continue to hold out in signing a BIA despite pressure applied by the US.

The aid factor and its influence concerning the 37 countries that have signed a BIA is discussed in depth in forthcoming research,²⁴ but is alluded to in this article, in order to clarify certain statements regarding the BIAs relative to the countries that refuse to sign. Lastly, this article fills a gap in the literature by examining one continent's response to the BIAs relative to the US stance concerning the ICC.

Why should one bother with studies of certain regions? First, state behaviour deserves to be studied for the sake of understanding international relations behaviour as a whole. Second, according to Anda:²⁵

Neglecting the behaviour of weak states in foreign relations is contradictory and unjustifiable as the weakness of states should provide the basis for scholarly understanding of their efforts at co-operation in international fora.

Third, there seems to be a general assumption that weak states have no voice, no influence and no power. This study reinforces that weak states are powerful in their own right and do have avenues available to them should they seek to use them. African countries are more likely to obtain a greater benefit from co-operating with other institutional structures and allying with other regions that are cognisant of Africa's needs. This enables the weaker state to resist pressure or gain advantage over the stronger state.

As foreign policy scholars emphasise, studies of foreign policy that are generalisable should be applicable to all types of states. However, the factors we analyse may not be regionally specific. Regional organisations, NGOs, civil society, legal obligations and the issue of sovereignty are all variables that may be issues within other regions, although some variables may be more important than others. In attempting to generalise factors concerning the BIAs, we cannot have a general explanation or explanations to account for the trend in different countries.

Country approaches to the BIAs remain domestic affairs. It is interesting how the approaches remain diverse yet baffling on occasions. Each country is specific with a unique relationship with the US. (These positions may be similar or converging for some countries). Hence, unique and diverse political, economic and social contexts would explain the different positions. Perhaps key government players in these countries, such as heads of states, foreign affairs ministers and others may give us specific explanations as to how they approach US requests to sign or ratify BIAs. As it is, we can only speculate, provided this is grounded on some justification. Domestic variables, such as politics, social issues, elite behaviour, executive and judicial issues may also

²⁴ D Cotton *Carrots and sticks: The economic consequences of article 98 in the African region* (2007) (due in fall).

²⁵ MO Anda *International relations in contemporary Africa* (2000).

contribute to states' decisions in signing a BIA. These variables could be of further relevance concerning regional or individual country studies.

It is also useful to look at some additional data observations concerning this study. There has been some difficulty in finding certain country data in relation to the BIAs. Therefore, one weakness of this study is that some of the countries that are included in the regional organisations we discuss have not publicly released information as to why they signed a BIA. Was it pressure over aid that caused them to sign? One cannot positively say without delving deeper into each country's domestic affairs. It is suspect that after speaking with experts within Africa, some governments are hard-pressed to relinquish information in order to bypass fallouts from other governments. However, a lack of data should not keep a researcher from dealing with a particular issue.

Inquiries into the African Union (AU) did not produce anything substantial concerning mandates and the like. What we did find was that the AU deems the issue of jurisdiction a sovereign matter, thus it is hesitant to pressure states on the issue of a BIA. Since all 47 sub-Saharan African states are members of the AU, one recommendation would be for the AU to play a more prominent role in issues such as the BIAs through harnessing a collective political role considering its high profile involvement in peacekeeping. This issue would be relevant for future inquiry and research considering the huge obligations the AU is involved in currently; most notable, its peacekeeping initiatives in the region and its support to Sudan. Further research might also include the domestic politics of each individual country as a possible variable. This would involve a very large case study. These issues will be useful for an expanded study of Africa and for the inclusion of other geographical regions of the world. Another area for future research might include examining existing status of forces agreements (SOFA) in each government in Africa. In addition, examining each governmental response relative to understanding the legal ramifications of the BIA could be important. This would involve examining the constitution of each country to see if the executive may sign the BIA without the knowledge of parliament.

2 The International Criminal Court

In April 2002, the ICC Statute came into force with over 60 ratifications. The ICC is a permanent tribunal in which the crimes of genocide, war crimes and crimes against humanity are addressed. In May 2002, the US declared that it no longer intended to pursue ratification of the Rome Statute and asked to remove its signature from the Statute.²⁶

²⁶ Bill Clinton had then War Crimes Ambassador David Schaffer sign the Rome Statute on 31 December 2001. This signature would ensure that the US would still be able to be involved in the process of negotiations on the Court. US Department of State *Fact sheet: The International Criminal Court*, May 2002.

Threatening to withdraw American peacekeepers from Bosnia, the US pushed through Resolution 1422 in the UN Security Council in July 2002, exempting all UN peacekeepers from the ICC's jurisdiction for one year. This was renewed in June 2003.²⁷ The US then launched a campaign to ensure that its nationals would not fall within the jurisdiction of the Court.

The US concern lies within a situation where a US national could be accused of a crime in the territory of a state that is a party to the ICC. Under the 'principle of complementarity', the state where the crime occurred is obligated to surrender the US national to the ICC, if the state itself is unable or unwilling to prosecute the matter.²⁸ Of utmost importance to the US, this obligation applies even when the accused is a national of a state that is not a party to the ICC.²⁹ Additionally, the US has argued that the ICC lends too much discretion to prosecutors who may bring politically motivated charges against US citizens, officials and military personnel.³⁰ The BIAs sought by the US would require states to send an American national requested by the ICC back to the US instead of surrendering him or her to the ICC.

According to Rosenfeld, 'the terrorist attacks of September 11, 2001 dramatically changed US military strategy'.³¹ He explains:³²

While foreign countries have recently allowed the US to station troops on their soil as part of the US war on terrorism, it remains to be seen whether or not they will provide immunity against ICC jurisdiction in the form of Status of Forces Agreements (SOFAs).

Thus, Rosenfeld reasons: 'The war on terrorism has also exposed a need for access to foreign bases, thereby shifting some negotiating leverage in favour of the receiving country and away from the US.'³³ He continues:³⁴

²⁷ C Fehl 'Explaining the ICC: A practice test for rationalist and constructivist approaches' (2004) 10 *European Journal of International Relations* 357 362.

²⁸ Rome Statute of the International Criminal Court, Issues of Admissibility (1998) art 17(1)(a).

²⁹ n 28 above, arts 12 & 13.

³⁰ US Department of State (USDOS) Bureau of Political-Military Affairs *Frequently asked questions about the US government's policy regarding the International Criminal Court* (2003).

³¹ E Rosenfeld 'Application of US status of forces agreements to article 98 of the Rome Statute' (2003) 2 *Washington University Global Studies Law Review* 273 288.

³² Status-of-forces agreements define the legal status of US personnel and property in the territory of another nation. The purpose of such an agreement is to set forth rights and responsibilities between the United States and the host government on such matters as criminal and civil jurisdiction, the wearing of the uniform, the carrying of arms, tax and customs relief, entry and exit of personnel and property, and resolving damage claims; Status of forces Agreement (SOFA) <http://www.globalsecurity.org/military/facility/sofa.htm> (accessed 3 December 2004).

³³ As above; Rosenfeld (n 31 above) 288.

³⁴ Rosenfeld (n 31 above) 291.

In several cases, the US has obtained exclusive jurisdiction over military personnel from countries where it has been involved in humanitarian relief efforts or similar military interventions. These agreements have usually been negotiated with countries in dire need of US assistance that are willing to sacrifice legal jurisdiction in order to obtain economic or military aid... Negotiated on a case-by-case basis, these agreements responded to the necessity for immediate US military involvement.

However, in our view, with the recent history of wartime abuses; the alleged torture at Guantanamo Bay, the torture incidents at Abu Ghraib and the assault on Fallujah in 2004, the debate over the BIAs has become more prominent, which serves to re-emphasise the importance of the BIAs to the US and, ultimately, the scope of BIAs to governments around the world. In this respect, some governments are hesitant to sign a BIA. Moreover, the resultant pressure to do so means finding a way in which to resist. One way of resisting pressure is with and among regional organisations.

3 Resisting pressure: Regional organisations and others

3.1 Regional organisations

One factor that may influence a country's decision making is pressure within and among regional organisations. Pressure on a country in this sense refers to the influence that regional organisations have upon countries when it comes to decision making. Regional organisations often unite when supporting certain issues, thereby forming a coalition on deterring neighbouring states from doing what is against their interests. This is often accomplished by regional organisations creating mandates for their members to follow or making membership contingent upon states following certain requirements of the organisation. In Africa, there is widespread recognition of the benefits to be derived from regional collaboration.³⁵ As Peck explains:³⁶

Regional organisations are superior in being more familiar with local conditions, culture and actors. These organisations have expanded their capacity to take on certain objectives other than that for which they were originally designed, for example: Organisations such as the OAU (now the AU), ECO-WAS and the SADC, which originally formed for economic reasons, are now taking on a peace and security role, because of the realisation that the two issues are closely linked.

Thus, acting as a solid front, regional organisations often unite on common goals when it comes to foreign policy. The human rights

³⁵ R Gibb 'Southern Africa in transition: Prospects and problems facing regional integration' (1998) 36 *Journal of Modern African Studies* 287 289.

³⁶ C Peck 'The role of regional organisations in preventing and resolving conflict' in CA Crocker *et al* (eds) *Turbulent peace: The challenges of managing international conflict* (2001) 563 578.

issues that have affected African countries past and present, the obligations that arise from being a party to the ICC and the subsequent act of regional organisations taking on expanding roles may be a factor in a country's refusal to sign a BIA. Stein³⁷ suggests that '[r]egimes arise because actors forego independent decision making in order to deal with the dilemmas of common interests and common aversion. They do so in their own self-interest.' Hence:

Hypothesis 1: The seven countries refuse to sign a BIA because of an alignment and/or obligation to regional organisations.

This variable examines the regional organisations of the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC) in order to see if there is a correlation between any of the states being a member of the organisation(s) and/or being a party to the ICC. Specifically, do these organisations have specific mandates that would reinforce their legal obligation to the ICC, thus influencing countries' decision to sign a BIA? Have they organised meetings relevant to the issues of the BIAs, thereby forming a coalition on deterring members from signing them? Lastly, what accounts for the fact that some members of these organisations have signed BIAs while others have not? Statements from personal interviews, communiqués, mandates and reliable news sources are used to determine whether regional organisations exert an influence on a country's decision to sign a BIA. Not unlike regional organisations, civil society, NGOs and the media are also important in mobilising public opinion and mobilising government entities into making decisions.

3.2 Civil society, non-governmental organisations and the media

According to Almeida:³⁸

NGOs have learnt that . . . educating and mobilising public opinion provides leverage to influence policy decisions of states. The strategy used domestically is to target key actors in the government and members of parliament. Internationally it is to use every opportunity available to work within the framework of the UN and to place the establishment of the ICC on the political agenda of world leaders.

Civil society, NGOs and the media have had an impact on governments concerning the BIAs. For example, NGOs in Africa have offered workshops and/or mandates in support of the ICC of which the seven countries are members. These workshops have been instrumental in training officials on the issues and workings of the mechanisms of the ICC and BIAs. The workshops have also encouraged and involved civil society

³⁷ A Stein 'Co-ordination and collaboration: Regimes in an anarchic world' in S Krasner (ed) *International regimes* (1983) 116.

³⁸ I Almeida *Non-governmental organisations and the International Criminal Court* (date unknown) 63.

participation in engaging with governments to ratify and implement legal instruments important to the promotion and protection of human rights. Also, journalists, scholars and representatives of the African and US government involved in BIA issues have had a remarkable influence on ordinary citizens and local governments by educating them through the media on BIA basics. For example, the Kenyan media has been at the forefront of encouraging robust debate on both sides of the argument through commentaries such as those put forth by former US Ambassador to Kenya, William Bellamy, legal commentators such as Godfrey Odongo, members of parliament and the public. Television has also been an outlet for debates, especially in the case of Benin. Hence:

Hypothesis 2: The countries refuse to sign a BIA because they are under pressure from civil society, NGOs and the media that oppose signing a BIA.

Civil society and NGOs consist of a group of persons and/or a network of organisations that represent other persons and organisations in their communities concerning cultural, ideological or political issues. Pressure within civil society and NGOs represent the influence that these groups have on their respective governments concerning the BIA issue. This factor will be analysed by examining the influence of civil society and NGOs. Specifically, what steps have they taken and how significant has their influence been concerning the BIAs? Also, what impact has the media had on educating the public and alternately, influencing government decisions concerning the BIA issue? A third issue concerns the legal realm, surrounding the BIA itself, the ICC and constitutional statutes and existing international treaties of which these states are members.

3.3 Legal issues

While theories vary, there is a general understanding among international lawyers that states act within two realms: the external, where they are members of the international community, and the internal, where they exercise sovereignty over matters within their own territories. One consequence of this division is that international law generally leaves each state to give its own domestic effect to treaty obligations. In this respect, some states follow a 'monist' approach to international law. That is, international law and domestic law form a single body of jurisprudence governing internal affairs. Once ratified, treaties are regarded as self-executing or directly applicable, and they automatically have the force of law. Others adopt a 'dualist' view. They see international law as quite separate and distinct from domestic law, requiring an act of domestic legislation in addition to ratification before international norms become binding nationally. The legislation becomes the sole legal authority in the state. In this regard, African states vary widely in how they give effect to treaty commitments at home. So what happens when a court must choose between a treaty

provision and national law? One possible resolution is a constitutional provision giving treaties superior status over domestic law.³⁹ Many African constitutions incorporate such a provision, including those of Benin, Mali and Niger.

Certain governments in Africa have declared openly that they believe signing a BIA would violate their obligations as state parties under the Rome Statute. This is especially true concerning South Africa, a dominant power in the region, which has been very vocal in espousing its reluctance on signing a BIA which it believes would undermine the ICC. Another example is Benin, which originally sent the BIA to the Supreme Court for a legal analysis in order to get feedback on whether the BIA was consistent with domestic legislation per their obligation under the Rome Statute. Also, another trend within legal obligation includes the issue of accountability for human rights violations. The strong belief of African leaders as to the success of the ICC acting as a vehicle to end impunity and therefore increase the chance for regional stability is valid and one issue that should not be neglected.

There are a few more factors that may be less significant under legal obligation that we believe need to be discussed and that may contribute to whether a country signs a BIA. It should be mentioned here that these are personal opinions and are not quotes from government officials, scholars or journalists. Legal principles involving state obligations under the Rome Statute also include the issue of ICC judges elected from Ghana, Mali and South Africa to sit on the ICC bench. It serves to reason that any country that has a judge on the ICC bench would not do anything to undermine the functions of the Court. In this respect, we will analyse why Ghana chose to sign a BIA in spite of the fact that it has a judge on the ICC versus why Mali and South Africa refuse to sign a BIA. Another factor that might influence the legal principle is the International Criminal Tribunal for Rwanda (ICTR), which has its seat in Tanzania. Tanzania's relationship as the home of the ICTR falls under useful determinants in signing a BIA. A common sense approach is used regarding this issue because of the human rights issues that arise from being the host of the ICTR and because of the Tanzanian Embassy bombing (terrorism). In this respect, Tanzania has more than enough reason to refuse a BIA on the grounds of its history. It is also useful to explore why Rwanda signed a BIA and Tanzania has not relative to the ICTR. Hence:

Hypothesis 3: Based upon domestic jurisprudence, these countries refuse to sign a BIA because they believe it will violate their obligations as state parties to the Rome Statute and the Vienna Convention on the Law of Treaties.

³⁹ A Angwenyi & C Briggs 'How to ensure the judiciary enforces treaty obligations' African Centre for Technology Studies http://www.briggslawcorp.com/articles/Innovations_article.pdf (accessed 3 July 2005).

Common domestic jurisprudence as it applies to the legal factor means the application of foreign law to domestic law. This factor will be tested using comments from country officials, legal opinions from domestic courts and interviews with African journalists, law scholars and ICC experts. The data obtained for the case of Ghana and Rwanda are quite valid as it is derived from African news sources, scholarly writings and communiqués. The fourth and final issue concerns the much-examined and debated decision to maintain state sovereignty.

3.4 Sovereignty

One of the oldest factors concerning a state's decision to honour certain legal instruments is whether the state believes the instrument or the request in itself violates a nation's sovereignty. A common refrain popularly espoused about treaties is that they surrender national sovereignty and therefore represent a threat to a country's interests. Accordingly, the right to enter into a treaty and be legally bound by it is a vital aspect of any nation's sovereignty. Kilby discusses the issue of political sovereignty within the realm of aid. Although his essay is structured around official international aid, we have applied it to the bilateral aid relationship, since aid is at stake and weighs upon a country's decision to sign a BIA. Stressing the importance of the territorial domain and domestic policies of a sovereign state, he explains:⁴⁰

Any action that directly or intentionally threatens the integrity of the state or the welfare of its citizens is prohibited . . . The duties of the aid donor appear to require aid conditionality that conflicts . . . with respect for recipient state sovereignty . . .

Alternately, Herbst, in his influential study, entitled *States and power in Africa*, concludes that:⁴¹

African nations are still extremely insecure about their sovereignty because they do not exercise authority across their territories. Indeed, African nations jealously guard their sovereignty because it is so critical to the exercise of power and have consistently refused to implement arrangements like the European Union's that diminish the authority of states.

Hence:

Hypothesis 4: The countries refuse to sign a BIA because they believe the request by the US to sign a BIA violates state sovereignty.

In examining this factor, we will proffer statements from country officials, scholars and journalists who have stressed the importance of national sovereignty as a major issue in a country's refusal to sign a BIA. In sum, the following factors will be analysed in this study:

⁴⁰ C Kilby 'Aid and sovereignty' (1999) 25 *Journal of Social Theory and Practice* 84.

⁴¹ J Herbst *States and power in Africa* (2000) 234.

- Factor 1: An alignment and/or obligation to regional organisations;
- Factor 2: Pressure from civil society, NGOs and the media that oppose signing a BIA;
- Factor 3: Based upon domestic jurisprudence, the BIA would violate countries' obligations as state parties to the Rome Statute and the Vienna Convention on the Law of Treaties;
- Factor 4: The BIA violates state sovereignty.

The majority of countries in Africa need aid. However, aid does not seem to be a factor for deciding whether the seven countries in this study sign a BIA, thus, the need for other factors to be examined. The following section examines these factors in detail.

4 Data analysis and discussion

Hypothesis 1: The seven countries refuse to sign a BIA out of an alignment and/or obligation to regional organisations.

Regional organisations often unite when supporting certain issues, thereby forming a coalition on deterring neighbouring states from doing what is against their interests; especially if the organisation in question has a member mandate concerning a foreign policy issue at stake, then all things being equal, it would seem to hold true that countries would refuse to sign a BIA. Consistent with liberalism in that states may co-operate through internal mechanisms and bargaining, African countries have used regional organisations to their advantage; although it is obvious that not all countries within Africa have abided by regional organisation mandates. Regionally, at least 16 networks and organisations have been created in various African countries to support the ICC campaign.⁴²

Regionally, ECOWAS has always been highly involved and committed in the ICC ratification process by attending the early workshops available by ICC NGOs.⁴³ For example, in January 2002 in Abidjan, Côte d'Ivoire, ECOWAS and the ICRC co-hosted a seminar on the ratification and implementation of the ICC Statute. The meeting observed that all ECOWAS member states are party to the 1949 Geneva Convention and their additional Protocols of 1997, and that these treaties require state parties to adopt national implementing measures in respect of the Geneva Convention and the repression of grave breaches of international humanitarian law based on universal jurisdiction.⁴⁴

⁴² See CICC Key Networks 'Africa country information' <http://www.iccnw.org/?mod=regionalnetworks®ion=1> (accessed 31 March 2007).

⁴³ Human Rights Watch 'Special issue and campaigns for the ICC: World Report 2002' <http://www.hrw.org/wr2k2/contents.html> (accessed 12 April 2005).

⁴⁴ BC Olugbuo 'Implementation of the Rome Statute of the ICC in Africa: An analysis of the South African legislation' (2004) 1 *Eyes on the ICC* 197-194.

In addition, there is evidence to substantiate that external relations have played a big part in motivating and educating African states on the workings of the ICC in general. For example, Canada is one of the largest donors to ECOWAS and one of the strongest proponents of the ICC.⁴⁵ Canadian justice officials, at a meeting with ECOWAS members in Abidjan, Côte d'Ivoire in January 2002, advised the West African states on the implementation of the Rome Statute. Participants agreed that political capacity exists in most ECOWAS communities to work towards a smooth transitional process in implementing domestic legislation. All participants drafted a plan of action based on a common strategy to collaborate with governments to further the ICC campaign in the region.⁴⁶

South Africa also wields enormous influence in the southern region of Africa and has been a leader of the 'like-minded group' of more than 90 states, which seeks to form an ICC with strong and independent powers.⁴⁷ It has played an important role in the establishment of the ICC. Delegations from Lesotho, Malawi, South Africa, Swaziland and Tanzania had participated in the effort to establish the ICC from as early as 1993. A number of consultative meetings were held between 1995 and 1997 to consider the possible implications and benefits arising from the establishment of the ICC. Additionally, on 14 September 1997, legal experts from the SADC states adopted the 'Principles of Consensus' in Pretoria and later issued a 'Common Statement' which subsequently became the instruction manual for SADC's negotiations during the Rome Conference in 1998.⁴⁸ Approximately one year after the Rome Conference in 1998, the members of SADC assembled a workshop in Pretoria to develop legislation intended to address all of the members' domestic concerns with ratifying the Rome Statute and to prompt its members (Lesotho, South Africa and Tanzania) to co-operate on advancing its causes, thereby showing the importance of international and regional co-operation for the future of the ICC.⁴⁹

Furthermore, the Pretoria Statement adopted by the delegates of the SADC states lists three elements of which 'legal principles' play a role in their decision to abide by the Rome Statute and its provisions: (1) the importance of safeguarding the integrity of the Rome Statute; (2) affirming their desire to work together as SADC states; and (3) acknowl-

⁴⁵ Human Rights Watch *The status of ICC implementing legislation*.

⁴⁶ 'African countries stress importance of national implementation' (2002) 20 *ICC Monitor* 1 5.

⁴⁷ Human Rights Watch *Rights group praises South Africa for stand on International Criminal Court* 15 June 1998.

⁴⁸ Olugbuo (n 44 above) 192-193.

⁴⁹ Pretoria statement of common understanding on the International Criminal Court adopted by the delegates from the SADC states at the Conference on the International Criminal Court, Pretoria 5-9 July 1999 <http://www.iccnw.org/publications/monitor/12/monitor12.199908.pdf> (accessed 2 May 2005).

edging the important role played by the SADC countries in the adoption of the Statute.⁵⁰ Additionally, during the treaty negotiations for the ICC in Rome in 1998, South Africa, a democratic leader in the region, along with other states from the SADC, played an essential role in thwarting the efforts of some major powers to weaken the Court. The strong united support for the ICC from SADC nations, which South Africa helped to forge, was critical to the successful adoption of the Rome Treaty in the face of strong opposition from the US.⁵¹ It openly opposed the invasion of Iraq by the US and has been verbally dominant in its approach to the BIA issue. Alternately, Lesotho, Namibia and Tanzania are all SADC states, not to mention that they were regarded as frontline states in the ending of apartheid in South Africa. Lesotho is surrounded geographically by South Africa and economically dependent upon it. Additionally, its internal affairs are strongly influenced by South Africa. South Africa and Namibia also have a very long historical link in that Namibia, being formerly South West Africa, is largely economically dependent upon South Africa. This commonality between the three could reinforce the stance that their respective governments have taken on the BIA issue. According to Thuita Mwangi, former Political Affairs Officer in Kenya, '[t]here was an effort to form an East African position on the BIAs, but once Uganda signed a BIA, the issue became moot'.⁵²

However, Uganda is the only country in the East African Community (EAC) trade bloc that has signed a BIA with the US.⁵³ In addition, the ACP-EU Joint Parliamentary Assembly met in Brazzaville, Republic of Congo from 31 March to 3 April 2003. At this meeting, the assembly specifically addressed the incompatibility of the Rome Statute with the BIAs and its relationship with the ACP-EU member states:⁵⁴

- (4) recognises that the agreements proposed by the US are contrary to the Rome Statute and the treaty commitments of the EU member states;
- (8) Expects the EU and ACP governments and parliaments to refrain from adopting any agreement which undermines the effective implementation of the Rome Statute; considers therefore that ratifying such an

⁵⁰ As above.

⁵¹ Human Rights Watch 'South Africa praised on International Court: Pretoria becomes 23rd state to ratify War Crimes Tribunal' New York, 27 November 2000.

⁵² T Mwangi 'Relevance of ICC to Kenya: Interpretation of article 98 to the Rome Statute' Kenya National Commission on Human Rights The Forum on the ICC and African Court on Human and People's Rights 27-30 October 2004. Follow up on article: Phone interview with author July 2005. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

⁵³ F Oluoch 'Kenya on collision course with ICC' *The East African* 25 April 2005 <http://www.nationmedia.com/EastAfrican/25042005/Regional/Regional2.html> (accessed 27 April, 2005). However, Burundi and Rwanda, who will become members of the EAC in July 2007, have both concluded BIAs.

⁵⁴ ACP-EU Joint Parliamentary Assembly 'Resolution of the International Criminal Court (ICC)' ACP- EU3560/03/fin.

agreement is incompatible with membership of or our association with the EU or the ACP-EU Joint Parliamentary Assembly.

Unfortunately, out of the number of member states in the aforementioned organisations, more have signed BIAs than not. Although organisations may entertain the notion of a mandate concerning a certain foreign policy issue, the states themselves, if they are not held to a mandate, may feel obliged to go along with the US request to sign a BIA. Thus, the mandates of organisations within Africa have not had an overwhelming impact concerning the BIA issue, unlike the EU, which at one point entertained the idea of membership contingent upon not signing a BIA, thus another reason why countries within the African region may feel less hesitant about complying with the US request to sign a BIA. We must therefore entertain the notion of additional factors.

Hypothesis 2: Countries refuse to sign a BIA because they are under pressure from civil society, NGOs and the media that are against signing a BIA.

NGOs, civil society and the media educate and mobilise public opinion, thereby providing leverage in order to influence policy decisions of states. One senior official of a small West African country was recently surprised that the US was using tremendous pressure to approach his country, which has never been tied to any military co-operation with Washington and for which there is almost no possibility of troop presence.⁵⁵ To address this issue, a number of NGOs have worked with countries in order to speed up the implementation of domestic legislation concerning the ICC. There have been workshops held in Burundi, DRC, Nigeria and Tanzania addressing legislation, draft implementation and human rights issues. Meetings were held in countries in all regions, illustrating the importance placed on universal acceptance of the ICC.⁵⁶

Respectively, the same efforts have taken place in relation to the BIA issue. According to Kambale:⁵⁷

African NGOs are aware of the importance of forming a common strategy to address challenges to ratification and implementation in Africa. Their actions will have to rest on three pillars: the central role of local organisations; good coordination among organisations; and better access to decision-makers.

Furthermore, national NGOs are more familiar with the decision-makers and the political climate, and have a better sense of what strategies will be more effective in each country.⁵⁸ The plan of action of the civil society participants at the recent ECOWAS conference in Abidjan sent

⁵⁵ 'The United States attacks the ICC: Africa must consolidate its resistance' *ICC Monitor* 7 February 2003).

⁵⁶ 'Conferences stress implementation and universal ratification of Rome Statute' *ICC Monitor* 12 February 2003.

⁵⁷ P Kambale 'New momentum and new challenges for Africa's ratification campaign' *ICC Monitor* 6 April 2002.

⁵⁸ As above.

a clear message to the region. Participants decided to make a concerted effort between and within NGOs to involve other civil society representatives. The success of the talks in Niger between the Coalition for the International Criminal Court (CICC), the Lawyers Committee on Human Rights (LCHR), Human Rights Watch (HRW), the media, the Niamey Faculty of Law and the 20 or so national NGOs is a good example of the benefits of increased consultation with civil society.⁵⁹ Regional conferences are always an excellent opportunity for such consultations. They allow the NGOs of several countries of the same region to improve their respective campaign techniques by learning from one another. More direct and restricted meetings on a national level, however, can also be very effective in co-ordinating and raising awareness among civil society participants. This was confirmed at the meeting in Niger when the representatives of the entire national NGO community and of three international NGOs had an in-depth consultation and discussion of the ICC Statute, its mechanisms and potential challenges to practical application.⁶⁰

Tanzania also has a large NGO community that has close relations with the government, while Benin has a very strong human rights NGO presence in their country and is a model in the region concerning the education of civil society regarding ICC legislation and information on the BIA issue. Francis Dako of the CICC emphasises the importance of civil society and NGOs concerning the BIAs.⁶¹

In respect to Benin (that held out for so long), Mali and Niger and their ability to withstand US pressure concerning the BIAs, one main reason can be given for this: The present state of activeness within civil society organisations and NGOs have gone a long way by hampering the inability of the governments in these countries in acceding to the BIAs, even if the governments wanted.

He continues regarding Mali:⁶²

National pride has influenced policies in most African countries in recent times. In the case of Mali, for example, partisan pressures and national pride in not wanting to be stigmatised as a 'puppet government' of the US superpower status, irrespective of whatever economic incentives the US government gives to boost its economy, is, to my understanding, the reason why the Malian government has refused to sign the BIA.

Dako emphasises the importance of NGOs in promoting an awareness of issues related to the ICC:⁶³

⁵⁹ As above.

⁶⁰ As above.

⁶¹ F Dako, ICC Francophone Africa Co-ordinator (Cotonou, Benin), interview with Deborah Cotton 7 June 2005. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

⁶² As above.

⁶³ F Dako 'Benin: A model for co-operation between government and civil society' *ICC Monitor* June 2004.

In December of [2002], a dozen local NGOs created the Benin Coalition for the ICC. . . . Composed mainly of human rights specialists and law practitioners, [they] developed a close collaboration with government experts interested in the ICC process, including officials of the Ministries of Justice and Foreign Affairs. As a result, NGOs have been able to engage in frank dialogues with government institutions. . . . Furthermore, NGOs in Benin also successfully encouraged the government . . . to resist intense pressure from the Bush administration to sign a BIA . . . NGOs urged the government to not vote in favour of UN Security Council Resolution 1422 1487 which concerns the exemption of peacekeepers from non-state parties of the Rome Statute from the jurisdiction of the ICC. The good relationship between civil society and public institutions regarding the ICC is a positive development in Benin and serves as an example for other states in the region and elsewhere.

Additionally, South Africa is unique in that NGOs and civil society have a considerable say in the matters or affairs of government. Indeed, many government officials and Ministers were drawn from NGO ranks. This has meant that the South African government is very responsive to international influence, including the influence of international treaties; human rights treaties included.

There have been two human rights organisations within Namibia that have been instrumental in pressuring the government to not sign a BIA. The National Society of Human Rights (NSHR) urged law makers not to agree to US requests to sign a BIA and the Legal Assistance Center (LAC) backed the Namibian government to reject a request by the US to shield its soldiers from prosecution in the ICC.⁶⁴ Similarly, in Kenya, the National Commission on Human Rights (KNCHR) has been instrumental in educating the public and government concerning the ICC and BIAs. In a forum hosted by the Commission, the former Director for Political Affairs Thuita Mwangi stated:⁶⁵

Article 98 was never intended for use to enact new agreements and Kenya must be commended for standing up to the US purely for the stakes involved in as far as Kenya's role as a regional mediator and for resisting US pressure when it seeks to bully those states that have chosen to stand with the ICC.

In addition, KNCHR has been at the forefront of leading discussions by individuals and civil society on the need for an implementing domestic legislation as soon as Kenya ratified the Rome Statute. KNCHR has the statutory mandate to act as the chief government agent in ensuring that the government complies with its obligations under international treaties and conventions. It is under this mandate that the Commission

⁶⁴ Summary of information on Bilateral Immunity Agreements (BIAs) or so-called art 98 agreements as of 14 April 2006 http://www.iccnw.org/documents/BIADb_Current.xls (accessed 6 May 2006).

⁶⁵ T Mwangi 'Relevance of ICC to Kenya: Interpretation of article 98 to the Rome Statute', KNCHR, The Forum on the ICC and African Court on Human and People's Rights 27-30 October 2004. Note: These are personal opinions and should not be stated as an opinion of the Kenyan government.

has been actively involved in bringing together stakeholders such as government ministries, the judiciary, the police, academics and civil society organisations to ensure that Kenya complies with its international obligations under the Rome Statute. The Commission organised a workshop in October 2004 to raise awareness on the ICC and subsequently facilitated public deliberations on the significance of article 98 of the Rome Statute and the BIAs. Kenya acceded to the Rome Statute on 15 March 2005, which created an obligation to ensure implementation of the Statute in Kenyan national legislation. The International Crimes Bill was published by Attorney-General Amos Wako on 24 March 2005, and states in its Preamble that its objective is to provide for the punishment of international crimes, specifically genocide, crimes against humanity and war crimes, and to enable Kenya to cooperate with the ICC. In July 2005, the Commission organised a workshop attended by government representatives, civil society, both Kenyan and international, and Kenyan and foreign legal experts. Workshop participants reviewed the draft International Crimes Bill and adopted recommendations that would contribute to the development of a final draft that effectively implements the Rome Statute.⁶⁶

The media has also had a great influence in educating and mobilising public opinion on the BIA issue. According to Dako, '[a]mong other activities in Benin, a televised debate was organised to increase awareness of this issue among the public'.⁶⁷ Also, numerous US and African government officials have taken to the newspapers to express their views. In this respect, William Bellamy, the former US Ambassador to Kenya, and Godfrey Odongo, a legal commentator, have been at the forefront of the debate of the BIA in Kenya and in the African region as a whole. Their numerous commentaries have led to a robust debate on both sides of the issues and have invited comments from dignitaries and the public alike in addressing support for countries to remain steadfast in their decision to not sign a BIA.

In sum, numerous influences contribute to a country's stance on the BIA issue: internal and external. Thus, there is not only the pressure to sign a BIA, which a government must consider, but also the enormous pressure not to sign. In this respect, it could be that some governments face a Catch-22 situation: anger the US and appease civil society or *vice versa*. This is very true for those young democracies such as Benin, which had refused to sign a BIA for some time, and Mali, which still faces increased pressure to maintain the status quo. This is where civil society and local NGOs are helpful in that they may assuage the concerns of both parties through education and support, not to mention

⁶⁶ Kenyan National Commission on Human Rights (2005) Report of the Stakeholders Workshop to analyse the International Crimes Bill, March 2005, held in Mombasa, Kenya 14-26 July 2005.

⁶⁷ As above. F Dako Interview with Deborah Cotton, 7 June 2005.

developing stronger ties with government officials, thus influencing decisions concerning foreign policy issues.

The third issue rests within the legal realm of domestic decision-making processes.

Hypothesis 3: Based upon domestic jurisprudence, the countries refuse to sign a BIA because they believe it would violate their obligations as state parties to the Rome Statute and the Vienna Convention on the Law of Treaties.

All of the seven countries have worked vociferously to draft domestic legislation in order for laws to be consistent with the Rome Statute. They have also covered all of the legal aspects of the BIA issue when needed with NGOs, legal scholars and government officials. For example, Benin has been a model when it comes to enacting legislation to cover the Rome Treaty and its model had been followed by various countries in the region. Additionally, Benin sent the BIA to its Supreme Court for a legal analysis and *per* the Court, the violation of obligations under the Rome Statute initially prevented Benin from signing a BIA along with its obligations as a state party to the Vienna Convention on the Law of Treaties (VCLT). The issue of legality seems to be an overriding issue concerning some states' decisions to sign a BIA. For example, according to Dako:⁶⁸

Obviously, certain domestic issues, legal obligations, and alternate aides have obliged some of these countries from signing the BIA. To illustrate this point, we can take the case of Benin. In this country, the primacy of law obliges the Head of State to seek legal opinions prior to acceding to any international agreement. And from the legal opinion issued by the Supreme Court, the government of Benin cannot sign the bilateral agreement proposed by the American government without compromising its obligations under the Rome Statute establishing the ICC. A common stance is that Benin, Mali and Niger are state parties to the Rome Statute and have common domestic legislation that deters them from signing any international agreement that will compromise their commitment to the ICC.

The Supreme Court opinion stipulated that Benin could not sign an agreement which would violate its obligations to the spirit and letter of the Rome Statute because:⁶⁹

(1) General Principles Governing the Implementation of Treaties

It should be recalled that the rule *pacta sunt servanda* affirmed in the Vienna Convention of 23 May 1969, to which Benin is also a party, determines that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith' (article 26). The corollary of this provision can be found in article 18 of the

⁶⁸ As above.

⁶⁹ Benin Supreme Court legal opinion on a bilateral agreement between the United States and the government of the Republic of Benin relative to art 98 of the Rome Statute Establishing the International Criminal Court 3. Note: Thank you to Francis Dako for information concerning Benin.

Vienna Convention which provides that 'a state is obliged to refrain from acts which would defeat the object and purpose of a treaty'.⁷⁰

(2) Specific obligations of Benin to the Rome Statute

Benin ratified the Rome Statute, which imposes obligations such as co-operation with the International Criminal Court; the reach of such obligation would be limited by the draft agreement submitted for signature. Benin cannot go against the Rome Statute by basing itself on the examples of article 98 of the Statute. In the absence of reservations, which article 120 formally prescribes, any agreement which would come into effect following [the ratification of] the Rome Statute can only be interpreted as violating the good execution of its obligations.⁷¹

(3) Regarding the internal order

The Benin Constitution of 11 December 1990 defines the principles of defence of human values as indefeasible; it therefore cannot admit through bilateral agreements provisions that hamper the prosecution of crimes against humanity. Benin cannot sign the bilateral agreement, especially given the fact that it failed to emit any reservations during the ratification of the Rome Statute, pursuant to the provisions of article 124 which stipulate that 'a state which becomes party to the statute can declare, for a period of seven years from its entry into force of the statute, that it will not accept jurisdiction of the Court over the crimes defined in article 8 when it is alleged that such crime was committed on its territory or by one of its nationals'. Furthermore, if the motivations of Benin at the time of ratification have changed in light of new circumstances by virtue of the *rebus sic stantibus* rule, according to which a state can invoke fundamental change of a circumstance to modify the content of its obligations, the government of Benin could then foresee, prior to the signature of the said draft bilateral agreement, an amendment, revision or withdrawal provided for respectively in articles 121, 123 and 127 of the Rome Statute.⁷²

In spite of Benin's strong stance against the BIA, according to Citizens for Global Solutions, 'Benin signed a BIA as it risked losing up to \$250 000 IMET funds for fiscal 2005 and up to \$50 000 IMET funds for fiscal 2006'. In fact, US military aid to Benin is estimated around US \$5 million annually, mostly going to the maintenance and equipment of the regular armed forces of Benin. This constitutes a significant part of the Beninese military budget, estimated to be at US \$27 million

⁷⁰ n 69 above, 3.

⁷¹ n 69 above, 4.

⁷² As above.

annually,⁷³ thus, there was a huge amount of pressure for Benin to sign a BIA. Additionally, in an interview by Deborah Cotton with Ambassador Théodore Comlanvi Loko of Benin in June 2006, Ambassador Loko stated:⁷⁴

Although Benin believed that the US position on the BIA was out of line with the Rome Treaty, a BIA was signed without the knowledge of the Constitutional Court . . . The government of Benin also made an agreement with the US that if a soldier from the US is arrested for war crimes and sent back to the US, then Benin wants evidence of the prosecution.

In lieu of this, the fact remains that Benin is seen as a model for the region, despite the fact that they bowed to US pressure to sign a BIA.

Niger has also determined that its Constitution does not allow it to sign a BIA.⁷⁵ Considering the common domestic legislation between Benin, Mali and Niger, it remains to be seen how long Mali and Niger will hold out. Also, although Nigeria has already signed a BIA, it is now threatening to rescind its signature. For example, after putting pressure on President Olusegun Obasanjo to rescind Nigeria's BIA with the US, the Nigerian senate passed a resolution declaring the BIA null and void. The senate reasoned that⁷⁶

[b]ecause the National Assembly was not consulted when the BIA was signed, it was in contradiction to section 12 of the Nigerian Constitution and therefore null and void.

The implications of Benin signing a BIA without the knowledge of the Constitutional Court and of Nigeria signing a BIA in contradiction of its Constitution is unknown, but does open an avenue for further research.

Alternately, a feeling of legal obligation towards the ICC is discernible in South Africa. If one were to look at the general African record, a feeling of legal obligation towards the ICC is a premise that one can say has shaped Africa's perception towards the ICC. This is motivated by a number of factors: First, Africa, more than any other continent, remains the bloody continent of wars in which atrocities abound. It is to be applauded that many initiatives at different levels are now in place to negotiate peace, forestall or prevent war, and so on. However, the fact is, these wars have had a big influence on the conscience of African governments, which have moved with remarkable speed to be party to the ICC by ratifying the Rome Statute. The motivating factor seems to

⁷³ 'US suspends military aid to Benin' *AFROL News* 4 July 2006.

⁷⁴ Interview by Deborah Cotton with Ambassador Théodore Comlanvi Loko of Benin at the Senior Leader Seminar, Africa Centre for Strategic Studies, Atlanta, Georgia, 11-23 June 2006.

⁷⁵ ND Kristof 'The US's schoolyard bully diplomacy' *The Daily Journal Caracas*, 15 February 2006 <http://www.thedailyjournalonline.com/article.asp?CategoryId=13303&ArticleId=200653> (accessed 15 May 2006).

⁷⁶ Citizens for Global Solutions 'Nigeria's senate wants BIA rescinded; Declares BIA null and void' 17 August 2005 http://www.globalsolutions.org/issues/bia_resource_center/learn/Nigeria (accessed 12 May 2007).

be a desire to say 'no' to crimes within the ICCs ambit (hence legal obligation). This desire to affirm a legal obligation may have filtered into the refusal by a number of African states to water down the ICC's purpose by being a party to the BIAs.

On the other hand, the South African government is very responsive to the influence of international treaties. This extends to their Constitution, as interpreted by an independent Constitutional Court. In effect, this means that the ICC rule of law framework falls into the scheme of a government of democracy, which is receptive to international ideas. There is in place a judiciary, which is ready to question and in some cases veto the executive and/or parliament, which have the hallmarks of independence. These are relevant factors for South Africa's approach to a number of issues. The influence of international law on a number of issues, such as women's rights and domestic legislation, children's rights, restorative justice, and so on, is directly observable in South Africa, even in court jurisprudence, more so than, say, Kenya, where international laws influence a number of issues.

There is also the significance of domestic legislation versus international law. In most anglophone African countries (with an English common law or Roman-Dutch law heritage in their legal system), a system of dualism applies in respect to the application of international law, hence, domesticating legislation is often needed to bring into force international treaties. This may even apply to francophone African countries (with a civil law system) and a monist system where a treaty is not self-executing, like a significant part of the Rome Statute. The record of domestication with regard to general UN treaties, for example the International Covenant on Cultural, Economic and Social Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, and so on, has not been very good. However, the ICC treaty seems to be a different case. Domesticating legislation is in place or in the pipeline. What this tells us is that a number of African countries are taking their legal obligation under the ICC treaty seriously. This can be supported further by the premise that Africa had a prominent place in the drafting stage of the Rome Statute (unlike in many other treaties, for example, the Convention on the Rights of the Child that had only one sub-Saharan African state representing the continent). This way, Africa may feel as much a part of the ICC process as the rest of the world. Hence an active participation post-adoption of the ICC treaty as evidenced by ratification, nomination and the election of judges, other officials and ICC meetings.

Kenya also opposed signing a BIA in part because of legal issues. The Law Society of Kenya (LSK) believes that the BIA amounts to double standards. Former Chairperson Tom Ojienda said:⁷⁷

⁷⁷ As above.

The BIA is contrary to international law and would constitute a betrayal of the Kenyan people. The BIA also contravenes article 18 of the VCLT, which states that countries that have ratified a treaty are obliged to refrain from acts that defeat the object and purpose of the treaty.

Mutula Kilonzo, a then nominated Kanu member of parliament, argued:⁷⁸

Kenya should stand firm and only react to good laws given that the US has in the past two decades been perceived as the vanguard of human rights, rule of law, administration of justice and governance. For lawyers and the LSK, the key issue is that signing a BIA with the US could also mean the loss of EU support for any lawyer from Kenya ever getting a job at the ICC as a judge or prosecutor.

At a meeting for the formation of a South Africa-Kenya Bi-National Commission (BNC), both governments rejected what they called 'US intimidation and diplomatic arm-twisting' on the BIA issue.⁷⁹ Additionally, the South African cabinet announced its decision not to sign a BIA with the US, stating that 'South Africa's position in this regard is premised on its commitment to the humanitarian objectives of the ICC and the country's international obligations'.⁸⁰

A few African countries may have other reasons for not signing a BIA through special ties to the ICC. For example, the South African government nominated Judge Navanethem Pillay, President of the ICTR, for election as a judge at the ICC. Alternately, Mali nominated Judge Fatoumata Dembele Diarra, who served as *ad litem* judge in the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁸¹ It serves to reason that any country that is a state party to the ICC and has a judge on the ICC bench would not do anything to undermine the functions of the Court. Ghana, who also has a judge on the ICC bench, did not sign a BIA, but instead received a waiver from the US. This waiver means that Ghana is exempt from ratifying a BIA and its military aid would not be affected. It did, however, sign an executive agreement stating that it would not extradite US nationals to the jurisdiction of the ICC.⁸² In addition, at a meeting on the ICC and Africa in 2003, the Minister of Foreign Affairs of Ghana, the Honorable Nana Akufo-Addo stated:⁸³

⁷⁸ As above.

⁷⁹ As above. Summary of information on Bilateral Immunity Agreements (BIAs) or so-called article 98 agreements as of 28 June 2005.

⁸⁰ D Pressly 'We'll go it alone, SA tells US' news24.com 24 July 2003 http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1392282,00.html (accessed 5 March 2005).

⁸¹ International Criminal Court homepage 'Judge Biographical Notes'.

⁸² Presidential Determination No 2003-27, Waiving prohibition on United States military assistance.

⁸³ Africa Legal Aid (AFLA) 'The International Criminal Court and Africa' Accra, Ghana 24-25 October 2003.

Despite the various conflicts that continue to bedevil the continent, the masses of people continue to support the rule of law. The signing of article 98 agreements with the United States is not a reflection of double standards but rather a continuation of the United States policy of not supporting the Court. The emphasis should be to make the rule of law effective at the national level.

It is safe to say that, although Ghana signed an executive agreement, it does not take away the concept of the rule of law inherent to the ICC.

Although we did not find any concrete evidence linking Tanzania's not signing the BIA to the ICTR, it stands to reason through common sense that it might have some effect on the government's decision to abide by its principles under the Rome Statute. If anything, the ICTR has shown that the presence of the Court raises the awareness of the importance and value of human rights and serves as a deterrent for the commission of war crimes. The government of Tanzania is frequently called upon to mediate between its neighbours. For example, it served a crucial political role, serving as the seat for the Arusha peace talks aimed at ending the ethnic bloodshed in Burundi.⁸⁴ In addition, Desire Assogbavi, an Outreach Liaison for the CICC, stated that 'Tanzania would not sign a BIA because it finds the views by the US towards the ICC confusing considering the US support for the ICTR'.⁸⁵ As for the ICTR, it is important to acknowledge that Rwanda is not a party to the ICC, although its 1994 genocide resulted in the creation of the ICTR. It is also common knowledge that the current Rwandan government has been very dissatisfied with the slow pace of trials and the bureaucracy involved in the ICTR and thus did not sign on as a party to the ICC. Thus, the Rwandan government signed a BIA.

In sum, the legal obligation that some countries in Africa feel towards the ICC is very strong and not surprising, considering the comments put forth by various experts and officials. It is possible that, although some countries signed a BIA because of aid, they still feel strongly towards the ICC. This can be seen by the countries that currently have situations pending before the court (Sudan excluded). It is pretty much a foregone conclusion that, if a country cannot handle its own legal affairs, then it will most likely refuse to give up aid that would benefit it. In conclusion, it is our opinion that a legal obligation to the ICC is a powerful factor for whether the seven countries in this study sign a BIA. The fourth and final factor concerns the issue of sovereignty.

Hypothesis 4: The countries refuse to sign a BIA because they believe that the request by the US to sign a BIA violates state sovereignty.

⁸⁴ As above. USDOS, Tanzania.

⁸⁵ D Assogbavi 'Outreach liaison for Africa and Europe' CICC headquarters, New York July 2004. Phone interview by Deborah Cotton. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

According to Dako, sovereignty, more than other foreign policy issues, is of relevance when it comes to whether certain countries sign a BIA.⁸⁶

Regarding the issue of foreign policy differences between the US, Benin, Mali and Niger, they are infrequent: There have been no major disputes on record that would warrant such a strong anti-US stance as per the BIA issue. On the average, the US government has enjoyed good bilateral and multilateral co-operation with all three countries over decades. In our opinion, the government and people of Niger refuse to sign the BIA simply because they believe that any international agreement should serve her interest to the fullest, and also respect her sovereignty without bias.

In Kenya, government officials said that the US move showed a lack of respect for Kenya's sovereignty. Kenyan lawmaker Paul Muite reasoned:⁸⁷

The US can keep their dollars as long as they respect our dignity. It is not only Americans who can train our military personnel, and it is time we started looking at the European Union, China, South Africa or even Japan for such training.

According to then Director of Political Affairs, Thuita Mwangi:⁸⁸

Kenya does have some point of leverage with the US in that it is the site of the regional headquarters and has the largest US Embassy in East Africa, co-ordinating activities in nine other countries in the region.⁸⁹

David Musila, the Chairperson of the Liaising Committee of Parliament in Kenya, also stressed dissatisfaction with the US stance on the BIAs: Musila recalled the 1980s incident of a US soldier who killed a Kenyan woman but got off with a Sh500 fine and was repatriated back to the US:⁹⁰

We should not allow Kenya to be treated like that again. Let the Americans keep their money and we will protect our country's sovereignty.

Lesotho also cited sovereignty as an issue regarding the BIA. According to a statement made by His Excellency Professor Lebohng K Moleko:⁹¹

Lesotho favours an approach that would take into consideration the concerns of those who are still doubtful of the ICC, with a view to accomplishing

⁸⁶ As above. F Dako Interview with Deborah Cotton, 7 June 2005.

⁸⁷ 'Kenyans indignant over US pressure for immunity treaty' *Xinhua News* 31 May 2005 http://news.xinhuanet.com/english/2005-05/31/content_3028095.htm (accessed 19 June 2006).

⁸⁸ President Mwai Kibaki appointed Thuita Mwangi as new Permanent Secretary for Foreign Affairs of Kenya in 2006.

⁸⁹ As above.

⁹⁰ E Miring'uh 'MP's move to block state on ICC treaty' *The East African Standard* 4 June 2005.

⁹¹ His Excellency Professor Lebohng K Moleko Statement by Permanent Representative of Lesotho to the United Nations, at the first meeting of the Assembly of State Parties to the Rome Statute of the ICC 9 September 2002.

the universality of the Court. In a similar vein, Lesotho believes that the rights of states to sovereignty cannot be allowed to justify impunity and to compromise humanity's best hope for justice.

However, one problem with the sovereignty argument is that it does not explain why so many African countries have signed BIAs, while so few have not. Morgenthau adds a different dimension to the argument on sovereignty in that 'sovereignty is not freedom from legal restraint'. He explains:⁹²

The quantity of legal obligation by which the nation limits its freedom of action does not as such limit its sovereignty. The oft-heard argument that a certain treaty would impose upon a nation obligations as onerous as to destroy its sovereignty is, therefore, meaningless. It is not the quantity of legal restraints that affect sovereignty, but their quality. A nation can take upon itself any quantity of legal restraints and still remain sovereign, provided those legal restraints do not affect its quality as the supreme law-giving and law-enforcing authority.

Since so many African countries have signed BIAs, the sovereignty argument seems weak. After all, countries are free to reject any type of bilateral agreement. It seems more likely that the strategy used to get the BIAs signed could be of importance. It could be what some countries are referring to when they put forth the sovereignty argument. In other words, its not so much what you do but how you do it. For example, whom the US government sends to represent them and the diplomatic skills needed to persuade a country to acquiesce to a particular foreign policy issue is of relevance. For example, Colin Powell's powers of persuasion are different from John Bolton's (both have been responsible for the BIA issue at times). Later, Constance Newman, Head of African Affairs at USDOS, who is more familiar and sensitive to African politics, entered the fray. Currently, Robert G Loftis, a 26-year Foreign Service veteran and former ambassador to Lesotho, is currently the Senior Advisor for Security Negotiations and Agreements and is in charge of the BIAs.⁹³ Thus, whom the US sends diplomatically to make BIA arrangements is an important factor.

Of course, the other side to the sovereignty argument pertains to that argued by Kilby in that:⁹⁴

The duties of the aid donor appear to require aid conditionality that directly conflicts with respect for recipient state sovereignty in that it conflicts with the duty of the state to improve the welfare of its citizens, while at the same time preserving state sovereignty.

Kilby makes a crucial argument and one that may deserve closer attention provided there are no other factors than aid that would influence a

⁹² CJ Barker *International law and international relations* (2000) 42.

⁹³ US Department of State Office of Security Negotiations and Agreements (PM/SNA) <http://www.state.gov/t/pm/c17194.htm> (accessed 14 May 2007).

⁹⁴ As above. Kilby (n 40 above) 17.

country's decision to forego a BIA. In this respect, a government may feel that their duty to provide for citizens through aid is more powerful than the issue of state sovereignty.

Overall, the comments by government officials citing the sovereignty issue seem valid. However, the real question here is whether the issue is legal sovereignty, political sovereignty or both. We realised during the course of the research that sovereignty means different things to different people. No comment has been specific enough to conclude sufficiently that sovereignty is the most important factor concerning the BIA issue when so many other African countries have signed BIAs and not stressed the sovereignty factor. But it does seem so for the seven countries in this study, particularly Kenya and Lesotho. Perhaps, as reasoned by Kilby, improving the welfare of citizens is more important than the issue of sovereignty.

5 Conclusion

The degree of co-operation with respect to signing a BIA has been charted within the constraints imposed by regional organisations, NGOs, civil society, the media, a legal obligation to the ICC and state sovereignty. They remain important explanations of the ability of these states to refuse to give in to signing a BIA. Our findings sustain an approach very sensitive to the role of regional organisations.

Institutions are important within the African region. They create an atmosphere of co-operation whereby common interests are realised and whereby groups may mobilise in order to promote their agendas. This is evident regarding NGOs and civil society, citizen involvement in ICC meetings and workshops designed to facilitate the implementation of the Rome Statute, individual governments' work involving domestic legislation, and educating the governments of countries on the BIA issue. The legal obligations that all of the countries stress concerning the ICC is very relevant in that governments have used domestic legal institutions to examine the legality of the BIA in relation to their obligations under the Rome Statute and the VCLT. In the example of Benin early on, and in South Africa, this move had an effect on their decision regarding the BIA. A legal obligation also falls in line with and is indicative of how African governments weigh their decisions accordingly and analyse what benefits they may obtain by the strategic decisions they make.

The stance that South Africa and Kenya have taken is of relevance in the authors' view. Both governments have remained strongly committed to the ICC through the implementation of domestic legislation and their vocal opposition to the BIA issue via outreach programmes to all countries in Africa. Their goal and payoff have been to enforce their obligations under the Rome Statute regardless of the pressure from the US. In this respect, Kenya and Lesotho's governments have also

remained vocal and strengthened their ability to keep the US at arm's length through opposition to the BIA in the name of state sovereignty.

Individually, the most important variable that allows these seven countries to withstand pressure from signing a BIA seems to be a strong belief towards a legal obligation to the ICC. Although other countries that have signed the BIAs feel strongly about the ICC, there are obviously other mitigating factors such as aid and US involvement in the region, which would explain why they signed a BIA while at the same time supporting the ICC and its mission. The variables of judges and the ICTR alone may present a weaker argument, but when taking into account the statement of the government of Ghana on aid and the relevance of Rwanda's view toward the ICTR, the legal factor is strengthened concerning Mali, South Africa and Tanzania.

In addition, the regional organisations of ECOWAS and the SADC concerning mandates relative to the ICC and BIAs are powerful, yet do not explain why most of the countries in these organisations signed a BIA. The argument of sovereignty is a little elusive at best, as certain aspects of sovereignty are bound to be relinquished with any type of agreement between countries. In our opinion, the main issue lies within the coercive pressures put on a government and their ability or decision to stand up or back down on certain issues. However, the ability to remain firm in the face of pressure from the US is strengthened by the support of external allies, such as the ICC, human rights NGOs, law groups and the media. Moreover, there has always been a debate concerning sovereignty and legal issues, which may be useful for another study. A further study might also examine the political and legal implications of signing a BIA without the knowledge of the Constitutional Court, in contradiction of the constitution or by the executive without permission from parliament.

This research set out to explain the contributing factors that enable seven African countries to withstand pressure from the US by not signing a BIA. The ability of strong states to coerce weaker states into certain foreign policy objectives is nothing new. Moreover, the foreign policy decisions of weaker states concerning the BIA issue are interesting and relevant, not to mention overlooked in the literature. Although there is existing literature concerning the legality of the BIAs, there has been little attempt to analyse the behaviour of certain regions in response to the BIA issue, with the exception of Wylie's study on the Caribbean states and Boduszyński and Balalovsk's study on Croatia and Macedonia.⁹⁵ Thus,

⁹⁵ L Wylie 'Prestige versus pressure over the International Criminal Court: Response of the Caribbean states' Paper presented to the Annual Meeting of the Canadian Political Science Association University of Manitoba, Winnipeg, Manitoba, 2-5 June 2004; MP Boduszyński & K Balalovska 'Between a rock and a hard place: How the US-EU battle over article 98 played out in Croatia and Macedonia' Occasional Paper published by East European Studies at the Woodrow Wilson International Center for Scholars in Washington DC, No 71 September 2003.

this study contributes to the literature concerning Africa's response to the BIA issue. The interest in countries that do not sign a BIA is of importance as it helps to understand why and how weaker countries refuse to give into pressure from a stronger power. Although theories may provide explanatory power towards the understanding of state behaviour, specific variables are more instructive when examining why and how states behave as they do. The strong commitment of the seven countries in this study reinforce how co-operation and facilitation may be enhanced by taking advantage of institutional structures and mechanisms through regional and external state power relations.

Counter-terrorism legislation and the protection of human rights: A survey of selected international practice

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Summary

The 11 September 2001 attacks in the USA have recast global attention on terrorism. Following the attacks, a number of governments around the world rushed to enact legislation against terrorism while others have either introduced or have been constrained to introduce anti-terrorist legislation by the USA and its ally, the UK — as part of their ‘either you are with us or you are against us’ global anti-terrorism campaign. Others have resurrected draconian colonial anti-terrorism legislative measures. Almost invariably, these laws have greatly impinged upon or have serious implications for human rights and freedoms, and for the fundamental principles of humanity. This article provides an overview of the range, and human rights implications of anti-terrorism legislative measures adopted in selected countries in different geo-political regions of the world since 11 September. The article considers these measures in the light of the fundamental principles of humanity as reflected in the Turku Declaration. It is argued that each state should have, in co-operation with others and in accordance with the dictates of international law, the liberty to adopt counter-terrorism legislation that not only is consonant with its local circumstances, but also helps it meet its obligations under international law, including the

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primary obligation to protect the rights of all people without discrimination of any kind. Significantly, there is a need for the international community to deal with the problem of terrorism in a holistic manner that ensures that, in their quest to effectively deal with the terrorist threat, states do not erode the rights of all persons subject to their jurisdiction.

1 Introduction

The 11 September 2001 (11 September) attacks in the United States of America (USA) have recast global attention on terrorism.¹ In the aftermath of the attacks, a number of governments around the world rushed to enact legislation against terrorism. Among others, Australia,² Britain,³ Canada,⁴ India⁵ and the USA⁶ have all passed anti-terrorism legislation. Further, a number of countries in Africa⁷ and other parts of the developing world have either introduced or have been constrained to introduce anti-terrorism legislation by the USA and its ally, the United Kingdom (UK) — as part of their ‘either you are with us or you are against us’ global anti-terrorism campaign.⁸ Others have resurrected draconian colonial anti-terrorism legislative measures.

¹ Terrorism is not a new phenomenon. For a historical background, see MC Bassiouni (ed) *International terrorism and political crimes* (1975); A Cassese *Terrorism, politics and law: The Achille Lauro affair* (1989) ch 1; J Murphy ‘Defining international terrorism: A way out of the quagmire’ (1989) 19 *Israel Yearbook on Human Rights* 13; HH Han *Terrorism and political violence: Limits and possibilities of legal control* (1993); OY Elagab *International law documents relating to terrorism* (1999) xx-xxi; W Laqueur *A history of terrorism* (2001); A Sinclair *An anatomy of terror: A history of terrorism* (2004); H Duffy *The ‘war on terror’ and the framework of international law* (2005); JM Lutz & BJ Lutz *Terrorism: Origins and evolution* (2005); B Hoffman *Inside terrorism* (2006); B Saul *Defining terrorism in international law* (2006).

² Australia’s raft of anti-terrorism laws includes the Security Legislation Amendment (Terrorism) Act 2002 (No. 2), Suppression of the Financing of Terrorism Act 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002, Telecommunications Interception Legislation Amendment Act 2002, and Border Security Legislation Amendment Act 2002.

³ Anti-Terrorism, Crime and Security Act 2001 (ATCSA). New legislation, the Prevention of Terrorism Act 2005, has been enacted to replace the part 4 powers in the ATCSA with a new scheme of control orders.

⁴ Anti Terrorism Act 2001.

⁵ Prevention of Terrorism Act 2002.

⁶ Among others, USA PATRIOT Act 2001 and Homeland Security Act 2002.

⁷ African countries that have introduced or are in the process of introducing anti-terrorism legislation include Algeria, Egypt, The Gambia, Kenya, Mauritius, Morocco, Namibia, South Africa, Swaziland, Tanzania and Uganda.

⁸ See eg J Mulama ‘East Africa: The church slams anti-terror bills’ <http://www.lewrockwell.com/ips/mulama1.html> (accessed 13 December 2004).

Almost invariably, these laws have greatly impinged upon or have serious implications for human rights,⁹ particularly those of criminal suspects, political oppositions, migrants, refugees and asylum seekers. The laws also have implications for the fundamental principles of humanity as reflected in the Turku Declaration.¹⁰

This paper provides an overview of the range, and human rights implications of counter-terrorism legislative measures adopted in selected countries in different geo-political regions of the world since 11 September 2001. The paper also considers these legislative measures in the light of the fundamental principles of humanity set out in the Turku Declaration. It is argued that each state should have, in co-operation with others and in accordance with the dictates of international law, the liberty to adopt counter-terrorism legislation that not only is consonant with its local circumstances, but also helps it meet its obligations under international law, including the primary obligation to protect the rights of all people without discrimination of any kind. Most importantly, there is a need for the world to deal with the problem of terrorism in a holistic manner that ensures that, in their quest to effectively deal with the terrorist threat, states do not erode the rights of all persons subject to their jurisdiction.

Although a number of states have since 11 September either introduced or revived anti-terrorism legislation, this paper does not provide an exhaustive treatment of their legislative practice in regard to countering terrorism. Rather, it offers an overview of legislative measures adopted post-11 September in selected countries around the world: Africa (Mauritius, South Africa and Uganda), the Americas (Canada, Guyana and the USA), Australasia (Australia, India and Singapore), Europe (Italy, Sweden and the UK) and the Middle East (Israel, Iran and Saudi Arabia). These countries have been selected as case studies for three main reasons: (1) they represent a diversity of legal systems and regions; (2) each is a party to one or more of the main international

⁹ In October 2001, Amnesty International raised the concerns that '[i]n the name of fighting "international terrorism", governments have rushed to introduce draconian new measures that threaten the human rights of their own citizens, immigrants and refugees . . . Governments have a duty to ensure the safety of their citizens, but measures taken must not undermine fundamental human rights . . .' Common features of the new anti-terror laws include broad or vague definitions of new offences, wide powers of detention without trial, prolonged incommunicado detention (which is known to facilitate torture), intrusions into privacy, and measures which effectively deny or restrict access to asylum or speeds up deportation.

¹⁰ See Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Abo Akademi University, Turku/Abo, Finland, 30 November to 2 December 1990.

human rights treaties,¹¹ and (3) each is a party to one or more of the various international and regional human rights conventions and agreements relating to terrorism. Ease of access to relevant national legislation was another factor influencing choice of case studies. It should be noted, however, that reference will be made where appropriate to the situation in other countries.

The human rights concerns explored in this paper include the effects of anti-terrorism legislation on refugees and minorities, access to legal representation, infringement of privacy, and limitations on political rights and freedoms.

It should be noted from the outset that there is no universally accepted definition of terrorism.¹² Since the 1920s, the international community has unsuccessfully attempted to formulate a universally accepted definition of terrorism. This 'definitional knot' is primarily attributable to the fact that terrorism is an inherently controversial and elusive concept which evokes strong emotional and contradictory responses. Although the use or threat of violence for the achievement of political ends is common to both states and non-state groups, there is no agreement on when use of violence may be considered legitimate. For example, while developing countries have tended to exempt the actions of national liberation movements from the concept of terrorism,¹³ developed countries have confined their use of the term to violence by those opposing the established order.¹⁴ Thus, it is common to hear of the relativist adage that 'one man's terrorist is another man's

¹¹ The principal international human rights treaties are the International Covenant on Economic, Social and Cultural Rights (CESCR); the International Covenant on Civil and Political Rights (CCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (MWC). See Office of the United Nations High Commissioner for Human Rights *Status of ratifications of the principal international human rights treaties as of 9 June 2004* <http://www.unhchr.ch/pdf/report.pdf> (accessed 13 June 2006). It is notable that, in addition, some of these countries have constitutions that guarantee human rights.

¹² A 1988 study identified 109 definitions covering 22 definitional elements. See AP Schmid & AJ Jongman *Political terrorism: A new guide to actors, authors, concepts, databases, theories and literature* (1988) 5. See also R Higgins & M Flory (eds) *Terrorism and international law* (1997); B Golder & G Williams 'What is "terrorism"? Problems of legal definition' (2004) 27 *University of New South Wales Law Journal* 270; Saul (n 1 above); Duffy (n 1 above). See further http://www.unodc.org/unodc/terrorism_definitions.html (accessed 12 May 2007).

¹³ See eg sec 1(4) of the Protection of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004 (South Africa), which exempts groups engaged in armed struggle for national liberation, self-determination and independence.

¹⁴ See J Lambert *Terrorism and hostages in international law* (1990) 30-31.

freedom fighter'.¹⁵ This ideological divergence has hampered the formulation of a clear, consistent and universally accepted definition of terrorism.¹⁶ For this reason (and given its nature which does not require a definition of terrorism), this paper does not attempt to define the term. Rather, it adopts the simplistic working definition that terrorism is the use of violence for political goals.

2 The international anti-terrorism legal framework

The international legal framework for counter-terrorism consists of 19 universal and regional instruments as well as numerous resolutions of the United Nations (UN) General Assembly and Security Council.

2.1 United Nations counter-terrorism measures

Terrorism is not a new phenomenon. The international focus on terrorism began as early as 1937 when the League of Nations held a conference on the issue in an attempt to adopt an international convention for the prevention or punishment of terrorism. However, the response of the international community has, for most of the period of the existence of the UN, not been robust. Since the massacres at Lod Airport in Israel and at the Olympic Games in Munich in 1972, however, the UN General Assembly has taken measures to deal with terrorism. Anti-terrorism treaties preceding 11 September range from the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft to the International Convention for the Suppression of the Financing of Terrorism of 1999.

There are currently 12 universal conventions on specific aspects of terrorism: hijacking of aircraft,¹⁷ the sabotage of aircraft,¹⁸ attacks on

¹⁵ See eg Bassiouni (n 1 above) 485. Illustratively, in 1985, the Angolan representative in the UN General Assembly stated that 'acts of terrorism cannot be compared under any pretext, with the act of those who are fighting colonial and racist oppression, and for their freedom and independence'. Cassese (n 1 above) 7.

¹⁶ Nonetheless, a variety of national and international laws have been used to characterise acts of terrorism as criminal. It is notable that the UN Working Group on Terrorism has identified broad elements of terrorism: 'Without attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality.' See United Nations *Report of the Policy Working Group on the United Nations and Terrorism*, Annex to A/57/273, S/2002/875, para 13 <http://www.un.org/terrorism/a57273.htm> (accessed 14 June 2006).

¹⁷ Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.

¹⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.

'internationally protected persons', that is, heads of state and heads of government, foreign ministers, diplomats, etc,¹⁹ the taking of hostages,²⁰ terrorist bombings²¹ and the financing of terrorist activities.²² To these may be added the various international conventions on international humanitarian law,²³ which are designed, *inter alia*, to proscribe the use of terrorism during armed conflict. International humanitarian law prohibits terrorist activities in armed conflict by criminalising (1) attacks against other than military targets; (2) the use of force disproportionate to that needed to attain the military objective; and (3) the use of force that does not discriminate between the target of the attack and persons who are not the object of such attack. It also prohibits the unnecessary use of force under any circumstances.

Since September 2001, the UN Security Council has adopted several binding resolutions aimed at restricting terrorism and minimising the ability of terrorists to mobilise support. Significantly, on 28 September 2001, the Security Council adopted Resolution 1373. This Resolution criminalises the provision of funds and services to terrorists and freezes the financial assets of people who commit terrorist acts. As with most other international instruments on terrorism, the Resolution does not define 'terrorism'. It further obliges member states of the UN to take measures to implement the Resolution.²⁴ Resolution 1373 also establishes a Counter-Terrorism Committee (CTC) to monitor its implementation.²⁵ In April 2004, the Security Council passed Resolution 1540 which prohibits states from providing any form of support to non-state actors that attempt to acquire nuclear, chemical and biological weapons.

It is notable that post-11 September counter-terrorism initiatives at the universal level have not been limited to the Security Council. The General Assembly has established an *Ad Hoc* Committee on terrorism working primarily on developing a draft comprehensive anti-terrorism convention designed to fill the void left by the 12 sectoral treaties.

¹⁹ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

²⁰ International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

²¹ International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

²² International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

²³ The four Geneva Conventions of 1949 and their Additional Protocols of 1977.

²⁴ In February 2002, the Commonwealth Secretariat's Expert Working Group on Legislative and Administrative Measures to Combat Terrorism produced a report which offers a model framework for implementing UN Security Council Resolution 1373 of 28 September 2001.

²⁵ See para 6 of the Resolution. The CTC has instituted a periodic reporting system which requires states to submit reports on measures undertaken at national level to meet the commitments in the Resolution.

Although there are a number of international and regional treaties that aim to combat terrorism,²⁶ there is no single universal convention on the entire phenomenon of terrorism.

2.2 Regional counter-terrorism initiatives

A number of conventions on terrorism have also been adopted at the regional level. These include the Arab Convention on the Suppression of Terrorism, 1998; the European Convention on the Suppression of Terrorism, 1977; the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 1971; the OAU (African Union) Convention on the Prevention and Combating of Terrorism, 1999; and the Protocol to the AU Convention on the Prevention and Combating of Terrorism, 2004. Other anti-terrorism initiatives in Africa include the September 2002 African Union (AU) counter-terrorism conference in Algiers, the establishment of the African Centre for the Study and Research on Terrorism, the AU Declaration on the Prevention and Combating of Terrorism in Africa,²⁷ and support for UN Security Council Resolution 1373 which, *inter alia*, reaffirms that the suppression of acts of international terrorism (including state-sponsored terrorism) is an essential contribution to maintaining international peace and security.

In response to 11 September, the European Union has adopted a range of anti-terrorism measures, including the Council Framework Decision on Combating Terrorism and the Council Framework Decision on the European Arrest Warrant and Surrender Procedures between the member states.²⁸

Many states around the world have also concluded bilateral agreements to deal with the problem of terrorism. However, these measures largely deal with the rendition of fugitive offenders.

It is worthy of note that the international legal framework for dealing with terrorism has been criticised for a number of perceived shortcomings. According to Cassese,²⁹ there are three main limitations to international anti-terrorism measures: (1) inadequate ratifications; (2) the lack of effective enforcement mechanisms in the event of violation; and (3) the lack of specification that terrorist crimes are not 'political offences' and as such not exempt from extradition.

²⁶ A listing of these conventions is available at <http://untreaty.un.org/English/Terrorism.asp> (accessed 14 June 2006).

²⁷ Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, 13-14 October 2004, Algiers, Algeria, adopted in October 2004 at Algiers Mtg/HLIG/Conv Terror/Decl (II) Rev 2 <http://www.africa-union.org/Terrorism/DECLARATION%20Algiers%20REV.pdf> (accessed 14 June 2006).

²⁸ Com (2001) 522 Final/2.

²⁹ Cassese (n 1 above) 11.

3 Anti-terrorism legislation: A survey of selected international practice

3.1 Overview

As a starting point, it is worth noting that, at the national level, anti-terrorism legislation is not a new phenomenon. In many African countries, the colonial governments maintained all kinds of legislation to deal with what they considered terrorist activities, but which the African people fighting for liberation and for their rights considered a just fight. Almost invariably, these activities were criminalised through penal codes for each colony based on some draconian law drafted in the far away colonial capitals of Brussels, Lisbon, London and Paris.

In South Africa, a plethora of laws enacted by the apartheid regimes prior to the democratic changes of 1993 ensured that the legitimate activities of the African National Congress (ANC) and other political parties in the struggle for freedom were curtailed and penalised through a range of criminal sanctions — from restrictions on movement to imprisonment and the death penalty. Under cover of the anti-terrorist legislation (for example the Terrorism Act 83 of 1967 and the Internal Security Act 74 of 1982), apartheid state security agents routinely and with impunity abridged the human rights of suspected freedom fighters (branded ‘terrorists’),³⁰ as well as members of their families, through arbitrary arrests, imprisonment without trial, torture and extra-judicial executions. One only has to browse through the report of the Truth and Reconciliation Commission to learn the ghastly details.

Another matter of note is that a number of countries are parties to the international conventions and protocols relating to terrorism (South Africa is a party to nine of these) as well as to the AU Convention on Terrorism (AU Convention). These instruments enjoin states to take measures, including legislative measures, to combat terrorism. Thus, the AU Convention enjoins the state parties to adopt ‘any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of [the] Convention and their respective national legislation’.³¹ However, the AU Convention cautions that:³²

Nothing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples’ Rights’.

³⁰ Eg, one of the world’s most respected statesmen, Nelson Mandela, was for long considered a terrorist, not only by the apartheid regime, but by countries such as the USA.

³¹ Art 4. See also art 5, which requires the states parties to co-operate in preventing and combating terrorism ‘in conformity with national legislation and procedures of each state’ and art 6, recognising the jurisdiction of each state party over certain ‘terrorist acts’.

³² Art 22 of the AU Convention.

Further, UN Security Council Resolution 1373 not only condemns the 11 September attacks in the USA, but also allows states to take the necessary steps to prevent the commission of terrorist attacks, including stopping the recruitment of members of terrorist groups, and adopting measures to prevent the financing, planning, facilitation and commission of terrorist acts.

Clearly, therefore, international law permits states to take national legislative measures to combat terrorism, but such measures must not offend against international law. However, the fact that most new anti-terrorism laws in Africa have been proposed or introduced under pressure from the USA³³ and the UK³⁴ makes it improbable that such legislation would reflect local concerns, including the protection of (usually, constitutionally guaranteed) human rights. As Makau Mutua, the Chairperson of the Kenya Human Rights Commission, has said in regard to his country's unpopular Suppression of Terrorism Bill of 2003:

It [the bill] was not drafted by Kenyans or based on Kenya's needs. It originated in the United Kingdom. It is also a fact that both the UK and the USA are intimidating and coercing Kenya into enacting this foreign and unnecessary law.

It is a well-established principle of international law that a state cannot legitimately invoke its domestic law to justify a failure to comply with its international treaty obligations and customary international law.³⁵ It is also important to note that a number of states have not considered it necessary to enact any specific new counter-terrorism legislation. These states assert that their existing criminal laws already cover the specific conduct referred to as 'terrorism'.³⁶ For instance, within the Southern African Development Community (SADC), only two (South Africa and Mauritius) of the 14 member states have enacted specific anti-terrorism legislation. Given the limitations of space, it is not possible to present more than an overview of the legislative responses in selected countries. Consequently, what follows is a survey of the anti-terrorism legislative

³³ Eg, in June 2003, the USA ambassador to Kenya publicly criticised Kenya's anti-terrorism efforts claiming that there had not been a single arrest since the 1998 car bomb attack on the USAembassy in Nairobi.

³⁴ It is noteworthy that the unpopular Kenyan Suppression of Terrorism Bill was a precondition for the lifting of the flight ban, which the UK government imposed earlier on all UK flights to Kenya, allegedly on the grounds that they could be targets of a terrorist attack. The ban was lifted in June 2003 only after the publication by the Kenyan government of the anti-terrorism bill. The draft legislation proposed life imprisonment for anyone committing terrorist acts and a 10-year jail term for anyone suspected to be in possession of weapons of mass destruction. Eighteen opposition MPs refused to support the bill, which they said, was draconian, unconstitutional and infringed fundamental civil rights.

³⁵ See *The Lotus* (1927) PCIJ Rep Ser A No 10.

³⁶ Eg, in a response to the UN Counter-Terrorism Committee on 19 June 2002, the government of Zambia stated that it has a number of provisions under its Penal Code (Cap 87 of the Laws of Zambia) that can be used to fight against terrorism in accordance with Security Council Resolution 1373.

measures adopted in selected member states of the UN representing different geo-political regions of the world.

3.2 Africa

3.2.1 Mauritius³⁷

Post-11 September anti-terrorism legislation in Mauritius was first introduced by that country's government in January 2002 and controversially passed by parliament despite a walkout by opposition parliamentarians. There are several key pieces of Mauritian legislation which aim to counter terrorism: the Prevention of Terrorism Act 2002, the Financial Intelligence and Anti-Money Laundering Act 2002, the Prevention of Corruption Act 2002, the Prevention of Terrorism (Special Measures) Regulations 2003 (as amended), the Financial Intelligence and Anti-Money Laundering Regulations 2003, the Anti-Money Laundering (Miscellaneous Provisions) Act 2003, and the Convention for the Suppression of Financing of Terrorism Act 2003.

The most controversial of these laws is the Prevention of Terrorism Act, which was adopted in circumstances that saw four presidents change office in one month in view of their refusal to sign the bill into law. It has been argued that the enactment of this Act was essentially a response to 'severe pressure that was threatening the country's economy'³⁸.

Section 3 of the Prevention of Terrorism Act defines an 'act of terrorism' as 'an act which may seriously damage a country or an international organisation; and is intended or can reasonably be regarded as having been intended to seriously intimidate a population' so as to unduly compel a government or an international organisation to perform or abstain from performing any act. The section further specifies activities which may constitute terrorism, including attacks upon a person's life that may cause death, kidnapping, seizure of aircraft, ships or other means of public transport, the manufacture, possession, acquisition or supply of weapons (including nuclear and biochemical weapons), and interference with public utilities the effect of which is to endanger life. The legislation also allows the police to detain 'terrorism' suspects without access to legal counsel for 36 hours and gives the

³⁷ The Republic of Mauritius is a party to three of the 12 UN Conventions on terrorism namely, the Convention for the Suppression of Terrorist Bombings, the Convention against Transnational Organised Crime and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. It is also a party to the AU Convention on the Prevention and Combating of Terrorism.

³⁸ A Thomashausen 'A comparative law assessment of the proposed South African anti-terrorism legislation' (2003) <http://www.pmg.org.za/docs/appendices/030624thomas.htm> (accessed 24 November 2004).

government the right to extradite them or deny them asylum and to return them to countries where they might face human rights risks.

Under section 10(6)(b) of the Prevention of Terrorism Act, the Minister responsible for national security may prohibit the entry into Mauritius of suspected international terrorists or terrorist groups. In terms of section 25, the Minister may, for the purposes of the prevention or detection of offences or the prosecution of offences under the Prevention of Terrorism Act 2002, give directions to service providers for the retention of communication data. Further, the police may obtain a court order authorising a communication service provider to intercept, withhold or disclose to the police information or communications.

Needless to mention, civil society groups, opposition parties, and Amnesty International have expressed concern that most of the provisions of the Act are too broad and do not meet the international standards of fairness. In particular, Amnesty International has expressed concern that the term 'acts of terrorism' could be broadly interpreted to undermine fundamental human rights.

The Prevention of Terrorism (Special Measures) Regulations 2003, which came into effect on 25 January 2003, gives effect to part II, section 10(6) of the Prevention of Terrorism Act 2002. It provides for the freezing of assets and funds of suspected international terrorists and terrorist groups. In terms of regulation 3, the Central Bank or the Financial Services Commission may give directives to any financial institution under its regulatory control to freeze any account, property or funds held on behalf of any listed terrorist. It is an offence for a national or any person within Mauritius to give funds or economic resources directly or indirectly to listed individuals or entities

The Financial Intelligence and Anti-Money Laundering Regulations provide for the verification of the 'true identity of all customers and other persons' with whom banks, financial institutions and cash dealers conduct business. The Anti-Money Laundering (Miscellaneous Provisions) Act 2003, which amends the Financial Intelligence and Anti-Money Laundering Act 2002 and establishes a National Committee for Anti-Money Laundering and Combating of the Financing of Terrorism, gives wide powers to the Central Bank and the Financial Services Commission to issue codes and guidelines on anti-money laundering. It also provides for derogation from the banks' duty of confidentiality to enable them report suspicious transactions.

The Convention for the Suppression of Financing of Terrorism Act was enacted in 2003 to give effect to the International Convention for the Suppression of the Financing of Terrorism 1999. The Act makes it an offence for any person to finance acts of terrorism and gives powers to courts to order forfeiture of funds intended to be used for or in connection with terrorist acts.

3.2.2 South Africa

In 2000, the South African Law Commission released a discussion paper (Discussion Paper No 92) on review of terrorism legislation (broad legislation inherited from the apartheid era) and draft legislation on terrorism. This attracted widespread condemnation and vehement public opposition because of the apprehension that it was an attempt to infringe on fundamental rights and freedoms in South Africa, thereby forcing the government to withdraw the draft legislation. However, in the aftermath of the 11 September 2001 attacks in the US, the South African government revived this legislation. The Anti-Terrorism Bill was tabled before the Parliamentary Portfolio Committee on Safety and Security in March 2003.

The Bill, which made provision for wide-ranging police powers to search vehicles and persons and provided for various offences, including providing support to or membership of a terrorist organisation, hijacking an aircraft, hostage taking and nuclear terrorism, was withdrawn after sustained public criticism. After some changes were made to it, the anti-terrorism legislation was re-introduced into parliament as the Protection of Constitutional Democracy against Terrorist and Related Activities Bill of 2003. On 12 November 2004, the new Bill was unanimously passed by the National Assembly. It became law on 14 February 2005.³⁹

The rationale for the enactment of the anti-terrorism Act is the necessity to comply with international instruments (particularly Security Council Resolution 1373). According to the Parliamentary Select Committee, the offence of terrorism in section 54 of the Internal Security Act (which the Act repeals) was too narrow and only provided for terrorism against the South African government — a situation that was contrary to global trends on international terrorism which can target any government.⁴⁰ Local legislation was also said to lack provision for specific offences which 'must be created in terms of international conventions'. In short, the claim was that local laws 'do not meet all the international requirements related to terrorism and related activities'. The purpose of the Act is:

To provide for measures to prevent and combat terrorist and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities; to provide for Convention offences; to provide for a mechanism to comply with United Nations Security Council Resolutions, which are binding on member states, in respect of terrorist and related activities; to provide for measures to prevent and combat the financing of terrorist and related activities; to provide for investigative measures in

³⁹ Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.

⁴⁰ See Minutes of the Security and Constitutional Affairs Committee, 29 January 2004 <http://www.pmg.org.za/docs/2004/viewminute.php?id=3834> (accessed 24 November 2004).

respect of terrorist and related activities; and to provide for matters connected therewith.

Thus, the new anti-terrorism Act creates the offence of terrorism and prescribes a punishment of life imprisonment for the commission of a terrorist act and makes it illegal to belong to designated terrorist groups.⁴¹ Section 1 of the Act defines terrorist activity and terrorist-related acts, but does not define 'terrorism'. It is interesting to note that section 1(4) of the Act excludes 'any act committed during a struggle waged by peoples, including any action during an armed struggle' for 'national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces'.⁴²

The Act also provides for 'convention offences' based on the 12 UN anti-terrorism conventions and the AU Convention, which include the financing of terrorism, hijacking aircraft or ships, hostage taking, causing harm to 'internationally protected persons' and committing hoaxes involving biochemical agents. Other offences relate to harbouring and concealment of suspects and failure to report terrorist suspects to the authorities.

In terms of penalties, the Act provides for life imprisonment or a multimillion rand fine to be imposed on convicted terrorists (section 18). In addition to any such punishment, courts are empowered to make orders for forfeiture of property reasonably believed to have been used in the commission of an offence or in connection with the commission of an offence (section 19). The Act also provides for the making of court orders for the payment of wasted expenses incurred due to hoaxes.

It is notable that the Act provides for some safeguards. Thus, for instance, no investigating proceedings and no prosecution can be instituted without the written authority of the National Director of Public Prosecutions (NDPP). There is also a requirement that the NDPP promptly communicate the outcome of any prosecution to, *inter alia*, the UN Secretary-General. The question is how effective these safeguards would be. This is an assessment that can only be properly made once the Act has been tested in a court of law.

3.2.3 Uganda

The Ugandan Anti-Terrorism Act 2002 is aimed at suppressing acts of terrorism, both locally and internationally. It provides for the punishment of persons who plan, instigate, support, finance or execute acts of

⁴¹ This seems to be a common provision in counter-terrorism legislation. See eg the Anti-Terrorism Act of Canada and the Anti-Terrorism Act 2002 of Uganda.

⁴² This exemption is an example of the ideological divergence which renders it difficult for states to formulate a universally accepted definition of terrorism (see section 1 above).

terrorism,⁴³ prescription of terrorist organisations and punishment of persons who are members of, or who publicly profess to be members of, or who convene or associate with or facilitate the activities of terrorist organisations. The Act also makes provision for the investigation of acts of terrorism and the surveillance of terrorist suspects. Law enforcement officials have powers to monitor bank accounts, e-mails, telephone calls and other electronic communications of suspects.⁴⁴ Employers are obliged to report absent employees where they suspect these of involvement in terrorist activities.

Unlike most other anti-terror laws, the Act defines terrorism. Section 7 of the Act provides that 'terrorism' is any act which involves serious violence against a person or serious damage to property, endangers a person's life (but not just the life of the person committing the act), and creates a serious risk to the health or safety of the public. Any such acts must be 'designed to influence the government or to intimidate the public or a section of the public', and must be in pursuance of a 'political, religious, social or economic aim indiscriminately without due regard to the safety of others or property'. The section lists acts which constitute terrorism. The offence of terrorism carries a mandatory death sentence if the terrorist act directly results in the death of any person.

Section 8 of the Act provides for other terrorist offences including aiding, abetting, financing, harbouring or rendering support to any person, with the knowledge or belief that such support will be used for or in connection with the preparation or commission or instigation of acts of terrorism. Conviction for any of these offences carries the death penalty. Section 10 provides for official declaration of certain organisations as terrorist organisations. However, there is no provision for any appeal procedure to challenge prescription as a terrorist organisation.

3.3 The Americas

3.3.1 Canada

Canada's anti-terrorism legislation includes the Public Safety Bill 2002 and the Aeronautics Amendment Act 38 of 2001. The former was introduced to replace the Public Safety Act, Bill C-42, which was introduced on 22 November 2001 but withdrawn after significant public criticism. The Bill enacted the Biological and Toxin Weapons Convention Implementation Act and allowed cabinet ministers to respond immediately to terrorist threats. The latter allows Canadian air carriers to provide approved passenger information to approved countries.

⁴³ See also sec 26 of the Penal Code, Cap 120 of the Laws of Uganda (2000 Revised Edition) which relates to terrorism.

⁴⁴ Secs 19(5)(a), (b) & (f) Uganda Anti-Terrorism Act.

In the aftermath of the September 2001 attacks, Canada introduced the Anti-Terrorism Act (Bill C-36), which amended several acts including the Criminal Code, the Official Secrets Act, the Canada Evidence Act, and the Proceeds of Crime (Money Laundering Act) and the Immigration and Refugee Protection Act 2002. The Act gives the state power to restrain property linked to terrorist groups upon the granting of an order by the Federal Court.

Canada's definition of terrorist activity includes actions which are an offence under the UN anti-terrorism instruments or are undertaken for political, religious or ideological purposes that threatens the public, or national security by killing, seriously harming or endangering persons, causing substantial damage to property that is likely to seriously harm people, or by interfering with or disrupting an essential service, facility or system. The Act allows for the designation of terrorist groups. Knowingly participating in terrorist activity attracts a 10-year sentence of imprisonment.

3.3.2 Guyana

In December 2001, the government of Guyana introduced Circular No 66/2001 (later amended by Circular No 68/2001) requiring licensed financial institutions as a preliminary step to combat terrorism.

The concept of terrorism was introduced in Guyanese law in September 2002 through the Criminal Law (Offences) Amendment Act which amended the Criminal Offences Act. The amendment provides that anyone who threatens the security or sovereignty of Guyana or strikes terror into any section of the population commits a terrorist act. In terms of section 309A(1)(b) of the amendment Act, anyone who commits a terrorist act is guilty of an offence and if such act results in the death of any person, may be punished with a fine of G\$1 500 000 together with death. This penalty extends to anyone who 'conspires, attempts to commit or advocates, aids and abets, advises or incites or knowingly facilitates the commission' of terrorist acts.

3.3.3 The United States

The USA arguably has the largest collection of counter-terrorism legislation with a large number pre-dating 11 September. However, the aftermath of attacks witnessed a flurry of anti-terrorism legislative activity in the USA involving changes to existing legislation and enactment of new anti-terrorism legislation.

Post-11 September legislation includes the Financial Anti-Terrorism Act 2001⁴⁵ (which amends the Right to Financial Privacy Act 1978, the Fair Credit Reporting Act and other Federal laws governing records and reports in monetary transactions and requires institutions to share

⁴⁵ HR 3004.

customer financial information with Federal intelligence agencies for use against terrorism); the USA Patriot Act 2001⁴⁶ (which is designed to 'deter and punish terrorist acts in the USA and around the world, and to enhance law enforcement investigatory tools, and for other purposes); the Terrorist Bombings Convention Implementation Act 2001;⁴⁷ Bio-terrorism Response Act 2001;⁴⁸ Enhanced Border Security and Visa Entry Reform Act 2002;⁴⁹ Homeland Security Information Sharing Act; and Enhanced Penalties for Enabling Terrorists Act 2002.⁵⁰

On 18 September 2001, an Act authorising the President to use 'all necessary and appropriate force' against states, organisations or persons he determines planned, authorised, committed or assisted the 11 September attacks was passed.⁵¹ An amendment to the Immigration and Nationality Act⁵² in October 2001 grants permanent authority to the government to admit, in a temporary non-immigration status, aliens who possess or will supply to law enforcement agencies critical information concerning criminal or terrorist organisations. The Anti-Terrorism and Port Security Act of 2003 is intended to prevent and respond to terrorism at or through ports. The Terrorist Bombings Convention Implementation Act of 2002 (Title I) and the Financing of Terrorism Convention Implementation Act of 2002 (Title II) implement relevant international conventions previously signed by the USA.⁵³ The Terrorism Penalties Enhancement Act passed in 2004 increases criminal penalties for fatal acts of terrorism and denies federal benefits for convicted terrorists.

The main legislation against terrorism passed after 11 September is the Patriot Act 2001⁵⁴ and the Homeland Security Act 2002. The former introduced wide changes to the country's laws and provides for enhanced national security against terrorism, greater surveillance procedures, mechanisms to detect and report money laundering and currency crimes, stricter immigration measures, and procedures for

⁴⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (HR3162), Public Law No 107-56.

⁴⁷ Public Law 107-197, Title I.

⁴⁸ HR 3448.

⁴⁹ HR 3525.

⁵⁰ S 1981.

⁵¹ Authorisation for Use of Military Force (S J Res 23, Public Law No 107-40).

⁵² Public Law No 107-45.

⁵³ HR 3275, Public Law No 107-197. The Acts implement the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism, signed by the USA on 12 January 1998 and 10 January 2000 respectively.

⁵⁴ Public Law 107-56 (see n 40 above).

co-operation and information sharing in the investigation of terrorism.⁵⁵ The Act defines 'terrorism' in terms of activities that:

- involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the USA or of any state, or that would be a criminal violation if committed within the jurisdiction of the USA or of any state;
- appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

The Act further defines 'terrorist organisation' as a group designated under the Immigration and Nationality Act or by the Secretary of State as a group of two or more individuals, whether related or not, which engages in terrorist-related activities. This includes providing material support to terrorists or soliciting funds for terrorist organisations.

The Act has extended the scope of existing surveillance powers to cover a range of terrorism-related offences, including the use of weapons of mass destruction, killing American citizens abroad and terrorism financing. It also updates the USA Penal Code in relation to terrorism and creates new penalties in respect of terrorism. Further, the Act gives the USA Attorney-General the power to detain foreigners suspected of terrorism where the Attorney-General has reasonable grounds to believe that the individual concerned has or will commit espionage or sabotage; attempt to overthrow the government; has committed or will commit terrorist acts; or is otherwise engaged in activities that threaten national security.

The Homeland Security Act created a new Department of Homeland Security to oversee matters relating to national security which had previously been the responsibility of 22 separate agencies. Other versions of the Patriot Act and related legislation have also been introduced.

3.4 Australasia

3.4.1 Australia

Australia has one of the largest collections of anti-terrorism legislation. Current federal anti-terrorism legislation in Australia includes the Criminal Code Act 1995 (which incorporates the main terrorism legislation

⁵⁵ The Act amended the Electronic Communications Privacy Act, the Foreign Intelligence Surveillance Act, the Family Education Rights and Privacy Act, the Money Laundering Act, the Immigration and Nationality Act, the Banking Secrecy Act, the Right to Financial Privacy Act and the Fair Credit Reporting Act. The Act amends the Federal Criminal Code to authorise the interception of wire, oral and electronic communications for the production of evidence of (1) specified chemical weapons or terrorism offences and (2) computer fraud and abuse. It also amends the Immigration and Nationality to widen the scope of aliens ineligible for admission or deportable due to terrorist activities.

enacted after 11 September as schedule 1, part 5.3 (Terrorism), divisions 100-103), Criminal Procedure Regulations 2002 (which lists proscribed terrorist organisations), Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002 (which provide for a list of terrorist organisations with which financial dealings are restricted), and the Australian Security Intelligence Organisation Act 1979 (ASIO) (which confers special powers on ASIO in regard to terrorism). Other notable legislation passed after 11 September 2001 include the Suppression of the Financing of Terrorism Act 2002 (which includes amendments to the Criminal Code 1995 to criminalise the financing of terrorism and amendments to the Charter of the United Nations Act 1945 to make it an offence punishable by up to five years' imprisonment to hold assets that are owned or controlled by terrorist organisations or individuals, or to make assets available to them), Security Legislation Amendment (Terrorism) Act 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002, Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002, Border Security Legislation Amendment Act 2002, and Telecommunications Interception Legislation Amendment Act 2002. All of these amended a range of legislation.⁵⁶

Each one of Australia's states and territories has also enacted anti-terrorism legislation in the post-11 September period.⁵⁷

3.4.2 India

India has a raft of counter-terrorism legislation predating 11 September 2001, such as the Prevention of Terrorism Ordinance 2001, the Terrorist and Disruptive Activities (Prevention) Act 1987, and the Prevention of Seditious Meetings Act 1911. In the aftermath of 11 September, several pieces of legislation designed to counter terrorism have been adopted including the Prevention of Money Laundering Act 2003 (which criminalises money laundering and enjoins banks to maintain

⁵⁶ Eg, the Security Legislation Amendment (Terrorism) Act 2002 amends the Criminal Code by, *inter alia*, introducing the offences of engaging in a terrorist act (punishable by life imprisonment) and providing or receiving training connected with a terrorist act.

⁵⁷ New South Wales (Terrorism (Commonwealth Powers) Act 2002 and Terrorism (Police Powers) Act 2002; Northern Territory (Terrorism (Northern Territory) Request Act 2003, Terrorism (Emergency Powers) Act 2003, and Criminal Code Act 1983, Schedule 1, Part III, Division 2 Terrorism (secs 50-55); Queensland (Terrorism (Commonwealth Powers) Act 2002, and Police Powers and Responsibilities Act 2000, Sections 132-137 Emergency use of surveillance devices); South Australia (Terrorism (Commonwealth Powers) Act 2002; Tasmania (Terrorism (Commonwealth Powers) Act 2002 and Classification (Publications, Films and Computer Games) Enforcement Act 1995, secs 3 & 10; Victoria (Terrorism (Commonwealth Powers) Act 2003, Terrorism (Community Protection) Act 2003, and Petroleum (Submerged Lands) Act 1982, sec 151B (emergency periods); Western Australia (Terrorism (Commonwealth Powers) Act 2002.

and furnish records), the Prevention of Terrorism (Repeal Ordinance) 2004 promulgated by the President of India on 21 September 2004, which repeals the Prevention of Terrorism Act 2002, and the Unlawful Activities (Prevention) Amendment Ordinance 2004 which amends the Unlawful Activities (Prevention) Act 1967. It is notable that the repeal of the Terrorism Act of 2002 does not affect anything duly done, or any right, privilege or obligation or liability acquired, accrued or incurred under the repealed legislation.

The Unlawful Activities (Prevention) Ordinance contains a wide definition of 'unlawful activity' and imposes a penalty for belonging to an 'unlawful association'. An 'unlawful activity' means any action taken by an individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise '(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty or territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India'. A terrorist act, which is also widely defined, is punishable with death or life imprisonment, and a fine where such act results in the death of any person or in any other case, imprisonment for not less than five years which term may be extended to life.

The Ordinance also provides for forfeiture of the proceeds of terrorism, but allows for an opportunity to make representations by the person whose property is being seized and appeal to a court. It is an offence to support or fund a terrorist organisation.

3.4.3 Singapore

The United Nations Act, which entered into force on 29 October 2001, authorises the Minister for Law to issue regulations to give effect to UN Security Council anti-terrorism measures. The most notable of such regulations are the United Nations (Anti-Terrorism Measures) Regulations 2001 which define a 'terrorist act' and prohibit the financing of terrorism by persons in Singapore or by citizens of Singapore elsewhere.

The Terrorism (Suppression of Financing) Act 2003 aims to give effect to the International Convention for the Suppression of the Financing of Terrorism. Sections 3 to 6 of the Act comprehensively cover the scope of criminal activities set out in article 2 of the Convention.⁵⁸ The Act defines a terrorist as any person who commits or attempts to commit, any terrorist act, or participates in or facilitates the commission of any

⁵⁸ See Fourth Report of Singapore to the Counter-Terrorism Committee, S/2004/133, 20 February 2004 <http://daccessdds.un.org/doc/UNDOC/GEN/N04/247/93/PDF/N0424793.pdf?OpenElement> (accessed 14 June 2006).

terrorist act. A terrorist act includes releasing into the environment any harmful substance, chemical or biological agent, disrupting any computer systems, public utilities, public transportation or disruption to the police. The Act also imposes a duty to inform the police of terrorist activities. Failure to do so attracts a fine and/or imprisonment for up to five years.

3.5 Europe⁵⁹

3.5.1 Italy

The main Italian post-11 September counter-terrorism legislation consists of Law 438/2001 and Law 155/2005. Law 438/2001 of 15 December 2001 concerning Urgent Measures Against International Terrorism extended the scope of article 270 of the Penal Code to cover international terrorism. Article 270 *bis* provides for imprisonment of up to 15 years for individuals convicted of promoting, constituting, organising, leading or financing organisations which promote violence in aid of terrorism or to endanger democracy. Individuals who associate with such organisations are liable to imprisonment upon conviction for five to ten years. Article 270 *bis* provides for imprisonment for up to four years for persons harbouring or assisting terrorists.

Law 155/2005, which entered into force on 2 August 2005, widened the definition of terrorism in article 270 *bis*. In terms of the amendment, terrorism includes promoting, constituting, organising, managing or financing organisations which intend to carry out violent activities, or assisting any individual (with the exception of close relatives) who participates in such organisations. Also covered in the definition are enrolling or training individuals to carry out violent activities if, in view of their nature or context, such activities might cause grave harm to a country or international organisation, and are calculated to intimidate the population or to constrain the powers of the state or international organisations to carry out or not to carry out any activity, or to destabilise or destroy fundamental political, constitutional, economic and social structures of a country or of an international organisation. It is notable that this definition is in addition to other acts defined as terrorism in international treaties to which Italy is a party.

Law 438/2001 and Law 155/2005 give the police and other investigating agencies enhanced powers to pursue terrorists, including the use of false identities and interception of communications where necessary in order to obtain information for the prevention of terrorism, subject to specified safeguards. Thus, for example, there must be clear justification of the need and the information acquired in such circumstances can only be used for purposes of investigation, not in criminal proceedings.

⁵⁹ A number of European states, including France, Germany, Greece, Italy, Norway, Sweden and the United Kingdom have enacted anti-terrorism legislation.

Law 155/2005 strengthens the provisions in Law 438/2001 in a number of respects. Article 2 of Law 155 enables the discretionary granting of residence permits to illegal aliens who collaborate with the authorities. Other provisions include authorisation to take samples of saliva or hair for DNA testing without consent in cases of suspected terrorism. However, the dignity of the individual must be respected.

Law 189/2002, Law 271/2004 and Law 155/2005 permit the immediate expulsion of non-Italian nationals on terrorism-related grounds.

3.5.2 Sweden

Swedish counter-terrorism legislation includes the 2002 Act on Criminal Responsibility for the Financing of Particularly Serious Crimes and the 2003 Act on Criminal Responsibility for Terrorist Offences. The former implements the International Convention for the Suppression of the Financing of Terrorism and establishes the criminal responsibility for persons who collect, provides or receives funds or other assets with the intention that they should be used or in the knowledge that they are to be used in the commission of particularly serious crime.

In terms of the latter Act, a number of offences under Swedish law, including murder, manslaughter, gross assault, kidnapping, the spreading of poison or contagious substances, constitute a terrorist offence where the act in question might seriously damage a state or an intergovernmental organisation and the act is intended to seriously intimidate a population or part thereof, unduly force a public authority or an intergovernmental organisation to perform an act or to abstain from doing something, and seriously destabilise or destroy fundamental political, constitutional, economic or social structures of a state or intergovernmental organisation.

3.5.3 The United Kingdom

Counter-terrorism legislation in the UK is nothing new owing to the numerous incidents of political violence in the context of the Northern Ireland conflict. Notably such legislation includes the Prevention of Terrorism (Temporary Provisions) Act, in force since its passage in 1974 and until its replacement in 2000 with the Terrorism Act (which reforms and extends the pre-existing anti-terrorism legislation). In December 2001, the Anti-Terrorism, Crime and Security Act was enacted. The purpose of the Act is to enhance anti-terrorism measures and security, through new measures to block terrorist access to funding, better information sharing, and improving security at airports and nuclear sites. The Act also extends police powers. Part 4 of the Act, which deals with immigration and asylum, is controversial.⁶⁰ Section 23 of the Act gives

⁶⁰ The powers of detention under this Act were controversial as they were essentially a form of executive authorised detention exercise exclusively in regard to foreign nationals of the Muslim faith. See http://en.wikipedia.org/wiki/Anti-terrorism,_Crime_and_Security_Act2001 (accessed 14 June 2006).

the Home Secretary extensive powers to detain 'international terrorists' indefinitely. These provisions apply only to foreign nationals subject to immigration control that the UK proposes to remove or deport from the country but cannot for the time being so remove or deport. It is notable that the measures under part 4 have entailed derogation from the right to liberty and security in article 5(1) of the European Convention on Human Rights and article 9(1) of CCPR.

In March 2005, the UK enacted the Prevention of Terrorism Act 2005, which aims to replace the part 4 powers in the Anti-Terrorism, Crime and Security Act 2001 with a new scheme of control orders,⁶¹ allowing for the imposition of an extensive and non-exhaustive set of conditions on the movements of suspected persons with restrictions approximating a form of house arrest. Unlike part 4 of the 2001 Act, the powers under the new Act can be applied to British and non-British suspected terrorists alike.

Following the 7 July 2005 London transport network bombings, the British government proposed the creation of three new offences of 'acts preparatory to terrorism', 'terrorist training' and 'indirect incitement to terrorism'.⁶² There was also a controversial proposal to increase the maximum period of detention without charge from 14 days to three months.

3.6 The Middle East

3.6.1 Iran

The Anti-Terrorism Bill which was approved by Cabinet on 19 November 2003 and is under scrutiny by the relevant specialised committees of the Islamic Consultative Assembly (Parliament) provides that every deliberate violent act against internationally protected persons, sabotage of public and private assets and facilities, dangerous acts against aviation and airliners' security, hijacking, wrecking and damaging vessels, financing terrorism constitute criminal offences. The Act also makes provision for the confiscation of assets generated from terrorist activities.

A Money Laundering Bill has been adopted by parliament but not endorsed by the Guardian Council (Constitution supervisory body).

⁶¹ Sec 1 of the Act defines a 'control order' as 'an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism'. Control orders may be issued by the Secretary of State (except in the case of an order imposing obligations that are incompatible with the individual's right to liberty in art 5 of the ECHR) or by a court upon application by the Secretary of State (in the case of orders that include derogation).

⁶² See <http://www.cageprisoners.com/print.php?id=9336> (accessed 20 September 2005).

After its re-adoption in full by parliament, the Bill has been referred to the State Expediency Council for final review and approval.⁶³

It is worth mentioning that articles 512 and 516 of the country's Islamic Penal Code provides for the punishment of perpetrators of 'offences and crimes against other countries and the foreign security of the state'.⁶⁴

3.6.2 Israel

According to its initial report to the CTC, Israel has been under threat of terrorism since its independence.⁶⁵ Consequently, it has developed an 'extensive network of (agencies) and a body of domestic legislation' to counter terrorism. Anti-terrorism or terrorism-related laws pre-dating 11 September include the Defence Regulations (State of Emergency) 1945, Prevention of Terrorism Ordinance 1948, and Penal Law 1977. The Regulations and the Ordinance, *inter alia*, authorise the freezing or confiscating of assets of terrorist groups.

In the post-11 September period, it enacted the Prohibition on Money Laundering Orders which enjoin financial institutions to report financial transactions which appeared to them to be unusual.

In 2002, the Suppression of the Financing of Terrorism Law, which implements the Convention on the Financing of Terrorism, was adopted.

3.6.3 Saudi Arabia

Saudi Arabia has not adopted any specific anti-terrorism legislation as such. According to its compliance reports submitted to the CTC, Saudi Arabia enforces provisions of international conventions on terrorism in accordance with the principles of the Islamic Shari'a, which is the source of law in Saudi Arabia.⁶⁶ It has acceded to seven of the 12 universal conventions on terrorism.

In accordance with the Shari'a, terrorism and the financing of terrorism are characterised as 'spreading mischief in the land' or 'spreading

⁶³ See Fourth Report of the Islamic Republic of Iran to the Counter-Terrorism Committee, S/2005/224, 28 March 2005 <http://www.un.org/sc/ctc/countryreports/reportsA.shtml> (accessed 14 June 2006).

⁶⁴ As above.

⁶⁵ See Report of Israel to the Counter-Terrorism Committee, S/2001/1312, 31 December 2001 <http://daccessdds.un.org/doc/UNDOC/GEN/N02/229/21/PDF/N0222921.pdf?OpenElement> (accessed 15 June 2006).

⁶⁶ See Third Report of the Kingdom of Saudi Arabia to the Counter-Terrorism Committee, S/2003/583, 2 June 2003 <http://daccessdds.un.org/doc/UNDOC/GEN/N03/384/65/PDF/N0338465.pdf?OpenElement> (accessed 14 June 2006). International agreements relating to terrorism are enforced by royal decree and then referred to the authorities concerned for implementation by each authority in its own area of jurisdiction.

evil on earth' (*al-ifsad fi al-ard*) and crimes against society (*hirabah*) to which severe penalties, including death, apply.⁶⁷

By Royal Decree 39 of 18 August 2003, Saudi Arabia adopted the Money Laundering Statute to deal with the financing of terrorism. Article 2 of the Statute provides that the financing of terrorism terrorist acts or terrorist organisations constitutes a crime of money laundering which attracts severe penalties. In terms of article 12, funds suspected of being intended to finance terrorism may be seized upon suspicion or by order of a competent court.

4 The human rights implications of anti-terrorism laws

4.1 The primacy of international human rights law

The primacy of international human rights law derives from the UN Charter together with the Universal Declaration of Human Rights (Universal Declaration). Article 1(3) of the Charter sets human rights as the cornerstone for the achievement of the purposes of the UN. Article 55(c) provides that the UN will encourage 'universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion', while article 56 imposes an obligation on UN member states 'to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in article 55'. It is therefore clear that UN member states are obliged to respect human rights. The pre-eminence of this obligation is confirmed by article 103 of the Charter:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The Universal Declaration proclaims that it is 'a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive to secure their universal and effective recognition and observance'. While the legal standing of the Universal Declaration is subject to debate, the constant references to it in numerous international fora, international human rights treaties and in the legislative and judicial proceedings of many countries, indicates that it has become a part of customary international law binding even on those states that did not approve it in the first place in 1948.

States have the primary responsibility for protecting the security of all persons under their jurisdiction. In this regard, states are at liberty to

⁶⁷ See Fourth Report of the Kingdom of Saudi Arabia to the Counter-Terrorism Committee, S/2004/884, 2 November 2004 <http://daccessdds.un.org/doc/UNDOC/GEN/N04/603/45/PDF/N0460345.pdf?OpenElement> (accessed 14 June 2006).

adopt measures to combat terrorism and to protect those subject to their jurisdiction. However, these measures must be consistent with international human rights standards. As the UN Working Group on Terrorism has emphasised, international law requires that states adhere to basic human rights standards in their fight against terrorism.⁶⁸ In 2003, the UN Security Council declared that 'states must ensure that measure(s) taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law'.⁶⁹ It is noteworthy that UN Security Council Resolution 1373 itself expressly calls upon states to 'take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts'. In its Preamble, the resolution also reaffirms the need to combat by all means, 'in accordance with the Charter of the United Nations', threats to international peace and security.⁷⁰

It is notable that all the countries surveyed in this paper are parties to one or more of the seven core international human rights treaties. These treaties impose legal obligations to respect, protect and implement fundamental rights and freedoms. They also include clear restrictions on the actions that states may take within the context of the fight against terrorism.

4.2 Counter-terrorism legislation and human rights

It is widely accepted that terrorism constitutes a violation of human rights, especially the rights to physical integrity, life, freedom and security and also impedes socio-economic rights.⁷¹ All acts of terror — whether by a state or groups of individuals — seriously impair the enjoyment of human rights by persons in the places targeted.

⁶⁸ See Report para 26.

⁶⁹ Security Council Resolution 1456 (2003), Annex. This position has been reaffirmed in subsequent Security Council Resolutions on terrorism.

⁷⁰ It is interesting to note, however, that the CTC, which is established in terms of Resolution 1373, maintains that 'monitoring performance (of states) against other international conventions, including human rights law, is outside the scope' of its mandate.

⁷¹ See eg Report of Working Group on Terrorism 1. See also OAU Convention on the Prevention and Combating of Terrorism 1999, Preamble, para 10; Arab Convention on the Suppression of Terrorism 1998, Preamble; OIC Convention on Combating International Terrorism 1999, Preamble; Draft UN Comprehensive Convention Against Terrorism, UNGA Res 51/210 (17 December 1996), 6th session (2002), UN Doc Supp 37 (A/57/37), annex I: Bureau Discussion Paper; European Commission, Proposal for a Council Framework Decision on Combating Terrorism, Brussels, 19 September 2001, COM (2001) 521 Final, 2001/0217 (CNS), Explanatory Memorandum, 2-3, 7; OAS General Assembly, AG/RES 1840 ('i-O/02), Preamble.

Thousands of people all over the world have lost their lives as a consequence of terrorist acts. The 11 September attacks in the USA are but one instance. Terrorism has a long history, with a variety of perpetrators: the Red Brigade in Italy and Bader Meinhof in the Federal Republic of Germany in the 1970s; American Central Intelligence Agency-sponsored terrorist activities against regimes that the USA administration did not favour; and the Israeli terror campaigns against Palestinians and *vice versa*, to name but a few. Africa has also had its fair share of 'terrorist' attacks — notably in Algeria, the 1998 bomb attacks on the USA embassies in Kenya and Tanzania which killed hundreds, and the October 2002 Soweto bombings alleged to have been carried out by members of the right-wing Afrikaner *Boeremag* organisation in South Africa.

All of the foregoing terrorist acts have resulted in loss of life and therefore in the curtailment of the right to life. However, it must be recognised that state efforts to curb terrorist activities have also culminated in the abridgment of many rights and freedoms, not only of the 'terrorist' suspects but also of innocent civilians. Some of the rights and freedoms infringed upon in the quest to curb terrorism include the rights to life, liberty, human dignity, expression, association, and fair trial. Often, state measures to curb terrorism offend against the fundamental principles of humanity.

However, since 11 September, many states have adopted draconian new 'anti-terrorism measures', including new legislation, which are in breach of their international obligations and pose a serious threat to human rights.⁷² The pressure on states to respond to the international terrorist threat has resulted in some states adopting legislative and administrative measures which effectively abridge or threaten to abridge human rights.⁷³ These include prolonged detention of suspects, curtailing the right of access to legal representation, removing the right of appeal, seizure of property and placing limits on freedom of expression. According to Amnesty International, these national legislative responses to terrorism are 'eroding human rights principles, standards and values'. In its report for 2004, Amnesty International says that countries have continued to flout international human rights standards in the name of the 'war on terror'. This has resulted in 'thousands of women and men suffering unlawful detention, unfair trial and torture — often solely because of their ethnic or religious background'.⁷⁴

⁷² The UN has recognised the threat to human rights posed by anti-terrorism measures through, *inter alia*, the appointment of an Independent Expert on Protection of Human Rights While Countering Terrorism.

⁷³ See also the Berlin Declaration adopted by the International Commission of Jurists (ICJ) on 28 August 2004.

⁷⁴ Amnesty International Report 2004 <http://web.amnesty.org/report2004/index-eng> (accessed 24 November 2004).

In recognition of the challenges to human rights posed by legislative responses to terrorism, on 25 October 2001, member states of the Commonwealth adopted a Statement on Terrorism in which they committed themselves to implementing UN Security Council Resolution 1373, 'in keeping with the fundamental values of the association including democracy, human rights, the rule of law, freedom of belief, freedom of political opinion, justice and equality'.⁷⁵ Significantly, the UN Security Council — the author of the resolution pursuant to which many of the states adopting anti-terrorism legislation purport to act — has recently reaffirmed 'the imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations and international law'.⁷⁶ It has also reminded states that 'they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'.

Both the UN General Assembly and the Commission on Human Rights have adopted resolutions focusing on the need to protect human rights and fundamental freedoms while countering terrorism. The UN General Assembly resolution adopted on 18 December 2002 affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular, international human rights, refugee and humanitarian law.⁷⁷ The resolution also requests the UN High Commissioner for Human Rights to take a number of actions, including examining the question of the protection of human rights while countering terrorism.

There are a number of controversial issues raised by anti-terrorist legislation. Significantly, vague definitions of 'terrorism' in most anti-terrorism legislation render the concept open to abuse. Such vague definition, has led, for example in the US, to laws stereotyping people of Arabic and/or Eastern descent as well as organisations considered to be 'left-wingers'. The definitional problem is perhaps best illustrated by the comments of the Chairman of the Kenyan Human Rights Commission on the Kenyan Suppression of Terrorism Bill of 2003:

The Bill defines terrorism in such broad and vague terms that it cannot withstand the scrutiny of logic. Terrorism is such an innocuous bogeyman that it can be used as an open-ended excuse to deny suspects a broad range of constitutional guarantees.

⁷⁵ See Report of the Commonwealth Committee on Terrorism (CCT): Commonwealth Plan of Action <http://www.thecommonwealth.org/Templates/Internal.asp?No-delID=35145> (accessed 14 June 2006).

⁷⁶ See UN Security Council Resolution 1566 (2004), S/Res/1566 (2004), adopted by the Security Council at its 5053rd meeting on 8 October 2004.

⁷⁷ General Assembly Resolution A/Res/57/219 of 18 December 2002. See also E/CN.4/Res/2003/68 adopted by the Commission on Human Rights at its 59th session on 25 April 2003.

Similar concerns formed part of the severe criticisms directed against the first post-11 September anti-terrorism legislation in South Africa.

While it is not intended to provide an exhaustive treatment of the human rights issues raised by anti-terrorism legislation, an overview of selected human rights may be instructive.

4.2.1 Refugees and asylum seekers

Some governments have used anti-terrorism legislation to suppress not only political oppositions but also minority groups. Some have used this legislation to evade their international obligations towards asylum seekers and refugees.⁷⁸ For example, Tanzania's Prevention of Terrorism Act 2002 gives immigration officers the power to arrest without warrant, any person suspected to be a terrorist or to have been involved in international terrorist activities. The minister responsible for immigration is empowered to refuse asylum to anyone.

In similar vein, the Mauritian Prevention of Terrorism Act of 2002 gives the government the right to extradite terrorist suspects or to deny such persons asylum and to return them to countries where they are at risk of persecution.

On 13 September 2001, Australian Defence Minister Peter Reith cited the 11 September attacks to justify his government's attempts to prevent asylum-seekers from entering Australia.

Given the proliferation of conflicts around the world and the attendant flow of displaced persons, such powers are too extensive and offend against the well-established international legal principle of non-refoulement.

4.2.2 Detention, torture and the right to a fair trial

One of the most important rights of a criminal suspect is the right to be informed of the reason for their detention and the right to seek legal advice. Anti-terrorist legislation often curtails these under the pretext that more detention time is required for the law enforcement officials to complete their investigations. Where it is permitted, the right to counsel is limited to consultation with 'approved' legal practitioners. Under the Prevention of Terrorism (Special Measures) Regulations 2003 (Mauritius), a terrorist suspect can be detained for up to 36 hours without access to anyone other than a police officer or medical officer on request.⁷⁹ In similar vein, anti-terrorism legislation passed in the UK, France, Germany and Italy introduced severe restrictions on freedoms including prolonged detention and refusal to grant the right of asylum

⁷⁸ See Human Rights Watch 'Opportunism in the face of tragedy: Repression in the name of anti-terrorism' <http://hrw.org/campaigns/september11/opportunismwatch.htm> (accessed 14 June 2006).

⁷⁹ The Anti-Terrorism (Amendment) Ordinance 2002 allows for detention without trial for up to 12 months!

and immigration on the mere suspicion that the individual or individuals concerned belonged to a terrorist group. In the aftermath of the July 2005 London underground and bus bombings, the British government proposes to increase the period of detention without charge of terrorist suspects from 14 days to three months.

In relation to USA anti-terrorism legislation, Human Rights Watch has expressed concern that: 'the breadth and vagueness of the criteria for the certification and detention of non-citizens raise the possibility of arbitrary or abusive application'.⁸⁰

In its report for 2004, Amnesty International has stated that, in 2003, torture continued to be widespread in Algeria, particularly in cases which the government described as 'terrorist activities'.⁸¹ According to Human Rights Watch, a number of people detained in a facility controlled by the Joint Anti-Terrorism Task Force in Uganda were tortured.⁸² In relation to the detention of individuals by the USA in its so-called 'war against terror', the UN Working Group on Arbitrary Detention concluded in 2003 that their conditions of detention were arbitrary.⁸³

In his statement to the Third Committee of the UN General Assembly, Theo van Boven, the Special Rapporteur on Torture, spoke of reported circumventions of the prohibition on torture in the name of countering terrorism. These attempts included the legal arguments of necessity and self-defence; attempts to narrow the scope of the definition of torture and arguments that some harsh methods should not be considered as torture but merely as cruel, inhuman or degrading treatment or punishment; acts of torture and ill-treatments perpetrated against terrorist suspects by private contractors; the indefinite detention of suspects (including children) without determination of their legal status and without access to legal representation. As the Special Rapporteur has rightly stated, the definition of torture contained in the Convention against Torture cannot be altered by events (such as terrorism) or in accordance with the will or interest of states. It should be noted that the prohibition against torture is now firmly established as a rule of customary international law and, arguably, has the character of *jus cogens*.⁸⁴

⁸⁰ See 'Human Rights Watch criticises anti-terrorism legislation' *Human Rights News* 22 October 2001 <http://hrw.org/english/docs/2001/10/22/usdom2947.htm> (accessed 22 September 2005).

⁸¹ See <http://web.amnesty.org/web/web.nsf/print/2004-dza-summary-eng> (accessed 24 November 2004).

⁸² See Human Rights Watch *World Report 2003: Uganda* <http://www.hrw.org/wr2k3/africa13.html> (accessed 24 November 2004).

⁸³ See Civil and Political Rights, including the Question of Torture and Detention, Report of the Working Group on Arbitrary Detention, E/CN.4/2003/8.

⁸⁴ Rules or principles of international law having a higher status and from which no derogation is permitted.

4.2.3 Freedom of association, expression and assembly

These are basic civil rights which are crucial to any functioning democracy. However, they are also rights which have increasingly been curtailed or are under threat from anti-terrorism legislation as governments move to ban public demonstrations in the name of state security. Anti-terrorism legislation threatens to undermine democracy, not only in Africa, but across the world. Such legislation can easily be used to suppress or undermine democratic opposition.

To illustrate, the Zimbabwean Public Order and Security Act of 2002 makes it an offence to publish statements that promote public disorder or undermine public confidence in the law enforcement officials or to insult the office of the President. The Ugandan government has been criticised for using the Anti-Terrorism Act of 2002 to 'repress political dissent and strictly limit freedom of expression'.⁸⁵ In September 2002, Ugandan radio stations were warned against giving publicity to an exiled political leader whom the government had labelled a 'terrorist' and threatened with prosecution under the Act, in terms of which it is an offence to give publicity to terrorists.

In its report for 2003, the UN Working Group on Terrorism expressed the concern that:

The rubric of counter-terrorism can be used to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent and/ or suppression of resistance to military occupation.

4.2.4 The right to privacy

The constitutions of most of the countries surveyed guarantee the right to privacy.⁸⁶ However, their legislation confers powers on law enforcement agencies that potentially threaten this right. Some of the anti-terrorist legislative measures give the police extensive powers to combat terrorism, including the use of electronic surveillance to identify terrorists.⁸⁷ As stated above, the Ugandan Anti-Terrorism Act gives law enforcement officials extensive powers to monitor bank accounts, e-mails, telephone calls and other electronic communications of suspects. The

⁸⁵ See M Kagari 'Anti terror bill an affront to human rights' *Daily Nation* 18 November 2003 <http://www.nationaudio.com/News/DailyNation/18112003/Comment/Comment181120036.html> (accessed 22 September 2005). See also CPJ *Attacks on the press in 2002* <http://www.cpj.org/attacks02/africa02/uganda.html> (accessed 22 September 2005).

⁸⁶ Constitution of Mauritius 1968, sec 9; Constitution of South Africa 1996, sec 14; Constitution of Uganda 1995, sec 27.

⁸⁷ Such provisions are not unique to African anti-terrorism legislation. Eg, the Canadian Anti-Terrorism Act also gives the police extensive powers of surveillance. Under the Anti-Terrorism, Crime and Security Act 2001 of the United Kingdom, the Home Secretary has powers to issue a code of conduct for the retention of communications data by communications service providers for national security reasons.

potential for abuse under these provisions is considerable. Thus, it has been argued, for instance, that the phrase ‘... articles of a kind which could be used in connection with terrorism ...’ in the Ugandan Anti-Terrorism Act is so ‘vague that it could be used to search for almost any object’.⁸⁸

4.2.5 Other human rights concerns

According to the UN Special Rapporteur on Religious Intolerance, anti-terrorist measures in a number of states have unduly limited freedom of religion or belief, in violation of international human rights standards.⁸⁹ Responses to terrorism have also led to new forms of racial discrimination and a growing ‘acceptability’ of the traditional forms of racism where certain cultural or religious groups are viewed as terrorist risks.⁹⁰ This has spawned new forms of racism that render it more difficult to combat racial discrimination and xenophobia.

Some of the anti-terrorism legislation surveyed *prima facie* poses a threat to the rights of the child. For example, while the Uganda anti-terrorist law imposes the sentence of death for the offence of terrorism; it does not expressly stipulate that it does not apply to children who might be involved in such activities. In view of the low age of criminal responsibility in Uganda, this *lacuna* is a serious concern.⁹¹

There are also concerns about the lack of procedural safeguards concerning the extradition or the surrender of suspects.⁹²

It should be noted that most of the countries surveyed have constitutional guarantees of human rights in their constitutions. Consequently, it will be interesting to see how the anti-terrorism legislative measures that have implications for human rights will be reconciled with the constitutional guarantees of human rights. Suffice to say, these constitutions are generally proclaimed to be the ‘supreme law’

⁸⁸ SB Bossa & T Mulindwa ‘The Anti-Terrorism Act, 2002 (Uganda): Human rights concerns and implications’ paper prepared for the Terrorism and Human Rights Network of the International Commission of Jurists, 15 September 2004 http://www.icj.org/news.php3?id_article=3517&lang=en (accessed 22 September 2005).

⁸⁹ Statement by Asma Jahangir, Special Rapporteur on Freedom of Religion or Belief to the Third Committee of the UN General Assembly, 3 November 2004. See GA/SHC/3798 <http://www.un.org/News/Press/docs/2004/gashc3798.doc.htm> (accessed 31 March 2007).

⁹⁰ Statement of the Special Rapporteur on Mercenaries to the Third Committee of the UN General Assembly, 3 November 2004. See GA/SHC/3798 <http://www.un.org/News/Press/docs/2004/gashc3798.doc.htm> (accessed 31 March 2007).

⁹¹ Bossa & Mulindwa (n 88 above).

⁹² Eg, questions have been raised about the extradition, without appropriate legal safeguards, of terrorist suspects by Pakistan to the USA.

of the countries concerned and that any law inconsistent with the constitution is void to the extent of the inconsistency.⁹³

The South African Anti-Terrorism Bill of 2003, which was designed to remedy the perceived shortcomings in existing legislation (including inability to curb urban terrorism), had wide-ranging implications for human rights and principles of humanity — its security measures seemed to contravene no fewer than 11 constitutional rights.⁹⁴ The Bill was criticised on several grounds. One issue was the broad definition of what constitutes a 'terrorist act'. For example, the Bill defined any activity that might result in the 'disruption of essential public services' as a 'terrorist' act. Such wide and vague definition had the potential for abuse through, for example, characterisation of legitimate strikes by public sector workers, demands for land, and civil disobedience campaigns as 'terrorism'. In effect, one could be guilty of a terrorist act when striking or participating in a public demonstration!

5 Terrorism and the fundamental principles of humanity

The Turku Declaration on the Fundamental Principles of Humanity affirms non-derogable minimum humanitarian standards, which are applicable in all circumstances. It provides, *inter alia*, that all persons (including those whose liberty has been restricted) are 'entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices'. It also prohibits a number of practices including outrages upon personal dignity.

On their face and with particular regard to the safeguards built therein, most of the anti-terror laws in the countries surveyed above respect these fundamental principles of humanity.⁹⁵ However, as indicated earlier, many of these laws have been roundly condemned as a threat to the rights enshrined in the countries' constitution and in international human rights treaties.

While it is recognised that all countries have the responsibility and obligation under international law to give effect to the relevant UN and regional conventions and resolutions relating to terrorism, individual

⁹³ Eg, sec 2 of the Constitution of Mauritius 1968 proclaims: 'This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.' See also Constitution of South Africa 1996, sec 2; and Constitution of Uganda 1995, sec 2.

⁹⁴ The Bill was subsequently withdrawn and replaced with the Protection of Constitutional Democracy Against Terrorism and Related Activities Bill which was passed by the National Assembly in November 2004 (see sec 3.2.2 above).

⁹⁵ Eg, a special interpretation clause requires the definition of 'terrorist act' to be interpreted in accordance with international humanitarian law. Persons detained in terms of the legislation are also entitled to consult with a legal and medical practitioner, and to be visited by a partner and chosen religious counsellor.

citizens have the right to be treated in accordance with the fundamental principles of humanity. In their current form, most anti-terrorism laws are likely to erode not only the human rights of the people but also the fundamental principles of humanity.

6 Conclusion

The legislative responses to terrorism in different countries around the world have the potential to impact negatively on human rights and freedoms such as the rights to freedom of expression, association, security of the person, religion, belief, opinion, assembly and demonstration, and to offend against the fundamental principles of humanity as defined in the Turku Declaration. As Amnesty International stated in May 2003:

The 'war on terror', far from making the world a safer place has made it more dangerous by curtailing human rights, undermining the rule of international law and shielding governments from scrutiny. It has deepened divisions among people of different faiths and origins . . .

The fact that many governments have been forced to introduce 'anti-terrorism' legislation by powerful states such as the USA and the UK in their prosecution of the so-called 'war against terror', without due regard to their local circumstances, not only enhances the likelihood that these countries have not given much thought to the implications of such legislation for human rights but also increases the risk of abuse by these states.

For these reasons, it is important that each state should have, in co-operation with others and in accordance with the dictates of international law, the freedom to adopt anti-terrorist legislation that not only suits it but also helps it meet its obligations under international law, including the obligation to protect the rights of all people irrespective of race, ethnic origin, political opinions, etc. Most importantly, there is a need for the world to deal with the problem of terrorism in a holistic manner that ensures that in their quest to deal with the terrorist threat, states do not erode the rights of all persons subject to their jurisdiction.

As the UN Policy Working Group on the UN and Terrorism stated in its 2002 Report:

Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality. To overcome the problem of terrorism it is necessary to understand its political nature as well as its basic criminality and psychology.

In sum, national legislative efforts to curb international terrorism should take account of human rights and fundamental principles of humanity.

From mandates to economic partnerships: The return to proper statehood in Africa

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Summary

The concern over state strength has since the end of the Cold War under the intellectual dominance of economists identified political institutional capacity as the most critical variable in development. This concern, also known under a variety of other names, such as 'governance' or 'state and institutional capacity', has in the meantime become the subject matter of a number of international and regional efforts. These efforts are aimed at promoting the idea of the primacy of the state in sustaining peace and security, the flourishing of civil society and the private sector, and at creating an enabling environment for sustainable growth and development, thereby ensuring a more equitable society. This article examines the potential role of regional mechanisms, such as the African Peer Review Mechanism and the mechanisms created by the Cotonou Agreement, in the return to good governance and proper statehood in Africa.

1 Introduction

The concern over state strength, writes Fukuyama in 2004, has since the end of the Cold War under the intellectual dominance of economists identified political institutional capacity, and not economics, as the most critical variable in development.¹ This concern, also known under a variety of other names, such as 'governance' or 'state and institutional capacity', has in the meantime become the subject matter of a number of international and regional efforts²

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¹ F Fukuyama *State-building, governance and world order in the 21st century* (2004) 21-22.

² Economic Commission for Africa African Governance Report (2005) <http://www.uneca.org> (accessed 18 October 2006).

to advance the emerging consensus on the primacy of the capable state to sustain peace and security, promote the flourishing of civil society and the private sector, create an enabling environment for sustainable growth and development, and ensure a more just and equitable society.

Most notable amongst these efforts are the World Bank's reports on the building of effective states (2005),³ on governance indicators (2006)⁴ and on policy discussions in respect of fragile states (2006),⁵ the Economic Commission for Africa's African Governance Report (2005),⁶ Tony Blair's Commission for Africa Report (2005),⁷ the European Union's (EU) Strategy for Africa (2005)⁸ and the joint statement by the European Parliament, Council and Commission on Development (2006),⁹ also known as the European Consensus on Development, which will find application in terms of the new economic partnership agreements of the post-Lomé economic development arrangements between the EU and the African, Caribbean and Pacific (ACP) states. In these documents and in commentaries on the subject matter, Africa draws much of the interest because it is the only region that lags behind in reaching the millennium development goals and it has the largest concentration of states considered weak or dysfunctional.

The new framework for and ensuing debate on development aid and state capacity encapsulated in the above documents are largely shaped by historical events associated with a specific phase in the formation of statehood, the subsequent discontent with inferior accomplishments in many fields and the post-Cold War unease about the growth in multi-faceted threats to international peace and security. In dealing with these matters in the pages that follow, it must also be taken into account that there is a body of opinion that divides itself on the way in which dysfunctional states should be saved by either rejecting most rescue attempts by the West as forms of colonialism in disguise, resting, as in the case with the mandate and trusteeship systems, on notions of paternalism and cultural superiority, or by unequivocally arguing for rehabilitated forms of trusteeship over African states that face increasing difficulties in performing basic governmental functions and in delivering

³ World Bank Task Force on Capacity Development in Africa Building Effective States, Forging Engaged Societies (2005) <http://www.worldbank.org> (accessed 15 October 2006).

⁴ D Kaufmann *et al* 'Governance matters v aggregate and individual governance indicators for 1996 — 2005' <http://www.worldbank.org> (accessed 15 October 2006).

⁵ In World Bank parlance, these states are referred to as Low-income Countries under Stress (LICUS). See <http://www.worldbank.org/eig/licus/findings.html> (accessed 20 October 2006).

⁶ n 2 above.

⁷ 'Our common interest' Report of the Commission for Africa (2005) <http://www.commissionforafrica.org> (accessed 10 October 2006). See especially ch 4 and 5 of the report.

⁸ European Commission Document COM (2005) 489 of 12 October 2005.

⁹ OJ 2006/C 46/01 of 24 February 2006.

essential services to their citizens.¹⁰ In this latter category, it is sometimes bluntly stated that what much of Africa needs is a form of 'disinterested neo-colonialism', which, although it does not stand much chance of acceptance, must 'in the absence of an alternative ... be considered'.¹¹ Grand theories in the former category are often far removed from the needs of those who die at the hands of their own governments and the time has perhaps come to face things as they are.

What should also be understood from the start is that the prospects of the newly envisaged economic partnership agreements between the ACP countries and the EU could lose ground and legitimacy against other forms of regime change if accomplishments keep on being spiced up by diplomatic language and placating phrases, while in reality the millennium goals, or any other goals for that matter, keep on drifting further away. The Dayton Peace Agreements, bringing the bloody Yugoslav conflict to an end, should also serve as a further reminder that obstinate parties to an agreement can be made to accept the terms and conditions thereof and that the implementation of such agreements can be very weak.¹² For things to be put into historical perspective and to have some grasp of the nature and scope of the issues involved in this new phase in development aid relationships, it is perhaps useful to first have a glimpse of some past events and of the resulting consequences and challenges.

2 Historical precursors

There is a general tendency, not wholly incorrect, to explain the international supervision arrangements under the mandate system of the League of Nations¹³ and the trusteeship version thereof under the United Nations (UN) Charter¹⁴ with reference to moral convictions infused with humanitarianism or natural law ideals of justice, coupled with the force of the political self-determination dogma of the twentieth century.¹⁵ After all, both article 22 of the League Covenant and article 73 of the UN Charter applied the principle of the well-being and development of peoples not yet being able to govern themselves properly as an

¹⁰ See, eg, R Gordon 'Saving failed states: Sometimes a neocolonialist notion' (1977) 12 *American University Journal of International Law and Policy* 903.

¹¹ W Pfaff 'A new colonialism? Europe must go back to Africa' (1995) 1 *Foreign Affairs* 2 3.

¹² PC Szasz 'The Dayton accord: The Balkan peace agreement' (1997) 30 *Cornell International Law Journal* 760.

¹³ See art 22 of the Covenant of the League of Nations (1919). See also D Rauschnig 'Mandates' in R Bernhardt (ed) *Encyclopedia of public international law* (1997) 280.

¹⁴ See arts 73-91 of the UN Charter (1945). See also D Rauschnig 'United Nations trusteeship system' in R Bernhardt (ed) *Encyclopedia of public international law* (1983) 369.

¹⁵ See also N Tsagourias 'Humanism and the mandates system: Its modern revival' in A-Ch Kiss & JG Lammers (eds) *Hague Yearbook of International Law 2000* (2001) 97.

orientation for what both arrangements were designed to achieve. In the *International Status of South West Africa* case, the International Court of Justice ruled that the 'mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilisation'.¹⁶

However, from the vantage point of the transformation of international affairs in the twentieth century, the supervision arrangements in both instances were an integral part of the new ideas on collective security and the institutionalisation of mechanisms for international co-operation in every aspect of life — political, economic, social, technical and cultural — which might otherwise be a cause for conflict and strife.¹⁷ It is therefore no coincidence that article 76 of the UN Charter, in particular, lists the furtherance of international peace and security as the first basic objective of the trusteeship system,¹⁸ followed by the promotion of the political, economic, social and educational advancement of the inhabitants of the trust territories, respect for human rights and fundamental freedoms, and equal treatment in economic and commercial matters for all members of the UN.

Whether we talk about mandates or trust territories, or, in more contemporary terminology, bring up the security and development risks associated with weak, failing, failed, fragile or dysfunctional states as a security and development problem,¹⁹ the golden thread that runs through all these cases is the issue of good governance, or rather the lack thereof. Weak governance, Fukuyama points out,²⁰

undermines the principle of sovereignty on which the post-Westphalian international order has been built. It does so because the problems that weak states generate for themselves and for others vastly increase the likelihood that someone else in the international system will seek to intervene in their affairs against their wishes to forcibly fix the problem. Weak here refers to state strength and not scope . . . meaning a lack of institutional capacity to implement and enforce policies, often driven by an underlying lack of legitimacy of the political system as a whole.

Through time this issue has found expression in different terms, despite the fact that, during the different historical periods, layers of considerations could have served as inter-relating factors for the forces that eventually gave shape to the mandate, trusteeship and self-determination ideas.²¹ Some examples may suffice.

¹⁶ *International Status of South West Africa* 17 ILR (1950) 47 49 50.

¹⁷ See *inter alia* A Fleury 'The League of Nations: Toward a new appreciation of its history' in MF Boemeke et al (eds) *The Treaty of Versailles: A reassessment after 75 years* (1998) 507 508.

¹⁸ See also CE Toussaint *The trusteeship system of the United Nations* (1956) 54.

¹⁹ See also A von Bogdandy et al 'State-building, nation-building and constitutional politics in post-conflict situations: Conceptual clarifications and an appraisal of different approaches' (2005) *Max Planck Yearbook of United Nations Law* 579.

²⁰ Fukuyama (n 1 above) 96.

Shortly after the outbreak of World War I, a rather prophetic article on armaments, nationalist wars, hegemonial powers and a commonwealth of states appeared in *Round Table*, one of the oldest international affairs journals, in which the following observation was made:²²

If we look at it from the point of view of the whole world, the government of dependencies is obviously necessary in the present stage of human development. . . . In all these cases the only course consistent with human progress is for a civilised government, strong enough to control the foreigner, to step in, restore law and order and justice, and set to work to lay the material and moral foundations on which the structure of civilised self-government may eventually be built.

In 1931, the Permanent Mandates Commission took the bold step to spell out that independent statehood can only be claimed if a political entity is equipped with a properly constituted government and administration capable to ensure the functioning of regular public services, is in a position to maintain its own territorial integrity and political independence, can enforce public peace and security throughout its territory, can secure the financial resources needed for the regular functioning of the state, and possesses a legislative and judicial organisation that could mete out justice to all on a continuous basis.²³ No less is this the concept that also underlies article 4(2) of the UN Charter, which requires for UN membership the capacity and willingness of states to carry out the obligations they have assumed in terms of the UN Charter.

It is now a historical fact that these considerations were largely ignored during the decolonisation frenzy. The classical example remains General Assembly Resolution 1514(XV), which stated categorically that 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.²⁴ By stigmatising the range of considerations that could co-determine the quality and sustainability of political governance as something more apparent than real (pretext), the resolution conveniently foreclosed the question on the content and substance of political rule that was taking shape under the self-determination campaign. Ironically, this was also the script for the coming into being of states whose sovereignty and political independence were more apparent than real, and eventually they became the prime violators of the very codes of conduct on

²¹ See also N Matz 'Civilisation and the mandate system under the League of Nations as origin of trusteeship' (2005) *Max Planck Yearbook of United Nations Law* 47 67.

²² *The Round Table* (1915/16) vol VI 'Harvest of the war' 1 12 13.

²³ *Commission Permanente des Mandates Procès-Verbale de la Vingtième Session*, 10 December 1931, No C 422 M 176 229.

²⁴ GA Resolution 1514 (XV) of 14 December 1960 para 3. See also D Rauschnig 'Das Ende des Treuhandsystems der Vereinten Nationen durch die Staatwerdung der ihm unterstellten Gebiete' (1965) *12 Jahrbuch für internationales Recht* 158 176.

non-intervention and human rights protection the General Assembly so energetically developed for the old colonial powers.²⁵

Clapham's striking assessment of these developments warrants emphasis:²⁶

The pretence that formally independent states should be treated 'as if' they possessed the full attributes of sovereignty, even if they evidently did not in fact do so, was used to cover the cracks in the façade, under the assumption that these cracks would eventually be sealed, and that artificial states would solidify into the real thing. Both superpowers and former colonial powers helped to maintain the states for whose protection they assumed responsibility, by means of diplomatic support, economic aid and, if need be, direct military intervention. These state-supporting activities were condoned and indeed encouraged by Third World international organisations, despite their general condemnation of 'imperialism', through the adoption of a doctrine of sovereignty that upheld the power of the government of any particular state, and recognised the right of that government to call on external assistance for its own protection. In the process little attention was given to the domestic structures of the state itself or, in the grossest cases, to the levels of repression and corruption that it embodied.

A familiar weakness in the African state-formation process, it is said, was the misfit between the indigenous foundations for statehood and the colonial-imposed government structures, coupled with historically too brief a period of engagement for external forces to build and develop institutional structures.²⁷ However, whatever the social, political and cultural circumstances, one of the decisive causes of the post-colonial failures in African statehood was the politically and internationally forced abandonment of developing the erstwhile colonies 'to the point of satisfying classical positive criteria of sovereign self-government', with the result that, to become a state, former colonial status and the 'evident desire of the population to be independent' at the expense of 'all other considerations' sufficed.²⁸ The irony that ensued from this was that decolonisation, instead of becoming the apotheosis of universal statehood in the post-war years, introduced its decline with the result that:²⁹

²⁵ See *inter alia* GA Resolution 2131 (XX) Rev 1 of 14 January 1966 and GA Resolution 2144 (XXI) of 26 October 1966.

²⁶ C Clapham 'The challenge of the state in a globalised world' (2002) 5 *Development and Change* 775 782.

²⁷ C Clapham 'The global-local politics of state decay' in RI Rotberg (ed) *When states fail: Causes and consequences* (2004) 77 85. See also A Mazrui 'Africa entrapped: Between the protestant ethic and the legacy of Westphalia' in H Bull & A Watson (eds) *The expansion of international society* (1984) 589; H Bull 'European states and African political communities' in Bull & Watson (above) 99.

²⁸ R H Jackson *Quasi-states: Sovereignty, international relations and the Third World* (1993) 17 18.

²⁹ Clapham (n 27 above) 82.

There are now significant areas of the world in which the existence of a state is little more than a pretence, maintained by the international system because it lacks any intellectual or legal framework other than statehood through which to understand and cope with developments on the ground. Legal fictions are of course a common place, in both domestic and international law, but they need to be recognised for what they are.

Two further examples illustrate the point made above. The first relates to Afghanistan, in which case the UN also had to uphold the illusion of statehood in order to make it possible to deal with a situation in terms of the Charter and to hold the incumbent 'government' responsible for enforcing UN resolutions. The case in point is Security Council Resolution 1267 of 15 October 1999, which, in the Preamble, reaffirmed the Council's 'strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan. . .'.³⁰ The purpose of this and other resolutions was to force the Taliban to discontinue giving sanctuary and assistance to a network of terrorists, including Al Qaida.³¹ At the time of these efforts, one part (approximately 90%) of Afghanistan was controlled by the Taliban, a dictatorial, fundamentalist, and drug-dealing religious clan, the other by tribal warlords caught in a mediaeval time-warp. The view, mainly held by non-governmental organisations (NGOs) that the Afghan 'state', 'formal justice system' and 'society' were destroyed by two decades of war before the United States removed the Taliban by military force after September 11, is wrong. The more accurate view is that³²

even before the war the Afghan state (*sic*) was exceedingly weak and not properly equipped for the administration of the country and the delivery of services to its citizens. . . . International assistance to the Afghan transitional process must therefore not 'merely' aim at restructuring governmental structures, but must start from the assumption that effective governance in the modern sense has never existed, even before the war. . . . It is thus not the reconstruction of formerly existing state structures that we are faced with, but in some sense the initial act of creation of the *political* community that transcends pre-modern ethnic, linguistic, religious and geographic loyalties.

The second example is Security Council Resolution 1725 of 6 December 2006 which deals with the escalating violence in Somalia even after the establishment of an internationally recognised but powerless transitional government, which included former warlords who, through their reign of terror, made ordinary government impossible since the

³⁰ See also SC Resolution 1333 of 19 December 2000, Preamble para 2.

³¹ On international law issues, see R Wolfrum & CE Philipp 'The status of the Taliban: Their obligations and rights under international law' in (2002) *Max Planck Yearbook of United Nations Law* 559.

³² E Afsah & AH Guhr 'Afghanistan: Building a state to keep the peace' in (2005) *Max Planck Yearbook of United Nations Law* 373 376. The conditions that existed before the US military offensive against the Taliban in 2002 are very much still in place. See FP Kühn 'Afghanistans schwieriger Weg zur Stabilisierung' in (2005) *Friedensgutachten* 60 62-64. See also SC Resolution 1662 of 23 March 2006 para 18.

early nineties. By all standards Somalia is a failed state, yet in the Preamble of the resolution, the Security Council *reaffirmed* its 'respect for the sovereignty, territorial integrity, political independence and unity of Somalia'. What the Security Council affirms here is far removed from the real state of affairs showing an embattled 'government' militarily, too weak to sustain an armed resistance against the militant Union of Islamic Courts without the large-scale military assistance of neighbouring Ethiopia.³³ But some entity must be the addressee of even the weakest international response to a crisis and a fake sovereign state will do just fine in the circumstances.

3 The return to first principles

The great irony of all this is that, while questions of effective governance and institutional capacity were blown away by the winds of change Harold MacMillan³⁴ warned about in the sixties, the international and regional communities of states were forced by subsequent events to return to this fundamental question and to confront it head-on. Even in the 2001 base document of the New Partnership for Africa's Development (NEPAD), it was acknowledged that post-colonial Africa inherited — by African leaders' own demands — 'weak states and dysfunctional economies that were further aggravated by poor leadership, corruption and bad governance', with the result that today 'the weak state remains a major constraint to sustainable development' and one of 'Africa's major challenges is to strengthen the capacity to govern and to develop long-term policies'.³⁵ This return to first principles was brought about mainly by two events: the unhappy experiment with economic reforms in developing countries since the seventies and, more recently, the concern with the interconnectedness between fragile or dysfunctional states and questions of international peace and security. The interesting aspect is that the pre-conditions for statehood and the question of state capacity, forgotten in the text of article 4 of

³³ See report of the Special Representative on Somalia in UN Doc SC 8930 of 26 December 2006; *Frankfurter Allgemeine Zeitung* 27 December 2006 1 3; *Neue Zürcher Zeitung* 27 December 2006 1 2.

³⁴ In 1960, the British Prime Minister, Harold MacMillan, gave his famous 'winds of change' speech in the South African Parliament in which he made the following pertinent observation: 'It is a basic principle of our modern Commonwealth that we respect each other's sovereignty in matters of internal policy. At the same time we must recognise that in this shrinking world in which we live today the internal policies of one nation may have effect outside it. We may sometimes be tempted to say to each other, "Mind your own business", but in these days I would myself expand the old saying so that it runs: "Mind your own business, but mind how it affects my business too".' See H MacMillan *Pointing the way* (1972) 473.

³⁵ New Partnership for Africa's Development (NEPAD) paras 2 & 4, adopted on 23 October 2001 in Abuja, Nigeria and accessible at <http://www.nepad.org> (accessed 31 March 2007).

the UN Charter under the domineering influence of post-colonial sentiments, were forced onto the world scene towards the beginning of the nineties, not so much through the efforts of the main political organs of the UN, but through the policy and research papers of international and regional donor institutions.

Already towards the end of the eighties a World Bank Report, co-produced by a large number of African researchers, acknowledged that the successful transformation of African economies is not only dependent on sound macro-economic policies and an efficient infrastructure. The root cause of weak economic performance, the report finds, has been the failure of public institutions. Thus, it was concluded that:³⁶

Underlying the litany of Africa's development problems is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account. In self-defence individuals have built up personal networks of influence rather than hold the all-powerful state accountable for its systemic failures. In this way politics becomes personalised, and patronage becomes essential to maintain power.

In the wake of new economic and security challenges after the end of the Cold War, the UN's Committee for Development Planning came to a similar conclusion as is clear from the following excerpt:³⁷

In many developing countries, economic reforms and economic development are made impracticable by an unfavourable political process and mode of governance. There are countries where there is a lack of transparency in government decision-making, a lack of government accountability to the populace, and the denial of fundamental human rights to large segments of the population. Such situations are attributable to vested interest groups wielding economic and political power, averse to social change and broad-based economic progress for fear that their own particular interests would be undermined.

In both instances, what seems to have been identified as a core concern is the *behaviour* and *conduct* of politicians and bureaucrats, which explains the observation that '[p]ublic officials in many African countries have too often behaved in unpredictable and corrupt ways, injecting a measure of uncertainty into economic incentives, property rights and governmental laws and regulations so as to discourage potential investors from being willing to put their capital at risk'.³⁸ This realisation also

³⁶ World Bank *Sub-Saharan Africa: From crisis to sustainable growth* (1989) 60 61.

³⁷ UN Committee for Development Planning *Poverty alleviation and sustainable development: Goals in conflict* (1992) 5 6. See also K Ginther & PJIM de Waart 'Sustainable development as a matter of good governance: An introductory view' in K Ginther *et al* (eds) *Sustainable development and good governance* (1995) 1.

³⁸ Committee for Development Planning Report (n 37 above) 45.

led to the abandonment of the idea that the need for a steady and consistent economic policy sometimes justifies the acceptance of authoritarian regimes which could provide the institutional stability for economic policy adjustments to be kept on a consistent course.³⁹ With the focus more on actual decision-making relationships than on formal institutional structures and roles as a function of good governance, certain attributes and capacities of government authorities in such states have turned out to be highly problematic. Not only were the post-colonial state systems artificial and highly elite-centred constructs and weak in relation to their external environments, but also too heavy with oversized and inefficient executive, bureaucratic, military and security establishments. In addition, legal and public institutions were subordinated to the interests of ruling elites that could not bridge the gap between the lack of skills, resources and knowledge on the one hand and the demands of modern government and the exigencies of the international environment on the other.⁴⁰

In a more recent report, the Committee, renamed in 1998 as the Committee for Development Policy, affirmed the emergence of good governance as a condition for development assistance, but also brought up the lack of consensus on the concept's core meaning and how it could be applied in practice.⁴¹ Perhaps what should be stated at the outset is that one should avoid equating effective governance with good governance — dictatorships can also be effective — or democratic governance, especially of the kind we find on the African continent, with effective governance. South Africa is a case in point in the latter category. Although the government might qualify as democratically composed, it is ineffective in several core respects, most notably with regard to law enforcement, a core function of any state which wants to be called by that name.⁴²

In any event, a helpful starting point on the different meanings of the concept of governance is to be found in the distinction drawn by the Committee between the academic and donor-driven discourses on the matter. Under the former, the concept of governance relates to the way in which power and authority relations can be explained by understanding institutional links between state, civil society and the private sector. The donor-driven discourse, on the other hand, focuses on

³⁹ n 38 above, 58.

⁴⁰ n 38 above, 63.

⁴¹ Committee for Development Policy *Poverty reduction and good governance* (2005) 9.

⁴² Other African 'democracies' find themselves in a similar position. In a recent study it was concluded that there is a 'lack of capacity by governments to develop and implement effective counter measures to stem the growth in organised criminal activity. This inability to act against criminal networks is exacerbated by the overall weakness of state institutions, civil society and the media.' See G Wannenburg *Africa's Pablos and political entrepreneurs: War, the state and criminal networks in West and Southern Africa* (2006). See also W Reno *Warlord politics and African states* (1998).

questions relating to the accountability of state structures, due process of law and policy effectiveness.⁴³ The Committee itself seems to be comfortable with both,⁴⁴ but adds two further perspectives. The first is that the question about what constitutes *good* governance is embedded in the values and standards of conduct that are postulated by the defining institutions or actors. The second is that, since government is also instrumental, the question about it being good or bad must be linked to what is achieved or not achieved in terms of national and international policy goals.⁴⁵

The issue about the cultural embeddedness of what constitutes good governance raises the question about universally applicable norms versus situation-specific and, often, relativistic assessment of good governance practices. Under the democratic and political governance initiative, the NEPAD document has opted for what is called the 'global standards of democracy' as guideline for the commitment to establish proper conditions for sustainable development. The introductory part reads as follows:⁴⁶

It is generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. With the New Partnership for Africa's Development, Africa undertakes to respect the global standards of democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers' unions, fair, open, free and democratic elections periodically organised to enable the populace to choose their leaders freely. The purpose of the Democracy and Governance Initiative is to contribute to strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.

In the case of human rights guarantees, the sentiments about global standards were recently also exhibited in the General Assembly's Third Committee in a draft resolution sponsored by Belarus and Uzbekistan, countries known for their human rights abuses, and adopted by a recorded vote of 77 states in favour and 63 against, with 26 abstaining.⁴⁷ In the Preamble it was affirmed that 'all human rights are universal, indivisible, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. . .'⁴⁸ However, it was added that 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'.⁴⁹

⁴³ n 41 above, 9 10.

⁴⁴ n 41 above, 10 11.

⁴⁵ n 41 above, 11.

⁴⁶ n 35 above, paras 79 & 80.

⁴⁷ GA/SHC/3873 of 16 November 2006, annex VIII.

⁴⁸ UN Doc A/C 3/61/L.31/Rev 1 Preamble para 2.

⁴⁹ As above. See also operative paras 3 & 5.

The elements or components of good governance and democracy mentioned in the NEPAD commitment above have become fashionable phrases in regional⁵⁰ and international documents dealing with the subject matter of good governance. However, the question remains about their meaning and realisation at the national level, especially in political, historical and cultural contexts where the understanding of governmental authority is undiluted by politically and culturally internalised constraints on the accumulation of power. The call for a more effective state machinery can be understood to mean more power to achieve narrow elite-centred objectives; majority rule without a concept of the republican idea of the state (formal democracy) could lead to absolute majority sovereignty; the rule of law may become the rule of the strongest group in the absence of effective checks and balances; a multi-party system with weak political opposition formations and the lack of differentiated civil institutions throughout the different strata of societal relationships could facilitate the bypassing of internal controls and coalition building behind a façade of political pluralism and competitiveness; etc.⁵¹ Commenting on the rise of illiberal democracies under the spectacle of formal, internationally monitored elections, Zakaria⁵² has made the following compelling conclusion:

There are no longer respectable alternatives to democracy; it is part of the fashionable attire of modernity. Thus the problem of governance in the 21st century will likely be problems *within* democracy. This makes them more difficult to handle, wrapped as they are in the mantle of legitimacy.

Against this background, certain main areas can be singled out where reform efforts in terms of the new initiatives on establishing good governance practices will be most critical, and most challenging at the same time.

⁵⁰ See eg the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I and the ECOWAS Protocol on Democracy and Good Governance, Protocol A/SP1/12/01 adopted in Dakar on 21 December 2001, especially arts 1 & 33.

⁵¹ See also African Governance Report (n 2 above) 203: 'Opposition parties in many African parliaments are very weak and could hardly engage the government in serious debates on major governance issues and policy options. Opposition party members in parliament are usually co-opted in legislative debates by the dominant or ruling party, weakening legislative deliberations and the capacity of members of parliament to effectively articulate the diverse interests of the people they serve.' For more analyses on these phenomena, see Freedom House *Freedom in the world country ratings 1972—2006* (2006) <http://www.freedomhouse.org> (accessed 27 November 2006); L Kekic *The world in 2007: The Economist Intelligence Unit's Index of Democracy* (2006).

⁵² F Zakaria 'The rise of illiberal democracy' (1997) 6 *Foreign Affairs* 22 42.

4 Main areas of concern and the challenges reform efforts could face

4.1 The executive and the public service

The recognition by the World Bank in 1989 that the economic crisis in Africa has deepened despite the efforts of the development community in the past, has led to the introduction of capacity building programmes with a view to address the failures caused by weak public institutions in Africa.⁵³ Amongst the range of governance aspects identified as in need of reform was, quite correctly, the civil service, a matter in respect of which the Bank's past reform efforts were equally disappointing. In putting the finger on this sore, the Bank has also struck at one of the fundamental problems with statehood in Africa. Subsequently, in 1994 the Africa Technical Department of the World Bank issued a report on the issue of civil service reform in which some key characteristics of the state-administrative environment in Africa were analysed by introducing the concept of the patrimonial state which emerged out of the superimposition of modern state and governance systems on traditional institutions based on kinship, ethnic and village linkages.⁵⁴ This opened the way for routes of entry into the public service and a whole range of official and unofficial fringe benefits based on dependency and reciprocity associations which could not but end in a coincidence of private and state interests. The report's findings on this phenomenon are important enough to quote extensively:⁵⁵

Generally the first order of business for any high-level official when taking office is to surround himself or herself with loyal friends, family members and supporters. The goal is to create personal and extra-legal bonds . . . Those who co-operate become bound by collusion to their superiors who may, at any time, denounce and demote them should they show signs of 'undue' independence or non-compliance. Each office/department becomes, therefore, dominated by the all-powerful group loyal to the 'boss' who are all linked by an all-embracing informal network of reciprocal claims and clandestine understandings and personal interests. Formal obligations of administrative duties are therefore almost irrelevant and effectively undermined. This is the reign of the 'in' crowd. Although appointments, promotions and transfers may nominally follow the formal administrative rules and needs, their latent but real purpose is to change the balance of power and financial position of incumbents and their allies. . . . Recruitment among the political elite and the bureaucracy constitute, therefore, the most privileged and secure way of building power, wealth and access to social services.

⁵³ n 36 above, xi.

⁵⁴ M Dia *A governance approach to civil service reform in sub-Saharan Africa* (June 1994), World Bank Technical Paper No 225 12.

⁵⁵ n 54 above, 18 19.

Elsewhere this phenomenon has been described as 'captured autonomy' in the sense that, in the absence of constraining forces outside the state apparatus, a ruling elite exercises control over the instruments of state power, that is, captures the state, and exploits it for the benefit of the elite's own narrow private interests. This is the rule of the 'strongman',⁵⁶ which means that:⁵⁷

The most important positions in the state apparatus, whether it be in the bureaucracy, military, police or in the polity, are filled with loyal supporters of the strongman. Loyalty is strengthened through the (unequal) sharing of the spoils of office. The strongman thus controls a complex network of patron-client relationships. The functions of the state only in a very limited sense has to do with producing public or collective goods. The state apparatus is a source of income for those fortunate or clever enough to control it. Such a state is by no means a basis for security, order and justice for its citizens; it is more of a threat, an apparatus against which the population must seek protection.

Such a state of affairs has ramifications for the efforts currently undertaken to address the situation through various reform packages in respect to constitutionalism, political and economic accountability, the rule of law, participatory government, the effective delivery of public services and control of corruption, all common elements of good governance one finds in the many reports on the subject-matter mentioned earlier on. A first concern is the effect of the economic and other awards of the patrimonial state on the incumbents of power and their willingness to abandon past practices in favour of governmental and management systems that will function without the social and political underpinnings for self-enrichment and the accumulation of power. Put differently: Why would the beneficiaries of the current system voluntarily give up their privileges in settings marked by largely apathetic and poorly-educated citizens and weak extra-governmental systems of control? Secondly, is there a social and political reality in place that could sustain the growth of forms of government the reform efforts wish for? And, if not, what will it take to create such a reality? Thirdly, can newly-designed government institutions and forms of constitutional governance really prevent the wholesale re-integration of existing patrimonial networks and mindsets into the new system?

⁵⁶ G Sorensen *Changes in statehood: The transformation of international relations* (2001) 84. See also M van Creveld *The rise and decline of the state* (1999) 329; M Bratton & N van de Walle *Democratic experiments in Africa* (1997) 61.

⁵⁷ n 2 above, 42: 'A common practice is for the ruling party to take undue advantage of state resources and deploy them for its private political ends during political campaigns and elections. Using government vehicles, diverting public funds to the political party and awarding contracts to party members are unhealthy political practices that do not encourage a level playing field among political parties and undermine the fair competition among political actors and organisations in a democracy.'

In the latter instance, one should consider the observation that⁵⁸

in new democracies corruption is a more pervasive threat to the rule of law than is political repression. Corrupt practices are carried over from the old regime and there are new opportunities for corruption as new governors gain the power to re-allocate the assets of the old regime.

This phenomenon, it has been argued, is associated with countries in the third wave of democratisation, that is, countries that have introduced competitive elections before the basic institutions of the modern state such as the rule of law, institutions of civil society and the accountability of governors were in place. Because they have democratised backwards, such countries can develop in three different ways: complete the process of democratisation, repudiate free elections and return to the undemocratic past, or fall into 'a low-level equilibrium trap in which the inadequacies of elites are matched by low popular demands and expectations'.⁵⁹

That the current nascent progress in good governance remains precarious and in danger of reversal also becomes clear once one looks behind the smoked glass version of reality fashioned by introductory words of praise in international institutional publications on governance in Africa. In its 2005 African Governance Report, the UN Economic Commission for Africa has pointed out that, although merit and performance are legally stipulated as criteria for appointments to the civil service in many countries, there is a 'wide gap between precepts and practice' and that meritocracy in appointment and promotion is largely compromised because '[p]olitical considerations and social links of ethnic, religious and kinship ties often influence recruitment to the public service'.⁶⁰ On capacity building in the public policy area, the report has noted that⁶¹

⁵⁸ R Rose & DC Shin 'Democratising backwards: The problem of third wave democracies' (2001) 31 *British Journal of Political Science* 331-341. See also M Szeftel 'Misunderstanding African politics: Corruption and the governance agenda' (1998) 25 *Review of African Political Economy* 221-235; 238: '[T]he governance agenda tackles corruption as if it were the cause of democratic and development problems rather than a symptom or consequence of them. Thus it fails to address the deeper political and class forces which drive the politics of clientelism and corruption.' See also M Szeftel 'Between governance and underdevelopment: accumulation and Africa's catastrophic corruption' (2000) 27 *Review of African Political Economy* 287; C Allen 'Understanding African politics' (1995) 22 *Review of African Political Economy* 301; I Taylor 'Advice is judged by results, not by intentions: Why Gordon Brown is wrong about Africa' (2005) 81 *International Affairs* 299.

⁵⁹ Rose & Shin (n 59 above) 331.

⁶⁰ n 2 above, 138.

⁶¹ n 2 above, 201. See also Report of the World Bank Task Force on Capacity Development in Africa *Building effective states, forging engaged societies* (2005) 42-43: 'Restoring ethics and professionalism in African public services will be an uphill journey without wider political support for bold efforts to transform the public service. The scope and speed of public service reform depend on the political capital and fiscal space of national leaders and on the commitment and strength of the public service leaders. . . . Do major business interests collude with political and bureaucratic elites and engage in procurement fraud, or organise to lobby for efficient government, a good investment climate, and lower tax burdens? Do citizens rely on government as the biggest employer and the source of patronage, or organise to pressure for efficient government and better services?'

the public policy community is very weak or virtually non-existent in many African countries, especially those that have only recently emerged from one-party or military rule. Policy formulation continues to be the domain of the leaders of the governing political parties and their chosen confidants, supported by favoured and trusted bureaucrats. And even within these narrow decision-making circles, policies are formulated without much regard to the relevant information or data and without consulting those who are likely to be affected by the policies.

Just as mass attitudes to democracy determine the prospects for the consolidation and legitimisation of a democratic form of government, the sustainability of and support for democratic rule by the ruling elite hinges on the question of intrinsic versus instrumental commitment to democracy. In the case of intrinsic support, a fragile political regime has the potential of being sustained through troubled times, because the democratic form of government is itself the motivation for the commitment. On the other hand, if the support is instrumental, that is, based on government's capacity to comply with popular needs according to the mood of the times, the support is conditional and can easily be withdrawn.⁶² If the latter view is also pervasive in government circles, then the question from the ruling elite's point of view is likewise whether there remains an alternative form of rule with a 'greater subjective validity or stronger objective claim to their allegiance'.⁶³

4.2 Parliament's role

A functioning parliament is constitutive for good governance. In addition to exercising an oversight function with respect to the executive and other public institutions, it provides the legislative framework for all government powers and functions, including those of the judiciary, and is therefore indispensable for setting the boundaries in terms of which determinations of legality and illegality can be made. In addition, it plays a key role in the allocation of the state's financial resources. Furthermore, it is also the forum where the government's accountability to its citizens can be determined.

Since independence, the balance between the executive, the legislature and judiciary in African states has shifted to the executive, and in Tony Blair's Commission for Africa Report it has been noted that fewer than half of the respondents in 15 out of 28 countries considered the legislative branch to be free from executive control and only about a quarter of respondents rated parliamentary performance in their respective countries as good.⁶⁴ The Economic Commission for Africa, while noting some improvements in the overall picture, has also concluded that 'more than half of the legislatures in Africa are under various

⁶² M Bratton & R Mattes 'Support for democracy in Africa: Intrinsic or instrumental?' (2001) 31 *British Journal of Political Science* 448.

⁶³ As above.

⁶⁴ n 7 above, 142.

degrees of subordination to external agencies in all major areas of legislation' and that 'very few legislatures were perceived by the experts as being largely or above corruption'.⁶⁵

Although some progress has been made in improving parliamentary control mechanisms, African parliaments in general are faced with formidable obstacles. Furthermore, a distinction must be made between constitutional regulation of oversight and separation of powers where it has been introduced or improved, and what is actually happening or is realisable in practice. Since opposition parties in many African parliaments are weak, engaging government in serious debates on government issues and policies is more ostensible than real. Furthermore, it has been noted that opposition party members are 'usually co-opted in legislative debates by the dominant or ruling party, weakening legislative deliberations and the capacity of members of parliament to effectively articulate the diverse interests of the people they serve'.⁶⁶ The capacity to perform in real terms is further debilitated by African legislators' lack of education, knowledge, information and research facilities, majority party control of the parliamentary machinery, lack of professional or trained support staff, and a low comprehension of the actual functions legislators must perform.⁶⁷

4.3 Rule of law, law enforcement and security

The rule of law is usually associated with legally circumscribed government conduct, independent judicial control over laws and the exercise of government powers and functions and the protection of human rights guarantees. Even if this very limited understanding of the rule of law is relied on, the gap between formal acceptance and substantive enforcement of the principle is notoriously wide on the African continent. In contrast to the abundance of rhetorical confessions to abide by the rule of law, wide-spread ratifications of the major international and regional human rights instruments and ceremonial references to the globally accepted codes of conduct in this regard in national constitutions, the mechanisms for enforcing the principles in question remain weak and precarious. The picture darkens if one considers some other elements of the rule of law which are often conveniently left out of the equation, such as the accessibility of the judicial system, effective reme-

⁶⁵ n 2 above, 126.

⁶⁶ n 2 above, 201. See also C Clapham *Africa and the international system: The politics of state survival* (1996) 56: 'Within an often astonishing short period after independence, the nationalist parties formed to mobilise popular support against the colonial regime, and at the same time to launch their leaders into positions of state power, declined from their previous position of apparently unchallengeable strength. . . . In the initial phase, opposition parties were permitted to remain in being only where the government lacked the resources to crush them, or where they were in any event so feeble that they presented no challenge to its tenure of power.'

⁶⁷ n 2 above, 201-202.

dies, effective law enforcement and prosecutions and the willingness and ability of the state to comply with court judgments.

On the issue of policing in general, one of the surprisingly few studies on the role of the police in post-colonial Africa concludes that, despite the political changes of the nineties, most aspects of post-colonial policing in African states have remained unchanged. Consequently, the protection of regimes from internal threats, accommodating new rulers and adapting to new political environments and their peculiar economic awards still overshadow the catching of criminals and the protection of life and property.⁶⁸ Commenting on the steep decline in state capacity in post-apartheid South Africa's Safety and Security and Home Affairs Departments, a country where crime and corruption have reached critical levels, Good has wisely noted that it is important to consider in such circumstances who might gain and who might lose from institutional erosion and resource dissipation.⁶⁹ If the gains are on the side of an elite of politicians, bureaucrats and their business associates, the profiting leadership will be unconcerned with corruption and would prefer to keep performance and standards low in the police services. This might also support the conclusion that⁷⁰

the many anticorruption and good-governance campaigns of recent years are in practice of little relevance to the reality of crime in the region and elsewhere, since the trade in drugs, gems, weapons and so on is either tremendously profitable for many politicians or is quite outside state and police control anyway.

The obstacles in making the rule of law real in citizens' lives are a well-known: lack of resources, capacity and training, lack of independence and security of tenure amongst the judiciary, unreliable, ineffective and corrupt law enforcement agencies, and so on.⁷¹ However, of even greater concern for the future establishment of real constitutional democracies with well-functioning judicial and law enforcement systems and in overcoming these deficiencies, is how to disentangle the state and its institutional apparatus from the warlord politics⁷² of the incumbents of power. To sustain some semblance of state sovereignty, and of an internal functioning state, the rulers of bureaucratically weak and internally insecure states in Africa must cultivate systems of patronage that are based on control over state resources and, in conflict zones, on the commercialisation of conflict goods. Such a network of rulers and clients, bound together through an exchange of largesse, removes the need for building strong, neutral and law-bound bureau-

⁶⁸ A Hill *Policing Africa: Internal security and the limits of liberalisation* (2000) 15 59 187.

⁶⁹ K Good 'Accountable to themselves: Predominance in Southern Africa' (1997) 4 *Journal of Modern African Studies* 554.

⁷⁰ Hill (n 68 above) 61.

⁷¹ See *inter alia* African Governance Report (n 2 above) 171.

⁷² See Reno (n 42 above).

cracies, since the patronage network itself is relied on as a (shadow) state bureaucracy that upholds the semblance of a functioning state. Thus, the 'term *weak* state signifies a spectrum of conventional bureaucratic state capabilities that exists alongside (generally very strong) informal political networks'.⁷³ The difference between this style of organisation and a conventional state⁷⁴

lies in the fact that the inhabitants do not enjoy security by right of membership in a state. Security is coincidental; it is reliant on the venture's profitability and the degree to which it satisfies the shared interests of the members of the organisation.

In such circumstances, there exists no institutionalised or widespread personal acculturation of the rule of law as *constitutive* of the state and of the powers and functions of state organs. Instead the (rule of) law is seen as part of the state *apparatus*, that is, a complex of *instruments* the incumbents of power (or their opponents) can appropriate to achieve objectives that are intimately tied up with their personal aspirations, fears and positions and the need to wield influence over followers and competitors. Thus, as has been noted elsewhere, the establishment of the rule of law can⁷⁵

imply either a strengthening of state capacities or a weakening of state power. It can represent the imposition of a set of state-determined rules governing private behaviour or the imposition of constraints on the personalised nature of government.

Regional and international reforms in this area face the further obstacle of changing the underlying pervasive influence of the instrumentalisation of the state since decolonisation to undertake rescue operations in almost every area of human endeavour. Even in the case of regime transition or reform, the contents of the constitution or the need to design new legal rules become points of contestation, often not for reasons of remedying the mischief in the old system, but to gain access to resources monopolised by the previous regime or to ensure benefits from state patronage or business opportunities that come in the wake of state capture under the pretext of reform or transformation.⁷⁶

In as much as the current concern with good governance and effective state institutions has forced the international community to revisit the constitutive elements of statehood, a debate on the distinction between the state and the aims pursued in its name, and between the constitutive and regulatory elements of the rule of law is long overdue. Under the instrumentalist conception of the state and of the law, these distinctions have become blurred or obscured and have

⁷³ n 42 above, 2.

⁷⁴ n 42 above, 3. See also N Cooper 'State collapse as business: The role of conflict trade and the emerging control agenda' (2002) 33 *Development and Change* 935.

⁷⁵ S Rose-Ackerman 'Establishing the rule of law' in Rotberg (n 27 above) 182-183.

⁷⁶ See also Bratton & Van de Walle (n 56 above) 88.

smoothed the way for some dangerous experiments with state power since decolonisation. What needs to take root is the insight that as long as an instrumentalist view of law and state prevails, the idea of legally circumscribed and limited state power remains an oxymoron. Under an instrumentalist paradigm, state power simply follows and coincides with state aims and objectives and whatever qualifies as a state aim or objective from time to time is at the same instant the subject matter of legal regulation and legitimisation.

4.4 Regional economic integration

In 1994 it was observed that⁷⁷

the track-record of regional co-operation in Africa has been a major cause of concern. Three decades of continued efforts have ended in near bankruptcy, which has given rise to a growing worry about the direction in which the co-operation drive is heading.

The 'three decades of continued efforts' is also littered with a multitude of sub-regional organisations⁷⁸ which have emerged in an unco-ordinated fashion all over Africa, only to produce a myriad of problems and disappointing outcomes. The genesis, growth, decline and stagnation of the regional institution-building efforts on economic integration are well captured in the following assessment by Gruhn:⁷⁹

The usual life-cycle of an inter-African organisation started with a series of inter-state conferences, which culminated in a charter-signing ceremony attended by heads of states, and the selection of a headquarters site. This was followed by the creation of an organisational bureaucracy, which then generally encountered financial difficulties, bureaucratic disarray, loss of interest by the organisation's members, and decline (and sometimes demise) of the organisation. It has become a common observation that many inter-African organisations are merely paper organisations.

In 2006, the Economic Commission for Africa still recorded a lack of substantial progress and mentioned rationalisation of regional economic communities as one of the main challenges confronting Africa in its quest for full economic integration. Although progress has been

⁷⁷ A Aly (ed) *Economic co-operation in Africa: In search of direction* (1994) 1.

⁷⁸ The following sub-regional organisations exist with the common purpose to achieve economic integration in the areas under their jurisdiction: Central Africa: Economic Community of Central African States (ECCAS); Central African Economic and Monetary Community (CEMAC); Economic Community of Great Lakes Countries (CEPGL); East and Southern Africa: Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC); Inter-Government Authority on Development (IGAD); Indian Ocean Commission (IOC); Southern African Development Community (SADC); Southern African Customs Union (SACU); West Africa: West African Economic and Monetary Union; Manu River Union; ECOWAS; North Africa: Arab Maghreb Union (UMA), Community of Sahel-Saharan States.

⁷⁹ IV Gruhn *Regionalism reconsidered: The Economic Commission for Africa* (1979) 5. See also S Asante *The political economy of regionalism in Africa* (1985) 28.

made in the areas of trade, infrastructure, regional public goods and peace and security, the Commission pointed out that⁸⁰

only a fifth of the regional economic communities have achieved their targets for trade among members. Common labour laws, free movement of labour, and rights of residence and establishment have still not been undertaken by most regional economic communities, and most are also lagging on almost all critical elements necessary for the success of an economic union. Progress in harmonising tax policies, deregulating, financial sectors, liberalising the capital account, and other areas has been insufficient. Even with sectoral programmes needed to deepen African integration, a third to a half of the regional economic communities acknowledge shortcomings in the effectiveness of their initiatives towards the integration goals.

Underlying causes for this malaise, according to the Commission, are, *inter alia*, overlapping membership in the different organisations, duplication of programmes, institutional inefficiency and ineffectiveness and poor co-ordination at the continental level.⁸¹

However, despite many set-backs and uninspiring progress, the ideal of regional economic integration is still high on the agenda and for obvious reasons: Without regional economic integration, inter-state trade in Africa will remain at its current low levels and the enlargement of internal African markets for sustainable economic growth, especially in countries with small economies, will remain nothing but an aspiration. Hence, a renewed effort was made in the Lagos Plan of Action, which recognised that rapid self-reliance, sustainable development and economic growth are linked, *inter alia*, to the economic integration of the African region. Hence, the proposal for an African Economic Community to be set up by 2000 by means of which the economic, social and cultural integration of the African continent must be effected.⁸² Although this process was set in motion by the adoption in 1991 of the Treaty Establishing the African Economic Community (AEC), outlining a staged process of economic integration over a 34-year period, which included the strengthening of the existing regional communities,⁸³ the Community's future existence as an autonomous entity for facilitating economic integration on the continent is uncertain. Since its objectives are now fully integrated within the African Union and NEPAD objectives, the AEC might become subsumed under the former.⁸⁴ In any event, most regional economic communities are

⁸⁰ United Nations Economic Commission for Africa *Assessing regional integration in Africa II* (2006) xvi <http://www.uneca.org> (accessed 10 November 2006).

⁸¹ n 80 above, ch 3-5.

⁸² Lagos Plan of Action for the Economic Development of Africa, Preamble and Annex I, adopted by the Assembly of Heads of State and Government of the OAU in Lagos, Nigeria, 28-29 April 1980.

⁸³ Treaty Establishing the African Economic Community paras 1, 2 & 6, adopted by the Heads of State and Government of the OAU in Abuja, Nigeria on 3 June 1991.

⁸⁴ See also E Baimu 'The African Union, African Economic Community and NEPAD' in C Heyns (ed) *Human rights law in Africa* (2004) 103.

behind on the stages set by the Treaty Establishing the AEC and it is difficult to see how the process will unfold if the whole project for regional economic integration is going to be taken over by the African Union (AU) under the NEPAD initiatives.

Whatever vehicle is chosen for economic integration, the process itself as well as its sustainability and successful implementation cannot be separated from finding a solution to the lack of institutional capacity and good governance at the national level. Strong and effective regional institutions are unthinkable without national states that have the capacity and will to work towards the common good at the regional level. This pre-condition is implicit in the Economic Commission for Africa's assessment of the poor national underpinnings for regional efforts towards economic integration. According to the Commission, progress is hampered by weak institutions lacking co-ordinating capacity within national governments, little translation of economic community goals into national plans, poor implementation of agreed programmes due to a lack of effective integration mechanisms at the national level, weak legislative processes for integration, poor fulfillment of financial obligations to regional organisations, and a poor understanding of economic integration issues amongst the general population.⁸⁵

5 The case for economic partnership agreements

According to the EU's 2005 Strategy for Africa,⁸⁶ the period between 2005 and 2015 will be a watershed period in relations between Europe and Africa. The Strategy, whose main objective is the achievement of the UN Millennium Development Goals in Africa, is based on extensive consultations with the AU and the African regional economic communities. In assisting African countries in making better progress towards achieving the Millennium Goals, the Strategy aims at (1) strengthening EU support in priority areas; (2) increasing EU financing for Africa, and (3) developing and implementing a more effective EU approach to development.⁸⁷ Of importance, though, is the Strategy's unambiguous declaration that peace and security for citizens and good and effective governance are central prerequisites for sustainable development for which government reforms will have to be undertaken in a number of areas.⁸⁸ Support for African initiatives, such as the African Peer Review Mechanism, forms part of the Strategy's approach. For the purpose of establishing a more comprehensive, integrated and long-term framework for future development arrangements with ACP coun-

⁸⁵ n 80 above, 69.

⁸⁶ EU Strategy for Africa (n 8 above).

⁸⁷ n 8 above, 9.

⁸⁸ n 8 above, 4 21.

tries, economic partnership agreements (EPAs) will be the instruments of sustainable development and of the ACP countries' integration into the global economy. The fundamental principles and objectives of the EPAs are defined by the 2002 Cotonou Agreement which is the new legal framework covering development assistance, trade and political relations between the EU and the ACP countries. Since this agreement is a sequel to the Lomé Agreements (1975-2000), some relevant historical elements must first be underlined.

5.1 The Lomé background

When the Treaty of Rome establishing the European Economic Community (EEC) was signed in 1957, some Community members still had overseas colonies and other dependencies. Since the state of political and economic development of the overseas dependencies at the time made it impossible for them to be treated on the footing of equality with the members of the Community, the relationship between Community members and their overseas dependencies came to be based on the principle of association. According to the original article 131 of the Rome Treaty, the purpose of association was to promote the economic and social development of the territories concerned and to establish close economic relations between them and the Community. In terms of the original article 132 of the Rome Treaty, association also meant that Community members were obliged to treat associated countries and territories as if they were participants in the evolving customs union of the EEC itself.⁸⁹ On the basis of this, the trade relationships that were to be established had to protect the Community members' reliance on raw material supply from the overseas territories while financial and technical assistance by the Community members were to bolster development efforts in these territories, some of which were in the process of becoming independent. The focus on economic and social development and on the improvement of economic relations as opposed to political governance issues is also clear from the series of implementing conventions that were adopted during the sixties to give effect to the articles of association in the Treaty of Rome. For instance, the Second Yaoundé Convention (Yaoundé II), adopted in 1969, states clearly in article 1 that the provisions of the Convention have as their object⁹⁰

the promotion of co-operation between the Contracting Parties with a view to furthering the economic and social development of the Associated States by increasing their trade and putting into effect measures of financial inter-

⁸⁹ For a more comprehensive account of these and subsequent developments, see *inter alia* EC Djamson *The dynamic of Euro-African co-operation* (1976) 1; CC Twitchett *Europe and Africa: From association to partnership* (1978) 17; M Lister *The European Community and the developing world* (1988) 13.

⁹⁰ Quoted in Djamson (n 89 above) 10.

vention and technical co-operation. . . . By these provisions, the Contracting Parties intend to develop their economic relations, to strengthen the economic structure and economic independence of the Associated States and promote their industrialisation, to encourage African regional co-operation towards the advancement of international trade.

Commenting on the objectives of association, one commentator has observed that the 'most crucial type of development which the Associates were likely to have expected in 1957, that is, the political development of independence, was not mentioned'.⁹¹ However, this, as well as the colonial overtones of the association-based relationships between the former colonies and EEC members, were about to change with the advent of the new development policies that evolved since 1975 under the Lomé Conventions, in response to the first enlargement of the EEC through the accession of Great Britain, Ireland and Denmark in 1973. Great Britain's accession, in particular, confronted the commonwealth ACP countries with an unfavourable competitive position *vis-à-vis* associated countries.⁹² Originally signed in 1975 between nine EEC members and 46 ACP countries, the Lomé Convention was subsequently renegotiated and signed to produce Lomé II (1980), Lomé III (1985) and Lomé IV (1990), each time introducing new issues that resulted from the gradual and incremental evolvement that characterised ACP-EU relations.⁹³ Because of its unrivaled extensive concessions and privileges granted to the ACP group of countries, this arrangement, that remained in force until 2000, is considered the most far-reaching and complex North-South contractual development initiative of the post-World War II period.⁹⁴

Of particular importance for current purposes is the role played by the Lomé process in placing governance issues in the ACP countries, initially by means of the issue of human rights protection, on the table. The opportunity for considering the inclusion of human rights considerations in the text of the Lomé Convention surfaced during the negotiations for Lomé II. Flagrant human rights violations in the seventies by the Amin regime in Uganda and the suspension in 1977, without the necessary legal basis, of Community development to that country, provided the prelude to this development. When these and other examples of misrule in Zaire, the Central African Republic, Liberia and Equatorial Guinea were introduced during an ACP-EEC Council of Ministers meeting in 1977, it soon became clear that the ACP countries were against

⁹¹ Lister (n 89 above) 18.

⁹² Djamson (n 89 above) 23; Lister (n 89 above) 61.

⁹³ S Marsh & H Mackenstein *The international relations of the European Union* (2005) 227; O Babarinde & G Faber 'From Lomé to Cotonou: ACP-EU partnership in transition' in O Babarinde & G Faber (eds) *The European Union and the developing countries: The Cotonou Agreement* (2005) 3.

⁹⁴ Babarinde & Faber (n 93 above) 4. See also H Noor-Abdi *The Lomé IV Convention* (1997) 29 30.

the introduction of human rights themes in the relationship with the EEC. In the ACP view, such a development would undermine their sovereignty, open the door to the EEC for unilateral intervention in internal affairs and lead to discriminatory and selective measures against ACP states. Also strongly defended was the view that human rights themes had no place in an agreement that deals with trade and economic co-operation and should be dealt with by the UN organs with legal competence in the field.⁹⁵ This strong opposition, maintained till the end, resulted in the adoption of Lomé II without a textual reference to human rights issues.

The negative attitude of the ACP countries changed in the run-up to Lomé III. In part this was the result of a trade-off based on *realpolitik*: The ACP countries wanted stronger Community action against apartheid South Africa as well as the recognition in Lomé of the human right to development.⁹⁶ Under the first claim, they could hardly shield their own human rights situation from outside scrutiny and, under the second, since they affirmed the indivisibility of human rights themselves, they could not prevent civil and political rights to also become an issue over time once the right to development was recognised. The outcome of this was the inclusion in Lomé III of some human rights references, albeit very tentative and innocuous. In the Preamble and a Joint Declaration annexed to the Final Act, the parties agreed to adhere to the UN Charter principles and reaffirmed their faith in fundamental human rights on the basis of which they condemned discrimination on the ground of race, sex and religion and deemed apartheid to be an affront to human dignity, which should be eradicated.⁹⁷

The positions of the parties on human rights issues were consolidated during the negotiations for Lomé IV. This was mainly the result of the European Commission's stance on strengthening the human rights provisions in Lomé and of the new contours drawn for the European Community's foreign relations on development aid that were starting to take shape in the eighties. The latter became particularly clear in a statement issued in 1986 by the EC Foreign Ministers to the following effect:⁹⁸

The Twelve seek universal observance of human rights. The protection of human rights is the legitimate and continuous duty of the world community and of nations individually. . . . Respect for human rights is an important element in relations between third countries and the Europe of the Twelve The Foreign Ministers affirm that in the development of their relations with non-member states as well as in the administration of aid the European Community and its member states will continue to promote fundamental

⁹⁵ K Arts *Integrating human rights into development co-operation: The case of the Lomé Convention* (2000) 167.

⁹⁶ n 95 above, 176.

⁹⁷ n 95 above 179-181; Noor-Abdi (n 94 above) 241 242.

⁹⁸ Bulletin of the European Communities 19 (1986) 7/8 item 2.4.4. 100 101.

rights so that individuals and peoples will actually enjoy to the full their economic, social and cultural rights and their civil and political rights.

In a 1991 resolution on human rights, democracy and development, the European Council made it clear that priority would be given to developing countries that have demonstrated a commitment to the implementation of democratic rule, human rights protection and the strengthening of the rule of law. In the same resolution, the notion of good governance was formally introduced, the adherence to which was seen as a precondition for achieving equitable development and therefore central to future development co-operation relationships between the European Community and developing countries. The principles espoused under the notion of good governance included democratic decision making, adequate governmental transparency and financial accountability, the creation of a market-friendly environment for development, measures to combat corruption, respect for the rule of law, human rights, and freedom of the press and expression.⁹⁹

The tentative results of Lomé III opened the door for a new drive on linking human rights considerations with development aid in the main text of Lomé IV. Apart from the Preamble, which reaffirmed the parties' commitment to all the major international and regional human rights instruments, article 5 of Lomé IV unequivocally linked co-operative operations between the negotiating parties with respect for human rights 'as a basic factor of real development and where co-operation is conceived as a contribution to the promotion of these rights'.¹⁰⁰ This undertaking must also be read in conjunction with article 10, in which the parties committed themselves to take all measures necessary for fulfilling their obligations under the Convention.

In essence, the position of the negotiating parties with regard to these commitments remained unchanged when the agreed upon mid-term review of the Lomé IV process took off in November 1994. The great irony of the time was that the situation in South Africa, for long a bone of contention between the negotiating parties, had changed for the better, which could not be said of the situation in many of the ACP countries. The European Commission's mid-term proposals centred around the establishment of closer links between development co-operation and democracy, good governance and the rule of law, including the strengthening of the human rights provisions of the text; the introduction of suspension mechanisms in the case of violations, and greater EU control over performance-related tranching of development finance disbursements. The ACP countries, on the other hand, while agreeing to the strengthening of the human rights provisions and the introduction of a democracy clause, emphasised the need for mutually accepted concepts of democracy, human rights, good gov-

⁹⁹ Bulletin of the European Communities No 24 (1991) II No 11 item 2.3.1 para 5 122.

¹⁰⁰ See also Arts (n 95 above) 183 184.

ernance and the rule of law, and raised concern over the procedures for suspension and EU control over the implementation process, which was considered to be a violation of the basic Lomé principles of equitable partnership and respect for ACP sovereignty.¹⁰¹

Apart from the many reproaches and demarches to governments in the nineties on human rights and democratic process issues, the more crucial question from an effective enforcement point of view was whether the human rights references and commitments in Lomé IV were strong enough to raise the suspension of the treaty arrangement in the case of non-compliance. Of relevance for this question are the grounds for the suspension of a treaty under articles 60(3)(b) and 62 of the Vienna Convention on the Law of Treaties (1969). In terms of the former article, a party to a treaty may terminate the treaty in the case of a violation of a treaty provision that is essential to the accomplishment of the object or purpose of the treaty. In terms of the latter, a change in circumstances since the conclusion of the treaty and which was not foreseen by the parties may be invoked as a ground for terminating the treaty if (a) the circumstances in question constituted an essential basis of the parties' consent to be bound by the treaty, and (b) the effect of the change is to radically transform the extent of obligations still to be performed by the parties.

That article 5 of Lomé IV did not create a watertight juridical basis for suspension in the above instances should be clear. In fact, the European Commission itself was of the unequivocal opinion that the human rights provisions in Lomé IV and the other conventions did not establish an essential element of the treaty arrangement between the parties and their breach not material in terms of the Vienna Convention on the Law of Treaties.¹⁰² This only changed with the adoption of Lomé IV-bis after the mid-term review when respect for human rights, democratic principles and the rule of law became essential elements of the Convention and linked to a suspension clause in the case of non-fulfilment.¹⁰³ This settled the legal basis for suspension, leaving another obstacle, that of consistent and non-discriminatory enforcement, still in need of a solution.

5.2 The Cotonou agreement

The above changes came during the last phase of the Lomé development arrangement between the ACP countries and the members of the European Community. In 2000, this arrangement had run its full course and a number of factors necessitated its replacement with a new North-South agreement covering development assistance, trade and political

¹⁰¹ K Arts & J Byron 'The mid-term review of the Lomé IV Convention: Heralding the future?' (1997) 18 *Third World Quarterly* 73 77.

¹⁰² See COM (95) 216 (1995) 7-8. See also Arts (n 95 above) 194.

¹⁰³ Arts (n 95 above) 198.

relations between the enlarged European Union and the 79 ACP countries. Firstly, 25 years of privileged concessions under the Lomé arrangements was unable to bring the majority of ACP countries into the fold of middle-income countries, and economic and social progress in many of these countries were 'uneven, dramatically slow or even in reverse'.¹⁰⁴ Secondly, after the end of the Cold War, the European Union had to rethink its external relations with the erstwhile eastern neighbours who were prepared to join under conditions set by the Union on internal governance matters and which in turn could not leave the EU-ACP relations on these issues intact. Thirdly, with the advent of the WTO in 1995, the privileges of Lomé became vulnerable under the equal treatment and non-discrimination WTO rules and had to be revisited. Fourthly, the forces of globalisation necessitated the integration of the ACP economies into the global economy to prevent their further marginalisation. Fifthly, the growing visibility of the EU in the international arena and the role it could play in the effective application of development aid and in matters of international peace and security necessitated a new orientation. Sixthly, the internal reforms that were taking place — sometimes begrudgingly and under external pressure — within some ACP countries created opportunities for dealing more effectively with the deteriorating conditions and growing public discontent in many of them.¹⁰⁵

This is the new environment in which the Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States (Cotonou Agreement), signed in Cotonou, Benin on 23 June 2000, has to give substance to the future ACP-EU relationships. Intended to remain in force for a period of 20 years, starting from 1 March 2000, the agreement was revised in 2005 with a view to enhance the effectiveness and quality of the partnership, a process that will be repeated with five year intervals. Here, only the most relevant aspects of the agreement will be highlighted.

In the Preamble, the parties acknowledged the fact that a specific kind of political environment, namely one that guarantees peace, security and stability, respect for human rights, democratic principles and the rule of law and good governance, is part and parcel of long-term development and that the responsibility for establishing such an environment primarily rests with the countries concerned.¹⁰⁶ A further preambular provision, recognising the contribution of regional

¹⁰⁴ Babarinde & Faber (n 93 above) 5.

¹⁰⁵ See O Babarinde 'The changing environment of ACP — EU relations' in Babarinde & Faber (n 93 above) 18.

¹⁰⁶ Cotonou Agreement, Preamble para 5. The Agreement and its 2005 amendments are accessible at http://ec.europa.eu/development/body/cotonou/index_en.htm (accessed 19 November 2006).

human rights instruments¹⁰⁷ was amended in 2005 by inclusion of a paragraph reaffirming that the most serious international crimes must not go unpunished and that effective measures must be taken at the national level to ensure their effective prosecution. This must be read in conjunction with the amended article 11 which, in paragraph 11(6), places an obligation on the parties to take steps towards ratifying and implementing the Rome Statute of the International Criminal Court in pursuance of their article 11 determination to bring about legal adjustments for this purpose in their national legal orders.

Of special significance for the legal enforcement of the Agreement are the fundamental principles of ACP-EU co-operation enumerated in article 2. The first principle, namely equality of the partners and ACP ownership of the implementation of the objectives of the agreement in accordance with their own development strategies, are not, as in the past, self-standing, but linked to the *essential elements* in article 9 regarding human rights, democratic rule, the rule of law, and the *fundamental element* regarding good governance.¹⁰⁸ In addition, article 9 determines that: co-operation between the parties must be directed towards sustainable development that shows respect for all human rights, democracy based on the rule of law and transparent and accountable government;¹⁰⁹ the parties accept their international obligations in this regard and the indivisibility and inter-relatedness of all human rights; democratic principles are linked to the organisation of the state to ensure the 'legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system and the existence of participatory mechanisms';¹¹⁰ respect for human rights, democratic principles and the rule of law 'shall underpin the domestic and international policies of the parties and constitute the essential elements of [the] Agreement',¹¹¹ and, lastly, good governance is considered to be the 'transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development'. This includes 'clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption'.

With this elaboration, the Cotonou Agreement has established a much firmer legal basis for terminating the treaty arrangement between the parties in the case of non-fulfilment of the treaty obligations. This

¹⁰⁷ n 106 above, para 8.

¹⁰⁸ See the 2005 title amendment of art 9 of the Cotonou Agreement.

¹⁰⁹ Art 9(1).

¹¹⁰ Art 9(2).

¹¹¹ As above.

must also be read in conjunction with the article 2 principle that the 'fulfillment of mutual obligations . . . assumed by the parties in the framework of their dialogue shall be central to their partnership and co-operation relations'. The dialogue framework mentioned here apparently refers to the political dialogue mechanism created in article 8 of the Agreement, according to which the parties assume the obligation to regularly engage in a 'comprehensive, balanced and deep political dialogue leading to commitments on both sides'. The objective of the dialogue is, *inter alia*, to establish agreed priorities, to address matters of significance for the attainment of the objectives of the agreement, such as the arms trade, excessive military spending, drugs and organised crime and discrimination, and to assess developments concerning human rights protection, democratic principles, the rule of law and good governance.¹¹²

The *essential elements* mentioned in articles 2 and 9 are directly linked to the dispute resolution and enforcement measures provided for in articles 96 and 97 of the Agreement.¹¹³ Article 96 provides for political consultations between the parties in the case of non-fulfilment of an obligation stemming from respect for human rights, democratic principles and the rule of law with a view to seeking a solution acceptable to all the parties. If the consultations do not lead to an acceptable solution, or if consultations are refused, other 'appropriate measures' may be taken. This procedure does not apply in 'cases of special urgency', a term which refers to 'exceptional cases of particular serious and flagrant violation' of one of the essential elements referred to in article 9 and which requires immediate reaction.¹¹⁴ Measures taken in terms of article 96 must comply with the general principles of international law and must be proportional to the violation. Suspension of the treaty obligations is now specifically mentioned as an 'appropriate measure', but only as a measure of last resort.¹¹⁵

The political dialogue provided for in article 8 of the Cotonou Agreement must be distinguished from the political consultations in article 96. The primary function of the article 8 political dialogue is to build up trust between the parties with a view to establishing long-term, sustainable and deeper relations between all participants. The regular dialogues envisaged here are therefore not a prelude to the political consultations of article 96, but are intended as a preventive measure

¹¹² Arts 8(2) & (4). See also K Arts 'Political dialogue in a "new" framework' in Babarinde & Faber (n 93 above) 155 159; See also Annex VII, arts 1 & 2 of the revised Cotonou Agreement, Official Journal of the European Union L 385, 29 December 2004 88 and the Guidelines for ACP-EU Political Dialogue adopted by the ACP-EU Joint Parliamentary Assembly in Official Journal of the European Union C80/17, 25 November 2004.

¹¹³ The title of art 96 reads as follows: 'Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law'.

¹¹⁴ Cotonou Agreement art 96(2)(a).

¹¹⁵ n 114 above, art 96(2)(c).

for the elimination of issues that could create the kind of crises that must be settled in terms of article 96.¹¹⁶

Article 97 of the Cotonou Agreement applies the political consultation procedure as a measure in combating corruption. This measure stems from the acknowledgment that the 'impact of corruption and illegal financial practices on the economies and societies of developing countries is enormous and constitutes an insurmountable obstacle to development and to breaking the poverty gap'.¹¹⁷ To put this into context, it was pointed out that while \$50 billion in aid flows to developing and transitional economies each year, an estimated \$500 billion is illegally transferred from developing and emerging countries to other countries as 'dirty money'.¹¹⁸ Given the seriousness of the situation, it is rather strange that the parties are under no obligation to enter into consultations in the case of 'serious cases of corruption'. Article 97 merely states that such instances 'should' give rise to consultations, and either party 'may' invite the other to enter into consultations. As in the case of article 96, the normal international law restrictions apply with regard to measures taken and suspension of the treaty arrangement is again a measure of last resort.

The above sets out in part the legal and institutional framework within which economic partnership agreements¹¹⁹ are supposed to give effect to the objectives of the Cotonou agreement, which cover all the institutional, governance and regional economic integration challenges highlighted earlier on. These agreements, for which negotiations must end on 31 December 2007 to allow them to enter into force on 1 January 2008,¹²⁰ must be WTO-compatible trading arrangements¹²¹ that take account of the different needs and levels of development of the ACP countries and regions.¹²² Although they carry the name of *economic* partnership agreements, they will have a clear disposition towards state-institutional capacity building in general with a view not only to help developing countries, especially in Africa, to meet the Millennium Development Goals, but to remove threats to human existence and to international peace and security broadly understood. This is clear, *inter alia*, from the EU Strategy for Africa which lists as priority areas the ensuring of security for citizens and the rule of law

¹¹⁶ See Guidelines for Political Dialogue (n 112 above) paras 5 & 8.

¹¹⁷ n 116 above, para AB.

¹¹⁸ n 116 above, paras AB & AC.

¹¹⁹ Cotonou Agreement art 37. See also S Wright 'Negotiating economic partnership agreements: Contexts and strategies' in Babarinde & Faber (n 93 above) 65; G Faber 'Economic partnership agreements and regional integration among ACP countries' in Babarinde & Faber (n 93 above) 85.

¹²⁰ Cotonou Agreement art 37(1).

¹²¹ Art 36. See also B Onguglu & T Ito 'How to make EPA's WTO compatible?' European Centre for Development Policy Management, Discussion Paper No 40 (2003).

¹²² Cotonou Agreement arts 35(3), 37(5) & (7).

and of good and effective governance as central prerequisites for sustainable development.¹²³

In a second, almost parallel development, the leaders of the European Union also approved the European Security Strategy (ESS) on 12 December 2003 which includes in its list of new threats facing the world, state failure (bad governance, corruption, abuse of power, weak institutions and lack of accountability) and state collapse often associated with organised crime or terrorism. Under the heading 'An international order based on effective multilateralism', the Strategy stated that:¹²⁴

The quality of international society depends on the quality of the governments that are its foundation. The best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order.

Considering itself, on good facts, to be a global player in today's world,¹²⁵ the EU Security Strategy's aim is to bring about an improvement in global governance also in areas that are beyond the borders of the immediate neighbourhood. The role of other regional organisations in this regard is therefore clearly acknowledged, including that of the AU,¹²⁶ in which respect the efforts undertaken under the newly-established African institutions are claimed to have changed the relationship between Africa and Europe.¹²⁷ In terms of the Security Strategy's objectives, the aim is therefore to contribute to 'better governance through assistance programmes, conditionality and targeted trade measures' to which is attached the clear warning that those states that place themselves outside the bounds of international society or persistently violate international norms should understand that there will be a price to be paid, including 'in their relationship with the European Union'.¹²⁸

6 Conclusion

Post-colonial states in Africa have had three things in common: a shared understanding of the need to maintain existing borders in the interest

¹²³ EU Strategy (n 8 above) at 4.

¹²⁴ EU Doc 15895/03 PESC 787 10. For general comments on the strategy, see A Toje 'The 2003 European Union security strategy: A critical appraisal' (2005) 10 *European Foreign Affairs Review* 117; AJK Bailes 'The European security strategy: An evolutionary history' Stockholm International Peace Research Institute (SIPRI) Policy Paper No 10 (2005).

¹²⁵ See *inter alia* C Bretherton & J Vogler *The European Union as a global actor* (2006), in particular ch 5 & 7.

¹²⁶ EU Doc 15895/03 PESC 787 9.

¹²⁷ EU Strategy (n 8 above) 2.

¹²⁸ EU Doc 15895/03 PESC 787 10.

of self-preservation,¹²⁹ regional inter-state relations based on the rhetoric of political self-determination and independence, state sovereignty, solidarity and unity, which also shaped their opposition to external domination, especially if it could be designated as some or other form of colonialism, and formal statehood marginally kept in place by a network of patrimonial internal and donor-dependent external power relations.

How long the *uti possidetis* claim will remain intact is a debatable point. After all, the nature of the numerous threats, both external and internal, to the future existence of the post-colonial state, as well as the countermeasures states must consider in response thereto, have little in common with the maintenance of arbitrarily drawn colonial borders. The two other common features of post-colonial statehood in Africa now also face a crucial moment with the unprecedented degree to which the international community and recently created regional institutions are becoming involved in almost every aspect of political and economic governance at the domestic level, as well as the strengthening of civil society, all aspects that were for long insulated against outside scrutiny under a political rhetoric designed to conceal unpalatable truths. Ironically, this is the result of post-colonial states' own double strategy pursued in international fora. In embracing the dominant values of the Westphalian state system to compensate for substantial inequality, weak post-colonial states demanded recognition as *equal* sovereigns through equal membership in the UN while, at the same time, sought economic assistance and other forms of special (*unequal*) treatment for the purpose of which the rules on equal rights and obligations had to be revisited to accommodate a wholly new legal regime on economic rights and duties and development assistance.¹³⁰ It is this latter strategy that has over time paved the way for domestic governance issues to become exposed to external inquiry, a process that has assumed a greater urgency in the context of the twenty-first century's peculiar security dilemmas. Moreover, the fact that the new demands for substantial reforms in political and economic governance were given form and substance by and through donor institutions and programmes is not a coincidence, but the result of a deliberate decision by donor countries to move the decision-making process away from the 'one country one vote' UN system to the Bretton Woods institutions where power is distributed according to economic resources.¹³¹

¹²⁹ Sorensen (n 56 above) 104: '[T]he OAU's commitment to colonial precincts . . . probably had to do with the general weakness of those states, large and small. The lack of an economic resource base, of any developed sense of community binding state and nation together, and of a capable apparatus of government, created a profound scarcity of mechanisms that could create coherence in the new states. In that situation it was not difficult for the elites to agree on the persistence of borders, the one remaining tangible element of cohesion'; Clapham (n 66 above) 45 46.

¹³⁰ See also Sorensen (n 56 above) 105.

¹³¹ n 56 above, 112.

Under current conditions, the combined results of the African Peer Review Mechanism and the mechanisms created by the Cotonou Agreement could hold the following prospects for the future: Firstly, it could upset the entrenched patron-client relations and patrimonial power structures that rendered the post-colonial state incapable of responding to the political, security, economic and social needs of its citizens. Secondly, the changes foreseen at the governance and economic integration levels have the potential, for the first time, in creating what is referred to as multilevel governance associated with regional arrangements that have developed into a well-integrated political, legal and economic union of member states where regulatory powers, exercised and overseen by institutions at different levels, including below and above the nation-state, are rule-bound and incapable of being over-accumulated in one area at the expense of another. In the European Union, this process has been largely facilitated by a fairly homogenous political and legal culture with roots deep in a common enlightenment experience.

For African states, both prospects raise interesting questions. Firstly, since the replacement of political rule that is not commensurate with good governance could pose a threat to the economic and other interests of a ruling elite and its clientele, both the resistance to or exploitation of change and what it will take to overcome the resistance may impair or even lead to a reconsideration of outcomes. It will be short-sighted to ignore the realistic assessment that in many African countries¹³²

neopatrimonialism will live on, albeit within the context of nominally democratic politics. In Africa's big man democracies, public life will continue to be dominated by executive presidents and their networks of personal loyalty. The prospects for the deepening of democracy will hinge on the strength of the permanent state apparatus relative to the ability of non-governmental actors to exert countervailing powers. At the same time, the survival of these new regimes is by no means assured; their fates are likely to be just as divergent as prior regime forms and transition trajectories. Despite the striking changes of the early 1990s, new democracies are likely to coexist alongside familiar and reinvented forms of governance.

¹³² Bratton & Van de Walle (n 56 above) 260. See also the following at 259: 'The high degree of continuity between the political personnel of the old and new regime and their reliance on private patronage during the transition have implications for the consolidation of democracy in Africa. First, neopatrimonial politics will persist after the transition; both by habit and by necessity, the victorious politicians will resort to clientelism to consolidate their own power. Over time, these tendencies may well intensify. Because security of office is more tenuous in regimes where leaders are chosen in elections, incumbents will quicken the quest for personal gain while they still have the opportunity to do so. Against this tendency, the human rights and good government activists in the prodemocracy coalition can initially temper the corruption and clientelism of the new government. But over time, these activists are eclipsed when they come into conflict with the leadership over issues of political expediency and are purged by old-style politicians.'

As for the regional integration prospect, there is the underlying force of homogenisation in terms of which countries, once integrated into the global economy, should converge on a similar model of economic development, namely the 'modern, industrialised, open, capitalist market economy'.¹³³ However, in a regional setting marked by diversity in state strength, the economic development trajectory could be quite different for the individual member states, more so since some may simply lack the institutional sophistication to cope with the demands of regional integration and co-operation. For such members, it will also become apparent that the concept of the national state economy based on an undiversified industrial sector is no longer appropriate. Moreover, to the extent that regional integration goes hand in hand with multi-level governance, marked by a diffusion and decentralisation of power, both upwards and downwards, the process also involves both a weakening and strengthening of states. States are 'strengthened to the extent that they acquire fresh regulative powers over a vast range of issues that would otherwise been outside the scope of their influence' and they are weakened 'to the extent that the regulation of the domestic affairs is now heavily dependent on bargaining with a host of other actors, especially the other member states'.¹³⁴ However, the acquisition of more regulatory powers will mean nothing if the capacity for exercising such powers is lacking from the start.

If the current circumstances are taken into consideration, making the development consensus behind the economic partnership agreements an effective instrument in the interest of good governance, will require, once again, difficult judgments, which will have to take into account the specific problems of often very different African states. Moreover, the practical challenges still remain, namely how to secure government effectiveness while changing the political culture of dysfunctional states, and how to arbitrate between the demands of greater participation, on the one hand, and the maintenance of authority on the other, if democracy appeared to be leading to greater inter-rival conflict and further state collapse.¹³⁵

¹³³ Sorensen (n 56 above) 63.

¹³⁴ n 56 above, 88.

¹³⁵ See also Clapham (n 66 above) 199. See also the following comment at <http://www.rationalreview.co/.content/31034> (accessed 18 June 2007): 'Sudan and seven other sub-Saharan African countries are among the 10 nations in the world most vulnerable to violent internal conflict and deteriorating conditions, according to a private survey. In the third-annual "failed state" index, analysts for *Foreign Policy* magazine and the Fund for Peace, a not-for-profit organisation dedicated to conflict resolution, Sudan was judged most at risk of failure. Violence in the Darfur region was the main contributing cause. As evidence that troubles in failing states often cross borders, the report cited violence spilling from Darfur into the Central African Republic and Chad. The five other African nations found most vulnerable were Somalia, Zimbabwe, Ivory Coast, Democratic Republic of Congo and Guinea. The ratings are based on 12 social, economic, political and military indicators.'

Arbitration and human rights in Africa

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Summary

With a colonial background and, in many cases, years of military and other forms of dictatorship, most African countries have elaborate constitutional provisions for the protection of human rights. Colonialism and those dictatorships involved the extensive denial and abuse of citizens' rights. Independence and cessation of dictatorships therefore invariably involved keen resolves to ensure the protection of citizens' rights in all practicable ways. African constitutions are therefore quite elaborate, for instance, with provisions that confer on every citizen or resident of the country in question such rights as those of unfettered access to courts for the determination of causes and matters as well as a requirement of public hearing of cases and pronouncement of judgments or findings. Most African countries are also now embracing commercial arbitration for the resolution of disputes. They are equally making serious efforts to transform themselves into preferred venues for international arbitrations by business people and business entities. Since arbitration is fundamentally a private and confidential process and an election to go to arbitration is in one way or the other a decision not to go to court, whether or not arbitration breaches citizens' human rights, is becoming an important issue on the continent. This article examines the question and finds that, unlike the situation in some other parts of the world, arbitration and human rights are not in any form of conflict on the continent. Therefore, arbitration does not breach human rights in Africa. African countries have rather worked out a synergy between the two streams of law. The article also finds that the situation is the same in the customary law and that, in working out this synergy, the continent

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has shown a worthy example to the world just as it did with the idea of an international customary law arbitration.

1 Introduction

In Africa, human and peoples' rights are issues of prime importance. Some of the rights provided for in the constitutions of African countries are those that concern the proper administration of justice. These are the rights of access to the courts and to a fair hearing within a reasonable time, as well as the right to a public hearing and public declaration of judgment.¹ These rights are also enshrined in the African Charter on Human and Peoples' Rights (African Charter). The right of access to a court ensures that all citizens are able to take their grievances against the government or any other citizen to impartial umpires paid by the state for determination according to law. A public hearing and a public delivery of judgment minimise the risk of deliberate miscarriage of justice. They promote probity and public scrutiny of the administration of justice. Considering that many African countries are developing political cultures, these rights are of enormous importance.²

As arbitration law and practice grow in importance in the different African countries,³ the question whether or not arbitration proceedings violate these cherished rights is assuming tremendous practical importance. In the same way, whether or not an infringement of any of the rights is arbitrable is becoming a very important question in Africa. *Prima facie*, there are conflicts between these rights and some of the sacred principles of arbitration. For instance, against constitutional provisions guaranteeing unfettered access to the courts for the determination of practically all manners of causes and matters,⁴ a recourse to

¹ Details of provisions on the rights of access, fair and public hearing and public declaration of findings are outlined in sec 3 of this article. Whether or not the right to a fair hearing (or natural justice) incorporates the right of access to justice or to the courts is not within the ambit of this work. For more on that question see, eg, A Jaksic *Arbitration and human rights* (2003). I shall therefore treat them (fair hearing and right of access) separately, if not for any other reason than the fact that the various African constitutions and the African Charter provide for them separately, that is, in separate sections or articles, as shown below.

² In developing political cultures, political leaders are often impatient with, and actually persecute, the opposition. They sometimes do so through sham court proceedings and trials.

³ Africa is in recent times progressively, even if slowly, moving away from a general and deep skepticism with which developing countries have normally beheld arbitration, towards a warm embrace of arbitration. On this generally, see A Asouzu *International commercial arbitration and African states: Practice, participation and institutional development* (2001) 119 and Al Chukwuemerie 'New hopes and responsibilities in the maturing process of arbitration law and practice in Africa: Nigeria as a case study' (2004) 2 *Nigerian Bar Journal* 55.

⁴ See eg art 68 of the Egyptian Constitution; art 37 of the Ethiopian Constitution, 1994. For the wording and their discussion, see sec 3.1 below.

arbitration is in all African countries — as in most jurisdictions — a waiver of the right of access to court for the particular dispute. That, in a sense, is an ouster of the court's jurisdiction to entertain such matters, at least unless and until the parties have attempted arbitration.⁵ In those African countries that have enacted national statutes that are based wholly or partly on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985,⁶ statutory provisions even expressly and almost completely oust the jurisdiction of the courts to entertain any cause or matter that is the subject of an arbitration agreement.⁷ Constitutional provisions requiring the public hearing of cases and public delivery of judgments⁸ are in conflict with privacy of hearing and of awards which are hallmarks of arbitration.⁹ While such constitutional provisions secure for every citizen lawfully conducting himself a right to attend and watch/participate in the proceedings of a court or other tribunal set up by law,¹⁰ except in extremely rare cases,¹¹ an arbitrator or arbitral

⁵ See nn 56–59 below and the text thereof for the necessary circumstances for, and extent of, this waiver.

⁶ Adopted in 1985 by the General Assembly of the UN on the recommendation of UNCITRAL. Presently Egypt, Kenya, Nigeria, Tunisia, Uganda, Zambia and Zimbabwe have enacted statutes based on the Model Law. See http://www.uncitral.org/uncitral/en/uncitral-texts/arbitration/1985Model_arbitration_status.html (accessed 15 December 2006). Curiously, though Uganda enacted her Arbitration and Conciliation Act in 2000, it is not listed.

⁷ See, eg, sec 9 of the Ugandan Arbitration and Conciliation Act 2000; sec 34 of Nigeria's Arbitration and Conciliation Act, cap A18 Laws of the Federation of Nigeria 2004 enacted as Arbitration and Conciliation Decree 1988; sec 10 of the Kenyan Arbitration Act, 1995. Each provides that a court shall not intervene in an arbitration except to the extent permitted by the Act. Each Act permits the courts' involvement only in areas that aid arbitration, such as a stay of court proceedings pending arbitration. The Acts also provide that, if a dispute subject to arbitration is taken to court and the defendant applies for a stay of court proceedings to enable the parties to go to arbitration, the court 'shall' (not 'may') stay its proceedings unless the arbitration agreement is itself null and void or inoperable. The Nigerian provision does not include the proviso on the arbitration agreement being null and void, etc, and so completely denies the court any discretion on the application if the envisaged arbitration is of an international character. For more on the matter, see Al Chukwuemerie 'Stay of court proceedings pending arbitration in Nigerian law' (1996) 13 *Journal of International Arbitration* 119.

⁸ Sec 19(14) Constitution of Ghana; sec 34 Constitution of South Africa, 1996; art 28(1) Ugandan Constitution, 1995; art 18(10) Constitution of the Republic of Zambia, 1991 ('... all proceedings of every court and proceedings ... before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public').

⁹ Being purely private proceedings between the parties thereto and the arbitrators, arbitration is confidential in every respect.

¹⁰ Such other formal tribunals as tribunals of inquiry.

¹¹ In juvenile matters and matrimonial causes, generally, where appropriate (sec 103 Matrimonial Causes Act cap M7, Laws of the Federation of Nigeria 2004); public morality (sec 19(14) Constitution of Ghana, art 28(2) Ugandan Constitution); national security.

tribunal is bound in law to exclude the public — all persons except those allowed in by the parties themselves.¹²

Ordinarily, these are areas of conflict between fundamental rights and arbitration. It is a conflict that has been recognised by, and is worrisome to, arbitrators, arbitration practitioners, constitutional lawyers and foreign investors. These stakeholders have recognised the conflict as existing not only in Africa but in practically all parts of the world.¹³ In foreign investment-seeking or -receiving countries, which most African countries presently are, the matter is of even greater importance. Investors may be encouraged or discouraged from investing in a particular economy depending on whether or not the conflict has the capacity of compromising a vibrant recourse to commercial or investment arbitration in or by that country.¹⁴

This article examines these issues and finds that beneath the surface there is really no conflict between arbitration and human rights in Africa. The article finds that, rather, a very good symbiosis has been worked out, even if unwittingly, by African countries, between human rights and arbitration. It canvasses the view that the right to a fair hearing within a reasonable time is far more secure during arbitration than before courts and other tribunals. It finds further that, in working out the symbiosis referred to above, Africa has taken the lead, just as it has done in another area with respect to commercial and investment arbitration.¹⁵ It is further the argument of the article that this symbiotic relationship between human rights and arbitration, which enables the continent to profit appropriately from two otherwise conflicting but very necessary streams of law, was not worked out merely to engender foreign investment, but in the search for substantial justice. It is also my view that, even if there was any conflict, it is in the interest of African countries, as of all countries, to make exceptions in favour of arbitration with respect to those rights. This would be notwithstanding the enormous importance of the rights of access to courts and of public hearing and delivery of judgment. As international commercial arbitration gains popularity in study and use in Africa, everything must be done to ensure

¹² If parties allow any person into the venue, the arbitrators cannot exclude him either. These are very trite principles which African arbitration statutes do not bother to spend time dealing with.

¹³ See, eg, Jaksic (n 1 above); A Asouzu 'The protection of human rights and private arbitration' (1998) *Africa Legal Aid Quarterly* 6; Mustil & Boyd *The law and practice of commercial arbitration in England* (1989).

¹⁴ See Asouzu (n 3 above).

¹⁵ The idea and principle of international customary law arbitration, which is obtainable in Africa, Asia and the Caribbeans. For more on the matter, see Al Chukwuemerie 'The internationalisation of African customary law arbitration' (2006) 14 *African Journal of International and Comparative Law* 143.

that it thrives and brings to African countries the tremendous benefits which other countries and regions have derived and are deriving from it.¹⁶

The article also examines whether or not human rights disputes ought to be arbitrable in Africa. This is an issue which hardly attracts scholars' attention. Such disputes are routinely taken to courts. However, in Africa the question deserves careful examination, even if circumstances in other parts of the world are different. Human rights abuses by governments and state agencies often occur on the continent. More than in most other parts of the world, congestion and delays in the court system make the dispensation of justice by the courts far less effective than by arbitration.¹⁷ For this and other reasons, the risk that justice will not be done is particularly so when the state — which sets up and funds the courts and also appoints judges — is a party. Also, the state (embodied by the government or government agencies) is generally the defendant in human rights matters.¹⁸ On the other hand, arbitration remains the most effective dispute resolution mechanism in the world.¹⁹ What is more, though arbitration is generally consensual — flowing from private agreements — and human rights disputes often arise in ways and manners that do not enable or permit the parties to reach an agreement to arbitrate, statutory arbitrations thrive on the continent. These statutory arbitrations, such as trade dispute arbitrations, also involve governments and their agencies. There is no reason why human rights arbitrations fashioned after statutory arbitrations

¹⁶ For some such benefits, see Al Chukwuemerie 'Commercial arbitration as the most effective dispute resolution method: Still a fact or now a myth' (1998) 15 *Journal of International Arbitration* 83; Al Chukwuemerie 'Enhancing the implementation of economic projects in the Third World through arbitration' (2001) 67 *Arbitration* 240.

¹⁷ For more on this, see Al Chukwuemerie 'Arbitration and the ADRs as panacea for the ills in the administration of justice in the Third World' (2005) 1 *Ebonyi State University Law Journal* 102.

¹⁸ As in other ages and climes, some judges tend to defer to governments and their agencies when they appear as parties in court. This is not a problem unique to Africa. Lord Atkin was displeased with its very pronounced occurrence in a case he participated in, *Liversidge v Anderson* (1942) AC 206, and he said: 'I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive . . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecter of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister.' For more on this and how this is impossible in arbitration, see Al Chukwuemerie 'Salient issues in the law and practice of arbitration in Nigeria' (2006) 14 *African Journal of International and Comparative Law* 1.

¹⁹ See eg Chukwuemerie (n 16 above).

should not thrive. The article argues that as of now, arbitration is the best, if not indeed the only way to secure real independence of adjudicators and real speedy justice against most African governments and their agencies in human rights matters.

The article examines arbitration and human rights in African customary law, both in historical and contemporary perspectives. This is necessary because customary law remains a very important part of the law or legal system of practically every African country.²⁰ In its various forms²¹ and variance in details from place to place on the continent,²² it remains the private law of a good percentage of African people. Such people are not just illiterate village dwellers. In many cases they are also well-educated persons resident in cities but who have chosen, even if unwittingly in some cases, to have customary law regulate their intimate personal affairs.²³ However broadly the African constitutional provisions on human rights may be framed, there will always be patterns of behaviour following 'the contours of norms' that are indigenous to the people within or outside the constitution and there will always be interactions that will be shaped by (and disputes resolveable only by) standards and procedures emanating directly from the day to day traditional life of the people and the reality of their society.²⁴ In this writer's view, therefore, this discussion will be grossly incomplete, and

²⁰ See, eg, TW Bennett *A sourcebook of African customary law for Southern Africa* (1991), where different writers examined the issue from anthropological and other perspectives.

²¹ It is either customary law in the pure sense of being the traditional practices with binding force of law or religious law that has acquired such totality of governance of the people's lives such as to replace the traditional practices/law. It is in the second sense that Islamic law is recognised as customary law.

²² This varies from place to place since it follows, and is completely based on, the culture and traditions of the people which vary from tribe to tribe on the continent. Even within one tribe, there sometimes are differences amongst different communities or groups of communities. It also changes with time as it tends to adapt to any changes that may occur in a particular community over time. The position was captured by a Nigerian colonial judge when he said: 'One of the most striking features of West African native custom is its flexibility, it appears to have been always subject to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character.' Osborne CJ in *Lewis v Bankole* (1908) 1 NLR 81,100–101. See also the South African case of *Hlophé v Mahlalela & Another* 1998 1 SA 449.

²³ Examples are well-educated persons who, eg, contract their marriages in the customary way and refuse to convert it into a statutory marriage, ie a marriage under the Marriage Act. Some go on to become traditional rulers and live their lives completely in abidance with the customary practices of their people. This writer has shown that even expatriates such as Europeans and Americans who by their own volition get so integrated into the customary practices of traditional African society that they go ahead to take chieftaincy titles and so on, automatically make themselves subjects of the customary law. See Al Chukwuemerie 'Commercial and investment arbitration in the African customary law: Myths or realities?' (2006) *Abakaliki Bar Journal* 26.

²⁴ L Sheleff *et al* *The future of tradition: Customary law, common law and legal pluralism* (1999) 186.

indeed a denial of the very nature of Africa and African laws, if it does not also examine the subject from the perspective of customary law. There is nothing in any African constitution suggestive of an intention to abrogate customary law rules. On the contrary, customary law, at all appropriate points, complements the constitutions and other statutory provisions on relevant subjects, including human rights. Indeed, with respect to human rights, just as in other areas, the constitutions 'leave a wide range of matters *in personam* by what may be referred to as "operative rules and norms"', which include indigenous or customary legal institutions and rules.²⁵

After discussing the relevant issues as they relate to customary law, the article examines human rights provisions in the different African constitutions under appropriate subheadings. It also considers relevant provisions of the African Charter and examines the meanings that have been attached, or are likely to be attached, to these constitutional and Charter provisions. The provisions as interpreted are juxtaposed with arbitral proceedings to see how they affect arbitration positively or negatively. Where decisions have not yet been made on any relevant constitutional or Charter provision, reference is made to decisions on similar conventions and statutes in other parts of the world. In this respect, decisions on the European Convention on Human Rights and the English Human Rights Act, 1998, are useful. All such decisions are, of course, mere examples of what African courts or the African Commission on Human and Peoples' Rights (African Commission) may decide to do or pronounce in similar circumstances; that is, they are only of persuasive influence or value.

2 Customary law arbitration and human rights

This writer has attempted to show in different ways in other works that arbitration and alternative dispute resolutions (ADRs), such as conciliation, mediation and negotiation, were firmly entrenched in the old traditional African societies and were part and parcel of the people's life, though not called by these English names.²⁶ Those works also showed that as of now, customary law arbitration has grown to cover disputes in even such matters as oil and gas operations as well as some

²⁵ L Juma 'The legitimacy of indigenous legal institutions and human rights practice in Kenya: An old debate revisited' (2006) 14(2) *African Journal of International and Comparative Law* 176 181.

²⁶ See, eg, Al Chukwuemerie 'International commercial arbitration and the UNCITRAL Model Law under written federal constitutions: Necessity versus constitutionality in the Nigerian legal framework' (1998) 15 *Journal of International Arbitration* 83; Al Chukwuemerie 'The recent odyssey of customary law arbitration and conciliation in Nigeria's apex courts' (1998) *Abia State University Law Journal* 1; Chukwuemerie (n 16 above) and chs 4, 9 & 10 of Al Chukwuemerie *Studies and materials in international commercial arbitration* (2002). See also Chukwuemerie (nn 15 & 23 above).

aspects of international trade and investment. These issues do not bear repetition here.

Like all incipient societies, however, early African societies did not have a human rights charter. Such things evolved with time in each society.²⁷ The effect was therefore that, in ancient African societies, most of which were organised into empires and kingdoms, little importance was attached to the observance of human rights. It was therefore in some cases possible for human rights to be flouted, even with impunity.²⁸ In many societies, human rights generally depended on the social status of the person in question.²⁹ A slave was for all intents and purposes an object or subject of ownership (a piece of property as it were) and was not entitled to many of the rights guaranteed by law — such as access to courts, a right to a fair hearing and a public hearing.

Slaves were not entitled to go to court and could not appoint an arbitrator. It was the practice that they could complain to a person outside the slave owner's house or state their case in any dispute with an outsider through their owner. A complaint or case against a slave would be made to or through that slave's owner. An owner would therefore pursue in his own name any arbitral or court proceeding between the slave and a freeborn. The slave owner in such proceedings occupied a higher position than a parent, guardian or friend does today in proceedings involving an infant.³⁰ The question of whether or not a resort to arbitration amounted to a breach of his right of access to court or of fair and public hearing therefore did not arise at all.

Generally amongst freeborns outside the monarchy, there was equality of persons before the law. Each person had a right of access to the courts just as much as he had to arbitration and alternative dispute

²⁷ The exception is the USA, which itself was established on the tenets of equality of all men, and of justice. Nevertheless, even in America that had such a hard-worn beautiful national heritage and foundation, slavery continued for decades. There was also the official policy of extermination of native Indians as well as other forms of racial segregation. Even now blacks are yet to enjoy being elected president. Even with the Magna Carta in England, social justice for the masses as different from the barons was not immediately entrenched.

²⁸ For some of the notable abuses, see UO Umozurike *The African Charter on Human and Peoples' Rights* (1998) 15–18.

²⁹ This was the general trend in practically all contemporary societies and indeed in all societies organised along the pattern of empires and kingdoms. For the position in Europe (the present UK, France, Germany, etc), see eg H Peacock *A history of modern Europe 1789-1978* (1980) and V Cronin *Napoleon* (1982).

³⁰ This was learnt or confirmed in interviews held with elders and custodians of the traditional societies' history and culture in several parts of Igbo land in Eastern Nigeria. The author was informed that the position is the same amongst all the Asante of Ghana, the Zulu of South Africa and the people of Benin Republic, by lawyers indigenous to those tribes. For a confirmation that in such matters similarity existed between the different traditional societies across the length and breadth of Africa, see TO Elias *The nature of African customary law* (1956).

resolution generally.³¹ There were no statutory or constitutional provisions that made access to courts a superior right over access to arbitration, or granting an exclusive or preferential jurisdiction to the courts over other dispute resolution fora in the manner that the present provisions on access to court seem to suggest. As a matter of fact, the traditional African environment did and does give preference to arbitration and alternative dispute resolution over litigation. Therefore, a separate or exclusionary right of access in favour of the courts could only be a mirage.³²

Whether or not a public hearing and delivery of judgment were strict requirements of customary law depended on the part of Africa in question. Whilst they were strict requirements in most language groups of South Africa,³³ Igboland in Nigeria and Asante in Ghana, it was not so in the Upper Volta regions and among some of the language groups of North Africa.³⁴

In modern African customary societies, this has changed a great deal. For instance, the institution of slavery has long been abolished and every person enjoys equality before the law.

Concerning the right of access to courts *vis-à-vis* the right or choice to arbitrate, the legal position will depend on the courts that are used. If it is access to customary courts as against customary arbitration, the position is exactly as it was in pre-colonial times when Western-style constitutions and courts were not yet in place. If it is the right of access to Western-style courts (set up by constitutions) as against customary law arbitration, the situation is akin to that of Western-style courts against Western-style arbitration which is discussed below. With respect to the right to a public hearing and the public delivery of a finding, the position varies depending on whether or not the courts in question are customary or Western-style courts.³⁵

With respect to the principles of a fair hearing, the position has remained the same. Observance of the relevant principles ensuring a fair hearing is a *sine qua non* for the exercise of any judicial, quasi-judicial

³¹ Though non-arbitration practitioners sometimes refer to arbitration as an ADR (Alternative Dispute Resolution) method, the fact is that arbitration has since assumed a distinct character of its own. It is midway between litigation and ADR. It shares some characteristics with litigation on the one hand and with ADRs on the other, but is not the same.

³² In fact, even as with respect to courts, the customary African system or procedure is itself very similar to arbitration and ADR and a practical difference hardly exists. As a South African judge has observed: 'Dispute resolution in traditional African courts gives full recognition to the idea that a public trial is only a minor phase in the progress of a dispute. The aims and procedures in these courts revolve around mediation or arbitration and reconciliation as opposed to adjudication with a win-or-lose result as in western courts.' N Mokgoro 'The role and place of lay participation, customary and community courts in a restructured future judiciary' in M Norton (ed) *Reshaping the structures of justice for a democratic South Africa* (1993) 65 75.

³³ As above.

³⁴ See Elias (n 30 above).

³⁵ See sec 3.1 below.

or other adjudicatory power, including that of an arbitrator, under customary law. A person cannot be an arbitrator over a matter if he has a personal interest in it. He cannot be a judge in his own cause. It is equally so if his spouse, child, parent, brother, sister or other relation has an interest in the matter. If the arbitrator manifests bias against any party in the proceedings, his award is completely invalid. It seems clear that it would be of no moment that the award went in favour of the person against whom the bias was shown.³⁶

One unique principle in the observance of human rights (including the rights of access to courts and public hearing) in traditional African society of the past and present is the concept that every man is his brother's keeper. This concept has ensured an admixture of rights and duties. As a man is given rights, he acquires also certain duties and responsibilities which he owes other members of the society. He cannot claim rights except alongside the execution of his duties. The individual's rights cannot be claimed against society except as part of society's rights and cohesive system. The position is well captured by the late Professor Claude Ake:³⁷

We put less emphasis on individual and more on the collectivity, we do not allow that the individual has any claims which may override that of the society. We assume harmony, not divergence of interests, competition and conflict; we are more inclined to think of our obligations to other members of our society rather than claims against them.

Another commentator put the matter this way:³⁸

³⁶ Interviews with elders and informed members of Onicha-Agu Amagunze community, Nkanu-East local government area of Enugu State of Nigeria, and of some Zulu persons of South Africa in March 2005. This is one of the aspects which show clearly that the fine principles of law and life have never been the exclusive preserve of any particular set of communities in Europe or anywhere else. Any assertion to the effect that the indigenous legal system was primitive through and through can only be the result of unresearched armchair criticism or a colonial hangover and mentality. All other Africans spoken with on this point confirmed that the position is the same in their own custom — Ghanaians, South Africans and Beninese. A close relation of the parties or any of them can only act as a mediator, an intervener whose opinion would be a non-binding suggestion. For a person to assume the estate of a dispute resolver whose decision or opinion is binding on the parties, he must not be a relation of any of them. The only exception seems to exist in favour of a family head or traditional ruler who, by virtue of his position, has impartiality assumed in his favour. Even then, if his relationship with one of the parties is extremely close or closer than the relationship with the other party (eg if one party is the spouse, child, parent, etc), he cannot adjudicate the matter.

³⁷ 'The African context of human rights' (1987) *Africa Today* 5–12, cited by Umozurike (n 28 above) 18. The principle is likely to be in operation up to the foreseeable future, particularly since it has been adopted in the African Charter, arts 27(2), 28 and 29, which provide that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. The Preamble to the African Charter also declares that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'. The principle of duties alongside with rights is applicable on a much lower level in the borrowed or assimilated European or Western laws now applicable in the different African countries as their general laws.

³⁸ V Uchendu 'Traditional and social order' excerpt from inaugural lecture, University of Calabar, Nigeria, 11 January 1990, cited by Umozurike (n 28 above) 19.

The kinship principle provided the individual with a community whose moral order emphasised shared values, a sense of belonging, security and social justice. In such social order duties preceded rights. The principle was clear: to enjoy your rights you must do your duty; and duty and right have a reciprocal relationship, and structurally both were balanced. The genealogical structure, whatever its depth, solved the dialectical problem of relating the present to the past and both to the future. It is a simple transformation embedded in the lineage system. The lineage incorporates the living, the dead and the unborn. By the principle of reciprocity, the living respect the ancestors and the traditions they left; the ancestors reciprocate by maintaining the prosperity of the living community and through re-incarnation, strengthen the living lineage. When the living die, they join their ancestors.

This is a defining characteristic of the typical African traditional society. It must, however, be properly appreciated to avoid the rather sweeping and erroneous extension or interpretation which a few scholars, even African scholars, have tried to put on it. One such scholar has interpreted it as a 'mentality of assistance', indeed a 'colonial mentality' under which³⁹

the mind is but little inclined to cultivate and make use of any sense of initiative and responsibility, the colonial mentality has nonetheless found a favourite and predisposed home for itself in the organisation of the traditional life of most African societies where the fate, behaviour and gestures of each individual are under the control of norms, practices and traditions created and consecrated by the community or the group, to the exclusion of all individual or personal action or innovation. The role of individual will is reduced to a minimum, each person living according to rules or practices ensuing from his status.

With due respect, if this is actually the position anywhere in Africa, it is the exception rather than the rule and must be at the fringes of the continent. Much as African society ensures a high degree of brotherhood and collectivity, it does not destroy individuality or initiative. Uniqueness and initiative resulting in personal differences, approaches and dispositions ensure dynamism for the society. A very high degree of republicanism has always existed in such societies as the Igbos of South-eastern Nigeria and in some other parts on the continent. Nguema in the same article identified four types of traditional African societies and the proposition could never have been true of the four types. It is also worth noting that no authority for these assertions was cited, nor did he name any society where that is the position. Such scathing remarks on the kinship principle, particularly as it concerns human rights, stem from a hangover of mental colonialism and an insufficient perception of the differences between the obsessive concern of the West for the

³⁹ I Nguema 'Human rights perspective in Africa' (1990) 11 *Human Rights Law Journal* 261 264.

individual and the commendable African emphasis on the collective. This difference has been expressed very well by another writer as follows:⁴⁰

One critical difference between African and western traditions concerns the importance of the individual. In the . . . western world the ultimate repository of rights is the human person. The individual is held in a virtually sacralised position. There is a perpetual and, in our view, obsessive concern with the dignity of the individual, his worth, personal autonomy, and property.

3 Relevant constitutional provisions

3.1 Right of access to court

One of the rights that prevents or curtails political and other forms of persecution is the right of access to the courts. The right is so fundamental for any society that it is recognised as a constitutional right, even in jurisdictions with unwritten constitutions,⁴¹ unless it is expressly excluded by law.⁴² It is one of the bedrocks of a proper administration of justice that to deny a citizen access to the courts is an outright denial of justice and the rule of law and indeed a breach of his right. We can therefore safely assert that it is an existing right, even in the few African countries where the constitutions are silent on the point.⁴³ In these countries the people have a right of access to justice. In each cause or matter they are at liberty (subject to regulation by statutes and non-statutory legal principles) to choose to go to court or to choose any other mode of dispute resolution.

In fact, the right of access to a court is sometimes actually regarded as synonymous with, and the embodiment of, the right of access to justice. Such an impression or emphasis is particularly the case in countries emerging from colonialism or dictatorial and oppressive regimes. It exists because litigation has previously been the major or principal mode of dispute resolution. Framers of constitutions normally have only courts and

⁴⁰ A Legesse 'Human rights in African political culture' in KW Thompson (ed) *The moral imperatives of human rights: A world survey* (1980) 130, cited by Juma (n 25 above) 179.

⁴¹ Eg, it is entrenched even in the unwritten Constitution of England. See *Raymond v Honey* (1982) 1 All ER 756; (1983) 1 AC 1. See also *R v Secretary of State for the Home Department, EXP Leech (No 2)* (1994) QB 198, where Steyn LJ declared that it is 'a principle of our law that every citizen has a right of unimpeded access to a court'.

⁴² Dictatorial and oppressive regimes which have arisen time and again in some parts of the world sometimes make laws ousting the jurisdiction of courts over some matters. Examples are the Constitution (Suspension and Modification) Decrees of 1984 and 1994 in Nigeria. See also *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) of the African Commission. The regimes of Idi Amin in Uganda, Milton Obote, Jerry Rawlings in Ghana and (even now) Robert Mugabe of Zimbabwe have been guilty of this.

⁴³ Burundi, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, Guinea-Bissau, Libya, Madagascar and Mali.

formal tribunals set up by government in mind when framing provisions for access to justice or to dispute resolution fora. It is mainly this mindset that breeds the problem or question as to whether or not arbitration and other informal or private dispute resolution mechanisms operate in breach of parties' right of access to courts or, in that sense, to justice. This is because (with only litigation in mind) the framers of constitutions routinely impose on adjudicators such requirements as the observance of a public hearing and the publication of the decision, which fly in the face of the core values and strengths of arbitration over litigation.⁴⁴ We shall now examine African constitutional provisions on the right of access to courts with a view to seeing if and how a resort to voluntary arbitration may amount to a breach of that right.

As already stated, some countries have no constitutional provisions conferring a right of access to the courts, but this does not mean that citizens have no such right. It simply means that they have an equal right of access to the courts and all other dispute resolution mechanisms. Even if unwittingly, such constitutional provisions avoid the error of giving the unintended impression that litigation is the only recognised or the preferred dispute resolution mechanism or that it is superior to other mechanisms. In such countries the question of whether or not a resort to arbitration breaches a party's right of access to court does not arise. It will at best be a mere, and indeed mute, academic point.

Other constitutions confer rights of access to the courts in a manner that purports to convey finality and rigidity on the point. For instance, article 68 of the Egyptian Constitution provides that 'the right to litigation is inalienable for all, and every citizen has the right to refer to his competent judge'. The 1994 Ethiopian Constitution provides in article 37 that every person has the right to bring 'justiciable disputes to, and obtain a decision or judgment by a court of law or, where appropriate, by another body with judicial power'.

Prima facie this right and others like it seem to be an absolute right. It must be noted, however, that what these sorts of provisions seek to achieve is simply the protection of a citizen's right to go to court if he so wishes. No constitution in Africa or anywhere else imposes upon any person a duty to go to court in a civil matter⁴⁵ if he does not want to. The provisions also do not expressly negate or exclude all other dispute

⁴⁴ Such values as confidentiality, absence of rigidity or formality and speed. For a detailed examination of these and other strengths of arbitration, particularly in the African context, see Chukwuemerie (n 17 above) and Chukwuemerie (n 18 above).

⁴⁵ The institution of criminal proceedings is mainly the responsibility of the state. It is therefore in civil proceedings that the citizen needs an assurance that this right exists. The point has not arisen for decision before an African court or the African Commission to the best of this writer's knowledge. It may well be, however, that when it arises, the courts or the African Commission will take the same view as the European Court of Human Rights, which determined in the 1970s that the right of access to courts is simply a right to institute proceedings in civil matters: the *Golder* case, judgment of 21 February 1975 Series A No 18 (1979-80) 1 EHRR 524.

resolution mechanisms such as arbitration. The question that arises is whether, if a party voluntarily enters into an agreement to go to arbitration with another party, can he, when a dispute actually arises, refuse to go to arbitration on the allegation that the arbitration agreement or a consequent arbitral proceeding would be in breach of his right of access to court? In other words, does the making of an arbitration agreement amount to a waiver of his constitutional right to litigation or is he, by virtue of such a constitutional provision, unable to waive the right to litigation? In these matters, no case law or judicial interpretation of the relevant provisions can be found on the continent. Neither an African court nor the African Commission seems to have encountered the point, though it would appear that in the case of *Scot v Avery* arbitration clauses, there is a clear waiver of the right of access to court.⁴⁶ With respect to cases involving other than *Scot v Avery* clauses, and outside the statutes based on the UNCITRAL Model Law, a cue can be taken from the European Commission and Court of Human Rights which have held in a number of cases that the right of access to court is by no means an absolute right, but one subject to limitation;⁴⁷ and that by its very nature the right of access to court may be waived by a party in preference to another dispute resolution mechanism such as arbitration, provided that the waiver is unequivocal.⁴⁸

In considering article 6 of the European Convention, the European Commission has held that the voluntary making of an arbitration agreement is a waiver of the right of access to court.⁴⁹ However, African courts and the African Commission can hardly find such reasoning persuasive. There is nothing in the mere making of an arbitration clause that automatically ousts the jurisdiction of the courts. The clause can

⁴⁶ A *Scot v Avery* clause (named after the old case in which its principles were first expounded, *Scot v Avery* (1856) HL 1) is one which provides that the parties shall not have any resort to a court until arbitration has been tried. In the face of such a clause there is in fact no cause of action for litigation until the parties have tried arbitration: *Khetran v New India Assurance Co Ltd* (1968) 3 ALR Comm 115 (Tanzania); *Obembe v Wema bod Estate Ltd* (1977) 5 SC 129 (Nigeria). In this writer's view, the clause is the philosophy and preferred approach of the UNCITRAL Model Law on International Commercial Arbitration in art 8. The article provides for a mandatory stay of court proceedings pending arbitration once a party applies for stay, no matter the nature of the arbitration clause involved. It is consequently the legal position in those African countries that have adopted the Model Law in their jurisdictions. See n 8 above.

⁴⁷ *Waite and Kennedy* Application No 00026083/94, judgment of 18 February 1999. On this generally, see Jaksic (n 1 above).

⁴⁸ *R v Switzerland*, Application No 10881/84, Decision of 4 March 1987; *Suovaniemi & Others v Finland*, judgment of 23 February 1999 cited by Jaksic (n 1 above) 279 n 399.

⁴⁹ *Suovaniemi* case (n 48 above).

after all be an *Atlantic Shipping* clause⁵⁰ or even a *Union of India* clause,⁵¹ either of which implicitly preserves court jurisdiction, unlike a *Scot v Avery* clause. It is therefore only with respect to *Scot v Avery* clauses⁵² that African courts and the African Commission can find an automatic waiver of the right of access to the courts.⁵³ It also needs to be pointed out that, where a resort to arbitration is not voluntary but compulsory, the parties cannot be said to have waived their right of access to court. Their choice of arbitration is not the product of the exercise of their will.⁵⁴

Therefore, a resort to arbitration can fail to act as a waiver of a party's right of access to court and, arguably, become a breach of that right if, and only if:⁵⁵

- (a) it is a compulsory/statutory arbitration not predicated on an agreement freely entered into by him;
- (b) the choice of arbitration and the consequent waiver of the right of access to court are not unequivocal;
- (c) the arbitrator compels him as a third party to join the process despite the fact that there is no arbitration agreement binding upon him;
- (d) through some artificial processes (such as the piercing of a corporate veil, the alter ego doctrine or the 'group of companies' doctrine), it (the party) is brought in as a sister organisation to one of the parties. Such a bringing in or inclusion of a third party cannot be regarded as a clear waiver of its right to go to court.

⁵⁰ A clause which prescribes that, except if arbitration is resorted to within a specific time, the right to arbitrate is thereby waived. The name is taken from the first case where its principles were elaborated, *Atlantic Shipping & Trading Co Ltd v Louis Dreyfus* (1922) 2 AC 250.

⁵¹ A clause conferring on only one party the right to demand arbitration. Just like the other clauses, this is named after the case in which the principles were clearly formulated, *Union of India v Bhorat Engineering Corp* LLR Delhi Series (1971) 2 57. See also *Pittalis & Others v Sherepettin* (1986) 1 QB 868.

⁵² See n 53 above and the text thereof.

⁵³ It is the actual start of an arbitral proceeding that in all cases constitutes a waiver of the right of access to court. It is an unequivocal intent on the part of the parties, whatever the nature of the arbitration clause amongst them, to go to arbitration and forego remedy in the courts. Remedy can only be sought in the courts in so far as they are ancillary or complimentary to the arbitral process or if the arbitral process fails irretrievably. This is in exception of such countries as South Africa, where court jurisdiction is hardly affected even when parties have gone to arbitration. See the South African Arbitration Act 1965 and such cases as *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* 2003 2 SA 278. That being the case, it would appear that the most unequivocal way of indicating a waiver of the right and of most clearly evincing an intention to arbitrate is a *Scot v Avery* clause.

⁵⁴ This is recognised even by the European Commission, despite the unsupportable opinion in *Suovaniemi* (n 48 above), eg, its report of 12 December 1983, Applications No 8588/79 and 8589/79 para 30.

⁵⁵ On (c) and (d), see Jaksic (n 1 above) 280.

It is only in these circumstances that an arbitral proceeding in those African countries can be viewed as being in breach of the constitutional right of access to court. Even then investors and business organisations operating or wanting to operate in such countries have no reason for fear or apprehension. Compulsory arbitrations (ie (a) above) are encountered only in trade disputes between employers and employees. Such arbitrations do not normally affect the investment and business potential or chances of the parties, particularly when they are expatriates or owned by expatriates.⁵⁶ Subheads (b) and (c) above cannot arise unless the parties themselves bring them about. The arbitration of investment disputes can be effectively resorted to in such places just as any other.

The third, and more difficult type of provision of the right of access to court in African constitutions is the case in which the constitution provides for dispute resolution in court and 'other tribunal established by law'. The Constitution of the Republic of Malawi, 1994, provides in section 41 that every person shall have access to any court of law or any other tribunal with the jurisdiction for the final settlement of legal issues. In section 23(2), the 1991 Constitution of Sierra Leone equally empowers 'any court or other authority' prescribed by law for the determination of the existence or extent of civil rights or obligations, to hear causes and matters. The Constitution of the Republic of Togo provides in article 19 that every person shall have the right in all affairs to have his cause heard and decided equitably by an independent and impartial jurisdiction within a reasonable time. There is nothing in the Constitution restricting the meaning of 'jurisdiction' to courts only. Rather, it seems obvious that tribunals are included.

Article 18(9) of the Zambian Constitution, 1991, is even more liberal, by granting parties a right to exclude a public hearing by agreement. Article 28(1) of the Ugandan Constitution, 1995, confers on courts or 'tribunals established by law' the jurisdiction to entertain disputes over people's civil rights and obligations. Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, provides that in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality. Section 34 of the South African Constitution, 1996, provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a

⁵⁶ Such compulsory arbitrations are of course conducted in a manner that ensures that the advantages of arbitration over litigation are available. Again, provision for compulsory arbitration is in effect an effort to prevent parties from taking such matters to regular courts — the very place which investors want to avoid. Such provisions are therefore in a sense simply *Scot v Avery* arbitration clauses.

fair public hearing before a 'court or, where appropriate, another independent and impartial tribunal or forum'.⁵⁷

The germane question here is whether or not arbitral tribunals fall under the term 'other tribunal established by law' or its several in these and similar provisions. If arbitral tribunals fall within the scope of 'other tribunal', it means that constitutional requirements in each such country for public hearing/trial and the publication of judgment bind arbitral tribunals and thus effectively destroy confidentiality, one of the attractive hallmarks of arbitration.⁵⁸ In such a case, any arbitration conducted in private would amount to a breach of the parties' right to a public hearing and public pronouncement of decision. Such arbitration would be unconstitutional and therefore invalid and completely null and void.⁵⁹ A resort to arbitration, properly so called, would be a breach of a party's right. Such a scenario would enable a shifty businessman to enter into an arbitration agreement, derive all possible benefits from the transaction, and after the dispute resile from arbitration and insist on litigation. He would even most probably insist on litigation in his own country's courts. Such a legal regime would hardly be consistent with the yearnings of African nations and their concerted efforts through NEPAD.⁶⁰ It would also negate their efforts, made through modern and progressive arbitration statutes, to attract direct foreign investment and to make their shores attractive venues for transnational arbitral proceedings.⁶¹ I seek to show here that arbitral tribunals are neither 'other tribunals' in those provisions, nor does a recourse to arbitration constitute a breach of any party's right to have his matter heard and determined by a court or 'other tribunal'.

⁵⁷ See also art 12(1)(a) of the Constitution of the Republic of Namibia 1990; sec 19(13) of the Constitution of Ghana 1992 — 'adjudicating authority . . . established by law'; art 9 of the Fundamental Law of the Second Republic of Guinea 1990; art 13(h) of the Fundamental Law of Equatorial Guinea 1991 — a right to present complaints and petitions 'to the authorities'; art 4 of the Constitution of Burkina Faso — 'independent and impartial jurisdiction'.

⁵⁸ The essence and bedrock of arbitration rest in extensive party autonomy, private hearing and declaration of award, and confidentiality. Without those, arbitration can hardly be preferred over and above litigation.

⁵⁹ In Africa, the supremacy of the constitution and attendant unconstitutionality and invalidity of any statute or rule of law that contradicts a constitutional provision are well established. See, eg, sec 1(3) of Nigeria's 1999 Constitution.

⁶⁰ New Partnership for Africa's Development. See <http://www.nepad.org> (accessed 31 March 2007).

⁶¹ African countries are taking steps to modernise their legal regimes for arbitration. Presently six of the countries have made statutes patterned wholly or substantially after the UNCITRAL Model Law. The francophone countries are members of the OHADA Treaty and have the Uniform Arbitration Act; 42 of the 53 African countries are already members of the ICSID (an African country, Nigeria being one of the very first countries to ratify it in 1965) and 22 countries are members of the New York Convention. These are no doubt giant strides though a lot of work still needs to be done on the continent, for which see Asouzu (n 4 above); Al Chukwuemerie *Africa and the UNCITRAL Model Law on arbitration: Winning and losing to win* (forthcoming).

Taking the latter first, that is, if arbitral tribunals are not the tribunals envisaged by the constitution, our arguments above to the effect that the right of access to court is not absolute, will hold. When a party elects to go to arbitration by voluntarily and clearly entering into an arbitration agreement, he has properly waived his right of access to court with respect to the dispute in question.⁶² It will not lie in his mouth to allege a breach of his right of access to court.

At the risk of repetition, we need to restate here that in Africa, outside of customary law, arbitration and ADRs are relatively new. In fact, until recently, many African minds conceived of dispute resolution through the legal process outside the customary law simply as litigation. Commercial arbitration, particularly international arbitration, was regarded with skepticism flowing mainly from unsavoury experiences in the past at the hands of biased international arbitrators.⁶³ Even now that awareness has been created in most countries, arbitration is still not as popular with policy and law makers as litigation. The natural consequence of this is that arbitral tribunals are not kept in mind when constitutions are drafted. The words 'other tribunal' are therefore not a reference to arbitral tribunals, but to official or public quasi-judicial tribunals, such as tribunals of inquiry set up by government.

Generally, the independence and impartiality of an arbitration tribunal and its duty to treat the parties equally are consistent with the strict principles of fair hearing and have been provided for clearly in African arbitration statutes. Examples are section 12 of Uganda's Arbitration and Conciliation Act, 2000, and section 8 of Nigeria's Arbitration and Conciliation Act.⁶⁴ Each requires an arbitrator to be impartial and independent with respect to the dispute and parties before him. This is not usually the case with the courts and official or public tribunals.⁶⁵ The provision is missing from statutes establishing those courts and

⁶² It needs to be noted that the waiver only affects his right to litigate the substantive dispute. It does not abrogate his right of recourse to the courts (by way of application) for the enforcement or setting aside (as the case may be) of any award rendered in the arbitration. Nor is he disentitled from appealing from a decision given in such an application. In African states that have enacted statutes based on the UNCITRAL Model Law, he has no right of appeal against the award.

⁶³ *Per J Paulson*, 'It may be true that in the beginning of this century, and until the 1950s, arbitrations conducted by various "international tribunals" or commissions evidenced bias against developing countries': 'Third World participation in international commercial arbitration' (1987) 2 *ICSID Review* 21. See also M Sonarajah 'Power and justice in foreign investment arbitration' (1997) 14 *Journal of International Arbitration* 103; Al Chukwuemerie 'Commercial and investment arbitration in Nigeria's oil and gas sector' (2003) 4 *Journal of World Investment* 828.

⁶⁴ Ch A18 Laws of the Federation of Nigeria 2004 (revised); sec 13 Kenya's Arbitration Act 1995.

⁶⁵ In Nigeria, the High Court laws of the Eastern, Northern and Western regions which apply in all the State High Courts in the country contain no such provision. So also the Court of Appeal Act and Supreme Court caps C36 and S15 respectively Laws of the Federation of Nigeria, 2004. Nor does the Tribunals of Enquiry Act cap T21 contain any such provision.

tribunals because constitutional provisions on fair and public hearing bind them. The provisions on a fair hearing appear in African arbitration statutes, simply because the draftsmen, knowing that the constitutional provisions do not apply to arbitral tribunals, have to make provision for arbitral tribunals. In the absence of such provisions in arbitration statutes, arbitral tribunals would infringe no statutory law if they did not observe a fair hearing.

As already stated, African countries have for some time now had deliberate policies to enact modern arbitration statutes and generally make their shores preferred venues for international commercial arbitration.⁶⁶ It is inconceivable that they would want to remove or destroy the prime characteristics and advantages of arbitration over litigation (privacy, etc) by requiring all arbitral proceedings to be held in public. For instance, since 1967 Nigeria has consistently taken steps to aid the growth of the law and the practice of arbitration within her shores and has consistently tailored her policies and legislations in that direction. She could therefore⁶⁷ hardly have in 1999 adopted a constitutional policy destroying the privacy of arbitration.

Article 7(1)(a) of the African Charter grants every individual the right of access to 'competent national organs' and article 7(1)(d) grants him 'the right to be tried within a reasonable time by an impartial court or tribunal'. It is not clear why, with respect to a criminal trial, the African Charter uses the specific words 'court or tribunal', while using 'competent national organs' in respect of civil suits. Nonetheless, it seems rather clear that 'competent national organs' include tribunals set up under the law. A community reading of articles 7(1)(a) and 7(1)(d) seems to suggest this. Other regional and global human rights instruments are clearer on the point. The jurisprudence that has been developed around those clearer provisions supports our argument that arbitral tribunals are not part of the tribunals envisaged by provisions on access to courts and tribunals. For instance, the European Convention on Human Rights provides in article 6 that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing 'by an independent and impartial tribunal established by law'. It has been held repeatedly that 'tribunal established by law' in that provision does not include an arbitral tribunal in a voluntary arbitration and that entry into an arbitration agreement by a party amounts to a renunciation of the right to go to court.⁶⁸ It has also been held that, for a tribunal to be a 'tribunal established by law' it needs to, amongst other things, exercise judicial functions, have independence from the executive arm of government and the parties, have a fixed term of

⁶⁶ See n 62 above.

⁶⁷ For further elaboration of the point and the instances, see Chukwuemerie (n 63 above).

⁶⁸ See *Deweever v Belgium* (1980) 2 EHRR 439; *R v Switzerland* (n 48 above).

office for officers and have guarantees afforded as to its procedure.⁶⁹ The African Commission may be persuaded by arguments in the same direction when interpreting articles 7(1)(a) and (d).

The International Covenant on Civil and Political Rights, of which most African countries are state parties, provides in article 14 that:

All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) 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 interest of justice; but any judgment rendered . . . in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

In its General Comment No 13, the United Nations (UN) Human Rights Committee⁷⁰ stated:

- (1) The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- (2) In general, the reports of states parties fail to recognise that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. . . .
- (4) The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised . . .

Of course, this commentary has no force of law whatsoever and can only at the very best have persuasive authority. Despite the commentary, countries have felt free to interpret the provision as excluding arbitral tribunals. In fact, the commentary itself was a reaction to the general trend of interpretation and implementation of article 14 by state parties which involved or entailed the exclusion of arbitral tribunals. For instance, the article has force of law in Hong Kong having been domesticated by the Hong Kong Bill of Rights Ordinance, 1991, but several Hong Kong courts have taken the view that not all tribunals fall under the provision. In *R v Town Planning Board ex parte Kwan Kong Co Ltd*,⁷¹ Wang J held *inter alia*:

⁶⁹ *Le Compte, Van Leuven & De Meyere v Belgium*, (1982) 4 EHRR 1.

⁷⁰ Adopted by the Committee on 12 April 1984 at its 516th meeting.

⁷¹ (1995) 3 HKC 254. See also *MA Wan Farming Ltd v Chief Executive in Council* (No 1) (1998) HKC 190.

'Suit at law' therefore means very clearly a legal proceeding in a court of law. I do not believe that when reference is made to a suit at law, any lawyer or layman will have any doubt that the words can have only one meaning, namely, a legal court proceeding . . . The usage of the words in a 'suit at law' in connection with judgment delivered in public can leave no doubt that the reference there is unmistakably to a formal judgment in legal court proceedings delivered in public, something familiar to everyone brought up under the common law system of Hong Kong. The 'suit at law' can therefore only mean a formal suit, action or proceeding brought in court by one party against another party.

It should be abundantly clear from the foregoing that a recourse to arbitration by any person in Africa is not a breach of his right of access to a court or formal tribunal, but rather a voluntary waiver of that right. Since arbitration is currently the best dispute resolution mechanism, particularly in an African/Third World setting,⁷² it is a waiver that enables the party to achieve the best for himself or itself in the resolution of the dispute at hand.

We contend that on yet another ground arbitration enforces the African's right of access to justice more than mere access to court does. The African Commission has repeatedly held that the right of access to the courts 'must naturally comprise the duty of everyone, including the state, to respect and follow these judgments'.⁷³ Despite pious and salutary provisions in most African constitutions on the rule of law and the independence of the judiciary, most African countries, as represented by their governments, have failed woefully in this area. The continent has had more than its share of military and other oppressive dictatorships run by self-centred officials.⁷⁴ Such regimes behold court judgments with deep contempt and arrogant defiance. In fact, in the imagination of most such rulers the fact that judges and the courts constitute an arm of government simply means that the judges and courts are extensions of the executive. They further imagine that judges and courts must take instructions from rulers (the executive) and should not dare 'annoy' them through adverse judgments. Even some civilian

⁷² See nn 18 & 20 above and the texts thereof.

⁷³ *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998). See also *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 44.

⁷⁴ Nigeria, eg, has been independent since 1960, but for 39 of those 47 years, oppressive military regimes with little regard for the rule of law have held sway. Of the 17 years of civilian regimes, a former military general and former military Head of State has ruled for nearly eight years with very little difference, if any, in his perception and attitudes in government, particularly towards court judgments, from when he was a military dictator. Military and other dictators have held sway for different but long periods in Cameroon, Chad, Egypt, Ethiopia, Ghana, Somalia, Uganda and Zimbabwe.

regimes disobey court orders with surprising impunity almost as a matter of course.⁷⁵

On the contrary, arbitral awards are not observed in the breach. Even oppressive governments normally obey arbitration awards, particularly when other nationals or foreign interests are involved.⁷⁶ To that extent, therefore, the question as to whether or not arbitration breaches any citizen's human right does not arise at all. The truth is rather that, while the courts are often helpless in the breach of citizens' rights which they (the courts) pronounce upon, arbitration effectively secures citizens' rights in this area.

It must be noted that a waiver of the right of access to court (ie by electing to go to arbitration) does not amount to a waiver of other fundamental procedural safeguards under the different African constitutions. Whether it is an arbitral tribunal or any other adjudicating mechanism, the party's right to a fair hearing by an impartial umpire remains intact, as we shall see in the next section.

3.2 A fair hearing within a reasonable time

In the area of fair hearing, arbitration law corresponds completely with the African constitutional ideals, not because the constitutional provisions are applicable to arbitration, but simply because the two legal regimes happen to be similar. Practically all African constitutions provide for a fair hearing. Section 19(13) of the Constitution of Ghana, 1992, demands that every civil case 'be given a fair hearing within a reasonable time'. The South African Constitution provides in section 34 for a 'fair public hearing' before a court or another independent and impartial tribunal or forum. Section 36(1) of the Nigerian Constitution, 1999, entitles every person to 'a fair hearing within a reasonable time' by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality. Ironically, some countries have no provisions on the right to a fair hearing in their constitutions for civil cases and matters.⁷⁷ In such countries, parties can only rely on other statutory provisions and the common law prin-

⁷⁵ Eg, in December 2004 the Nigerian Supreme Court declared as unconstitutional and invalid the holding back of funds accruable to local governments (the third tier of government in the country) in Lagos State by the Federal Government and ordered that the funds be released forthwith in *Attorney-General of Lagos State v Attorney-General of the Federation* (2005) All FWLR (pt 244) 805. The President soon after the judgment asserted on prime time national television that the funds would not be released. He and his party men ceaselessly taunted and cajoled the courts on the matter and held on to the funds until August 2005 when just about one-third was released. The rest is yet to be released about three years after the judgment.

⁷⁶ Even Libya, in the days of its ultra-radicalism, obeyed the awards in *LIAMCO v Libya* (1981) 20 *International Legal Materials* 1; *BP Exploring Co Libya Ltd v Libya* (1979) 53 *International Law Reports* 297; *TOPCO/CALASIA v Libya* (1970) 53 *International Law Reports* 389, even though it considered them objectionable.

⁷⁷ The Constitutions of Algeria, Angola and Equatorial Guinea have no such provision.

principles governing a fair hearing. Article 7(1)(d) of the African Charter provides for 'the right to be tried within a reasonable time by an impartial court or tribunal'.

The fair hearing requirement is fundamental to the administration of justice. As such, even minor breaches cause the proceedings to be null and void. It is in this regard that most African constitutions require courts and tribunals to be both independent and impartial.⁷⁸

A court or tribunal has to give each party an (equal) opportunity to present his case and challenge the other party's case. This equality of opportunity is not to be evaluated solely from the point of view of the amount of time allocated. If a plaintiff in a court action elects to file his statement of claim within seven days instead of the 21 days provided for under the relevant rules of court, the defendant cannot be compelled to also file within seven days. He may decide to use the length of time (21 days) granted him by the rules. In the same way, if a party to an arbitral proceeding elects to file his points of claim within three days, nothing says that the respondent must have only three days to file his points of defence.

Since arbitral tribunals are not part of the dispute resolution fora covered by African constitutions, the principles governing a fair hearing or natural justice stated in these constitutions do not bind them. The rules that govern arbitral tribunals and arbitrators in this regard are to be found in the individual countries' arbitration statutes and common law, which in effect have the same rules for arbitration as the constitutions have for litigation. In Nigeria, for instance, under the common law any adjudicatory function performed in breach of any of the tenets of a fair hearing is absolutely null and void and of no effect whatsoever. The courts have held that such a proceeding has no consequence with respect to the rights and obligations of the parties.⁷⁹

There are arguments in some jurisdictions outside Africa, in Europe for instance, on whether or not the right to a fair hearing or equal treatment can be waived by a party.⁸⁰ In those jurisdictions, even when a tribunal or court is not independent and impartial, its judgment may still stand if the trial was 'generally fair'.⁸¹ In African countries with the same common law heritage as Nigeria, it is not so because, generally, the right to a fair hearing cannot be waived by any party involved

⁷⁸ See the different provisions already cited above. Typical examples are South Africa: 'a court or, where appropriate, another independent and impartial tribunal or forum' — sec 34; Togo: 'in all affairs have his cause heard and decided equitably by an independent and impartial' forum — sec 19; and Nigeria: 'a fair hearing . . . by a court or other tribunal . . . constituted in such a manner as to secure its independence and impartiality' — sec 36(1).

⁷⁹ *RC Okafor v Attorney-General of Anambra State* (1991) 6 NWLR (pt 200) 659 662.

⁸⁰ Jaksic (n 1 above) 233.

⁸¹ *Millar v Dickson (Procurator Fiscal, Elgin) and Other Appeals* (2002) 3 All ER 1041 Privy Council; *Brown v Stott (Procurator Fiscal, Dunfermline) & Another* (2001) 2 All ER 97.

in any proceeding. The right is not granted to him for his benefit alone, but also for the general good of society.⁸² He is incompetent to waive that which belongs to him and every other member of his society. To the best of this writer's knowledge, a case is yet to be seen in common law Africa in which the court or tribunal was obviously partial and dependent and the trial was said to have been fair overall or 'generally fair'. If such an issue arises before the courts in common law Africa, it can almost certainly be said that the courts, as alert as they are against a breach of fundamental rights, will have great difficulty in saving such a proceeding. Once a rule is allowed to stand to the effect that an unfair trial is generally fair, it will be very difficult in the majority of cases to draw the line between apparent partiality and dependence, and 'overall' or general fairness of trial. On the contrary, the African Commission has established for the continent persuasive authority in one of its decisions, to the effect that a trial must be fair as a whole, that is, wholly fair.⁸³

As shown above, six African countries have domesticated the UNCITRAL Model Law, a number which will increase with time.⁸⁴ In each country, article 18 becomes part of that country's statute on arbitration. It provides that the parties shall be treated equally and that each party shall be given the opportunity of presenting his case.⁸⁵ This ensures that the tribunal treats the parties equally and evenly without fear or favour — the principle of equality of arms. This principle is so sacrosanct that, in jurisdictions like Ghana and Nigeria, it is an abuse of office by a tribunal or an arbitrator if any one of the principles of a fair hearing is breached.⁸⁶

It has been held by the European Court of Human Rights that equality of arms in a matter involving two opposite interests —

- (a) means that each party should be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent;⁸⁷

⁸² See eg the Nigerian case of *Jonathan Enigwe v Michael Akaigwe* (1992) 2 NWLR (pt 225) 505 and the Ghanaian case of *Hage v Talch* (1967) GLR 372.

⁸³ *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

⁸⁴ Generally, before the advent of the Model Law, most countries of the world, not just Africa, did not have provisions on fair hearing in their arbitration statutes. The common law countries relied on the common law for the observance of the rules of natural justices in the arbitral process.

⁸⁵ Sec 14 Nigeria's Arbitration and Conciliation Act; sec 18 Uganda's Arbitration and Conciliation Act, sec 19 Kenya's Arbitration Act; art 26 Egypt's Law No 27/1994.

⁸⁶ See the Ghanaian case of *Hage v Talch* (n 82 above) 375 and sec 28 of the Ghanaian Arbitration Act 1961 — Act 38 and the Nigerian cases of *Taylor Woodrow Nig Ltd v SE GmbH* (1993) 4 NWLR (pt 286) 127 and *Lagos State Development and Property Corporation v Adold. Stamm International (Nig) Ltd* (1994) 7 NWLR (pt 358) 545 as well as sec 8 of the Nigerian Arbitration and Conciliation Act on disclosure and challenge of arbitrators.

⁸⁷ *Stran Greek Refineries and Stratis Andreadis v Greece* (1995) 19 EHRR 293.

- (b) involves an opportunity to comment on all facts of importance to the award, to canvass his legal viewpoint and oppose his opponent's, to offer relevant evidence and take part in the proceedings;⁸⁸
- (c) also entails a duty on the part of the tribunal to properly examine the submissions, arguments and evidence adduced by each party without prejudice to its assessments of whether they are relevant to its decision in the matter at hand;⁸⁹ and
- (d) proceedings are not conducted in a manner that puts a party at an advantage over and against the other party. It is of no moment that the favoured or privileged party did not actually benefit from the advantage. It suffices that he could have benefited from it.⁹⁰

African courts and the African Commission are likely to feel persuaded by this reasoning when faced with cases calling for decisions on these points. As yet there has not been such an opportunity.

The foregoing considerations show that, sometimes, there may be a theoretical equality of arms, but a practical equality tainted with misdemeanour. If, for instance, an arbitrator makes overtures 'equally' to both parties directly or through their lawyers, offering his services for any future arbitrations, his award in the matter at hand cannot stand, even if it is argued that the development did not affect his decision in the matter at hand. In *Babcock and Wilcox Co v PMAC Ltd*,⁹¹ this was what happened between an arbitrator and the parties' lawyers. One of the lawyers agreed to consider him for future work while the other told him that his conduct was improper. Though the court reasoned that 'it does not necessarily follow that the arbitrator's impartiality was compromised', it nullified the award. A contrary decision would have been very surprising because by their responses the lawyers (and therefore the parties they represented) had put themselves in unequal positions before the arbitrator. The party whose lawyer acted wrongly by making a promise of future consideration to the arbitrator had automatically been placed at an advantage over the other party whose lawyer had adopted the correct professional approach.

National statutes in the six countries that have domesticated the Model Law also ensure that each party has adequate notification of proceedings. This is because without due notice to, and/or appearance of, a respondent, it cannot be said that the parties are equal or are being treated equally or even that the tribunal has jurisdiction to entertain the matter.⁹² Article 21 of the Model Law determines that, unless

⁸⁸ *Dumbo Beheer BV v The Netherlands* ECHR (27 October 1993) Ser A 274, para 35.

⁸⁹ *Kraska v Switzerland* ECHR (19 April 1993) Ser A 254.

⁹⁰ *Borgers v Belgium* ECHR (30 October 1991) Ser A 214.

⁹¹ (1993) 863 SW 2d 225 233-234.

⁹² See eg sec 9 of the Kenyan Arbitration Act; sec 8 of the Ugandan Arbitration and Conciliation Act.

the parties agree to the contrary, arbitral proceedings over a dispute commences on the date on which the request for arbitration (a notice of arbitration) is received by the respondent.⁹³ All through the proceedings, whatever document a party forwards to the tribunal, he must forward to the other party. In the same way, whatever the tribunal sends to or does with one party, it must send to or do with the other party.⁹⁴

Article 12 requires any person approached in connection with an appointment as an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. He bears this duty of disclosure throughout the proceedings.⁹⁵ Therefore, to competently sit over an arbitral proceeding, each and all of the arbitrators must be independent of the parties and also actually impartial.

Independence is decipherable on an objective basis or standard whilst partiality can hardly be detected before it manifests. Partiality rests on the personal conviction, prejudices and general mental disposition of the arbitrator in question.⁹⁶ If in any business, blood or deep social relationship exists between an arbitrator (or a presiding judge in a court) and one of the parties, he is not independent of that party.⁹⁷

It is obvious from the foregoing paragraphs that, though in Africa constitutional provisions on a fair hearing do not govern arbitration, the principles guaranteeing a fair hearing apply in arbitral proceedings on the continent. This is particularly so in countries that have enacted the Model Law into their domestic legal regimes on arbitration. It has been argued that the specific nature of arbitration as a dispute resolution mechanism 'does not allow that the elements comprising the fair administration of justice . . . be transported *mutatis mutandis* to voluntary arbitration'.⁹⁸ However, in practice, the different aspects of the right to a fair hearing are effectively secured in arbitration. It follows,

⁹³ Sec 17 Nigeria's Arbitration and Conciliation Act; sec 21 Ugandan Act.

⁹⁴ See, eg, art 15(3) of the UNCITRAL Arbitration Rules 1976, adopted also by the six African countries that have adopted the Model Law.

⁹⁵ Secs 8(1) & (2) Nigeria's Arbitration and Conciliation Act; sec 12 Ugandan Act.

⁹⁶ *Kingsley v UK* Application No 35605/97, judgment of 7 November 2000 para 47.

⁹⁷ For a detailed examination of these things, see Al Chukwuemerie 'Appointment and challenge of arbitrators under the UNCITRAL Model Law' (1999) *International Arbitration Law Review* 167. See also *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995).

⁹⁸ Jaksic (n 1 above) 226. See the American case of *Commonwealth Coatings Corp v Continental Cas Co* (1968) 393 US 145, where Justice Black posited that the 'requirements of impartiality taken for granted in every judicial proceeding' were not suspended merely because the parties had agreed to arbitration. He then said that 'we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators more than judges'. In *JP Stevens & Co Inc v Rytex Corp* (1974) 312 NE 2d 466 469, the court was of the view that the 'arbitrator's quasi-judicial function . . . demands no less a duty to disclose than would be expected of a judge'.

therefore, that proper arbitral proceedings on the continent do not breach the fair hearing principle.

It needs to be pointed out here that in another major way, arbitration seeks to secure greater impartiality than the court system. Nowhere in Africa, to the best of this writer's knowledge, is a judge required by any expressly written rule to disclose to the parties appearing before him certain relationships he may have had with any of them. The law takes his impartiality for granted and does not demand of him to make disclosures — it is assumed that he will do so. If there was or is a relationship which can reasonably be expected to affect his independence or impartiality, he is expected to disqualify himself from hearing the matter and have it transferred to another judge. However, he may only disclose the reason — the relationship — if he so wishes. If, in his judgment, the relationship is not such that it will affect his judgment, he can keep quiet about it, whether or not it is known to the other party. If the other party finds out about the relationship and raises it, it would be considered, but if that party never gets to know or fails to raise it, the case will proceed as usual. This therefore means that a judge who is not very honourable⁹⁹ may well have a relationship with one of the parties in a matter before him. Knowing that it can or indeed will affect his judgment, but that the disadvantaged party does not know about the relationship, he may keep quiet on it, hear the matter and, out of bias, enter judgment for the favoured party.¹⁰⁰

That is hardly possible in arbitration. As part of the impartiality requirements, every arbitrator is required to disclose to the parties and fellow arbitrators in the matter any prior or contemporary relationship with any of the parties that may be capable of affecting his independence and/or impartiality.¹⁰¹ He bears the duty for the duration of the arbitral process.

⁹⁹ Much as the society, particularly lawyers, would wish that all judges were very honourable, events in several countries show that some are not. For more on this — corruption, sectional sentiments — see Chukwuemerie (n 18 above).

¹⁰⁰ This reality is often lost on many a lawyer, especially the non-litigators. There is an unscrutinised mental picture (which is in some way helpful to the profession) that a judge is an honourable man and will make necessary disclosures and decline from taking a case if there are impairing circumstances on his part. Perhaps it is that assumption that has caused several legal systems not to make specific rules on mandatory disclosure, and for sanctions in the event of failure to make such a disclosure. Indeed, if an impairing factor is discovered the case is transferred from the erring judge and if he has delivered a judgment it is liable to being set aside, but that is about all. This is one of the areas where the statement by a former judge is most appropriate with respect to practically every country, to wit: 'It has always seemed to me — and I cannot resist saying this even though it might not be traditional and to do so might be controversial — that we lawyers are too complacent. Do we examine our system often enough or closely enough to see how it can be improved? How often are these fundamental questions even addressed, let alone answers sought? These and many others should be.' — Justice Gerald Butlet, QC in his retirement address at the Southwark Crown Court, 8 May 1997.

¹⁰¹ See art 12 of the Model Law, sec 8 of Nigeria's Arbitration and Conciliation Act; sec 13 of the Ugandan Act; sec 13 of the Kenyan Act.

A disclosure made by an arbitrator under this rule enables others to dispassionately consider the matter and decide whether he should withdraw or continue. That way, the matter is taken away from his one-man opinion, which obviously would look upon his action or situation more favourably than a detached third party may. It is extraordinary men that are able to judge themselves or their actions with the same detachment and dispassion with which a non-involved person would.

The duty of disclosure in this way ensures that persons laden with bias or potential bias do not get to hear causes and matters in which they would, even if unconsciously, favour or victimise any one. Of course, like any other good thing, if the duty of disclosure gets overstretched, it becomes itself counter-productive and a hindrance to arbitration. That has not happened in Africa, to the best of this writer's knowledge, but there are examples in the United States, for instance, to be avoided. In *Al-Harbi v Citibank, NA*,¹⁰² A lost an award before three arbitrators, one of whom was C. A discovered that C, a lawyer, had been a partner in a firm which represented (B was the other party in the arbitral proceedings) interests affiliated with B's interests. It was found that, though C had never met B, never worked on B's matter and did not know that B or B's affiliate had been a client of that firm (which in any case he had left), he was not in a position to ask the firm for a conflict check. The court of first instance invalidated the award because of his failure to disclose these facts. The decision was only overturned upon appeal. The duty of disclosure need not be that cumbersome. Prospective arbitrators can hardly be required to embark on a voyage of discovery to unearth very far-away or reasonably inconsequential events they may very well have forgotten. An arbitrator only needs to disclose that which would cause a reasonable man to suspect bias. The standard is that of a reasonable man, not a timorous or highly litigious man determined to find excuses with which to attempt the overturning of an award, or an unnecessarily suspicious person.

If there is any relationship or circumstance that can affect the prospective arbitrator, then it is a valid ground for him to be challenged by the disadvantaged party. If he refuses to withdraw, the other arbitrators may ask him to withdraw from the proceedings and he must.¹⁰³ A failure to disclose a disclosable relationship has been held in an American case, *Richo Structure v Parkside Village Inc*,¹⁰⁴ to be a disqualifying factor. An arbitrator failed to disclose past business relationships with the party which eventually won the award. That party's lawyer had in the past represented the offending arbitrator and was, at the time the arbitral process was taking place, also representing him. The award was invalidated. The court reasoned that, if the facts had been disclosed, the

¹⁰² (1996) 85 F 3d 680.

¹⁰³ See art 12 of the Model Law; sec 8 of the Nigerian Act, sec 12 of the Ugandan Act.

¹⁰⁴ (1978) 263 NW 2d 204, 213 (Wis).

disadvantaged party would have had an opportunity to evaluate their significance. That party, it was further held, might ultimately have judged that the value of the arbitrator's 'expertise in the subject matter might outweigh the possibility of his being partial'. African courts and arbitration practitioners are likely to find this sufficiently persuasive to adopt in similar circumstances.¹⁰⁵

It must also be stated here that sometimes the high expectations had of judges and other adjudicators such as arbitrators may well be less real than is normally assumed. It is particularly so when, as often happens in arbitration, the adjudicators are not lawyers and so may not have as much detachment from the case before them as lawyers can have because of their training. It has been stated that:¹⁰⁶

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make up the man, whether he be litigant or judge.

Let it also be noted that a litigant's right to have his matter heard 'within a reasonable time', which is part of the right to a fair hearing in African constitutions, is even more likely to be satisfied or achieved by arbitration than litigation. One of the strong points of arbitration above

¹⁰⁵ It may be worthy of note that, much as I am canvassing for compulsory written rules on disclosure for judges just as arbitrators already have done, the duty of disclosure is indeed far more necessary and wider in arbitration than in litigation. This is because arbitrators, being relatively few, are always being circulated among disputes. They are much more likely to have interacted before with the parties or their lawyers. This is particularly so if they are members of the same trade or profession with the parties or their lawyers. Therefore, in considering what could be a disqualifying relationship or event in a particular case a balanced view must be taken of the circumstances. It often happens that the parties desire arbitrators who understand the nuances and peculiarities of the particular kind of business from which their dispute has arisen. No other arbitrator would be more qualified or suitable than the one who is equally a member of that trade or involved in that business, but with whom both parties or one of them may well have had numerous business or other encounters. It is also a fact, however, that in a different (even if far-fetched) sense an arbitrator may well be less patient to get to know the facts of a matter before him or that he may act in presumption. His intimate knowledge of the trade and its standards, in fact, his practical experience, may cause him 'to judge too swiftly in terms of the familiar that which is not yet fully known': L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353-383. Indeed, 'The career path of an arbitrator is likely not only to bring him into personal and professional contact with the disputants and their counsel; it is also likely to instill in him a strong sense of how things work — and how they are supposed to work. Even decision-makers who think of themselves as scrupulously neutral may be hard put to avoid the predispositions and preconceptions that so often seem to accompany practical experience as well as purely technical "expertise". This is a dynamic that may operate even in routine cases and seems especially likely where one of the parties claims to have observed "trade standards" and the dispute promises to call into question longstanding practices and patterns of behaviour widespread throughout an entire industry.' AS Rau 'On integrity in private judging' (1998) 14 *Arbitration International* 115-136-137.

¹⁰⁶ B Cardozo *The nature of the judicial process* (1921) 167.

other dispute resolution mechanisms is timeous hearing.¹⁰⁷ What is more, the Model Law and national (African) statutes based on it contain provisions for even much faster disposal of cases than obtains under any other legislation. Article 25¹⁰⁸ empowers an arbitral tribunal to terminate the proceedings if the claimant fails to communicate his statement/points of claim. It equally empowers the tribunal to continue the proceedings up to an award if the respondent fails to communicate his statement/points of defence. This is, however, without treating the respondent's failure in itself as an admission of the claimant's claim. Even after the parties have exchanged pleadings, if any of them fails to appear at the hearing to give evidence in support of his case, the tribunal may proceed to make an award based on the evidence before it.

In most of Africa, the courts often fail in this area as they are congested and delay is a very serious problem. Several factors, such as a lack of equipment, non-conducive service conditions and work environment for judicial officers, account for this. Cases sometimes take decades to get decided. For instance, in the Nigerian case of *Yesufu Adedoyin and Others v Muili Okunola*,¹⁰⁹ the retired Honourable Justice Olatawura was a clerk of the court when the case was filed in the High Court of Ibadan. It lingered on in that court until he left, completed his legal training and qualified as a lawyer, practised law for several years and was appointed a judge. He again encountered the case in that court and sat over it as presiding judge — 15 years later! In *ACB and Another v Prince AO Awogboro and Another*,¹¹⁰ a suit was filed in June 1986 along with a motion on notice for injunction. Appeals to the Court of Appeal and Supreme Court on the propriety or otherwise of the grant of the injunction sought took the next nine years, at which time the substantive issue was moot.¹¹¹

¹⁰⁷ For this and related issues, see Chukwuemerie 'Commercial arbitration' (n 16 above).

¹⁰⁸ Sec 21 of the Nigerian Act; sec 26 of the Ugandan Act.

¹⁰⁹ Suit No 1/92/57 judgment of Olatawura J (as he then was), cited in C Oputa *Our temple of justice* (1993) 27.

¹¹⁰ (1996) 3 NWLR (pt 437) 383.

¹¹¹ Generally, see Al Chukwuemerie 'Delay and congestion in Nigerian courts: Some urgent tasks and viable alternatives' in UU Chukwumaeze & S Erugo (eds) *In search of legal scholarship* (2001). It must be noted, however, that even in arbitration, unless a proceeding is properly managed, delay is a possibility. In *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* (1981) 2 Lloyd's Rep 446, the matter lasted 15 whole years between the arbitrators and the courts for enforcement of, and recourse against, the award. On proposals for solutions, see Al Chukwuemerie 'The parties' rights against a dilatory or unskilled arbitrator: Possible new approaches' (1998) 15 *Journal of International Arbitration* 130.

3.3 Public hearing

With respect to courts and formal tribunals, a public hearing is a must. Thus, except for the noted exceptions,¹¹² any judgment issuing from a non-public hearing or proceeding is invalid. A public hearing for them also includes the public delivery of judgment.

Confidentiality is the prime characteristic of arbitration. Confidentiality ensures that parties' trade secrets and other aspects that they are unwilling to disclose to the public remain their private information. For instance, company A may proceed against another in a dispute that requires disclosure of company A's trade secrets, such as chemical or other formula of production. If it gives such evidence at a public hearing, the evidence becomes public information and the company's competitors can use the information for any purpose. Every and any person who desires can, in the absence of any of the applicable exceptions, attend a public hearing and he cannot lawfully be excluded therefrom if he is not rowdy or otherwise unlawful. This would normally happen in litigation. On this account, parties prefer arbitration. What is more, arbitrators are under a duty not to testify in any subsequent court proceeding about facts that came to their knowledge while acting as arbitrators. In a public (court) hearing, not only the witnesses but the judge can lawfully testify later on facts that came to their knowledge in the course of those proceedings.

Arbitration is mainly a private affair that lays tremendous emphasis on party autonomy — the freedom of the parties to agree on how any aspect of the proceedings should play out. A constitutional provision requiring a public hearing by arbitrators and for awards to be delivered publicly whether or not the parties so desire would be antithetical to autonomy and it would destroy confidentiality. As already stated, confidentiality is a very important part of arbitration. There is nothing in the constitutional or legal cultures and policies of African states to suggest that in this age and time they would be taking steps to scare away parties from arbitration by decreeing the compulsory public hearing and pronouncement of awards. They would not want to convert arbitration into litigation. It would be much less so now that they are taking steps to make their states competitive in the field of international commercial arbitration. In fact, the requirement of a public hearing and public delivery of decisions is proof of the fact that arbitral tribunals are not envisaged by those constitutional provisions.

¹¹² Reasons of morality, public order or national security. Nigeria's sec 36 does not even have any exceptions. It may be argued that some tribunals such as university disciplinary panels or such other domestic panels need not sit in public, ie that not all members of the public (those outside the university, for instance) can lawfully demand to be admitted. Such an argument, however, ignores that 'the public' for such a panel is not necessarily the whole world, but is limited to the university community. It would be curious if there are no issues of security, morality or public order but such a panel proceeds to exclude the members of the university community — the public.

It is highly recommended that African constitutions exclude arbitral proceedings from tribunals that must hold public hearings and public delivery of findings. In the United Kingdom, as is the case in the rest of the world, this is not so. In these places, human rights treaties require all tribunals and courts to hold public hearings. In such places, a solution had to be found so as to preserve the prime characteristics of arbitration. The appropriate authorities have held that an arbitral proceeding and award need not strictly conform with this provision since they could after all be subject to subsequent control by courts that are, in themselves, bound to observe a public hearing and public pronouncement of decisions. That way, the desired guarantees are provided by the courts, which are then in a position to cure any defects of substance (not just form) that may have occurred in an arbitral proceeding. This is generally the position in the United Kingdom and in the jurisprudence of the European Court of Human Rights, with respect to the statutory adjudication scheme and under the UK Human Rights Act, 1998. It is equally the case under article 6 of the European Convention on Human Rights. In *Bryan v United Kingdom*,¹¹³ it was held that article 6 would not be breached if the proceedings in question were subject to 'subsequent control by a judicial body that has full jurisdiction and provides the guarantees of article 6'. This was followed in the English case of *Austin Hall Building Ltd v Buckland Securities Ltd*,¹¹⁴ where the court considered a public hearing with respect to adjudication. It held that, in answering the question whether a right to a public hearing had been observed, it was necessary to consider not only the adjudication process itself, but also the subsequent court proceedings that may become necessary in enforcing the adjudicator's decision.

Even if fair hearing provisions in African constitutions were to cover arbitral tribunals, it is possible that African courts would feel compelled to promulgate rules similar to this one. This is because, in practice, every African country's arbitral awards are enforceable only in the courts;¹¹⁵ courts which are themselves bound to observe public hearing and public delivery of judgments, as has already been shown in this work. No doubt, those courts generally lack the power to go into the merits of an award. They have jurisdiction simply to recognise and enforce an award or deny recognition and enforcement. Nonetheless, they certainly exercise 'subsequent control' of the awards and the arbitral process in the sense meant in *Bryan*. To that extent, therefore, arbitration proceedings would not be invalid in any African country that adopts the *Bryan* jurisprudence, despite being held in private.

Whichever of these options is taken as correct, an important factor is that African countries must preserve the confidentiality of arbitration.

¹¹³ (1996) 21 EHRR 342.

¹¹⁴ (2001) 25 EG 155; CILL 1734.

¹¹⁵ See, eg, secs 31 & 51 of Nigeria's Arbitration and Conciliation Act.

Otherwise they would destroy the very essence of arbitration. Such a destructive move would breed deep scepticism and dissatisfaction against arbitration amongst citizens. This would be an undesirable situation; the kind of situation which African countries, like the rest of the Third World, would not want.¹¹⁶ It would also run against the grain of the popular international position. As a further consequence, it would make African countries less attractive to parties who ordinarily might have chosen African countries as a venue for their arbitrations.

The African Charter does not provide for a public hearing even by the courts. As it concerns arbitration, this is a very commendable position. The position joins the African constitutions in freeing arbitration on the continent from any requirement for a public hearing or public delivery of judgments. Equivalent human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and indeed even the Covenant on Civil and Political Rights, provide for public hearings.

The position exemplified by the African Charter lends credence to my contention that African countries do not impose public hearings and public delivery of awards on arbitrators. This is proof of the fact that, where necessary, the continent has charted its own course and need not be judged by, or prevented from taking the initiative. A necessary initiative now underway on the continent is the arbitration of human rights disputes, as discussed below.

4 Arbitration of human rights matters

Human rights causes and matters normally arise when a party's right has been abused or is about to be abused — in Africa most often by a government or its agents. Such abuses occur in the realm of torts or delict, not contract. Our interest here is not just in whether such abuses are currently arbitrable, but also whether they should become arbitrable.

It has long been the position that tortious or delictual claims are not arbitrable.¹¹⁷ This may be explained on at least two grounds. In the first place, tortious wrongs, particularly breaches of fundamental rights, seldom arise out of contractual relationships. There would therefore not be any pre-dispute agreement between the parties allowing a resort to arbitration. Nor is it particularly easy for an aggressor — a flouter of a citizen's right — and his victim to sit down and conclude an agreement about anything after the dispute has arisen. This is even far less likely

¹¹⁶ For the causes of scepticism and dissatisfaction and emergence therefrom, see Chukwuemerie 'Enhancing the implementation of economic projects' (n 16 above) 240. See also Sonarajah (n 63 above).

¹¹⁷ See, eg, *Kano State Urban Development Board v Fanz Construction Company Ltd* (1990) 4 NWLR (pt 142) 1.

with respect to an agreement on how to extract a remedy from the aggressor by going to arbitration. This is particularly so if the aggressor is an oppressive government. Even if the parties were to be accommodating to each other so as to mutually agree on anything, such as a resort to arbitration, they would face a further hurdle if the breach of the right in question also constitutes a criminal offence. In that case, the breach may well not be compromisable and would therefore not be arbitrable under public policy. These difficulties, however, are not insurmountable or even as serious as they may look *prima facie*. I will show that African governments have often been parties to other forms of arbitration and that there is nothing intrinsically wrong with their being parties to human rights arbitrations.

In some African countries, the position on whether human rights are arbitrable seems to have been left open by statutes and constitutions. In Nigeria, for instance, section 46 of the 1999 Constitution provides that any person alleging that his right or rights is being or is likely to be contravened in any state 'may apply to a High Court in that state for redress'. The phrase 'may apply to' in the provision is capable of more than one interpretation. It could mean that he may or may not apply for redress, that is that he may decide to forego the pursuit of his rights: He 'may apply to court' as opposed to 'shall apply to court'. It could also mean that he may apply to court just as he may decide to apply elsewhere, for instance to an arbitral tribunal set up for the purpose. A tribunal could be set for the purpose, if the parties had agreed before or after the dispute that, rather than going to court and spending years on the adjudication of the matter, they should go to arbitration. There is really nothing in the statutes, public policy or indeed the common law stopping parties from submitting such compromisable claims to arbitration.

Another difficulty is that the chances of winning of a would-be claimant in such a proceeding are further diminished if he cannot show that the dispute over such a violation of his fundamental right is a dispute of a commercial nature. Under some African arbitration statutes that are based on the UNCITRAL Model Law, arbitration is necessarily commercial if undertaken under these statutes. The statutes, following the footnote to article 1 of the Model Law, list a number of aspects to be regarded as 'commercial'.¹¹⁸ Though the list is not exhaustive, it is

¹¹⁸ They are sec 57(1) of the Nigerian Act and art 2 of Egypt's Law Concerning Arbitration in Civil and Commercial Matters. Each provides that the term 'commercial' should 'be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not'. It further states that relationships of a commercial nature 'include, but are not limited to . . . any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering, licensing; investment; financing; banking; insurance, exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road'.

obvious that these aspects are in the same general family of aspects — commercial ventures and concerns. By the application of the *eiusdem generis* principle of statutory interpretation, tortious wrongs and claims are clearly excluded. This is notwithstanding the fact that the provisions provide that relationships of a commercial nature 'include, but are not limited to' those aspects. Under these provisions, when a man is wrongly detained without trial or his property is destroyed or seized by a rampaging government official or agency or a private individual, it will be difficult to bring it under any of those subheads. The position would be the same when he has suffered one form of discrimination or the other based on race or tribe, religion, gender or any other ground.

Another hurdle is that, though an arbitration agreement can be made to cover future disputes, there can be no arbitral proceeding over a dispute that has not arisen, no matter how soon it may happen. There must be an existing dispute between the parties. Therefore, any application based on an allegation that the party's right is 'likely to be contravened' will hardly be arbitrable on this ground, since it would not be a dispute in the sense envisaged by the arbitration statutes.

These difficulties notwithstanding, in the African environment at least some disputes on human rights violations may be arbitrable. Despite the pious constitutional provisions in African countries, it is often difficult or impossible to secure redress for human rights violations through the courts, especially when a government is the defendant. This is due to the inordinate delay that attends litigation in those countries. Sometimes there are judges who are more 'executive-minded' than the executive itself, and would adopt legal interpretations and excuses to deny a citizen his redress when the government has violated his rights.¹¹⁹

Firstly, there is really nothing in legal policy or common sense that determines that a matter is absolutely unarbitrable simply because it has not arisen out of a contractual relationship. It was probably because of this realisation that the UNCITRAL Model Law stipulated what should be arbitrable under it, ie what is 'commercial' to be 'matters arising from all relationships ... *whether contractual or not*'.¹²⁰ It should be sufficient that the parties to a dispute have reached an agreement to go to arbitration whether the relationship or situation out of which the dispute arose is contractual or not.

The requirement for a relationship to be commercial for a dispute arising therefrom to be arbitrable is, all things considered, simply an

¹¹⁹ At one point or the other in their history, each country and people had some executive-minded judges. In the UK of the 1940s, some judges were in that mould concerning the extensive powers the government appropriated to itself to arrest and detain citizens. In *Liversidge v Anderson* (1942) AC 206, Lord Atkin had to sound his time-hallowed alarm; see n 19 above.

¹²⁰ Ie things to be regarded as 'commercial' (my emphasis).

extension — even if an unconscious extension — of the unnecessary old rule for the relationship to be contractual. Commercial relationships are necessarily, or at least almost always, contractual. The philosophy of the Model Law that a matter may be arbitrable whether or not it is contractual ought to be carried through. There is really no irrevocable reason why non-commercial matters should not be arbitrable. This is particularly so in today's complex world where there is — more than ever before — an intermix of issues, ideas and principles in any single legal matter in question. The division of legal causes, matters and principles into straight jacket departments of commercial law, public law, private law, property law, and so on is, particularly now, convenient and real only for study and academic enterprise/endeavour. In real life dispute-resolution processes, any strict division of issues along these lines may well be artificial and impracticable, whether it is in litigation or any other mode of dispute resolution. It is time for the law to drop the rigid classification of matters into 'commercial' and 'non-commercial' for purposes of arbitrability. It should suffice that a compromise is capable of being reached in that the parties have agreed to go to arbitration. The whittling down of party autonomy — one of the bedrocks and virtues of arbitration — in this area ought now to cease. It is instructive that the Model Law set out to end this unnecessary dichotomy by including many things into the class of 'commercial' things. It is regrettable that the effort was easily defeated on delivery by the *eiusdem generis* principle, as already explained in this work.

Even if the foregoing suggestion is considered rather radical for now, a progressive approach to the law can still achieve arbitrability for several human rights disputes. For instance, if a dispute based on a human rights violation is in any way related to those aspects presently classified as 'commercial' by the law, it should be regarded as having satisfied the requirement of being 'commercial' in nature. Thus, if a citizen's right is violated in the course of 'construction of works . . . engineering' and so on, whether or not there is a contract between him and anyone who-soever, the dispute over the violation of his rights could be termed 'commercial' since it arose out of a transaction defined by law as 'commercial'. It should not matter that the dispute itself is tortious or delictual and not 'commercial'.

Turning to the arbitrability of disputes or causes of action that have tortious and criminal elements (ie that are *prima facie* not compromisable), it is submitted that such disputes should be arbitrable. After all, the dispute the parties seek to resolve by arbitration is not the criminal aspect of the matter, but the civil. The criminal aspect — the non-compromisable aspect — would remain for the courts. Thus, if a man is slapped or beaten up by another, they should be able to have the civil wrong and the attendant question of compensation resolved by arbitration if they so wish. The criminal aspect — the assault — would remain for adjudication by the courts. This would be the same as if

the victim was suing in court over a civil aspect, it should be enough that the victim — the complainant — first duly reported the matter to the police. By reporting the matter to the police, he would have set criminal proceedings in motion before taking recourse for a civil wrong.¹²¹

It remains to remark that the fact of the government is the culprit in most cases of human rights abuses does not pose any difficulty to the arbitrability of such disputes. Governments can be parties to arbitral proceedings. This is already happening in investment disputes, particularly under the auspices of the International Centre for the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), which operates under the ICSID Convention.¹²² African states are members of the Convention and are often parties to proceedings conducted under the auspices of the Centre.¹²³ Even outside of investment arbitrations some African governments have been regular parties, as it were, in arbitrations between them and their own nationals or subjects. In Nigeria, for instance, labour disputes between government and its workers routinely go through mandatory (statutory) arbitration, under the auspices of the Industrial Arbitration Panel, before proceeding to the National Industrial Court or ultimately to the regular courts if the arbitration is unsuccessful.¹²⁴

Since at least some African states and governments get involved in these two types of arbitration, African governments can legitimately be party to arbitrations on violations of citizen's human rights. In fact, it is only through the arbitration of such violations that the victims can be sure of an expeditious hearing and the granting of relief or remedies.

Pursuing remedies for human rights violations through the courts is a very cumbersome process because of the congestion and delay in the courts. On the other hand, arbitration is a fast and effective procedure. Victims of human rights violations by governments can be sure that arbitrators in their matters will be independent and impartial at least on two grounds. One is the compulsory duty of disclosure of impairing relationships and circumstances which arbitrators bear on the continent.¹²⁵ The second is that, although African governments sometimes

¹²¹ In at least most of the common law world, a victim of a tortious wrong that has a criminal element may now institute a civil suit once he has set the criminal proceedings in motion, eg by reporting to the police. See, eg, the Nigerian case of *Military Administrator, Akwa Ibom State v Obong* (2001) FWLR (pt 60) 1456 CA.

¹²² The International Convention for the Settlement of Investment Disputes Between States and Nationals of other States, New York, 1965.

¹²³ See eg the Libyan arbitration cases in n 76 above.

¹²⁴ These are done by virtue of secs 9 and 14 of the Trade Disputes Act cap T8 Laws of the Federation of Nigeria, 2004.

¹²⁵ See sec 3.2 of this article.

attempt to influence court judgments, they are unable to influence arbitrators. Whilst judges are appointed and paid by the state, arbitrators are highly-skilled individuals plying their trade. They cannot afford to be corrupt or pervert justice. Whilst a judge who is known to be pro-government may retain his job despite such a slur, an arbitrator so inclined will be out of business soon. The citizens may never again engage his services. Even if the government re-appoints him, such appointment will easily, vigorously and successfully be challenged by the other party or parties.¹²⁶

The fact that human rights disputes are currently not arbitrated in other parts of the world is no reason to argue that they should not be arbitrated in Africa. Circumstances on the continent necessitate the arbitration of human rights disputes. As the continent begins to have them arbitrated, it will be showing a new path to the rest of the world, just as it has done with the introduction of the concept of international customary law arbitration.¹²⁷ Dogma or colonial hangovers should not be used to dismiss the concept of human rights arbitration

5 Conclusion

This article attempted an examination of whether or not arbitration is antithetical to the human rights provisions in the various African constitutions on access to courts, fair and the public hearing of disputes and a public delivery of judgment. The article argues that arbitration does not breach these rights. It shows that a recourse to arbitration is a waiver of the parties' right of access to court. Parties who have so waived their rights of access to a court cannot allege a breach of that right. The article concludes that arbitral tribunals do not fall into the category of courts and tribunals which African legal systems require to hold public hearing and public delivery of judgments or findings.

The article shows that arbitration engenders fair hearing on the continent more than litigation. It posits the idea that disputes on the violation of human rights are arbitrable and should be arbitrable in Africa. In this regard, it argues that arbitration will ensure the greater attainment of justice for complainants or victims. It demonstrates that, dogma aside, the mere fact that a government is a party does not and cannot, without more, make human rights arbitrations wrong in law or common sense. It has shown that African governments are often parties to

¹²⁶ Under relevant provisions of law for successful challenge and removal of arbitrators by parties. See, as examples, secs 13 of the Ugandan Act, sec 14 of the Kenyan Act, sec 9 of the Nigerian Act, art 530 of the Moroccan Code of Civil Procedure. For more on why arbitration is a better mode of dispute resolution generally and particularly, see Chukwuemerie (n 18 above) and Chukwuemerie 'Commercial arbitration' (n 16 above).

¹²⁷ See n 16 above and the text thereof.

other types of arbitration (such as investment and trade dispute arbitrations) and that there is nothing intrinsically wrong in their being parties to human rights arbitrations. It contends that, even if human rights disputes are not currently arbitrated elsewhere, peculiarities on the African continent now necessitate the arbitration of such disputes in Africa. In that regard the article contends that, in arbitrating such disputes, the continent would be leading the world into a new direction as it has done in another area of arbitration through the concept of international customary law arbitration.

In summary, the inquiry shows that the human rights provisions in African constitutions do not affect arbitration in a negative way. The two legal streams of arbitration and human rights are smoothly flowing through the continent for the good of the people. Things can, in this respect, continue as they are. Things can even improve should disputes on human rights violations be arbitrated.

The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion

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Summary

Unlike other regional instruments of a general nature protecting human rights (the European Convention and the American Convention) and the International Covenant on Civil and Political Rights, the African Charter contains no clause on the derogation of human rights. This absence must be contrasted with the fact that most African constitutions contain such a clause and that African states frequently declare states of emergency. This deviation from the norm raises several questions that form the subject of this article. Should the limitation clause be considered to offer equivalent, or even a superior, protection to the derogation clause? What is then the specific scope of application of the derogation clause? Must the absence of a derogation clause be interpreted as being more or less favourable for the protection of human rights? What is the position of the African Commission? How does one reconcile international agreements that contain a derogation clause and the African Charter? Two arguments will be presented: one which favours a derogation clause and one which does not.

1 Introduction

The African Charter on Human and Peoples' Rights (African Charter) contains no clause on the derogation of human rights in the event of

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states of emergencies.¹ Such an absence is not common in international instruments, but it is not unique. Let us consider three examples, dating from before and after the adoption of the African Charter. The Universal Declaration of Human Rights (Universal Declaration) does not provide for the derogation of human rights. The International Covenant on Economic, Social and Cultural Rights (CESCR) of 1966 mentions the term 'derogation' only indirectly,² in order to demand in substance that states do not propose lesser protection in their internal laws than that which is recognised by the Covenant at the international level. This example is interesting because the International Covenant on Civil and Political Rights (CCPR), adopted on the same day, contains an explicit derogation clause.³ The International Convention on the Rights of the Child (CRC) of 1989 does not contain a derogation clause. Its article 38 specifies a legal framework in the event of armed conflict. It refers to international humanitarian law applicable to member states, which protection extends to children. The concept is original, implying that the legal protection of children's rights is ensured, not by CRC itself, but by humanitarian standards recognised elsewhere by member states.

There are numerous and significant examples of international instruments that contain an express derogation clause, such as article 15 of the European Convention on Human Rights (European Convention), article 4 of CCPR and article 27 of the American Convention on Human Rights (American Convention). On the national level, constitutions often contain clauses allowing for the derogation of rights. The Constitution of the Republic of South Africa (1996) recognises, in article 37, the constitutional conditions of a state of emergency, illustrated by a schematic table of rights not subject to derogation. All these considerations reinforce the idea that a period of emergency, whatever its causes, is not an occasion to ignore the law, but a legitimate cause to decrease the level of legal protection. This decrease is expressed in two ways: on the one hand, by a brief disruption of the normal organisation of powers in favour of the executive and administrative authority, civil

¹ F Ougergouz 'L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général' (1994) *RGDIP* 289-336; R Ergéc *Les droits de l'homme à l'épreuve des exceptional circumstances. Etude de l'article 15 de la Convention européenne des droits de l'homme* (1987). See also F Ougergouz *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité* (1993) 479; V Eteka *La Charte africaine des droits de l'homme et des peuples* (1996) 477.

² Art 5(2) CESCR.

³ Art 4 CCPR.

or military, which has the effect of validating measures otherwise illegal⁴ and, on the other, by a reduction of the rights and civil liberties normally recognised in accordance with constitutional and international law.

Why, under these conditions, does the African Charter omit a derogation clause? On a continent unfortunately characterised by an excess of conflict, is this omission a diplomatic paradox, irony or oversight? It is well known that the transition of the African continent towards democracy is delicate and that many new states have not escaped authoritarian regimes, both civil and military. The African Commission on Human and Peoples' Rights (African Commission) has, moreover, 'encourage[d] 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'.⁵ Does the absence of a derogation clause imply that it would be impossible for African states to keep such a legal commitment?

The absence of a derogation clause forms a paradox difficult to resolve, for three (complementary) reasons. In the first place, numerous African constitutions contain derogation clauses to become operational in cases of exceptional circumstances, crisis, war or their imminence. This leads one to deduce a common African constitutional standard, not reflected in the African Charter. Secondly, the paradox is continued in so far as many African states are party to both the Charter and CCPR, each requiring different legal commitments from states, since the former has no derogation clause. Supposing a state experiences a serious crisis, such as civil war, would its actions be justified under article 4 of CCPR or with regard to the African Charter? It is obvious that article 30(4) of the Vienna Convention on the Law of Treaties, which attempts to regulate the order of priority among various treaties concerning the same matter, does not resolve the question of this conflict of standards. In fact, the particular nature of treaties concerning the 'protection of the human person'⁶ excludes — in my opinion — article 30(4) from being applied. It seems to me that the conflict of standards may be

⁴ *Conseil d'Etat français (CE français), Assemblée, Sieur Laugier, Recueil 161*: automatically suspending an officer, decided by a circular dated 27 August 1944, goes against the principle according to which only a text having the force of law could create a new position. The circular is, however, justified by the 'exceptional circumstances of the time and in particular the fact that the government had not been able to meet and that it was impossible to legislate by edict to deal with the situation temporarily'. See also *Tribunal des conflits français, 27 March 1952; Dame de la Murette, Recueil 626*: The infringement of civil liberties committed in a period of exceptional circumstances cannot be described as such and is regarded as an administrative decision, within the competence of an administrative judge.

⁵ African Commission, 25 October to 3 November 1994, Resolution on the military ACHPR/Res 10(XVI)94.

⁶ Art 60(5) Vienna Convention on the Law of Treaties.

resolved by determining the legal standard most favourable for the protection of human rights. Or, in other words, which legal situation — the absence or the presence of the derogation clause — is most favourable for the protection of human rights? Finally, article 4(1) of CCPR mentions that the state has the prerogative of derogation, provided that the measures taken 'are not incompatible with other obligations imposed by international law'. A flagrant contradiction exists between the universal text and the regional text. It is thus debatable whether article 4 of CCPR could be applied by a state since the African Charter makes no provision for such a clause.

In order to initiate a critical discussion, I will consider the notion of a clause or regulation on the derogation of fundamental rights first. Thereafter, I will make the following proposals: I will put forward arguments in favour of the jurisprudential inclusion of such a clause in the African Charter. As a consequence or in parallel, there could be added to this clause, also by jurisprudential means, a list of rights which cannot be derogated from. However, the opposite notion must also be presented: Even though no derogation clause is included in the African Charter, this absence is nevertheless not devoid of relevance for the protection of human rights.

2 The derogation clause: Related notions; its contents

The recent drafting of Protocol 13 to the European Convention makes it possible, in my opinion, to distinguish between the notions of derogation, limitation and reservation in relation to human rights.⁷ The Protocol bears the evocative title of 'abolition of the death penalty under all circumstances'. It follows on Protocol 6 to the European Convention (1983), also dealing with the death penalty, which decreed that the death penalty was abolished, but could be applied 'for acts committed in times of war or imminent danger of war', which, in turn, follows on article 2(1) of the European Convention, which recognises that the penalty inflicted in carrying out capital punishment pronounced by a tribunal, in the event of the offence punishable by this penalty, constitutes a legal attack on the right to life. In other words, Protocol 6 repealed article 2(1) of the European Convention, except in cases of states that had not ratified it.⁸ Three characteristics define the abolition of the death penalty in Protocol 13. No limit or restriction may be placed on the right not to be subjected to the death penalty. That is the sole difference between it and Protocol 6, which does not exclude

⁷ *Bulletin d'information sur les droits de l'homme*, Conseil de l'Europe No 55, November 2001/February 2002 50-51.

⁸ On 30 June 2003, these were Armenia, Russia, Serbia-Montenegro and Turkey.

the possibility of resorting to the death penalty in the case of war or imminent danger of war.

It is in the nature of human rights that, except in exceptional circumstances, rights are accompanied by limitations. These limitations take their justification from the collective or social effect of the protection of fundamental rights. The text of a treaty or convention sometimes defines guiding principles regarding the limitation of rights. Thus, article 27(2) of the African Charter specifies, in a general limitations clause, that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. A similar clause is found in article 30 of the American Convention entitled 'Range of restrictions'. To a general limitations clause may be added limitations specific to the right under consideration.⁹ Certain rights that concern the dignity of the individual cannot be limited, and as their purpose is social harmony, they are exempt from the idea that rights are not limitless. It is in this sense that one must interpret the ban on any limitation or restriction on the right not to be subjected to torture and any other cruel, inhuman or degrading penalty or treatment.¹⁰ The same applies, therefore, to Protocol 13, which deals with the abolition of the death penalty, which is a form of inhuman treatment. Moreover, the text also declares that the abolition of the death penalty is not subject to any derogation, even in the event of war. Finally, this right cannot be the subject of any reservations. In other words, a state that ratifies the text cannot choose which measures it intends adhering to and which it rejects. A clause not liable to reservation is thus binding in its entirety.

The difficulty arises from the fact that various definitions dealing with the limitation or restriction of derogation and reservation of human rights overlap. Thus, the fact that a right is given a limitation does not mean that it cannot constitute a non-derogable right. Let us take the example of the right to equality and non-discrimination in the South African Constitution.¹¹ Article 9(2) establishes a list of grounds on the basis of which no measure of discrimination is allowed. By defi-

⁹ Thus, art 15 of the South African Constitution is concerned with limitations specific to the exercise of religious freedom, to which is added the general clause on the limitation of rights, to which art 36 refers.

¹⁰ Art 2(2) UN Convention Against Torture, 1984.

¹¹ The overlap of derogation and limitation can also be illustrated by Protocol 6 (P6) of the European Convention. According to art 2, it was possible to limit the range of the ban of the death penalty, in the case of a crime committed in a time of war or imminent danger of war, whereas no derogation of this right was authorised in accordance with art 15 of the European Convention, applicable in the 'event of war or other public danger threatening the life of the nation'. In other words, the restriction permitted what the clause on special derogation forbade. This contradiction is lifted if one considers that P6 applies to war as a motive of limitation of the right and art 15 applies to war as a condition of application. In other words again, P6 defined a relative right in exceptional circumstances and an absolute right in normal circumstances.

dition, this list, which is neither exhaustive nor definitive, does not exclude the existence of measures adopted on the basis of grounds not explicitly stated. It must be emphasised that the Constitution enumerates, with this list, a series of grounds hierarchically more important. In the event of a state of emergency,¹² some of these grounds may never serve as the basis of discriminatory measures. These are race, colour, ethnic or social origin, sex, religion and language. Conversely, therefore, still in exceptional circumstances, the principle of equality can be derogated on the following grounds: gender, pregnancy, marital status, sexual orientation, age, disability, conscience, belief, culture and birth. A non-derogable right can be understood, but not necessarily described, from the point of view of *jus cogens*. The right not to be subjected to any torture, which has no derogation, no limitation and no reservation, falls in the domain of *jus cogens*.¹³ On the supposition that the list of non-derogable rights, established by article 4(2) of CCPR, concerns mandatory standards of international law, other regulations taken from international humanitarian law must be added to it, such as the ban on the taking of hostages or the arbitrary deprivation of freedom.

Moreover, it is possible for the derogation clause to be the subject of a reservation. The reservation of France, at the time of its ratification of the European Convention in 1974, is an example of this. France sought, and still seeks (since it has not been withdrawn or abrogated) to achieve the following purpose: on the one hand, to make it known that the conditions for the implementation of the different national systems of derogation of rights must be understood to be in compliance with article 15 of the European Convention and, on the other hand, to rule that the exorbitant prerogatives bestowed on the President of the French Republic, on the basis of one of these systems of derogation, comply with article 15 of the European Convention, despite a considerable difference in terminology.¹⁴

Finally, to further simplify these different notions, the following table can be drawn up:

¹² Art 37.

¹³ International Criminal Tribunal for ex-Yugoslavia, 10 December 1998, *Furundzija* para 144 and ECHR, GC, 21 November 2001, *Al Adsani v Royaume-Uni* para 61.

¹⁴ Art 15 of the European Convention states that derogation is possible in 'the strict measure demanded by the situation', while the text of art 16 of the French Constitution (1958) makes provision for the President of the French Republic to 'take the measures demanded by the circumstances'.

Level of protection	Highest level of protection	Intermediary level of protection	Protection denied
Theory of the limitation of human rights	Right not subject to limitation (eg ban on torture, article 2(2) UN Convention against Torture, 1984)	Conditional right (namely all rights not part of non-relativist rights)	Right is the subject of a reservation and not of an interpretive declaration
Theory of the derogation of human rights	Right not subject to derogation (article 4 of CCPR: the right to life, ban on torture, the ban on slavery and bondage, ban on imprisonment for debt, non-retroactivity of the penal law, the right to be recognised as a person before the law and right to freedom of opinion)	All other rights consequently subject to derogation	Right is the subject of a reservation and not of an interpretive declaration
Theory of the reservation of human rights	Right not subject to reservation or reservation declared invalid for being contrary to human rights principles	Right partially reserved	Right is the subject of a reservation and not of an interpretive declaration

Does the classification of human rights — according to their level of protection and according to the overlapping of the hypotheses presented — give rise to a normative hierarchy? At the highest level, rights are not subject to reservation, derogation and limitation. At the lowest level, apart from reserved rights, partially reserved rights, derogable and limited rights, rights are subject to reservation, derogation and limitation. Between these two extremes, the classification is more delicate. Let us propose the following classification: relative non-derogable rights and relative derogable rights. Rather than evoking a normative hierarchy of human rights, with reference to *jus cogens*, it is the difference in nature between rights and their subsequent level of protection that is the pertinent criterion for the classification of human rights. Schematically, the following table can be drawn up:

Hierarchy of protection granted
Right not subject to reservation, derogation and limitation
Right non-derogable, but relative
Right derogable and relative
Right partially reserved, derogable and relative
Right reserved

When established by different treaty texts, the system of derogation meets a certain number of conditions before its implementation. In this regard, the General Comment on article 4 of CCPR, issued by the Committee on Human Rights, deserves attention as it defines the doctrine defining the system of derogation.¹⁵

The structure common to the clauses of derogation correspond, I believe, to the following three characteristics: First of all, an exceptional public danger that threatens the existence of the nation¹⁶ or a war or other public danger threatening the life of the nation¹⁷ or a war or any other crisis situation that threatens the independence or security of a state¹⁸ must exist. One must consider that any armed conflict, internal or international, such as defined by international humanitarian law, constitutes a valid cause to have recourse to the derogation clause. In such a case, international humanitarian law is added to the operation of the derogation clause. It is a threat to the independence of the state or to the existence of the nation that seems to trigger its implementation and, as the clause infringes on the normal course of human rights, it must be understood restrictively. This is because a natural catastrophe that does not threaten the existence of the nation does not justify recourse to the derogation clause. In the first instance, the state is the judge of the need to resort to this clause, but it must define the necessity of doing so. It is not merely a question of authorisation; rather it is for the Committee or the Court to decide whether this recourse is justified. Numerous examples are cited of instances when the invocation of this clause was not justified.¹⁹ This means that the fact of the existence of exceptional circumstances may be legally challenged.

Next, the state may suspend obligations it has contracted in order to confront such known danger. However, this does not mean that the

¹⁵ Committee on Human Rights, 24 July 2001, General Comment 29 (States of Emergency) (Article 4) (CCPR/C/21/Rev 1/Add11). It follows on a previous general comment, very much shorter, made 20 years earlier.

¹⁶ Art 4 CCPR.

¹⁷ Art 15 European Convention.

¹⁸ Art 27 CADH.

¹⁹ See General Comment 29 para 1.

rights in the Covenant are nullified. In the first place, certain rights exist for which no derogation is possible. The inviolability of the law thus ensures legal permanence. Next come all the other derogable human rights. The setting aside of these rights is not a *fait accompli*. It must be proven that their suspension is justified, on a case-by-case basis in the event of contention, as it must be proven that the derogable measure was introduced in strict proportion to that which is demanded by the situation. Here, the reference to the principle of proportionality is common to derogation and restriction. In practice, this will ensure that no provision of CCPR, however validly derogated from, will be entirely inapplicable.²⁰ This interpretation of the Committee is supported by the text of article 4(1) of CCPR, which indicates that the measures taken within the context of the suspension of rights cannot result in discrimination solely on the grounds of race, colour, sex, language, religion or social origin. In other words, the lowering of legal protection as a result of derogable rights cannot bring about discrimination on these grounds. This vigilance of the law, not its sedation, is shared by the classic principles of French administrative law.²¹

Finally, the recourse to derogation rests upon a necessary formality.²² The state must give notice of the recourse, specify the clauses to which derogation has been applied and give grounds for the derogation. A similar notification is made at the end of the period.

If one looks at the substance of these three conditions, it can be concluded that the system of derogation of human rights meets the following four conditions: necessity, proportionality, inviolability and temporality. What is meant by these terms? The necessity of the derogation implies that only exceptional circumstances can justify the transition to a state of emergency or exception. Consequently, the invocation of this situation by the state allows it to control the reality of the situation, the justification of the necessity of the derogation. Proportionality means that the derogation measures must serve the purpose of protecting public order in exceptional circumstances while recognising civil liberties. Again, control over the proportionality of these measures results. Inviolability introduces an idea of a division of human rights into those, the protection whereof cannot be affected by exceptional circumstances and the others that may be derogated. Finally, the temporary nature of the operation of the derogation clause, besides limiting the declaration, the entry into force and the duration of the state of emergency, brings about the following consequence: While it is inevitable that a time of crisis lowers the threshold of protection of

²⁰ General Comment 29 para 4.

²¹ *CE français*, 28 June 1918, *Heyriès*, *Recueil Lebon* 651: 'The President of the Republic must ensure that at all times the public services instituted by laws and regulations are able to function and that difficulties resulting from war do not paralyse their performance.'

²² Art 4(3) CCPR.

fundamental rights, should the legal situation, stabilised and validated at this time of crisis, be perpetuated once it has ended? Nothing justifies the maintenance of the lowering of the threshold once the circumstances that justified the crisis have ceased to exist. This is the meaning of French administrative jurisprudence. In *Sieur Laugier*,²³ it is found that the measure of automatic transfer to reserve duty, taken on the basis of a legal statutory circular by virtue of exceptional circumstances, must cease to be applied on the day when an authority with legislative power is capable of exercising this power. When exceptional circumstances cease to apply, the party concerned must logically be given back the rights he previously held and must be given the right to contest the derogation measures to which he was subjected (in this sense, see the solution of *Sieur Laugier*).²⁴ We turn to the reasons that militate in favour of the inclusion of a system of derogation in the African Charter.

3 Arguments in favour of the inclusion of a jurisprudential derogation clause in the African Charter

Is the absence of a derogation clause not disadvantageous to the protection of human rights? If a plea can be made for the opposite opinion, which seems to have the implicit support of the African Commission, it is on the grounds that, to equate restriction and derogation would lead to raising the level of the protection of human rights: the control of restriction, for whatever period, normal or exceptional, would at least be as advantageous as the control carried out in the case of exceptional circumstances. The strength of the argument has to be taken into account. Must one not conclude that the level of protection of rights is always more extensive due to restriction in a normal period than it is in a period of exceptional circumstances within the context of a system of derogation? Let us nevertheless consider the following three reasons for supporting the opposite point of view.

The first reason stems from the interpretation by the African Commission, of the absence of a derogation clause. Although not well developed, to my knowledge, the interpretation has given rise to jurisprudence sufficiently established to draw lessons from it. Two

²³ *CE français, Assemblée, Sieur Laugier, Recueil 161.*

²⁴ *CE français, 28 June 1918, Heyriès, Recueil 651:* In deciding to suspend temporarily the rule of communicating a file — in the case of the dismissal of an official — with the option of an appeal, after the cessation of hostilities. For a revision of the decisions taken, the President of the Republic was not guilty of an abuse of power.

cases must be mentioned, respectively involving Nigeria and Sudan.²⁵ The guiding principle of jurisprudence is the substitution of the absence of the derogation clause a limitation of rights. In the Nigerian case, it is said:

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. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.

In the Sudanese case, it is added that the absence of the derogation clause in the African Charter can be explained on the grounds that the restriction of fundamental rights is not a solution to national problems: The legitimate exercise of human rights does not present any danger to a democratic government that applies the rule of law:

The Commission has established the principle that where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law.

The solution presented by the African Commission is logical and legally sound: The derogation clause is considered as a sub-clause implied by the general clause on the restriction of human rights. Drawing the necessary conclusions, the Commission makes the operation of the derogation de facto, rather than legal, under the usual conditions for the operation of restriction: restrictive interpretation, necessity, proportionality and infringement of the substance of the right or rights. Thus, the Commission emphasises a rationale common to the notions of restriction and derogation: Because of the suspicion both notions arouse, legal protection can never be wholly set aside, but merely postponed, whether it be in the context of restriction or derogation. One can share the idea that, by comparison, the legal nature of a reservation is very different from that apparently common to restriction and derogation, since the exclusion of any legal protection stems from a valid reservation.²⁶

There are, however, limits to the absolute equation of restriction and derogation. One can take into account that, whereas it is permissible to restrict to the greatest extent possible all kinds of infringements upon

²⁵ *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) paras 41 & 42; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 80 (reference made to *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995)).

²⁶ G Cohen-Jonathan 'Les réserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux' (1996) *RGDIP* 915-949.

human rights, the specificity of the derogation must be emphasised. Above it has been shown that the substance of the system of derogation rests on four elements: necessity, proportionality, inviolability and temporality. Let us consider inviolability. Is there any mention in the jurisprudence of the African Commission of a list of rights not capable of derogation? No such jurisprudence exists, to my knowledge, which establishes a list of non-derogable rights. Would it not be more convincing, and indeed more correct legally, to draw up a list of rights not subject to derogation?²⁷ What about guarantees attached to the temporary nature of the system of derogation? By equating the system of derogation with that of restriction, the African Commission indicates its desire to create its own interpretation. Despite their similarities, the system of derogation and the system of restriction of human rights are not identical. The absence of a derogation clause in the African Charter must therefore be interpreted as a deficiency, as the system of derogation brings with it specific guarantees of protection.

Derogation clause (special clause)	Control of the necessity of the recourse to derogation Control of the proportionality of the derogable measures Control of the temporary nature of the derogation Inviolability of certain rights
Clause on restriction (general clause)	Control of the necessity of the recourse to restriction Control of the proportionality of the restrictive measures

The absence of a derogation clause in the African Charter encourages states not to include it in their domestic laws. This national absence is naturally prejudicial to human rights. By not having recourse to a derogation clause, as it does not exist in the domestic constitution or in the Charter, a state is able to disregard, for political reasons, its responsibilities while ill-advisedly reducing the free democratic play between the separation of powers and civil liberties (de facto dissolution of parliament, negation of human rights). In other words, the rationality intro-

²⁷ For the same reasons I do not agree with the doctrinal opinion according to which the absence of a derogation clause does not prevent the state from invoking the principle of a fundamental change of circumstances. So what about non-derogable rights when a treaty is challenged? Indeed, the circumstances invoked in support of the fundamental change — in law and in fact — are such that they lead to the invalidation or the suspension of the treaty (ICJ, 1973, *United Kingdom v Iceland* para 36), that is to say, its complete setting aside. That is not the purpose and the spirit of the clause on the derogation of human rights.

duced by a derogation clause must militate in its favour. Its absence renders exceptional circumstances commonplace, leading to their improper perpetuation. Moreover, this is the position held by the United Nations Sub-Commission on Human Rights,²⁸ which invites all states, whose legislation contains no explicit clause that guarantees the legality of the implementation of a state of emergency, to adopt clauses in accordance with international norms and principles such as they have been developed, and invites governments to limit recourse to a state of emergency only for circumstances the gravity of which and exceptional character are such that they justify its imposition, and to accompany this imposition with guarantees, notably concerning the proportionality, temporary nature and inviolability of rights. This appeal must be interpreted as an injunction on states not to be satisfied, perhaps and at best, with guaranteeing rights on the basis of a general clause on the limitation of rights in an exceptional period.

The second reason (for favouring the opposite point of view) stems from the compatibility of African constitutional systems with the African Charter. One would think that, in principle, in African legal systems, constitutional law would take precedence over international law and that the constitutions that include such a clause would go further than that which is demanded by the regional instrument for the protection of human rights. This would be applying the principle of minimal equivalence between legal systems: States are forbidden to do less, in terms of the extent of protection, but are left the choice of guaranteeing a right more fully. How then can one justify this absence? It has been shown above that this clause has to be included preferentially in national legal systems. How can one therefore accept that the African Commission should make no distinction, in terms of legal protection, between states that have with this clause in their constitutions and those that do not? Is this levelling-down acceptable?

Finally, the last reason relates to the compatibility of the absence of the clause in the African Charter with regard to CCPR. The following contradiction must be dealt with: Why should a state that has recourse to derogation, *de facto* or legal, have to answer for this act before the Committee on Human Rights and not before the African Commission? How can one accept that Banjul is less protective than Geneva? The contradiction is still more obvious if one asserts that systems of derogation under international law, whether dealing with human rights or with humanitarian law, cannot contradict one other, as this is too contrary to the logic of the state of minimal law applicable in the event of exceptional circumstances: international standards cannot diverge with

²⁸ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1995/33, Question on human rights and states of exception, 35th session, 24 August 1995.

regard to the protection of human rights on such a crucial point. However, this is indeed the case here.

Must one add — an argument of a political nature — that it does not seem realistic to act in a crisis situation as if it were possible to protect human rights at the level expected in a normal situation. Because the crisis situation responds on the formal level to a concentration of powers in the hands of the executive and to a lowering of the protection of fundamental rights, it is necessary to choose appropriate means to ensure that legal protection be reasonably maintained.

A final element of the discussion: May the African Commission, and especially the African Human Rights Court that came into being on 25 January 2004,²⁹ declare by jurisprudential means a state of emergency? Can the praetorian exercise include such a competence? The Human Rights Committee has shown³⁰ that the interpretation of article 4 could not be fixed by the text. In particular, the Committee has added to the list of non-derogable rights the following supplementary rights: the right of a person deprived of his or her freedom to humane treatment, the ban on the taking of hostages, the ban on genocide, the ban on the deportation or forced removal of the population, the ban on the call to national, racial or religious hatred. For its part, the Council of State in France did not hesitate to establish a jurisprudential system of government, by decree, to satisfy demands for the protection of legality during World War I.³¹ What is more, in French law, the jurisprudential system of government coexists with three other legal systems for exceptional circumstances: the state of siege (Law of 9 August 1849), the state of emergency (Law 3 April 1955) and the system of article 16 of the Constitution of 4 October 1958. Moreover, the extent of their respective guarantees is not similar. Thus, it must be noted that the jurisprudential system is more protective than the constitutional system.³² Why, under these conditions, would the African Court on Human and Peoples' Rights not be able to institute a jurisprudential system of government in the absence of a reform of the African Charter by the states?

²⁹ On 26 December 2003, the threshold of the 15 ratifications needed for the Court to come into effect was reached with the ratification of the additional Protocol relating to the African Charter on Human and Peoples' Rights by the Union of the Comores. The other 14 African states that have ratified the Protocol are: Algeria, Burkina, Burundi, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

³⁰ General Comment 24 July 2001.

³¹ *CE français*, 28 June 1918, *Heyriès*, *Recueil* 651 and *CE français*, 28 February 1919, *Dames Dol et Laurent*, *Recueil* 208. In certain respects, the system of emergency is similar to that of exceptional circumstances: *CE*, 4 June 1947, *Entreprise chemin*, *Recueil* 246: the forced execution, carried out in irregular conditions but justified by the emergency, cannot be considered an infringement of civil liberties; in the same way, the period of exceptional circumstances prevents it being termed an infringement of civil liberties.

³² *Grands arrêts de la jurisprudence administrative*, Paris, Dalloz, 13th ed (2001) 202.

4 The establishment of minima fundamental rights for Africa: Between autonomy and corollary of a clause on the derogation of human rights in the African Charter

The inclusion of a clause on the derogation of human rights in the African Charter would result in the establishment of minima fundamental rights for Africa. However, in the absence of a regional derogation clause, it would be necessary to proclaim a list of rights valid at all times and in all places. While this proposal *de lege ferenda* has solid justifications of timeliness, the heterogeneousness of constitutional situations does not favour the creation *by the Court* of a common African standard.

The normative weaknesses of contemporary international law must not be ignored. The relationship between the law on human rights and humanitarian law does not always offer appropriate legal protection.³³

On the one hand, the applicability of international humanitarian law depends on conditions related to the material nature of the conflict. Therefore the deliberately reductionist notion of internal armed conflict prevents numerous situations, although destructive, from being subject to humanitarian law. In particular, there are cases in which humanitarian law, despite there being a crisis situation, is of no use. Thus, article 93(1) of the Ethiopian Constitution, by referring to the situation of a natural catastrophe or epidemic liable to justify recourse to a state of emergency, reinforces the hypothesis of three sets of legal protection elaborated by the International Court of Justice. In its advisory opinion on the Legal Consequences of the Construction of the Wall,³⁴ the Court makes an ideological distinction between the hypothesis in which humanitarian law alone is applicable, that in which, on the contrary, only human rights are applicable and, lastly, that in which both branches of rights are applicable.

On the other hand, the international law on human rights, by allowing the validity of clauses of derogation, results in lowering legal guarantees. Therefore, the international law on persons is characterised by a situation of lesser rights because of the possible inapplicability of humanitarian law and the partial applicability of the international law on human rights. There does indeed remain a virtual applicability of principles of humanity, which flows from customary standards. Thus, in a famous judgment, the International Court of Justice alluded to 'considerations of elementary humanity'.³⁵ However, is the content of these customary standards really ensured?

³³ Services consultatifs, *Droit international humanitaire et droit international des droits de l'homme: Similitudes et différences*, CICR, 2003.

³⁴ ICJ, 9 July 2004 paras 102-113.

³⁵ ICJ, 9 April 1949, *Détroit de Corfou*, *Recueil* 1949.22

In an effort to respond to the demands for minimal common standards, mention must be made of an academic initiative. A declaration on minimum humanitarian standards by the Institute for Human Rights of Åbo Akademi University, Turku, has been taken up by the United Nations.³⁶ This text does not have any legal value. Its intention is clear: to compensate for the present inadequacies of international humanitarian and human rights law,³⁷ by not making the application of protected rights depend on 'situations' or on 'categories of protected persons'.³⁸ Article 1 states:

This Declaration affirms minimum humanitarian standards which are applicable in all situations, including violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.

Article 2 states:

These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.

The Turku declaration then specifies the minimum protected rights that are classified under international humanitarian law.³⁹ The Human Rights Committee classifies non-derogable or minimal rights into three categories, or rather two plus one categories: rights formally non-derogable in accordance with article 4(2) of CCPR and article 6 of the Second Optional Protocol to CCPR; derived non-derogable rights: respect for person deprived of freedom, the ban on the taking of hostages, rights of minorities (genocide), the ban on forced deportation and the ban on war propaganda. Moreover, formal and substantial non-derogable rights must be legally effective. This is why, for the Committee, the right of judicial control in the event of their alleged violation must also be considered imperative. Could these reflections not inspire the African Court?

Could the African Court establish a jurisprudential charter of minima

³⁶ Déclaration de Turku, 'Déclaration de règles humanitaires minima' *RICR*, No 789, May-June 1991 350-356; A Bouvier & M Sassoli *Un droit dans la guerre* Vol II Genève, CICR (2003) 679-683.

³⁷ H-P Gasser 'Les normes humanitaires pour les situations de troubles et tensions internes, aperçu des derniers développements' *RICR* May-June 1993 238-244.

³⁸ An analogous initiative can be mentioned. It concerns the rights of displaced persons, within their own country, who cannot claim the status of refugees: P Lavoyer 'Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays' *RICR* No 931 503-516 and Commission des droits de l'homme, 16 October 1998, *Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays* (E/CN/1998/53/Add 2).

³⁹ Eg arts 5 and 6 resembling the right of The Hague relating to the use of force, as well as under International Law on Human Rights (eg arts 8 and 9 on the right to life and procedural rights). General Comments 29 of the Committee on Human Rights, interpreting art 4 of CCPR, also deserves to be cited (CCPR/C/21/Rev 1/Add.11).

rights for Africa? To institute such a charter, the Court would have to prove, in my opinion, that there exists, first of all, many points of agreement on the level of national legal systems, in order to sanction subsequently such an interpretation on a regional level. This progressive method of interpretation is followed by the European Court of Human Rights.⁴⁰

The constitutional law of African states shows that clauses of derogation fall into two categories. The first concerns institutional clauses.⁴¹ Prejudicial to the customary separation of powers, they temporarily modify the operation of institutions by transferring responsibility and competence to the executive head. In fact, they imply only a weak protection of fundamental rights.⁴² The only guarantee offered by this type of clause, in this regard, lies in the fact that the prorogation of the state of emergency can only be authorised with the agreement of the legislative power. In the absence of such an authorisation, the suspension of fundamental rights would become *de jure* unconstitutional. The second category concerns clauses of derogation that envisage, besides the transfer of competences and responsibility to the executive head, the respect of the fundamental rights of persons.⁴³ A table of non-derogable rights, which cannot be the subject of any suspension measure, can be decreed. Thus, article 37 of the South African Constitution of 1996 makes provision for the rights to equality, human dignity, life, security of persons, individual freedom, ban on slavery, protection of the child and satisfactory conditions of imprisonment to be guaranteed. It specifies that the non-derogable part of these rights is only partial: It does not include the non-derogability of the whole of the right.⁴⁴ In other cases, there exists no list of non-derogable rights. For example, article 269 of the Constitution of Cape Verde ensures that the suspension of rights does not 'affect rights to life, physical integrity, personal identity, civil status, and citizenship, the non-retroactivity of

⁴⁰ The method of progressive interpretation is notably based on taking into account legal consensus of the law in member states, which authorises the Court to develop a common European standard, including a reversal of the interpretation. See recently, concerning the abolition of the death penalty in Europe, first shared by the member states, then by the Court: ECHR, 12 March 2003, *Öcalan v Turkey*, specifically paras 189 and following.

⁴¹ The quasi-totality of African constitutions envisages situations of internal unrest in the context of a state of emergency, state of siege, and exceptional circumstances, which have the effect of threatening the integrity of the territory, and the independence of the regular operation of institutions.

⁴² Eg, see the Constitution of Gabon, arts 49 & 50; the Constitution of Djibouti, art 62; the Constitution of Côte d'Ivoire, art 43; the Constitution of the Congo, art 109; the Constitution of the Comores, art 45; the Constitution of Guinea, art 74.

⁴³ Eg, see the Constitution of Cape Verde, art 293; the Constitution of Mauritius, art 18; the Constitution of South Africa, art 37.

⁴⁴ Under the heading of the principle of equality, see L Sermet 'Considérations sur la structure du principe d'égalité, à la lumière de l'article 9 de la Constitution sud-africaine de 1996' La Réunion, *Revue Alizés*.

criminal law, the right of the accused to defence, or freedom of conscience and religion'. While the presence of such a clause is laudable, it is regretted that the level of guarantee is not as high as that proposed by the declaration of Turku.

5 Arguments in favour of maintaining the absence of a derogation clause in the African Charter on Human and Peoples' Rights⁴⁵

Both legal and political arguments may be presented in this regard. Their soundness is real and it enables one to justify maintaining the absence of a clause on the derogation of human rights in the African Charter. Two legal arguments may be submitted.

A derogation clause can be considered as contrary to *jus cogens*.⁴⁶ While it is true that doctrine regards the very notion of *jus cogens* with scepticism,⁴⁷ this is probably because the International Law Commission has refused to define the notion materially,⁴⁸ opening the door to only a formal definition. The rule of *jus cogens* can be defined as follows: It is sanctioned in articles 53 and 64 of the Vienna Convention because states, with the notable exception of France, have acknowledged that the subjectivism that characterises the ability of the state to conclude treaties could and should be limited or, in other words, that it is necessary to set a limit on the autonomy of the will of the state, regarded nevertheless as absolute because of the sovereignty of the state.⁴⁹ The rule of *jus cogens* is formally distinct from a simple conventional or customary rule that only links some states; it is also formally distinct from a universal conventional or customary rule that creates, for the international community, obligations *erga omnes* giving any state an interest in acting.⁵⁰ What difference can then be established between the rule of *jus cogens*, universal by definition, and the equally universal obligation *erga omnes*? The first, alone, would have the effect of rendering void a conflicting legal act, treaty or custom, while the second would involve the responsibility of the author of the act. Finally, how is one to interpret the notion of 'imperative standard of a general international right'?⁵¹ In my opinion, the notion of 'imperativeness' is not

⁴⁵ The elements of discussion developed in what follows owe much to the friendly criticism of Prof Oswald Ndeshyo, Honorary Dean of the University of Kinshasa, during presentation of the paper on which this article is based.

⁴⁶ Art 53 Vienna Convention on the Law of Treaties.

⁴⁷ P Reuter *Introduction au droit des traités* (1972) 177: 'Finally, the uncertainties relating to the effects of *jus cogens* are affected by an uncertainty as serious as the notion itself.'

⁴⁸ ILC, *Rapports de la Commission à l'Assemblée générale, Annuaire de la CDI* (1966) 270.

⁴⁹ M Virally 'Réflexions sur le 'jus cogens' (1966) *Annuaire français de droit international* 10.

⁵⁰ International Court of Justice, 5 February 1970, *Barcelona Traction, Light and Power Limited*, Compendium 1970.32 para 33.

⁵¹ Art 53 Vienna Convention on the Law of Treaties.

synonymous with absolute right, without limit, without constraint. Therefore, the right to life is, in my opinion, a right that falls under *jus cogens*, but which is limited in the event of legitimate defence,⁵² while the right to a ban on all forms of torture can validly claim to qualify as a standard of *jus cogens* and not be subjected to any limitation.⁵³ Doctrine also explains that the notion of 'imperativeness' is not to be confused with that of 'obligatory nature' and that it is useful in distinguishing between the notions of *jus dispositivum* and *jus cogens*.⁵⁴ Contrary to the latter, *jus dispositivum* is a law to which states can add modifications, amendments and derogations as they like. This is perhaps where the central point of the argument lies. Legally, the derogation clause can be analysed as an exorbitant prerogative of the state, which can be subjected to restrictive conditions. Is this not the expression of a form of *jus dispositivum* of a unilateral kind? In other words, to recognise legally the state's prerogative to derogate from human rights would be to admit that human rights are at the disposal of the state. It can, however, be noted that certain rights cannot be the subject of a 'dispositivity' on behalf of the state,⁵⁵ thus expressing the notion that only certain human rights can claim the status of the standard of *jus cogens*. This is where the second legal argument intervenes, as a complement.

Is it possible to divide human rights into two categories: non-derogable rights, which do not allow the state any leeway in their derogation, and derogable rights? A formal approach to the law on human rights can effectively create this duality. However, in judicial practice,⁵⁶ in accordance with the political will of the United Nations⁵⁷ and also the facts, the dividing line between the two is far from being watertight and precise. Thus, the right to life is a right not capable of derogation,⁵⁸ whereas the right to be treated humanely and with due respect to the inherent dignity of the human being, in the event of being deprived of one's freedom, is.⁵⁹ A de-formalised approach to human rights argues strongly that the substance of human rights is one and the same thing and that there is no justification in dividing them. This concept seems all the more admissible because only certain civil and political rights would be derogable, while all economic, social and cultural rights would not

⁵² Art 6(1) CCPR.

⁵³ Art 2(2) CAT.

⁵⁴ Virally (n 49 above) 8 9.

⁵⁵ Art 4(2) CCPR.

⁵⁶ Eg, the symbolic example of the European Court of Human Rights, 9 October 1979, *Airey v Ireland*, series A No 32 para 26 that refuses to consider that there is a watertight partition between civil and political rights and economic and social rights.

⁵⁷ See World Conference on Human Rights, 12 July 1993, Declaration and Programme of Vienna, para 74 on the Interdependence of Human Rights, Democracy and Development.

⁵⁸ Art 4(2) CCPR.

⁵⁹ Art 10 CCPR.

be, due to the lack of a clause in CDESCR similar to that of article 4 of CCPR.

Finally, an argument of political expediency must be raised. This is perhaps the strongest. Owing to the dangerous political instability of numerous African states, it would be risky to introduce a derogation clause in the African Charter as certain states with evil intent could simulate a serious crisis, or even provoke one, in order subsequently to invoke the clause and thus escape their obligations. It is the risk of abuse of the use of the derogation clause that is to be feared. The solution, thus, lies in not sanctioning it. Under these conditions, even if the gap between the desirable and the possible remains wide, the dynamism created by the absence of a clause on the derogation of human rights in the African Charter remains promising for the protection of human rights in Africa.

The *Congo/Uganda* case: A comment on the main legal issues

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Summary

This article comments upon the judgment handed down by the International Court of Justice on 19 December 2005, in the Case Concerning Armed Activities on the Territory of the Congo: DRC v Uganda. The author uncovers the main legal issues pertaining to this case, namely, those associated with the legality of the use of force under international law, the rights and obligations of the occupying power in occupied territories, and the issue of diplomatic protection.

1 Introduction

The purpose of this comment is to highlight some of the most salient aspects of the judgment handed down by the International Court of Justice (ICJ or Court) in the *Case Concerning Armed Activities on the Territory of the Congo: Democratic Republic of the Congo v Uganda* (*Congo/Uganda* case),¹ and to analyse and comment upon them in light of applicable rules and principles of international law.

The ICJ judgment of 19 December 2005 on the *Congo/Uganda* case addresses a number of international law issues, including the legality of the use of force under the Charter of the United Nations (UN),² the issue of belligerent occupation and its corresponding international human rights and humanitarian obligations as contained in a multitude of international law instruments, the issue of the illegal exploitation of natural resources by an occupying power, and that of diplomatic pro-

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¹ Judgment of 19 December 2005 General List No 116 (*Congo/Uganda* case).

² 59 Stat 1031 TS 993 3 Bevans 1153.

tection under the 1961 Vienna Convention on Diplomatic Relations (Vienna Convention).³

In order to uncover the legal issues pertaining to the case, it is valuable to review the substance of the petition, the factual and legal bases of the Democratic Republic of the Congo (Congo or DRC)'s claims and of Uganda's counterclaims, the legal findings of the ICJ, as well as its reasoning and its final decisions. The assessment of the Court's decision on the legal issues raised in this case will take into consideration, when necessary, new developments that occurred in international law since the passing of the judgment. A conclusion will specify the implications of the Court's judgment in the case at hand for the progressive development of international law.

2 Factual and legal bases of the DRC's petition

2.1 Background to the petition

In 1997, Mr Laurent-Désiré Kabila⁴ assumed power in Zaire and renamed the country the Democratic Republic of the Congo. Kabila's ascension to power was made possible by Uganda and Rwanda, two neighbouring countries which provided him with military, logistic and economic support. On accession to power, the new President rewarded his two allies by granting them substantial benefits within the Congo, both military and economic. Such benefits included, for example, the appointment of a Rwandan national as the Chief of Staff of the *Forces Armées Congolaises*, the newly-created Congolese defence forces.⁵

Soon after Rwandan and Ugandan troops started operating in the DRC, the atmosphere between President Kabila and his two allies deteriorated as a result of the latter's increasing influence over the Congo's political, military and economic spheres. Faced with this uncomfortable situation, Mr Kabila sought to reaffirm and preserve the independence of the Congo from Rwanda and Uganda. It was within this context that, in July 1998, Mr Kabila learned of a planned *coup d'état* against him by the Rwandan Chief of Staff of the Congolese Defence Forces. On 28 July 1998, a reaction from the Congolese government came in the form of an official statement made by Mr Kabila, which called for the withdrawal of all foreign military forces from the DRC.⁶ This reaction helped to avert the completion of the planned *coup*. Immediately after the failure of the *coup* attempt, some Rwandan soldiers still present on the territory

³ Adopted on 14 April 1961 by the UN Conference on Diplomatic Intercourse and Immunities, Official Records Vols I & II UN *Treaty Series* vol 500 95.

⁴ Leader of the *Alliance des Forces Démocratiques pour la Libération du Congo*, one of the multiple Congolese rebel groups that proliferated in former Zaire shortly before the fall of Mobutu Sesse Seko, the then President of Zaire.

⁵ *Congo/Uganda* case (n 1 above) paras 29-30.

⁶ n 1 above, para 49.

of the Congo joined forces with the Congolese Tutsi soldiers which rebelled against their central government in an attempt to overthrow President Kabila. At the beginning of August of the same year, Uganda launched its own military attacks against the DRC.⁷

The military intervention led by the Ugandan People's Defence Forces started in the eastern part of the DRC. They advanced and occupied various regions in the north-eastern part of the country. During their progression, they provided military support to a substantial number of Congolese armed groups⁸ which had rebelled against the Kabila government. Such support involved, *inter alia*, the recruitment, education, military training and the supply of equipment to rebel groups.⁹

In order to contain and repel the Rwandan/Ugandan military attacks, the Congolese government turned to neighbouring countries (Angola, Namibia, Sudan and Zimbabwe) for military assistance, which was provided.

In an attempt to resolve the armed conflict that ensued between the DRC (together with its allies), on the one hand, and Rwanda and Uganda on the other, a series of meetings were held, at the regional level, between the belligerents and the representatives of various African states within the framework of what was officially known as 'the Lusaka process'. On 18 April 1999, this regional peace initiative gave birth to a cease-fire agreement concluded between the Congo and Uganda. As a follow up to the Lusaka peace process, Uganda adopted the Kampala Plan and the Harare Plan,¹⁰ which established the legal framework of its troops' disengagement and withdrawal from the DRC.¹¹

Meanwhile, on the international plane, the Security Council of the UN adopted a series of resolutions aimed at re-establishing peace within the DRC.¹² Thus, Resolution 1234 of 1999¹³ called upon states to bring to an end the presence of uninvited foreign forces in the Congo. Paragraph 8 of this resolution condemned all form of support to the Congolese armed groups, whereas paragraph 7 condemned massacres carried out on the territory of the DRC. In a decisive move to back the Lusaka peace agreement, the Security Council authorised the deployment of a UN liaison force to the Congo¹⁴ with the mission,

⁷ n 1 above, paras 30-31.

⁸ Such groups included the *Mouvement de Libération du Congo*, the *Rassemblement Congolais pour la Démocratie* and the *Armée de Libération du Congo*.

⁹ n 1 above, paras 31-32.

¹⁰ Signed on 8 April and 6 December 2000 respectively.

¹¹ n 1 above, para 33.

¹² Between 1999 and 2005, the Security Council adopted at least 34 resolutions concerning the situation in the DRC.

¹³ See S/RES/1234 (1999) adopted by the Security Council at its 3993 meeting held on 9 April 1999, para 2.

¹⁴ See S/RES/1258 (1999) adopted by the Security Council at its 4032 meeting held on 6 August 1999, para 8.

inter alia, to establish contact and maintain liaison with the Joint Military Commission (JMC) created by the signatories of the ceasefire agreement to monitor the implementation of the agreement; and to provide technical assistance to the JMC. Later on, Resolution 1279 of 1999¹⁵ transformed the UN military liaison forces into the UN Mission in the Democratic Republic of the Congo (MONUC). Under Resolution 1291 of 2000,¹⁶ the MONUC mandate was extended to include, among others, the monitoring of the ceasefire and the supervision and verification of the disengagement arrangements. Moreover, this resolution, in its paragraph 1, called for the withdrawal of all foreign troops from the Congolese territory in accordance with the Lusaka ceasefire agreement. This call was later reiterated by Resolution 1304 of 2000¹⁷ in which the Security Council, acting under chapter VII of the UN Charter, demanded that Uganda and Rwanda withdraw all their forces from the Congo without delay, in conformity with the timetable of the ceasefire agreement and the Kampala Disengagement Plan of 8 April 2000.¹⁸ This resolution further demanded that all other foreign military presence and activities in the territory of the DRC be brought to an end.¹⁹

On 23 June 1999, the DRC filed an application before the ICJ instituting proceedings against the Republic of Uganda; and in June 2003, Ugandan troops finally withdrew from the DRC.

2.2 Substance of the main contentions

In its memorial, the DRC submitted a number of claims in which it requested the ICJ to declare Uganda in violation of certain obligations it owes to the Congo under international law, and to determine the legal consequences which such violation involves. Similarly, Uganda presented a number of counterclaims in response to the DRC's submissions. The specifics of the contentions contained in both the main claims and main counterclaims are given below.

2.2.1 The DRC's main claims

The DRC presented at least four submissions, which are the main focus of the present comment. In the first submission, it requested the Court to declare that by invading, occupying and engaging in military and paramilitary activities on the eastern part of its territory, Uganda has violated various principles of conventional and customary international

¹⁵ S/RES/1279 (1999) adopted by the Security Council at its 4076 meeting held on 30 November 1999.

¹⁶ S/RES/1291 (2000) adopted by the Security Council at its 4104 meeting held on 24 February 2000.

¹⁷ S/RES/1304 (2000) adopted by the Security Council at its 4159 meeting held on 16 June 2000.

¹⁸ n 17 above, para 4(a).

¹⁹ n 17 above, para 4(c).

law (including article 2(4) of the UN Charter), which prohibit the use of force in international relations as well as foreign intervention in matters within the domestic jurisdiction of states; and impose respect for the sovereignty of states as well as for the principle of peaceful settlement of international disputes.²⁰

In its second submission, the Congo accused Uganda of resorting to acts of violence against its nationals, for killing and injuring them or despoiling them of their property, for failing to take adequate measures to prevent violations of human rights in the occupied regions and for failing to punish persons having engaged in the above-mentioned acts. It claimed that Ugandan armed forces perpetrated wide-scale massacres of civilians, resorted to torture and other forms of inhumane and degrading treatment, carried out acts of reprisal against civilians presumed to have harboured anti-Ugandan fighters, plundered civilian property, engaged in the deliberate destruction of villages and civilian private property, and abducted children and forcibly enlisted them in their armed forces. It further contended that such conduct was engaged in the violation of the following principles of international law: those principles of conventional and customary law imposing an obligation to respect and ensure respect for fundamental human rights law and international humanitarian law; those imposing an obligation to make a distinction in an armed conflict between civilian and military objectives; and those preserving the right of the Congolese people to enjoy the most basic civil, political, economic, social and cultural rights.²¹ Accordingly, the DRC requested the Court to declare Uganda responsible for violating the relevant provisions of the following instruments: the Hague Regulations of 1907;²² the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV);²³ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I);²⁴ the International Covenant on Civil and Political Rights of 1966 (CCPR);²⁵ the African Charter on Human and Peoples' Rights of 1981 (African Charter);²⁶ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT);²⁷ and the African Charter on

²⁰ n 1 above, paras 23-4 & 28.

²¹ n 1 above, paras 25, 181, 183 & 184.

²² Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land of 18 October 1907, especially arts 42 & 43 relating to the duties of an occupying power.

²³ 6 UST 3516 TIAS No 3365 75 UNTS 287.

²⁴ Adopted at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

²⁵ GA Res 2200A (XXI) UN Doc A/6316 (1966) 21 UN GAOR Supp No 16 52.

²⁶ OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 *International Legal Materials* 58.

²⁷ GA Res 39/46 UN Doc A/39/51 (1984).

the Rights and Welfare of the Child of 1990 (African Children's Charter).²⁸

In submission three, Uganda was accused of engaging in the illegal exploitation of Congolese natural resources, pillaging and looting its assets and wealth, and of failing, as an occupying power, to take adequate measures to prevent such acts and to punish persons having committed them. The DRC argued that such conduct was in breach of conventional and customary international law principles imposing, *inter alia*, respect for the sovereignty of states, including sovereignty over their natural resources as proclaimed by international instruments such as General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources.²⁹

In its fourth submission the DRC claimed to have sustained injury as a result of the illegal conduct of Uganda. Consequently, it requested the Court to declare Uganda under the legal obligation to cease forthwith all continuing internationally wrongful acts, provide guarantees and assurances of non-repetition, and make reparation for all injuries sustained by the DRC as a result of Ugandan occupation. It further requested the Court to determine the nature, form and amount of the reparation failing an agreement thereon between the two parties.³⁰

2.2.2 Uganda's main counterclaims

Before examining the details of Uganda's main counterclaim, it is worth indicating that Uganda has, of course, opposed all the allegations presented against it by the DRC. As regards the DRC's submission one, Uganda claimed to have acted in self-defence. With respect to submission two, Uganda denied to have been an occupying power where its troops were stationed. As for submission three, Uganda maintained that the DRC did not provide reliable evidence in support of its allegations regarding the looting and the illegal exploitation and plundering of its natural resources. The non-probative character of the DRC's evidence was also raised by Uganda against the DRC's first and second submissions.

As far as Uganda's main contentions are concerned, it has submitted three counterclaims in which it accused the DRC of the violation of the principle of non-use of force under article 2(4) of the UN Charter; the violation of specific provisions of the Lusaka Agreement; and for attacks on Ugandan diplomatic premises and personnel as well as on Ugandan

²⁸ OAU Doc CAB/LEG/24 9/49 (1990).

²⁹ Adopted on 14 December 1962; the DRC also relied on the following instruments: GA Res 3201 (S.VI) of 1 May 1974 on the Declaration on the Establishment of the New International Economic Order and GA Res 3281 of 12 December 1974, which established a Charter of Economic Rights and Duties of States; n 1 above, paras 222 & 226.

³⁰ See paras 4 & 252 of the *Congo/Uganda* case (n 1 above) for more details on this submission.

nationals. Only the latter counterclaim is of legal value for the purpose of this comment, in that it was the only successful counterclaim presented by the Republic of Uganda.

In this counterclaim, therefore, Uganda accused the DRC's armed forces for, *inter alia*, carrying out attacks on the Ugandan embassy in Kinshasa, confiscating property and archives belonging to the government of Uganda, Ugandan diplomats and Ugandan nationals; and mistreating diplomats and other Ugandan nationals present on the premises of the mission.³¹ Such actions constitute, according to Uganda, breaches of international diplomatic and consular law, in particular the following provisions of the 1961 Vienna Convention; article 22 on the inviolability of the premises of the mission, article 29 on the inviolability of the person of diplomatic agents, article 30 on the inviolability of the private residence of a diplomatic agent, and article 24 on the inviolability of archives and documents of the mission.³²

In essence, the principal claims and counterclaims of both the DRC and Uganda raised at least five fundamental issues of international law. They are: the legality of the use of force under international law; the issue of belligerent occupation and its corresponding human rights and humanitarian obligations as contained in a multitude of international law instruments; the issue of the illegal exploitation of natural resources; that of diplomatic protection under the Vienna Convention; and finally the issue of the legal consequences that flow from the violation of international obligations by a particular state.

3 Legal determination of the ICJ on each contention

3.1 The prohibition against the use of force in international law

The prohibition against the threat or use of force is the cornerstone of the UN Charter, article 2(4) of which stipulates that:

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

The provision of article 2(4) of the Charter was further reiterated and elaborated as a principle of international law in General Assembly Resolution 2625 (XXV) on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter.³³ This instrument clearly specifies the implications of the prohibition against the use of force. Firstly, it means that wars of aggression constitute a crime against peace giving

³¹ n 1 above, paras 306-12.

³² n 1 above, para 313.

³³ Adopted by the General Assembly of the UN at its 25th session held on 24 October 1970.

rise to state responsibility under international law. Secondly, states must not threaten or use force in violation of internationally recognised frontiers, or to solve international disputes. Thirdly, states are precluded from resorting to acts of reprisal involving the use of force. Fourthly, force must not be used by states to deprive peoples of their right to self-determination and independence. Fifthly, states must refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state and must not organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed against another state.³⁴ Although the Declaration on Friendly Relations is not a binding legal document, it nevertheless constitutes an important interpretative tool of the UN Charter's provisions.³⁵

On occasion, the ICJ has made pronouncements on the content of the principle of non-intervention as proclaimed by the UN Charter. Thus, in the *Nicaragua* case,³⁶ for example, the Court considered that if states were granted a general right to intervene, directly or indirectly, with or without armed forces, in support of an internal opposition in another state, such a right would lead to a fundamental modification of the customary law principle of non-intervention.³⁷ This would mean that this principle, to the extent that it has not yet been changed, prohibits any form of foreign intervention within the domestic matters of other states. The Court further concluded that acts committed in breach of the customary principle of non-intervention may also amount to a breach of the principle of non-use of force in international relations, if they directly or indirectly involve the use of force.³⁸ Article 2(4) can therefore be considered as declaratory of customary international law and as such, is binding upon all states.³⁹

The Court accordingly found that Uganda's military actions against the DRC were in contradiction with the requirements of article 2(4) of the UN Charter. It then turned to examine whether such actions could be justified under the self-defence clause of the UN Charter as Uganda has contended.⁴⁰

³⁴ MN Shaw *International law* (2003) 1018.

³⁵ As above.

³⁶ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* Judgment of 27 June 1986 *ICJ Reports* (1986).

³⁷ *ICJ Reports* (1986) 108 para 206.

³⁸ *ICJ Reports* (1986) 109-110 para 209; see also the *Congo/Uganda* case (n 1 above) para 164.

³⁹ Shaw (n 34 above) 1018.

⁴⁰ Uganda asserted that from 11 September 1998 to 10 July 1999, its military forces within the Congo were acting in self-defence. In support of its assertion, it argued that its conduct was justified in that the Congo had entered into an alliance with Sudan to launch military action against it, had provided covert support to anti-Ugandan rebel groups and had incorporated such groups as well as Interahamwe *génocidaires* militia into its regular army; n 1 above, paras 122-6, 134-5 & 138-9.

3.2 Exceptions to the prohibition on the use of force

The prohibition against the use of force under article 2(4) of the UN Charter is tempered by only two other provisions of the Charter, which establish the only legal framework within which force may be legally used in international law; namely, chapter VII and article 51. Whereas chapter VII provides for the use of force in the context of collective measures decided by the Security Council of the UN, article 51 grants states the right to use force individually or collectively in the exercise of their inherent right to self-defence. Uganda's counterclaim against the DRC's first submission was based on the latter provision.

Before elaborating on article 51 of the UN Charter, it is perhaps important to indicate that new trends have recently emerged in the debate concerning the use of force under chapter VII of the Charter in cases of threats of an internal character. In effect, the more controversial doctrine of the 'right to humanitarian intervention'⁴¹ in man-made atrocities is giving way to the emerging norm of a 'collective international responsibility to protect'. For the proponents of this new approach, the Security Council may authorise military intervention under chapter VII of the Charter, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.⁴²

With respect to Uganda's counterclaim under the Charter, article 51 provides in effect that:

Nothing in the ... Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the ... Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Under article 51, self-defence can be invoked only when an armed attack has begun. There exists no consensus yet as to the definition of the term 'armed attack', which is a key notion for the exercise of the right to self-defence pursuant to article 51 of the UN Charter. However, attempts have been made to identify certain acts which can be qualified as constituting armed attacks.⁴³ Thus, article 3 of the Defini-

⁴¹ For the contours of this right, see eg A Roberts 'The so-called "right" to humanitarian intervention' (2002) 3 *Yearbook of International Humanitarian Law* 3-51; R Mahalingam 'The compatibility of the principle of non-intervention with the right of humanitarian intervention' (1996) 1 *UCLA Journal of International Law and Foreign Affairs* 221-263.

⁴² See 'A more secure world: Our shared responsibility' Report of the High-Level Panel on Threat, Challenges and Change UN Doc A/59/565 (2 December 2004) 56-7 paras 199-203.

⁴³ See principally art 3 of the Definition of Aggression, annexed to General Assembly Res (XXIX) of 14 December 1974.

tion of Aggression, annexed to General Assembly Resolution (XXIX) of 14 December 1974, provides a list of such acts, which include: (a) invasion, bombardment and cross-border shooting;⁴⁴ (b) blockade;⁴⁵ (c) attack on state positions abroad;⁴⁶ (d) breach of stationing agreements;⁴⁷ and (e) participation in the use of force by militarily organised unofficial groups.⁴⁸ The illegal acts allegedly committed by Rwanda on the territory of the DRC involve at least those acts referred to in (a) and (e). The basic requirement for acts of attack, bombardment and cross-border shooting to constitute an 'armed attack' pursuant to article 51 of the UN Charter is that their commission reaches a certain intensity or scale, which is different from mere frontier incidents.⁴⁹ On the other hand, a state's support to armed groups would amount to 'armed attack' under article 51 of the Charter if it consists of sending armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another state of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein.⁵⁰

Article 51 of the Charter allows both individual and collective self-defence. The right to collective self-defence permits a third state to lend its assistance to a state victim of an attack.⁵¹ The resort to individual or collective self-defence will be lawful only when it occurs in response to an actual armed attack;⁵² but not in anticipation, or in prevention of it. Thus, article 51 does not allow the use of force by a state to protect perceived security interests beyond the parameters set by it. An anticipatory use of the right to self-defence would therefore be in contradiction with the wording of article 51, as well as with its object and purpose, which are to reduce as far as possible the unilateral use of force in international relations.⁵³

3.3 Limits on the right of self-defence

Pursuant to article 51 of the Charter, self-defence has to be used only until the Security Council of the UN has stepped in to take the necessary measures to restore or maintain international peace and security. Therefore, provisional defensive measures taken pursuant to article 51 are to be discontinued with the intervention of the Security Council.

⁴⁴ n 43 above, arts 3(a) & (b).

⁴⁵ n 43 above, art 3(c).

⁴⁶ n 43 above, art 3(d).

⁴⁷ n 43 above, art 3(e).

⁴⁸ n 43 above, art 3(g).

⁴⁹ B Simma (ed) *The Charter of the United Nations: A commentary* (2002) 796.

⁵⁰ The *Nicaragua case*, *ICJ Reports* (n 36 above) 103 para 195; also art 3(g) of the Definition of Aggression (n 43 above).

⁵¹ Simma (n 49 above) 802.

⁵² *Nicaragua case*, *ICJ Reports* (n 36 above) 103 para 194.

⁵³ Simma (n 49 above) 803.

The right to self-defence under international law is also limited by the principles of proportionality and necessity. These principles embody the idea that a lawful self-defence must only aim at halting and repelling the armed attack and must not entail retaliatory or punitive actions. In addition, they require that the extent of the defence must not be disproportionate to the gravity of the attack sustained; and that the means employed for the defence must be strictly necessary for repelling the attack.⁵⁴ Though not expressly mentioned in the Charter, the principles of proportionality and necessity nevertheless do apply to the concept of self-defence as a rule of customary international law.⁵⁵ This view was adopted by the ICJ in its Advisory Opinion in the *Nuclear Weapon* case, in which it emphasised that the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.⁵⁶

In 2004 a report was published by the United Nations High-Level Panel on Threats, Challenges and Change,⁵⁷ which further highlighted the importance of the test of proportionality and necessity as a fundamental element in the assessment of the legality of the use of force in the exercise of the right of self-defence. This report states that, in considering whether to authorise or endorse the use of military force, the Security Council should always address at least the following five basic criteria of legitimacy:⁵⁸

Seriousness of threat: Is the threatened harm to state or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killings, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

Proper purpose: Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

Last resort: Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

Proportional means: Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

Balance of consequences: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

In line with the argument developed above, the Court observed that Ugandan forces were not engaged in military operations along the common border against rebels who carried out cross-border raids. They were rather engaged in military assaults that resulted in the taking

⁵⁴ Simma (n 49 above) 805.

⁵⁵ *Nicaragua* case, *ICJ Reports* (n 36 above) 94 para 176.

⁵⁶ General List No 95 *ICJ Reports* (1996) 226 & 245.

⁵⁷ n 42 above.

⁵⁸ n 42 above, 57-58 para 207.

of many Congolese towns.⁵⁹ Moreover, the use of force by Uganda was not subsequent to an imminent or prior armed attack by the Congolese forces.⁶⁰ What is interesting to observe at this point is the fact that Uganda justified its conduct by raising the necessity to secure its legitimate security interests, which would be threatened by the presence within the Congo of genocidal elements and the Sudanese forces.⁶¹ Such an argument renders Uganda's actions against the DRC fundamentally preventive and anticipatory, thus contradicting the letter of article 51 of the Charter.

The Court finally found that the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not met.⁶² It further observed that Uganda's actions violated not only the sovereignty and the territorial integrity of the DRC, but it also constituted an interference in the internal affairs of the DRC and in the civil war raging there. Accordingly, it held that the unlawful military intervention by Uganda constituted a grave violation of the prohibition on the use of force as expressed in article 2(4) of the UN Charter.⁶³

4 The question of belligerent occupation

This aspect of the claim relates to the legality of the presence of Ugandan forces on Congolese territory. In fact, in its claim the DRC contended that Uganda was an occupying power in the areas where its troops were present.⁶⁴ Although this issue did not form part of the main submissions presented by the DRC, its determination became central in that the outcome of the DRC's second and third submissions heavily depended on the findings of the Court thereon.

The whole legal debate on this issue aimed at determining whether the DRC consented to the presence of Ugandan troops on its territory. Uganda argued in its counterclaim that its presence in the Congo until 11 September 1998 was consented to by the Congolese government; that from 11 September 1998 until 10 July 1999 it was acting in self-defence and that thereafter, the Lusaka Agreement legalised the presence of its troops in the Congo.⁶⁵

The traditional view in international law as regards the legal context of occupation is that when a state government has given its consent to the use of foreign forces within its territory, there exists no international

⁵⁹ See paras 110-111 of the *Congo/Uganda* case (n 1 above).

⁶⁰ n 1 above, para 143.

⁶¹ As above.

⁶² n 1 above, para 147.

⁶³ n 1 above, para 165.

⁶⁴ n 1 above, para 169.

⁶⁵ n 1 above, para 92.

armed conflict⁶⁶ and, consequently, one cannot conclude to the existence of belligerent occupation. In addition, consent must be freely and properly given, it must be explicit, and clearly ascertainable. However, in the absence of such consent, any military action engaged in by the intervening forces within the territory of a foreign state would be in contradiction of the rules and principles prohibiting the use of force.

Thus, as to the period prior to 11 September 1998, the Court confirmed the existence of a valid consent by the DRC on the presence on its territory of Ugandan forces; at least until 8 August 1998 at the closing of the Victoria Falls Summit, during which the DRC accused Rwanda and Uganda of invading its territory.⁶⁷ Even in the absence of any written agreement between the parties, the existence of a valid consent for the period prior to September 11 can easily be ascertained from the political, economic, military and other advantages granted by the Congolese government to Rwandan and Ugandan troops present in the Congo during this period.

However, the Court rejected Uganda's claim covering the second period (from 11 September 1998 to 10 July 1999) following its earlier arguments according to which Uganda could not rely on self-defence as a justification for its breach of article 2(4) of the UN Charter.

With regard to the period after 10 July 1999, the Court, after considering the evidence before it, remarked that the Lusaka Agreement which in fact set out the conditions of, and provided a schedule for, an orderly withdrawal of foreign troops from the DRC, did not contain any provision that could be interpreted as constituting consent by the DRC to the presence of Ugandan troops on its territory after July 1999.⁶⁸ Therefore, the presence of Uganda in the DRC during this period was unlawful. The Court then moved to determine whether such an unlawful presence amounted to belligerent occupation.

The international rules and principles relating to belligerent occupation can be found in articles 42 to 56 of the Hague Regulations of 1907,⁶⁹ articles 27 to 34 and 47 to 78 of GC IV of 12 August 1949,⁷⁰ and in general principles of international and customary law. The notion of occupation in international law is specified by article 42 of the Hague Regulations of 1907, which states that:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

This provision spells out the prerequisite for the application of the international law of belligerent occupation; namely that the occupying

⁶⁶ I Detter *The law of war* (2000) 88.

⁶⁷ n 1 above, para 53.

⁶⁸ n 1 above, para 105.

⁶⁹ n 22 above.

⁷⁰ n 23 above.

forces must be in a position to exercise control and to enforce their own authority in the occupied territory. The ability of the occupying power to assert its authority in the occupied territory is therefore a central criterion in the law of belligerent occupation. This includes the ability to issue directives to the inhabitants of the conquered territory and to enforce them.⁷¹ In addition, the law of occupation is applicable only to those areas of the foreign territory which are under the control of the occupying power.⁷²

The rules and principles of belligerent occupation as formulated above have been recognised by the ICJ as part and parcel of customary international law. Thus, in its Advisory Opinion on the Construction of a Wall Case, the Court observed that:⁷³

[I]n the words of the Convention (Convention (IV) Respecting the Laws and Customs of War on Land), those Regulations were prepared 'to revise the general laws and customs of war' existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the 'rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war' (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), p 256 para 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognised by all the participants in the proceedings before the Court.

Consequently, the Court noted that not only were Ugandan troops stationed in the Ituri district in the north-eastern part of the DRC, but their Commander-in-Chief also created a new province within the occupied area, appointed a governor to administer it, made suggestions concerning its administration, and supervised local elections in the controlled province.⁷⁴ The Court considered such conduct as clear evidence of the exercise of effective control and authority in Ituri by Uganda pursuant to article 42 of the Hague Regulations of 1907.

Ultimately, the Court held that Uganda was an occupying power only in the Ituri district at the relevant time. Therefore, it was under the legal obligation, in terms of article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore and ensure public order and safety in Ituri, in conformity with the laws in force in the DRC.⁷⁵ Moreover, it found that Uganda's responsibility could be engaged for any

⁷¹ D Fleck *The handbook of humanitarian law in armed conflicts* (1995) 243.

⁷² This approach is confirmed by the ICJ in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Authority* (2004) General List No 131 para 78.

⁷³ ICJ Advisory Opinion of 9 July 2004 (n 72 above) para 89.

⁷⁴ n 1 above, para 168.

⁷⁵ n 1 above, paras 177-178.

acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of international human rights law and international humanitarian law by other actors present in the occupied Ituri.⁷⁶

5 Violations of international human rights law and international humanitarian law

The task of the Court in this submission was twofold: firstly, to establish whether the acts allegedly committed by Ugandan officers and soldiers were attributable to Uganda; secondly, whether such conduct constituted a breach of Ugandan obligations under international human rights law and international humanitarian law.

5.1 Could the conduct of Ugandan officers and soldiers be attributable to Uganda?

In making its findings on this issue, the ICJ followed a line of reasoning it has adopted in one of its previous jurisprudences. In effect, in its Advisory Opinion of 29 April 1999, it observed that:⁷⁷

According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule, which is of a customary character, is reflected in article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

‘The conduct of an organ of the state shall be considered as an act of that state under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organisation of the state.’

There is no doubt that the status and functions of the Ugandan forces present in the DRC were determined by the Ugandan government on behalf of which they operated. Accordingly, the Court rightly held that the conduct of individual members of the Ugandan armed forces present in the occupied territory was attributable to the state of Uganda.⁷⁸

What would be interesting to inquire at this point is what the decision of the Court would be if a Ugandan member of the armed forces had personally committed illegal acts contrary to the instructions received, or in excess of his authority.

In this regard, and according to a well-established rule of customary international law, as reflected in article 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907, as well as in

⁷⁶ n 1 above, para 179.

⁷⁷ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion of 29 April 1999 para 62.

⁷⁸ n 1 above, para 213.

article 91 of AP I of 1977, the individual conduct of a Ugandan soldier will still be attributed to Uganda. The relevant provisions of these two instruments make it clear that a party to a conflict 'shall be responsible for all acts committed by persons forming part of its armed forces'. What is even more interesting in this respect is that a single illegal act committed by an individual member of the occupying forces may engage the international responsibility of the occupying state simultaneously with the individual criminal responsibility of the author of the illegal act.⁷⁹

5.2 Was the conduct complained of in conformity with the applicable principles of international human rights law and international humanitarian law?

Humanitarian law designs a set of rules that protect certain groups of people (eg the wounded, sick, prisoners of war, civilians and other non-combatants) in times of armed conflicts. As already mentioned above, the Hague Regulations of 1907 and GC IV of 12 August 1949 specify the essential protections accorded to persons in occupied territories. Thus, article 46 of the Hague Regulations requires the occupying power to ensure respect for their lives, honour, religious beliefs and private property;⁸⁰ whereas article 31 of GC IV outlaws the use of any method of coercion against the inhabitants of the occupied territory. Moreover, protected persons must not be subjected to murder, torture, corporal punishment, mutilation, medical experiment⁸¹ or forced labour.⁸²

On the other hand, a wide range of international human rights instruments⁸³ provides for the protection and safeguard of certain basic rights which all persons must enjoy. Such rights include the right to life, freedom from torture and from slavery, the right to liberty and security of the person, the right to privacy, freedom of movement and association, and the like. Whereas the respect and protection of some rights are absolute at all time,⁸⁴ states may derogate from their obligations in respect of other rights in time of war, public danger or

⁷⁹ Art 25(4) of the Statute of the International Criminal Court states in this sense that '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of states under international law'.

⁸⁰ See also art 27 of GC IV.

⁸¹ Art 32 of GC IV.

⁸² Art 52 of the Hague Regulations of 1907 and art 51 of GC IV.

⁸³ The Universal Declaration of Human Rights, CCPR, the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter, the Convention on the Rights of the Child, CAT, etc.

⁸⁴ Eg the right to life, the obligation to refrain from torture, inhuman or degrading treatment, and slavery may not be derogated from under CCPR (arts 6, 7 & 8), the European Convention (arts 2, 3 & 4(1)), and the American Convention (arts 4, 5 & 6) respectively; art 75 of AP I as well as art 4 of Additional Protocol II also provide absolute guarantees for certain human rights.

public emergency which threatens their life, independence or security.⁸⁵ However, the African Charter makes no mention of derogation, and the African Commission has held that states may not derogate from the rights in the Charter.⁸⁶

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 civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

Human rights law and humanitarian law are interrelated as to their fundamental objects: They both prescribe a certain quality of behaviour towards individuals, and are both concerned with the rights and protection of individuals.⁸⁷ In times of armed conflict, the protection of civilians under the Hague Regulations of 1907 and under GC IV of 1949 is extended by various provisions of human rights instruments to the extent that their application is not suspended.⁸⁸ Such an extension does not in any way modify the legal regime of *jus in bello*, which already regulates the conduct of armed conflict. Instead, it reinforces and strengthens the protection already provided to the victims of war by international humanitarian law.

On the basis of various reports and other credible sources⁸⁹ presented to it, the Court found Ugandan troops responsible for the following acts and omissions committed in violation of international human rights law and international humanitarian law: commission of acts of killing, torture and other forms of inhumane treatment of the civilian population; destruction of villages and civilian buildings; failure to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants; incitement to ethnic conflict; involvement in the training of child soldiers; and failure to take measures to ensure respect for human rights and international humanitarian law in Ituri.⁹⁰

Being aware of the fact that the conduct above falls within the ambit of both international human rights law and international humanitarian law, the Court first observed that there is a converging point between these two branches of international law; and further that under certain conditions international human rights law may well be applicable outside a state's territory. In support of this argument, it recalled the

⁸⁵ Art 4 of CCPR, art 15 of the European Convention and art 27(1) of the American Convention.

⁸⁶ *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

⁸⁷ Detter (n 66 above) 161.

⁸⁸ Detter (n 66 above) 317.

⁸⁹ For more details on these evidentiary documents, see the *Congo/Uganda* case (n 1 above) paras 206-210.

⁹⁰ n 1 above, para 211.

approach it adopted in its Advisory Opinion on the *Construction of a Wall* case, according to which:⁹¹

the protection offered by the human rights convention does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

Having thus highlighted the interrelation between the two branches of international law, the Court rightly concluded to their simultaneous applicability in cases of occupation. Moreover, it emphasised that international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.⁹²

As regards the lawfulness of the conduct of Ugandan troops in the DRC, the Court found that their acts (as enumerated above) were committed in violation of Uganda's obligations under articles 25, 27, 28, 43, 46 and 47 of the Hague Regulations of 1907, which are binding on the parties under customary international law. Uganda was also found to have ignored its conventional obligations under the following instruments to which it is party: articles 27, 32 and 53 of GC IV; articles 48, 51, 52, 57, 58 and 75(1) and (2) of AP I; articles 6(1) and (7) of CCPR; articles 4 and 5 of the African Charter; articles 38(2) and (3) of CRC; and articles 1, 2, 3 (3-6) of the Optional Protocol to the Convention on the Rights of the Child.⁹³

In conclusion, the Court declared Uganda internationally responsible for the violations of international human rights law and international humanitarian law committed by its armed forces and their members in the DRC, and for failing to comply with its obligations as an occupying power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.⁹⁴

6 Illegal exploitation of natural resources

To reach its decision on this contention, the Court relied heavily on the UN Panel reports as well as on the report of the Porter Commission,

⁹¹ n 1 above, para 216.

⁹² n 1 above, para 216; also the ICJ *Advisory Opinion on the Construction of a Wall Case* (n 72 above) paras 107-113.

⁹³ n 1 above, para 219.

⁹⁴ n 1 above, para 220.

which it both considered to be of higher and persuasive probative value.⁹⁵ On the basis of the Porter Commission's report, it found that despite the lack of a clear governmental policy directed at the exploitation of Congolese natural resources, Ugandan high-ranking officers, as well as soldiers, were involved in the looting, plundering, exploitation and trade of the DRC's natural resources, and that the military high command failed to take the necessary measures to put an end to such acts.⁹⁶ Such conduct, according to the Court, constitutes a clear violation of the *jus in bello*, as reflected in article 47 of the Hague Regulations of 1907 and article 33 of GC IV of 1949, which prohibit pillage.⁹⁷ It also amounts to a violation by Uganda of its duty of vigilance as an occupying power. In addition to this finding, the Court referred to article 21(2) of the African Charter, which proclaims the rights of spoliated and dispossessed people to the lawful recovery of its property as well as to an adequate compensation.

However, as regards the contention that Uganda violated the principle of the DRC's sovereignty over its natural resources, the Court observed that the customary international law principle of permanent sovereignty over national resources did not apply to the situation prevailing in the DRC. In the opinion of the Court, nothing in General Assembly Resolution 1803 (XVII) of 14 December 1962 on the Permanent Sovereignty over Natural Resources, as well as in subsequent resolutions,⁹⁸ suggests that such a principle is applicable to acts of looting, pillage and exploitation of certain natural resources by members of the occupying armed forces.⁹⁹

True to its position as adopted in paragraph 213 of the judgment,¹⁰⁰ the Court correctly found Uganda internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by its military personnel; for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligation under article 43 of the Hague Regulations of 1907 as an occupying power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied part of the Congolese territory.¹⁰¹

⁹⁵ n 1 above, para 237. The probative value of the Porter Commission Report stems from the fact that neither the DRC nor Uganda has challenged the credibility of the information contained therein (para 61).

⁹⁶ n 1 above, para 242.

⁹⁷ n 1 above, para 245.

⁹⁸ Namely, General Assembly Res 3201 (S VI) of 1 May 1974 on the Declaration on the Establishment of a New International Economic Order and General Assembly Res 3281 (XXIX) of 12 December 1974 on the Charter of Economic Rights and Duties of States.

⁹⁹ n 1 above, para 244.

¹⁰⁰ In which it attributes all acts and omissions of the Ugandan military personnel to the state of Uganda.

¹⁰¹ n 1 above, para 250.

7 The issue of diplomatic protection

The Court started its comments on this issue by recalling the timeless character of the 1961 Vienna Convention, which applies irrespective of the state of peace or that of armed conflict. In so doing, it set out the basic principles of diplomatic immunity as formulated in articles 44 and 45 of this document.

Article 44:

The receiving state must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving state, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45:

If diplomatic relations are broken off between two states, or if a mission is permanently or temporarily recalled: (a) the receiving state must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives; (b) the sending state may entrust the custody of the premises of the mission, together with its property and archives, to a third state acceptable to the receiving state; (c) the sending state may entrust the protection of its interests and those of its nationals to a third state acceptable to the receiving state.

In terms of article 22(1) of the 1961 Vienna Convention, the premises of the mission are inviolable and agents of the receiving state are not to enter them without the consent of the mission. This rule is absolute.¹⁰² The prohibition extends to the furnishings and other property on the premises, the means of transport, which are all immune from search, requisition, attachment or execution.¹⁰³ Thus, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran: United States of America v Iran*,¹⁰⁴ the ICJ strongly reaffirmed the fundamental character of this rule of general international law when it stated that:¹⁰⁵

Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection of the United States embassy and consulates, their staffs, their archives, their means of communication and the free movement of the members of their staffs.

The Court insisted that such obligations concerning the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission continued even in cases of armed conflict or breach of diplomatic relations.¹⁰⁶

¹⁰² Shaw (n 34 above) 671.

¹⁰³ Art 22(3) Vienna Convention.

¹⁰⁴ Judgment of 24 May 1980 General List No 64 (*Iranian Hostages case*).

¹⁰⁵ The *Iranian Hostages case* (n 104 above) para 61.

¹⁰⁶ n 104 above, para 86.

Article 24 of the Vienna Convention makes the archives and documents of the mission inviolable at any time and wherever they may be. Although the Vienna Convention is silent about the meaning of 'archives and documents', article 1(1)(k) of the 1963 Vienna Convention on Consular Relations defines the term 'consular archives' to include all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card indexes and any article of furniture intended for their protection or safekeeping.

Moreover, article 29 of the Vienna Convention contains one of the most fundamental and oldest established rules of diplomatic law; namely the rule that the person of a diplomatic agent is inviolable. He may not be arrested, detained or assaulted. The receiving state has to take all appropriate measures to prevent any attack on the person, freedom or dignity of diplomatic agents. This prohibition is reiterated and consolidated by the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which enjoins state parties to make attacks upon protected persons a crime under domestic law with appropriate penalties and to take such measures as may be necessary to establish jurisdiction over these crimes.¹⁰⁷ In addition, article 8 obliges state parties to extradite or prosecute alleged offenders.

Finally, article 30(1) of the 1961 Vienna Convention, which reflects the accepted rule in customary law, protects the private residence of diplomatic agents from any forms of violation, whereas article 30(2) provides for the inviolability of his papers, correspondence and property.

The Court in the *Congo/Uganda* case found that attacks on Uganda's diplomatic premises in Kinshasa indeed occurred, and that Ugandan diplomats were maltreated by members of the Congolese armed forces on embassy premises and at Ndjili International Airport. In accordance with the arguments developed above, it held that the DRC, through its conduct, has breached its obligations under articles 22 and 29 of the Vienna Convention.¹⁰⁸

Concerning the issue of the confiscation or removal of Uganda's property and archives, the Court relied on its reasoning in the *Iranian Hostages* case, according to which the Vienna Convention does not only protect foreign missions from violation by the receiving state, but also obliges the receiving state to prevent any other person or entity from doing so. On this premise, the Court considered that it had sufficient evidence indicating that Uganda's property, archives and working files have been removed. Accordingly, it found the DRC responsible for

¹⁰⁷ Arts 2, 3, 6 & 7 of this document.

¹⁰⁸ n 1 above, paras 337-340.

acting in violation of its obligations under article 24 of the Vienna Convention.¹⁰⁹

However, with respect to Uganda's contention based on the maltreatment of its nationals not enjoying diplomatic immunity, the Court rightly observed that this issue falls within the scope of the right to diplomatic protection, the exercise of which is subjected to the fulfilment of certain conditions. In fact, under general international law, at least two requirements must be met before a state can exercise its right to diplomatic protection: firstly, there must be a nationality connection between the victim of an illegal act and the state seeking to exercise diplomatic protection on his behalf. Secondly, the victim of an illegal act must have exhausted all local remedies available in the state where the illegal act took place. Relying on these general principles, the Court observed that no evidentiary documents existed which identified the alleged victims as Ugandan nationals. This condition not having been met, the Court declared this part of the counterclaim inadmissible.¹¹⁰

8 Legal consequences flowing from the findings of the Court

After establishing the international responsibility of Uganda,¹¹¹ the Court moved to the DRC's submission, in which it was required to set out the legal consequences attached to the violations by Uganda of its international legal obligations. The Court started its discussion on this submission by recalling the basic principle of reparation as established in international law.

8.1 Basic principle

According to an established rule of general international law, any violation by a state of its international obligation generates state responsibility and, consequently, a duty to make reparation. This general rule is repeated in article 1 of the 2001 International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,¹¹² which stipulates that '[e]very internationally wrongful act of a state entails the international responsibility of that state'. Article 2 of this instrument further defines an internationally wrongful act as conduct consisting of an action or omission, attributable to the state under international law, and constituting a breach of the international law

¹⁰⁹ n 1 above, paras 342-343.

¹¹⁰ n 1 above, para 333.

¹¹¹ n 1 above, paras 165, 220 & 250 respectively.

¹¹² GA Official Records 56th session Suppl No 10 (A/56/10) Annex to GA Res 56/83 of 12 December 2001 (ILC Articles on Responsibility of States).

obligation of that state. Furthermore, what constitutes a breach of an international obligation is specified by article 12, pursuant to which such a breach exists when an act of a state is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Nonetheless, the legal consequences that flow from the violation by a state of its international obligations towards another state are spelled out in the 2001 ILC Articles on Responsibility of States. They are cessation and non-repetition,¹¹³ and reparation.¹¹⁴

8.2 Cessation and non-repetition

In terms of article 30 of the 2001 ILC Articles on Responsibility of States, the state found responsible for a wrongful act under international law is under the obligation to cease that act if it is continuing, and to offer appropriate assurances and guarantees of non-repetition if circumstances so require. In the *Rainbow Warrior* case, the arbitral tribunal held that in order for cessation to arise, the wrongful act has to have a continuing character and the violated rule must still be in force at the date the order is given.¹¹⁵ However, a commitment given to ensure the implementation of specific measures may suffice to meet the obligation to offer a general assurance of non-repetition.¹¹⁶

Accordingly, in response to the DRC's request that Uganda be declared under the obligation to cease forthwith all continuing illegal acts and provide guarantees and assurances of non-repetition, the Court observed that the commission of internationally wrongful acts by Uganda had ceased.¹¹⁷ It further held that Uganda had given sufficient guarantees and assurances of non-repetition in the form of the Tripartite Agreement on Regional Security in the Great Lakes Region, signed by Uganda, Rwanda and the DRC. This document provided, *inter alia*, for the need to ensure respect for the principles of good neighbourliness, sovereignty, territorial integrity and non-interference in the internal affairs of sovereign states in the region.¹¹⁸

8.3 Reparation

According to article 31 of the 2001 ILC Articles on Responsibility of States, the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Reparation is therefore a central concept in the enforcement of the state's

¹¹³ Art 30.

¹¹⁴ Art 31.

¹¹⁵ *France v New Zealand* 82 ILR 499, 673; 74 ILR 241, 274.

¹¹⁶ *LaGrand case (Germany v United States of America)* Judgment of 27 June 2001 General List No 104 para 124.

¹¹⁷ n 1 above, para 254.

¹¹⁸ n 1 above, paras 256-7.

responsibility. This argument, which is confirmed by state practice and case law,¹¹⁹ was emphasised by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case, when it stated that it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.¹²⁰ In the final phase of this case, the PCIJ laid down the fundamentals of reparation in international law as follows:¹²¹

The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed.

In light of the applicable rules on reparation as explained above, the Court responded positively to the DRC's request for reparation by concluding that Uganda was under an obligation to make full reparation for the injury sustained by the DRC and its citizens as a result of Uganda's wrongful conduct.¹²²

On the other hand, following the finding of the responsibility of the DRC under the Vienna Convention,¹²³ the Court similarly decided that the DRC was under the obligation to make reparation for the injury it has caused to Uganda.¹²⁴

Finally, the Court enjoined the DRC and Uganda to decide on the nature, amount and form of the reparation, while reserving its right, failing an agreement between them, to make a determination thereupon in a subsequent procedure.¹²⁵

In anticipation of the nature and form of reparation that can be agreed upon by the DRC and Uganda, the basic principle is that the breach of an international engagement involves an obligation to make reparation in an adequate form.¹²⁶ In this regard, article 34 of the ILC 2001 Articles on Responsibility of States provides the DRC and Uganda with at least three methods of reparation from which they can choose. These are restitution,¹²⁷ compensation¹²⁸ and satisfaction,¹²⁹ either singly or in combination. These methods of reparation may be chosen by both parties when enforcing the Court's ruling on the submissions

¹¹⁹ Eg the *Chorzów Factory* case (n 126 below); the *Rainbow Warrior Arbitration* case (n 115 above); the *Gabèikovo-Nagymaros Project* case, *ICJ Reports* (1997) and the *Iranian Hostages* case (n 104 above) para 95 (5).

¹²⁰ PCIJ Series A No 17 (1928) 9.

¹²¹ n 120 above 47-48.

¹²² n 1 above, paras 259 & 345(5).

¹²³ n 1 above, para 344.

¹²⁴ n 1 above, para 345(11).

¹²⁵ n 1 above, paras 260 & 345(6) & 345(14).

¹²⁶ First phase of the *Chorzów Factory* case PCIJ Series A No 9 (1927) 21.

¹²⁷ Art 35.

¹²⁸ Art 36.

¹²⁹ Art 37.

relating to the violation of article 2(4) of the UN Charter, the illegal exploitation of natural resources and the violation of the incriminated provisions of the 1961 Vienna Convention. As far as the enforcement of the Court's decision on alleged violations of international human rights law and international humanitarian law is concerned, the parties may well be guided by a recent General Assembly resolution adopted on 21 March 2006, which provides for remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.¹³⁰ In addition to the methods of reparation provided for in article 34 above, Principle IX, paragraphs 21 and 23 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹³¹ establish two other methods, which the DRC and Uganda may opt for. They are rehabilitation and guarantees of non-repetition.

8.3.1 Restitution

Reparation by restitution in kind (or *restitutio in integrum*) would usually re-establish the situation which existed before the wrongful act was committed (*status quo ante*). This will happen only to the extent that it is not materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.¹³² Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some judicial act, or some combination of them. Examples of material restitution include the release of detainees, the handing over to a state of an individual arrested in its territory, and the restitution of ships or other types of property.¹³³

In the context of gross violations of international human rights law and serious violations of international humanitarian law, restitution as a remedy to, and reparation for, the violations should, whenever possible, restore the victim to the original situation in which he was before the violations occurred. Restitution in this context includes, as appropriate, restoration of liberty, the enjoyment of human rights, identity, family

¹³⁰ Res 60/147 (A/RES/60/147) of 21 March 2006 entitled Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Principle VII of this document provides that remedies include victims' right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

¹³¹ n 130 above (Basic Principles and Guidelines on the Right to a Remedy and Reparation).

¹³² ILC Commentary of the Articles on Responsibility of States (2001) 237-238.

¹³³ n 132 above, 240.

life and citizenship, return to one's place of residence, restoration of employment and return of property.¹³⁴

8.3.2 Compensation

This is a form of reparation intended to replace the value of an asset, the integral restitution of which is materially impossible.¹³⁵ Article 36(2) of the ILC 2001 Articles on Responsibility of States directs in this respect that the compensation to be provided shall cover any financially assessable damage, including loss of profits in so far as this can be established. Monetary compensation can be paid for both material and non-material (moral) injuries suffered by the victim of an internationally wrongful act.¹³⁶ Compensation for material injuries, such as loss of property, is generally assessed on the basis of the 'fair market value' of the property lost.¹³⁷

Compensation as a result of gross violations of international human rights law and serious violations of international humanitarian law shall be proportional to the gravity of the violation and the circumstances of each case.¹³⁸ Like compensation in the context of the 2001 ILC Articles on Responsibility of States, compensation for the victims of gross human rights violations and serious violations of international humanitarian law would encompass both material damages (such as loss of earnings, pensions, and such) and moral damages (such as pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium).¹³⁹ Other damages for which the DRC may claim compensation on behalf of its nationals may include physical or mental harm; lost opportunities, including employment, education and social benefits; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.¹⁴⁰

8.3.3 Satisfaction

The third option within the hands of the parties is satisfaction, which is a remedy of exceptional character arising only when restitution and compensation are not capable of providing full reparation to the injured party.¹⁴¹ This form of remedy covers injuries which are not financially

¹³⁴ Principle IX para 19 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 130 above).

¹³⁵ n 132 above, 243-244.

¹³⁶ *Rainbow Warrior Arbitration* case (n 114 above) 82 *ILR* 499 575.

¹³⁷ n 132 above, 255.

¹³⁸ Principle IX para 20 of Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 130 above).

¹³⁹ n 132 above, 254.

¹⁴⁰ n 132 above, Principle IX, para 20.

¹⁴¹ n 132 above, 263.

assessable, and which amount to an affront to the injured state. The injuries suffered here are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the state concerned.¹⁴² Satisfaction may consist of an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.¹⁴³ Such a modality may take the form of, for example, a declaration of the wrongfulness of the incriminated act by the competent court or tribunal of the guilty state.¹⁴⁴

In the *Rainbow Warrior* case, for example, the arbitral tribunal emphasised the long-established practice of states and international courts of using satisfaction as a remedy for the breach of an international obligation, particularly where moral or legal damage has been done to the state. Accordingly, the tribunal concluded that its public condemnation of France for its breaches of treaty obligations towards New Zealand constituted appropriate satisfaction.¹⁴⁵ Therefore, in negotiating an agreement on the appropriate formula of reparation, the DRC and Uganda will certainly keep in mind the possibility of making use of restitution, compensation and/or satisfaction as a method of reparation. Any disagreement arising on the amount of reparation will be decided upon by the Court.

Satisfaction as regards the violation by Uganda of the Congolese people's rights under international human rights law and international humanitarian law may take various forms, including any of the following:¹⁴⁶

- the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- judicial and administrative sanctions against persons liable for the violations;
- commemorations and tributes to the victims; and
- inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

¹⁴² n 132 above, 264.

¹⁴³ ILC Articles on State Responsibility, art 37.

¹⁴⁴ n 132 above, 266.

¹⁴⁵ n 115 above, 82 *ILR* 577.

¹⁴⁶ n 130 above, Principle IX para 22.

8.3.4 Rehabilitation

Reparation for international human rights law and international humanitarian law violations suffered by the DRC nationals may also occur in the form of rehabilitation. Rehabilitation would include medical and psychological care as well as legal and social services.¹⁴⁷

8.3.5 Guarantees of non-repetition

As it has been mentioned earlier, the Court found that Uganda had already given sufficient guarantees and assurances of non-repetition in the form of the Tripartite Agreement on Regional Security in the Great Lakes signed by Uganda, Rwanda and the DRC.¹⁴⁸ However, this finding should not in any way constitute a bar for Uganda to reiterate its guarantees of non-repetition towards the DRC as a form of reparation for the offences of international human rights and international humanitarian character committed by her against the DRC's nationals. In this respect, such guarantees may include all or any of the following measures:¹⁴⁹

- ensuring effective civilian control of military and security forces;
- providing international human rights and international humanitarian law education and training for law enforcement officials as well as military and security forces; and
- reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

The Court may be prompted to give assurances and guarantees of non-repetition at least in two ways; either on the basis of a binding decision to that effect reached by the Court on request from another party, or, in the absence of a request to that effect, as a result of a free agreement by the litigants as part of the implementation of the Court's final judgment according full reparation to the injured party. In the latter case, the giving of guarantees of non-repetition by the guilty party would be considered sufficient to wipe out all the consequences of the illegal acts.

9 Conclusion

Whereas the author fully agrees with the decision reached by the ICJ on each of the main issues of this case, which in fact conforms to international law, it is unfortunate to observe that at certain points, one is left with the feeling that the Court does not undertake an exhaustive ana-

¹⁴⁷ n 130 above, Principle IX, para 21.

¹⁴⁸ Sub-section 8.2 above.

¹⁴⁹ n 130 above, Principle IX, para 23.

lysis of the applicable law. This is particularly true with respect to the violation of international human rights law and international humanitarian law by Uganda, where the Court merely listed the incriminated provisions, without making any elaborate comment on their actual content, meaning, extent and implications.

Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa

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Summary

Human rights education plays an important role in the promotion of human rights. This article provides suggestions on how national strategies for human rights education should be devised. The author further argues that the African Commission on Human and Peoples' Rights has not lived up to its promise with regard to active involvement in efforts to improve human rights education across the continent. Suggestions are given as to how the Commission could play a more active role with regard to human rights education.

1 Introduction

In Africa, there are only isolated and mostly unco-ordinated efforts to educate the public on human rights. There are, for instance, ongoing thematic human rights conferences, workshops and *ad hoc* training programmes.¹ Human rights are also in some states taught as a subject by itself, especially in law faculties of universities, or as a component of interdisciplinary courses.² However, many African states do not have

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¹ MK Addo 'Implementation by African states of the plan of action for the United Nations Decade for Human Rights' (2000) 44 *Journal of African Law* 96 104.

² See Report of the United Nations High Commissioner for Human Rights on the mid-term global evaluation of the progress made towards the achievement of the objectives of the United Nations Decade for Human Rights Education (1995-2004), adopted at the 55th session of General Assembly, UN Doc A/55/360 (2000) paras 31 & 32.

proper human rights education programmes.³ Even in countries where human rights education programmes have been launched, they are often flawed.⁴ The great opportunity created by the Declaration of the United Nations (UN) Decade for Education on Human Rights has not been fully utilised.⁵ Only a handful of African states responded to the valuable Plan of Action under the UN Decade for Human Rights Education (1994-2004).⁶ It should, nonetheless, be borne in mind that the programme under the UN Decade was designed for international application and hence not based specifically on the situation in Africa. As will be argued further below, the African Commission on Human and Peoples' Rights (African Commission) could act as a mechanism for the co-ordination of human rights education efforts at the continental level.

2 Human rights education

2.1 Programme design

Human rights education programmes should be designed in a way that

³ See the section on Africa in the mid-term evaluation report (as above) para 129(a). See also L Gearon *The human rights handbook: A global perspective for education* (2003) 160-161.

⁴ See JP Martin *et al* 'Promoting human rights education in a marginalised Africa' in GJ Andreopoulos & RP Claude (eds) *Human rights education for the twenty-first century* (1997) 446. They are sometimes used as means of legitimising the ruling political party.

⁵ Res 1993/56 of 9 March 1993.

⁶ See UN Doc A/51/506 and UN Doc A/52/469. Eg, Algeria, Chad, Ghana, Sudan and Tunisia were the only countries that responded on the establishment of a national focal point and centre for human rights education which was required by the Plan of Action. In an evaluation survey conducted at the end of the Decade jointly by the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), to which only the Democratic Republic of the Congo, Ethiopia, Sierra Leone and South Africa responded, most governments mentioned that human rights education still remains a priority in their countries, since specific groups or issues have not been dealt with and appropriate co-ordination mechanisms for human rights education were not yet in place. The majority of responding governments supported the proclamation of a second Decade for Human Rights Education (2005-2014), as well as the establishment of a voluntary fund. For more on this, see United Nations Decade for Human Rights Education (1995-2004): Report on achievements and shortcomings of the Decade and on future United Nations activities in this area, Report of the High Commissioner, adopted at the 60th session of the Commission on Human Rights, UN Doc E/CN.4/2004/93 (2004) para 42. Based on this survey and considering that human rights education is a long-term and lifelong process, the UN General Assembly proclaimed the World Programme for Human Rights Education, structured in consecutive phases, that begun on 1 January 2005, the first phase of which was to cover the time from 2005 to 2007. See World Programme for Human Rights Education adopted by the 59th session of the General Assembly, UN Doc A/RES/59/113 (2005), paras 2 & 3. It is also believed that the Decade on Education for Sustainable Development (2005-2014) would partially provide a framework for continuing human rights education activities. The mandate of promoting human rights education and learning which has been given to the newly-established UN Human Rights Council will provide another source of effort on programmes of human rights education worldwide.

recognises the social, cultural, economic and political realities of a society. To this end, the process should begin with a baseline study, which should be conducted by a specific organ of state, with the aim of identifying the most pressing local and national human rights needs and defining the best approach to human rights education in the individual country. Existing programmes of education in human rights, launched by any actor, should be identified. The study should be a comprehensive one in terms of attempting to identify the status of knowledge of human rights and reflecting the needs of people from all walks of life. Such a study helps to adopt a comprehensive legal basis and strategy for human rights education at a national level. Based on it, short, medium and long-term plans and goals should be adopted. In fact, the basic purpose of such a study should be setting clear educational goals; a component of effectiveness that human rights education programmes lack too often. In order to ensure substantial improvements in the human rights situation, plans for programme evaluation and follow-up should also be incorporated.

2.2 Target groups

Human rights education programmes should target virtually all the people of a country through formal and non-formal avenues of education by the inclusion of human rights themes in school curricula, training, workshops, seminars and other informal events such as programmes in religious institutions. These are ways of reaching the maximum possible number of people. It might, however, be necessary to prioritise some groups such as children in school, prisoners, the police, and so on. But still, the programme should address this issue carefully as no portion of the population should be left out under the pretext of prioritisation.

A respect for human rights requires the concerted effort of the ordinary public, professionals, civil society and state officials. Education and training strategies should, therefore, focus on a diverse range of distinct constituencies that either nurture or inhibit the ability to protect human rights, including potential violators, monitors, investigators and relief providers. The use of well-established civil society institutions, such as workers' unions, religious and community organisations and the family, is invaluable for an easy reach to their members. The effect of human rights education can be boosted through pre-service education programmes for professionals.

The approach to human rights education differs between African states. The programme of civic education in Ethiopia, which has incorporated education on human rights, is limited to schools.⁷ There is a

⁷ Interview with Girma Alemayehu, Head, Civic and Ethical Education and Training Department, Ministry of Education, Federal Democratic Republic of Ethiopia, on 16 July 2005.

minimal attempt to educate the whole population.⁸ In Ghana, the programme being run by the National Civic Education Commission makes much use of informal avenues, as the subject is not part of school curricula.⁹ The programmes of Democracy for All and Street Law in South Africa are good models which should be followed by other countries. Democracy for All is one of the leading groups designing human rights education curricula for public schools, organising workshops for the community in general and publishing articles on democracy, human rights education and citizen participation.¹⁰ In the Street Law programme, university students get training on methods of teaching and they educate the public and students on different issues regarding human rights.¹¹ In South Africa, human rights education is now part of a national Democracy, Human Rights and Legal Education programme aimed at nurturing a culture of democracy and human rights in the country.¹²

A good human rights education programme should plan to educate and train in every area of a country. In most African countries, the majority of the population lives in rural areas, but programmes target only capital cities and major towns. In this connection, others would want to share the experience of the Education Centre for Women in Democracy (ECWD) in Kenya, which has been running civic education programmes on human rights awareness since 1997.¹³ ECWD reaches out to the rural areas through the extensive use of para-legal trainees recruited from the areas where they are supposed to operate.¹⁴ This method increases the effectiveness of human rights education, as the para-legals exploit the ties of clan, kinship and other effective mechanisms and make use of vernaculars. It is a kind of trust-building structure which can facilitate human rights education. Such an approach would also be suitable to overcome the barriers of poor infrastructure in most African countries.

⁸ As above. The interviewee said that the programme being implemented by the Ministry of Education cannot fulfil its proper goals as the students (the only targets) spend more time in the community which it leaves out.

⁹ Interview with Edward Mudashiru Tetteh, Assistant Civic Education Officer at the National Civic Education Commission, Republic of Ghana, on 12 November 2004. According to the official, the Commission was working hard towards the incorporation of civic education in school curricula.

¹⁰ D Pitts 'Human rights education in diverse, developing nations: A case in point — South Africa' http://www.usinfo.state.gov/journals/itdhr/0302/ijde/pitts_1.htm (accessed 13 November 2005).

¹¹ Interview with Lungowe Matakala, Lecturer (teaching Street Law), Faculty of Law, University of Pretoria, on 10 July 2004.

¹² Pitts (n 10 above).

¹³ BA Andreassen 'Bridging human rights and governance: Constructing civic competence and the reconstitution of political order' in HO Sano & G Alfredsson (eds) *Human rights and good governance: Building bridges* (2002) 111. See also <http://www.ecwd@swiftkenya.com> (accessed 20 November 2005).

¹⁴ As above.

2.3 Content

The content of human rights education may depend on the needs and background of the group which it targets. But, in any case, a good human rights education programme should be designed in such a way as to provide knowledge of human rights and develop intellectual and participatory skills. It should minimally address the ideals, values and principles underpinning the African Charter on Human and Peoples' Rights (African Charter) and other human rights instruments. These are criteria which citizens can use to judge the means and ends of government, as well as the means and ends of the myriad groups that are part of civil society. The monitoring mechanisms established by human rights instruments should also be highlighted. However, human rights education should go beyond simply disseminating information about human rights law. Learners should be equipped with critical thinking skills. It should develop the skills of citizens to interact with each other, monitor the handling of issues by the government and influence public policy.

Human rights should not be taught in isolation. It should include other ideals and values which reinforce a commitment to human rights. It should ideally be linked, among others, to peace, democracy, good governance, development, social justice, tolerance promotion, conflict resolution and problem solving. These points should be taken into consideration when determining the content of human rights education.

2.4 Duration

Programmes of human rights education should be launched with long-term commitment. It should not be conducted on a 'hit-and-run' basis, as is the case in some African countries.¹⁵ Because of such short-term commitments, human rights education fails to attain its goals. It is therefore very important that education on human rights be conducted for a long enough period to inculcate human rights values, methods of protection, and advocacy and other relevant skills.

2.5 Methodology and medium

The implementation of human rights education programmes is a crucial step which involves many issues which have direct impact on its effectiveness. A matter of fundamental importance in this regard is the training of teachers or trainers specifically in human rights. The method of teaching or training and the medium of dissemination used to educate in human rights are other two determinant factors.

¹⁵ In Kenya, eg, voter education as a component in rural democratisation was conducted through short-term courses (one to three days) by urban-based civic groups. See Andreassen (n 13 above) 107. The same was true with voter education for the May 2005 elections in Ethiopia.

A good methodology of human rights education should engage the participants in attitudinal skills as well as knowledge development.¹⁶ Educators should apply an active learning methodology instead of lecturing. The former is a method of education that involves the active participation of learners or trainees and aims at developing their problem-solving skills. Active learning is a student-centred approach in which the teacher facilitates or supervises, with inputs, the exercises (case study, role-play, small group discussions and such) aimed at the development of knowledge and skills. The participatory approach is viewed as motivating, humanising and ultimately practical, since this form of learning is linked more strongly with attitudinal or behavioural change than is a pure lecturing method.¹⁷ This is the approach which can provide the necessary knowledge and skills to respect human rights and challenge their violation.

In human rights education, the elements of knowledge and practice are intrinsically linked and must be taught in a joint and coherent manner.¹⁸ Human rights education must not be theoretical, but relevant to people's daily lives. It should be related to the realities on the ground. The method in developing materials as well as teaching or training should enable learners or trainees to relate the knowledge of human rights they acquire to their application in practice. This is a possible source of challenge to educators in Africa. Learners would want to relate their knowledge to what happens on the ground. Considering that there is a poor record of respect for human rights in many countries, in comparison to the commitment by their governments, educators may face problems convincing learners of the ideals they advocate.¹⁹

The means or medium of education depends on the level of technological advancement and the target audience of the education. In

¹⁶ In the evaluation that has been made at the end of the UN Decade for Human Rights Education, it is concluded that in some countries formal education is traditionally knowledge-based, and this approach alone is not conducive to attitudinal changes which are the objective of human rights education efforts. See UN Doc E/CN.4/2004/93 (2004) (n 6 above) para 25.

¹⁷ F Tibbitts 'Emerging models for human rights education' (2002) in Electronic Journals of the US Department of States: Issue of Democracy <http://usinfo.state.gov/journals/itdhr/0302.htm> 8 (accessed 20 July 2005).

¹⁸ JB Marie 'Human rights education, a fundamental resource in the prevention of violations' in LA Sicilianos (ed) *The prevention of human rights violations* (2001) 271.

¹⁹ This was among the observations from the series of workshops that have been held by the Ministry of Education of Ethiopia to introduce new textbooks for civic education to all teachers of the subject in the country in mid-2003. Most of the participants expressed the view that they have difficulty answering the questions students raise by relating the ideals they teach to what obtains in practice (considering the political sensitivity of the issues). The author was one of the facilitators of the training of teachers.

Africa, oral communication is taken to be the principal medium of communication.²⁰ Therefore, in situations where it is possible, for instance in schools, human rights education should be done through oral communication. However, one should reach the public, which sometimes may be difficult, if not impossible. This is because of infra-structural and related problems which are common in many African countries. This should not justify the failure to provide education for those people. If there is a real commitment to human rights education, citizens have to be educated in any way possible. A lesson may be taken from the Kenyan experience discussed above. It is also advisable to make use of regular radio programmes on human rights, as radio is the most important medium of mass communication in Africa.²¹ The relevance of print media, television and other electronic media should not be ruled out, though they are not accessible to the majority of the population in Africa.

3 The African Charter and human rights education

Article 25 of the African Charter imposes the duty to promote and ensure through teaching, education and publication, a respect for the rights and freedoms contained in the Charter and to see to it that these freedoms and rights, as well as corresponding obligations and duties, are understood. Article 26 adds that 'state parties shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion of the rights and freedoms guaranteed by the present Charter'. If states and the African Commission act upon these provisions with imagination, these articles could prove helpful in developing a useful programme for human rights education in Africa. They establish the normative framework for the development and implementation of effective human rights education programmes in African states. As shall be shown below, it is the African Commission which should monitor the implementation by states of their obligations under these articles.

4 The promotional mandate of the African Commission

The African Commission was established to monitor the implementa-

²⁰ Art 19 'Freedom of association and assembly unions, NGOs and political freedom in sub-Saharan Africa' (2001) <http://www.article19.org/docimages/986.htm> (accessed 5 April 2005).

²¹ IMS Assessment Mission 'The Rwandan media experience from the genocide' (2003) 10 <http://www.i-m-s.dk/pic/Rwanda20media%20experience%20Report%20June03.pdf> (accessed 10 April 2005).

tion of the African Charter. The status of the African Commission within the framework of the African Union (AU) remains unclear, as the Constitutive Act of the AU is silent on the African Commission.²² Considering that the Commission was established 'within' the OAU (now AU) and that the former is funded by and reports to the latter, it can be taken as an organ of the AU in charge of promoting and protecting human rights in Africa.²³

The African Commission has both a promotional and protective mandate. While article 30 of the African Charter generally states that a commission shall be established for the purposes of promoting human and peoples' rights and ensuring their protection in Africa, article 45 details these functions. It lays down the framework for the promotion of human rights that would in the long run, if applied properly, have the effect of forestalling violations. This framework includes the dissemination of information, research and formulation of normative standards and co-operation with national and international institutions for purposes of promoting respect for human rights. In theory, the

²² See the Constitutive Act of the African Union, OAU Doc CAB/LEG/23 15, adopted by the Assembly of Heads of State and Government of the OAU in Lome, Togo on 11 July 2000 (entered into force 26 May 2001), art 5 (listing the organs of the AU). The issue of status of the Commission within the framework of the AU arose as an off-the-agenda but interesting issue in the January 2006 Summit of the AU in Khartoum, Sudan. In addressing a meeting, the Chairperson of the Commission of the African Union (AUC) distinguished the representatives of the organs of the AU in attendance and skipped the Chairperson of the African Commission on Human and Peoples' Rights, who was seated right next to those who were being addressed. The Commissioner Political Affairs of the AUC interjected to remind the Chairperson of the failure to address the African Commission's Chairperson, to which the former replied that the Commission is not an 'organ' of the AU and hence its Chairperson cannot be addressed at the same level as the others. This gave rise to an interesting discussion between the Commissioner Political Affairs and the Legal Counsel of the AU, which culminated in the preparation of a legal memorandum on the status of the African Commission within the framework of the AU to which the attention of the Chairperson of AUC would be called (the author has assisted in the preparation of the memorandum).

²³ The provisions of the African Charter on the establishment of the Commission 'within the OAU' (art 30), the election of commissioners by the highest political organ of the OAU (art 33), the funding and staffing of the Commission by the OAU and the appointment of the Secretary by the Secretary-General of the OAU (arts 41 & 44), and that the Commission reports to the Assembly (art 59) all indicate that the Commission is placed on the same footing with such organs of the AU as the African Court of Justice, the Financial Institutions and Specialised Technical Committees. Again, as the AU is the legal successor to the OAU, the treaty responsibilities of OAU organs under the African Charter have automatically been taken over by organs of the AU. Similarly, organs established within the OAU became organs of the AU. Incidentally, the question of institutional status may definitely arise in relation to the African Court of Human and Peoples' Rights. However, it can be argued that the decision to integrate the African Court of Human and Peoples' Rights and the African Court of Justice into one court (decision of the Assembly of the Union at its 3rd ordinary session in July 2004, Resolution AU/Dec 45 (III)) solves the problem by giving the Human Rights Court the status assumed by the Court of Justice as an organ of the AU under art 5(1) of the Constitutive Act.

African Commission has demonstrated a perfect understanding of this mandate in stating that, within the framework of its promotional role, it has, *inter alia*, an information and education function, a quasi-legislative function, an institutional co-operation function and an examination of state reports function.²⁴

The African Commission carries out various activities in the name of the promotion of human rights. It organises seminars and workshops on various human rights topics in collaboration with different organisations. Commissioners conduct 'promotional missions' to states, depending on the availability of funds,²⁵ during which they engage stakeholders in dialogue on appropriate ways of enhancing the promotion and protection of human and peoples' rights in the specific state. They also take part in conferences, seminars and experts' meetings on various issues related to human rights, in Africa and elsewhere. These are the types of activities which the African Commission usually includes in its activity reports under the heading of 'Promotional Activities'.²⁶ Such activities are largely carried out on a piecemeal basis rather than as a well-co-ordinated continental effort that the Commission is well-placed to create. It is also unlikely that participation of commissioners in 'high level' conferences, workshops and seminars on human rights would have a direct impact on the knowledge of the ordinary public about the human and peoples' rights protected by the African Charter.

Under the African human rights system, as elsewhere, an interest in protection mechanisms overshadows efforts of promoting human rights. However, it was found that the protection of human rights through 'blaming and shaming' governments or states does not yield much fruit.²⁷ This suggests that the promotion of human rights, especially through education, should be given much more weight. For instance, through education in human rights targeted at state officials, professionals, students and the public at large, the violation of human rights can be curbed — while officials and professionals would be required to work in accordance with accepted norms of human rights,

²⁴ African Commission on Human and Peoples' Rights, Mandate http://www.achpr.org/english/_info/mandate_en.html (accessed 20 January 2007).

²⁵ Commissioners were sometimes unable to conduct scheduled promotional missions due to a lack of funding. See eg Twentieth Annual Activity Report of the African Commission on Human and Peoples' Rights, 9th ordinary session of the Executive Council, 25-29 June 2006, Banjul, The Gambia, EX.CL/279 (IX) para 22.

²⁶ The promotional role of the African Commission would be enhanced by the fact that it meets in different African states and is thus able to open dialogue and co-operate with a variety of African governments on a face-to-face basis. See CFJ Doebller 'A complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and other African Union initiatives affecting respect for human rights' (2003) 13 *Transnational Law and Contemporary Problems* 7 15.

²⁷ See N Rosemann 'Human rights education — Towards the end of the UN Decade' (2003) 4 *Nordic Journal of Human Rights* <http://www.hrea.org/erc/Library/rosemann03.pdf> (accessed 15 May 2006).

as informed citizens would put them under pressure to respect the same. For this reason, the promotion of human rights is more effective than deterrence strategies which involve sanction by human rights instruments.²⁸ According to the often-quoted adage, 'prevention is better than cure'. Extensive promotion of human rights through education has special importance for African states where violations of human rights have been prevalent and where, as in many other parts of the world, many people do not have a functional knowledge of human rights.²⁹

The above suggests that the African Commission should build its human rights promotion strategy mainly around the promotion and co-ordination of human rights education. The Commission can make use of its promotional mandate to bring about respect for human rights in African states by organising human rights education and co-ordinating or supervising such efforts by state and non-state actors on the continent. The fact that the newly-established African Court on Human and Peoples' Rights complements the protective functions of the African Commission³⁰ means also that the Commission may now devote much of its resources to the promotion of human rights.

5 The African Commission and human rights education

5.1 Co-ordination

Article 45 of the African Charter provides that the African Commission should disseminate information on the rights guaranteed by the Charter and mechanisms of their implementation. It is also charged with the mandate of encouraging national and local institutions concerned with human and peoples' rights and co-operating with other African and international institutions concerned with the promotion of human and peoples' rights.³¹ Based on the same provision, the Commission

²⁸ D Barnhizer 'Human rights strategies for investigation and "shaming", resisting globalisation rhetoric, and education' in D Barnhizer (ed) *Effective strategies for protecting human rights: Prevention and intervention, trade and education* (2001) 7.

²⁹ See Addo (n 1 above) 100. See also N Flowers 'Human rights education in the USA' (2002) in US Department of State (n 17 above) 18.

³⁰ See the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in Ouagadougou, Burkina Faso, on 9 June 1998 (entered into force on 25 January 2004), Preamble para 7 & art 2.

³¹ This can, eg, be a basis for the African Commission to co-operate with such actors as UNESCO and the OHCHR, both of which are concerned with human rights education at the international level. According to the international Plan of Action under the UN Decade for Human Rights Education (1994-2004), the implementation of which was co-ordinated by the aforementioned organisations, regional human rights organs, such as the African Commission, were to be used as focal points with the role of co-ordination. See UN Doc A/51/506 and UN Doc A/52/469.

may also co-ordinate human rights education efforts of member states to the African Charter.

The African Commission has passed resolutions in which it recited the provisions of articles 25 and 26 of the Charter and highlighted the importance of education to an effective implementation of the African Charter,³² and called on African states to 'ensure . . . that human rights are included in the curriculum at all levels of public and private education and in the training of law enforcement officials'.³³ In its programme of activities for 1992-1996, the Commission pledged to assist in the development of curricula and courses for formal and non-formal education in human rights.³⁴ In 1996, the Commission adopted a five-year Plan of Action, including a section on human rights education with special emphasis on the African Charter, under which it was planned to develop curricula and courses on human rights education for various professional and age groups.³⁵ However, a review of the Activity Reports of the Commission and other relevant documents reveals that many of the components of these impressive resolutions and the Plan of Action were not implemented. The same holds true for the appeal (to the Commission) of the First Ministerial Conference on Human Rights in Africa held in Grand Bay, Mauritius in 1999, to adopt appropriate strategies for human rights education and take measures to implement them.³⁶ In later years, not much has been said by the Commission on human rights education.

Over and above organising general and specialised events of human rights promotion, the African Commission can create a regional or

³² Resolution on Human and Peoples' Rights Education, Seventh Activity Report of the African Commission on Human and Peoples' Rights (1993-1994) Annex VII. The Commission stated that education in human and peoples' rights is a prerequisite for the effective implementation of the African Charter and other international human rights instruments.

³³ Resolution on the African Commission on Human and Peoples' Rights, Promotional Activities, Sixth Activity Report of the Commission (1992-1993). The Commission further requested states to ensure that education for human rights and democracy should involve every organ of society as well as the media. In its Resolution on human rights education (n 32 above), the Commission also requested state parties to ensure that education and information regarding human and peoples' rights are included in the training of law enforcement personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

³⁴ African Commission on Human and Peoples' Rights: Programme of Activities 1992-1996, Human Rights Conferences and Workshops, Sixth Activity Report (n 33 above) Annex V.

³⁵ African Commission on Human and Peoples' Rights, Mauritius Plan of Action (1996 — 2001), sec II/3 on Promotional Mission of the African Commission http://www.achpr.org/english/declarations_mauritius_en.html (accessed 28 July 2006).

³⁶ The First OAU Ministerial Conference on Human Rights in Africa, meeting from 12 to 16 April 1999 in Grand Bay, Mauritius, Grand Bay (Mauritius) Declaration and Plan of Action para 20 <http://www.africanreview.org/docs/rights/grandbBay.pdf> (accessed 26 July 2006).

central mechanism of co-ordination and supervision of human rights education efforts in Africa. First and foremost, it may create a pool of resources on human rights education that responds to the needs in various states. This would simply be a realisation of the promises in the above-mentioned resolutions and action plan. A continental mechanism for human rights education may further be created through: the establishment of partnerships and co-operation with and among non-governmental organisations (NGOs) and national institutions in accordance with article 45(1)(c) of the Charter, the state reporting procedure under article 62 of the Charter, and the Commission's special procedures.

Through partnerships among different actors, a pool of potential and experience can be created for effective human rights education. There is a finding to the effect that, in Africa, most NGOs are aware of human rights education initiatives of governments and the latter are also aware of similar programmes of NGOs.³⁷ There is also evidence of collaboration of NGOs with governmental institutions through joint projects and networking activities.³⁸ Moreover, governments and NGOs have a relationship with the African Commission.³⁹ This is a ground on which the latter can build to strengthen joint efforts on human rights education. The fact that there is also a quest for improved partnership⁴⁰ would help the Commission to create the necessary partnership between governmental and non-governmental institutions.

The African Commission has a strong relationship with NGOs.⁴¹ It has an NGO forum before every session. At this forum, NGOs report on their activities, including human rights education, and the Commission

³⁷ Mid-term evaluation report (n 2 above) para 28.

³⁸ As above, para 36.

³⁹ The African Commission has established a procedure for granting affiliate status to national human rights institutions and observer status to NGOs. More than 30 states have national human rights institutions with which the Commission has developed links and over 350 NGOs have observer status at the Commission.

⁴⁰ Mid-term evaluation report (n 2 above) para 41. Consecutive conferences of African national human rights institutions have also stressed the need for partnership with NGOs and the African Commission. See the Durban Declaration (second conference held in Durban, South Africa, 1-3 July 1998) paras 8 & 14, and Lome Declaration (third conference held in Lome, Togo, 14-16 March 2001) para 5. The latter urged African institutions to apply for affiliate status with the African Commission.

⁴¹ NGOs have been in the forefront in educating in human rights in Africa. Already in 1993, in a resolution that has actually been proposed by NGOs, the African Commission has taken into consideration the great efforts made by the African NGOs to promote and implement human and peoples' rights through education on both formal and informal levels and decided to intensify its co-operation with the African NGOs on human and peoples' rights education. See Resolution on human rights education (n 32 above).

recommends ways of making their endeavour effective.⁴² This is appreciable. However, this should be coupled with organising a similar forum for national institutions concerned with human rights education and establishing or strengthening partnerships between them and NGOs. The Commission can use this opportunity to promote co-operation and co-ordination between state and non-state actors. It would be worthwhile to create a common forum for both.

5.2 Monitoring

5.2.1 State reporting

Under article 1 of the African Charter, state parties undertake to adopt legislative and other measures to give effect to the rights in the Charter. As has been pointed out above, articles 25 and 26 of the Charter impose the duty to educate the public on human rights and establish institutions entrusted with the promotion of human rights. Under article 62, states are required to submit reports to indicate how they have implemented article 1, that is, the legislative and other measures they have adopted to give effect to the Charter. In relation to human rights education, states are expected to report on the legislative, policy and practical steps they have taken to carry out their obligations or to realise the right of citizens to human rights education. The African Commission examines such reports,⁴³ in the course of which it should stress the duty of states to adopt comprehensive national human rights education programmes and implement these effectively.

The African Commission adopted Guidelines for State Reporting in 1989 which require state parties to report on each right and duty enshrined in the African Charter. Considering that these guidelines of the Commission are lengthy and probably serve as a disincentive to reporting, the Commission adopted complementary summary guidelines under which states are specifically required to report on the steps taken to carry out their obligations on human rights education under article 25 of the Charter.

State reports are discussed in public at each session of the Commission. One commissioner is designated as Special Rapporteur and is required to prepare a list of questions to be addressed by the representatives of the reporting state. This list is sent to the state ahead of the

⁴² Interview with Prof EVO Dankwa, Commissioner African Commission on Human and Peoples' Rights, on 10 November 2004. However, the interviewee agreed that issues relating to human rights education arise in the same way as other issues and hence do not get the particular attention this paper argues for. He also agreed that the right to human rights education has not been taken seriously in Africa.

⁴³ While art 62 of the African Charter does not designate a specific organ to consider reports of states, the African Commission requested the OAU to specifically assign it with the mandate at its 3rd ordinary session in April 1988 and the latter approved the request at its 24th ordinary session.

consideration of the report. Considering the special importance of human rights education and the clear obligation of states in that respect, the Rapporteur should incorporate specific questions relating to the steps taken with regard to human rights education. The Commission may get the necessary information on the steps taken by states from other sources, mainly NGOs.⁴⁴ It should also identify human rights education programme components, based on which it can advise states or make comments.⁴⁵

During the examination of states' reports, commissioners sometimes stress the importance and necessity of public awareness about the African Charter rights.⁴⁶ They also ask about the extent to which the provisions of articles 25 and 26 of the Charter are implemented in member states.⁴⁷ The Commission has also begun issuing concluding observations in which it enshrines recommendations that states should make efforts to ensure that the provisions of the African Charter are widely known to adults and children alike.⁴⁸ The problem is that such questions and recommendations, which arise in the examination of some reports, are often based on insufficient information. The Commission should gather supplementary information from various sources on the status of human rights education in specific states. The Rapporteur preparing the list of questions should do extensive research before preparing a detailed list of questions relating to human rights education.

5.2.2 Special procedures

The African Commission can also make use of its Special Rapporteurs

⁴⁴ According to the Commission, upon receipt of a report, the Secretariat sends copies to international (such as Amnesty International and the International Commission of Jurists) and local (from the state that has submitted the report) NGOs and invites them to avail to it information and/or questions relating to human rights in the submitting state. See African Commission on Human and Peoples' Rights, State Reporting Procedure http://www.achpr.org/English/_info/state_procedure_en.html (accessed 20 May 2007). While this has rarely been interpreted in practice, it would serve as a valuable source of information regarding human rights education in the state concerned and hence help the Commission to provide useful comments.

⁴⁵ The Commission may make use of the components and related practices discussed under sec 2 of this article.

⁴⁶ See eg Examination of the Initial Report of Nigeria, 13th session, April 1993, published by the Danish Centre for Human Rights (1995). Commissioner Kisanga stressed the importance of awareness in enforcing the rights in the Charter and asked about the situation in Nigeria, particularly in rural areas, to which the representative of the state answered that human rights were being taught in schools, 'though not properly'. It would have been far better if there were information on the state of human rights education in Nigeria to base the question on.

⁴⁷ See eg Report on the 14th session of the African Commission (1-10 December 1993), Examination of Report of Ghana.

⁴⁸ Eg, see Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa, adopted at the 38th ordinary session of the African Commission (21 November to 5 December 2005) para 27.

and other mandate holders of country or thematic mechanisms to regularly encourage human rights education efforts through their activities and include systematically in their reports and recommendations information on human rights education as relevant to their mandate.⁴⁹

While the Special Rapporteur mandates that already exist may be good enough to work towards effective human rights education on the continent, provided that they mainstream human rights education in their activities, the establishment of a specific mandate on human rights education would provide an opportunity of particular importance to promote human rights in Africa and hence prevent violations in the first instance.

6 Conclusion

The African Commission has passed resolutions on human rights education in which it highlighted the legal framework available for the creation of a comprehensive continental mechanism. However, the Commission has undertaken few activities relating to human rights education. The Commission may establish a meaningful continental system for human rights education through partnership and co-operation with states and non-state actors. It may also monitor the implementation by states of their obligation to educate in human rights through the state reporting procedure and its special mandates.

⁴⁹ The African Commission has Special Rapporteurs on prisons, women, freedom of expression, human rights defenders, refugees and displaced persons and extra-judicial executions. While all these mandates have a promotion aspect, the human rights defenders rapporteur has special relevance to human rights education in that it aims at protecting those who are involved in promoting human rights. The resolution which established the latter mandate (35th ordinary session, Banjul, The Gambia, 4 June 2004) stressed the crucial contribution of human rights defenders in promoting human rights, democracy and the rule of law and called upon member states to include information on measures taken to protect human rights defenders in their periodic reports. The Commission also has Working Groups on the death penalty, on specific issues relating to the work of the African Commission, and on indigenous populations/communities in Africa whose mandate may be used to promote human rights in the areas of their work.

When a child is not a child: The scourge of child soldiering in Africa

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Summary

The important place of children as integral to every country's future has been documented in legal, political, social and economic doctrine on domestic, regional and international platforms. Human rights instruments and covenants all espouse the protection of the child with concomitant rights and state obligations. Yet, despite this, in several countries in Africa, one finds children being abused through the wholly unconscionable practice of child soldiering. Whilst this scourge is not only an African problem, it is recognised that the dilemma is critical in Africa. This article examines the reasons why any country and/or military group/person would introduce children to armed conflict, the effect of such engagement on the child victim, and the international and African regional legal conventions. Taking cognisance of the continued abuse of children as participants in armed conflict, the writer makes recommendations for the elimination of the crisis, at both national and international levels. If the terror is allowed to continue unchecked, the consequences for Africa will, inevitably, be the emergence of a generation of disaffected individuals with concomitant limitations for growth and development personally and for Africa, as a whole. This is not the legacy of the African renaissance.

1 Introduction

The phrase 'child soldiers' appears to be a patent antithesis; yet various research reports and articles in the popular press make reference to the reality of hundreds of children across the world participating in war and hostilities as combatants and supporting resources. Reports from

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Human Rights Watch indicate the shocking statistics of children being used in armed conflict in more than thirty countries around the world.¹ Brett estimates the number of child soldiers worldwide at 300 000² and Twum-Danso notes that about 120 000 of them are in Africa.³ The evidence presented by the Coalition to Stop the Use of Child Soldiers makes for even more harrowing reading, with reportedly higher numbers of children being exploited in armed conflict worldwide. According to their report, '[m]ore than 500 000 children under 18 have been recruited into state and non-state armed groups in over 85 countries worldwide. At any one time, more than 300 000 of these children are actively fighting as soldiers . . .'⁴ Analysing the various reports, it is clear that the problem is not limited to one country or geographic region, but it is described as being most prevalent and critical in Africa.⁵ The

¹ Human Rights Watch 'Stop the use of child soldiers: Facts about child soldiers' <http://www.hrw.org/campaigns/crp/index.htm> 1 (accessed 10 November 2005).

² R Brett 'Child soldiers: Causes, consequences and international responses' in E Bennett *et al* (eds) *ACT against child soldiers in Africa: A reader* (2000) 18. See also Twum-Danso (n 1 above) 12 and BBC World Service 'Children in conflict' <http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/> 1 (accessed 10 November 2005).

³ Twum-Danso notes that, of the estimated 300 000 children exploited as child soldiers, 120 000 are in Africa. A Twum-Danso *Africa's young soldiers: The co-option of childhood* (2003) 12.

⁴ IRINnews.org 'Too small to be fighting in anyone's war' <http://www.irinnews.org/webspecials/childsoldiers/default.asp> 1 (accessed 10 November 2005).

⁵ The Coalition to Stop the Use of Child Soldiers confirms unequivocally that 'Africa has the largest number of child soldiers' Coalition to Stop Child Soldiers 'Frequently asked questions' <http://www.child-soldiers.org/childsoldiers/questions-and-answers> 1 (accessed 17 May 2007). See also Choike 'Child soldiers' http://www.choike.org/nuevo_eng/informes/972.html 1 (accessed 10 November 2005) and Amnesty International 'Child soldiers' <http://web.amnesty.org/pages/childsoldiers-index-end> 1 (accessed on 10 November 2005). The following examples from various reports provide a more graphic illustration of the extent and nature of the problem confronting Africa: In Uganda, the rebellion of the Lord's Resistance Army (LRA) against the government has been on-going since the 1980's. One UN Report records that since the beginning of the resistance campaign, approximately 30 000 children have been abducted to serve by the LRA: United Nations 'Uganda: Child soldiers at the centre of mounting humanitarian crisis' <http://www.un.org/events/tenstories/story.asp?storyID=100> 1 (accessed 10 November 2005). The report continues: 'The most disturbing aspect of this humanitarian crisis is the fact that this is a war fought by children — minors make up almost 90% of the LRA's soldiers. Some recruits are as young as eight years, inducted through raids on villages. They are brutalised and forced to commit atrocities on fellow abductees and even siblings. Those who attempt to escape are killed. For those living in a state of constant fear, violence becomes a way of life and the psychological trauma is incalculable.' United Nations 'Uganda: Child soldiers at the centre of mounting humanitarian crisis' <http://www.un.org/events/tenstories/story.asp?storyID=100> 1 (accessed 10 November 2005). Other reports from Human Rights Watch indicate that in October 2005 there was definite evidence that the Ivorian government had begun recruiting Liberian children who had previously participated in Liberia's civil war to go into combat alongside other combatants: Reuters Foundation (1) 'Alerting humanitarians to emergencies' <http://www.alertnet.org/thenews/newsdesk/HRW/aa2c8d3c3f4ca971df0f695211847956.htm> 1 (accessed 10 November 2005). Evidence to support this allegation came from a series of

majority of the children recruited into armed service range in age from 15 years to 18 years. There are, however, reports indicating that children as young as seven years have been part of armed conflicts.⁶

Accepting these facts, the next (uninformed) assumption that is often made is that such an unconscionable practice must be the activity of illegitimate and/or rebel groups. However, again this myth must be dispelled, as the references to children in armed conflict speak to their deliberate recruitment by armed opposition groups, paramilitaries and also the civil militia.⁷ Recruitment further appears to have little gender bias and both male and female children are recruited into armed conflict.⁸

2 Understanding children's participation in the armed forces

Children join the armed forces for a number of reasons. In some cases, their actions are completely voluntarily, in other instances they act out of desperation, whilst other children become victims of participation because they are forced or abducted into the army.

In the first two instances, where children voluntarily join the fighting forces, in many cases the underlying reason was a need for security, taken in whatever form. Research shows that children often join the

interviews conducted with Liberian ex-combatants (including three children aged between 13 and 17 years). The interviewees all indicated that they had been approached by recruiters from either Liberia or Côte d'Ivoire to join the government forces in Côte d'Ivoire in the fight against the anticipated civil unrest. In further describing some of the militia camps inside Côte d'Ivoire, they reported that these bases housed several hundred Liberians — 'with dozens of Liberian children' — most of whom had also fought with the Liberian rebel group': Reuters Foundation (1) (above) 2; P Kouassi 'Ivory Coast recruiting Liberian child soldiers' *The Guardian* 29 October 2005 7. Reports from Bujumbura deal with anecdotal evidence of children as young as 12 years who were taken off the streets by Tutsi militia men in Burundi to join in their fight against the Hutu rebels. The number of children used in the conflict between the Hutu majority and Tutsi minority varies, but a guesstimate appears to place the figure at approximately 3 000: Reuters Foundation (2) 'Alerting humanitarians to emergencies' http://www.leadingthecharge.com/stories/news_0099188.html 1 (accessed 10 November 2005). In another report, an 11 year-old boy fleeing his village outside Bujumbura, which had been razed by violence, found himself taken with the tide of refugees to Sudan. Here he was immediately recruited by Sudanese rebels and immediately put to war. This was his life for the next nine years until he was rescued by the United Nations forces: Reuters Foundation (1) (above) 1-2. For additional case studies and references, see Bennett *et al* (n 3 above) 35-67.

⁶ n 4 above, 1.

⁷ United Nations 'Impact of armed conflict on children' <http://www.un.org/rights/concerns.htm> 1 (accessed 10 November 2005).

⁸ Twum-Danso (n 1 above) 39. As an example, Human Rights Watch reports that in Ethiopia and Uganda it is estimated that almost one-third of child soldiers are, in fact, female. Human Rights Watch (n 2 above) 1.

army after their homes had been decimated by fighting in the area and their family scattered and/or killed in the fighting. In such circumstances, for these children left alone, the 'army' provided a refuge where the recruits were assured of shelter, food and protection.⁹ These children are drawn into the fighting force which becomes a 'safe haven' and surrogate home for them. In this case, the task of removing children from the armed situation becomes even more difficult because the children simply have nowhere else to go. In many cases, once removed from the fighting forces, the only alternative for the child would be to either rejoin the armed forces or go into a life of crime. Without a very strong support system or remedial intervention, these children become excellent targets for re-recruitment.

There are also examples of children who joined the various armed forces because of the financial incentive provided. For instance, in the case of children being recruited for the fighting in Côte d'Ivoire, children interviewed by Human Rights Watch indicated that they were lured with offers of cash — between \$300 and \$400 — if they were prepared to take up arms. Others indicated that, in addition to the money for their own services, they were given 'money, rice and clothing to encourage their friends to join'.¹⁰ In many of these cases, the initial contact was made by someone known to and trusted by the children.

Yet other voluntary recruits saw the armed force to which they attached themselves as a means of doing something to avenge family killings. Simbulan notes that in yet other cases, the passion and motive

⁹ Yet, art 24 of the Fourth Geneva Convention, 1949 (ie the Convention dealing with the protection of civilian persons in time of war) makes special provision for a child's welfare in times of conflict. It states: 'The parties to the conflict must take the necessary measures to ensure that children who are orphaned or separated from their families as a result of war, are not left to their own resources . . . The parties to the conflict must facilitate the reception of such children in a neutral country for the duration of the conflict (my emphasis). Quite apparently, the intention of the Convention is that children during times of conflict receive special protection, even if it requires their transfer from the zone of hostility to a place of safety. Unfortunately, in many of the cases cited above, there is no adherence to this rule and, in fact, children in situations of vulnerability are seen as an easy target for growing the numbers of the fighting forces. Interestingly, this is not only an African crisis. Reports from the Philippines are that Filipino children also regard the taking up of arms as a way out of poverty: Inq7.net 'Kids take up arms as a way out of poverty, study says' http://news.inq7.net/nation/index.php?index=18story_id=56680 1 (accessed 16 November 2005). In Southern Afghanistan, a 14 year-old boy serving as a military policeman admitted to interviewers that 'life was tough but that he had to join the "army" to earn some money for his family' (n 4 above, 2). According to IRIN, this boy is one of about 8 000 children believed to be under arms in Afghanistan.

¹⁰ Reuters Foundation (1) (n 5 above) 2. Ellis also notes that in Liberia '[m]any of the Liberian youths who joined Charles Taylor's NPFL to overthrow the Doe administration saw the civil war as an opportunity to acquire property and riches': S Ellis 'Liberia's warlord insurgency' in C Clapham (ed) *African guerillas* (1998) 158.

were not necessarily based in personal or private loss but rather in the child's belief in the creed of the armed group and the lack of trust in the government.¹¹

In all of these instances, however, despite the apparently voluntary nature of their conduct, the social, economic, political and psychological pressures associated with the joining exercise and the concomitant lack of real understanding of the issues involved cannot be over-emphasised. Machel makes a stronger statement, arguing aggressively that child soldiers can never be seen as 'voluntary recruits', as she notes that when the only options are survival or death/poverty, the choices of the children can hardly be called free and fair.¹²

The second broad category of child soldiers pertains to those children who are simply abducted into the fighting forces from their homes at night or from their schools. Reports also indicate that when a village has been massacred, the attacking forces make a deliberate effort to seize children who appear homeless and/or orphaned.¹³

Many of the children interviewed report that, having been recruited either by force or voluntarily, they are then made to commit various atrocities against their own communities, friends and family. The armed groups compel such actions as a means of ensuring that the children are effectively stigmatised and unable to return to their homes and communities.¹⁴ Most children, however, say that they remained with and continued to follow orders in the army because they were terrified of the repercussions of leaving. Several indicated that they were repeatedly threatened with death if they contemplated leaving.¹⁵ However, for others (as stated above), the army became the only life they knew. If they left, they realised that they would be on their own.

¹¹ Inq7.net (n 9 above) 4. In reading the anecdotal evidence, it is always interesting to note, however, that whilst the ideology of the freedom fighter may be the predisposing reason for some child soldiers, with just as many others, the end result is that even the most honourable cause is quickly shattered when children are made to actually participate as part of the armed group. A Honduras case study succinctly sums up this shattered dream and the concomitant impact on the child. 'At the age of 13, I joined the student movement. I had a dream to contribute to make things change, so that children would not be hungry. . . . Later I joined the armed struggle. I had all the inexperience and the fears of a little girl. I found out that girls were obliged to have sexual relations to alleviate the sadness of the combatants. And who alleviated our sadness after going with someone we hardly knew? . . . There is a great pain in my being when I recall all these things. . . . In spite of my commitment, they abused me, they trampled my human dignity. And above all, they did not understand that I was a child and that I had rights.' See United Nations (n 7 above) 2.

¹² G Machel *The impact of war on children* (2001) 11.

¹³ See R Peacock & K Booyens 'Victimisation vulnerability of children' in L Davis & R Snyman (eds) *Victimology in South Africa* (2005) 184.

¹⁴ See S Stavrou & R Stewart 'The reintegration of child soldiers and abducted children: A case study of Paloro and Pabbo, Gulu District, Northern Uganda' in Bennett *et al* (n 3 above) 35. See also Human Rights Watch (n 2 above) 2.

¹⁵ n 2 above, 1.

3 Why children?

Whilst there can be no excuse or justifiable explanation for why children would be targeted to participate in wars, conflict and hostilities, the reality is that it is happening. In analysing this situation, observers tend towards general agreement on the reasons why children have been and are still being exploited in armed conflict. Firstly, the children abducted (and even those who volunteer) are generally a cheap resource. They can be paid less and also eat less and are regarded as more expendable than adult soldiers.¹⁶ Secondly, as a result of their vulnerability and emotional and physical immaturity, children are generally less demanding, more malleable and obedient than adults. They can also be better manipulated, generally and specifically in these circumstances because they tend not to properly understand and question the issues. Children are often also described as 'fearless soldiers'. This is again often because they cannot comprehend and/or begin to imagine the consequences of what is expected of them. They simply take instructions or, if they dare to show resistance, they are cowed into submission. This was borne out by a 14 year-old respondent recruited by the Guatemalan army, who stated to Human Rights Watch: 'They forced me to learn how to fight the enemy, in a war that I didn't understand why it was being fought.'¹⁷ Another 16 year-old girl abducted by the Lord's Resistance Army in Uganda stated:¹⁸

One boy tried to escape [from the rebels], but he was caught . . . His hands were tied, and then they made us, the other new captives, kill him with a stick . . . I knew this boy from before [and when] I refused to kill him, they told me they would shoot me . . . After we killed him, they made us smear his blood on our arms. . . . They said we had to do this so we would not fear death and so we would not try to escape . . . I still dream about the boy from my village who I killed. I see him in my dreams, and he is talking to me and saying I killed him for nothing, and I am crying.

An ex-combatant from Burundi stated: 'It was terrible . . . When you heard shooting all you wanted to do was run away, but if you did, your own guys would shoot you.'¹⁹

¹⁶ Reuters Foundation (1) (n 5 above) 2. Research studies indicate that children abducted by armed forces are, generally, children from poorer homes. When a child from a wealthy home is abducted, the trend is usually to release the child after the requested ransom has been paid. See Twum-Danso (n 1 above) 13.

¹⁷ Human Rights Watch 'Stop the use of child soldiers: The voices of child soldiers' <http://hrw.org/campaigns/crp/voices.htm> 1 (accessed 9 January 2006).

¹⁸ n 17 above, 1.

¹⁹ See Reuters Foundation (2) (n 5 above) 1. This statement was made by a 17 year-old boy from Burundi who had been part of the Tutsi militia since the age of 12 years.

Lastly, and most importantly, IRIN contends children are used simply because countries can use them. The reality is that 'little effective action has been taken against those who violate the conventions and international agreements'.²⁰ For example, in Liberia, the United Nations (UN) Peace Keeping Mission indicated that they were aware of the problem and were 'actively monitoring the situation' on Liberia's borders.²¹ However, the reality is that, in the meantime, children continue to be trafficked into armed conflict on a daily basis in the area.

4 The consequences of child soldiering

Without being hierarchical or exhaustive, it would appear that the impact of child soldiering on the child victim is, at least, three-fold. This includes, broadly, physical danger, psychological trauma and educational stultification.

All the international conventions and most domestic rules acknowledging the importance of the welfare of the child reflect on the fundamental importance of a child's right to life, to safety, health, security and protection, to education, to shelter and food, and to dignity and respect. Child soldiers, however, have all of these rights violated — not only are they forced to perpetrate barbaric acts of violence against others, but they have also had to experience such violence perpetrated against their own persons. In reading about the lives of children exposed to war, one immediately recognises the real potential for these children to develop the symptoms of post-traumatic stress disorder. The corollary is that they become depressed, disaffected individuals with persisting patterns of problematic behaviour and functioning. Alcohol or substance abuse becomes common in adult life and many of the victims demonstrate a marked difficulty in establishing and maintaining social relationships. Many present later in life with an overwhelming fear of the unknown. This was supported by the report on child soldiers published by the World Health Organisation in 1996.

For many of the children, participation in the armed conflict may mean death or, at the very least, physical mutilation and/or psychological marring. In considering the psychological effects of child soldiering on the lives of the victims, one must be cognisant of one of the greatest abuses perpetrated against these children, namely, the loss of their childhood. Playing is a luxury to them and many of the affected children have been forced to commit grievous harm against strangers and, worse still, against people known and close to them. For example, reports taken from Angola point to child soldiers fighting for UNITA being forced to kill their relatives and neighbours and to loot their own

²⁰ n 4 above, 2.

²¹ Angola Press 'UNMIL: Liberian child soldiers recruitment was foreseen' 10 November 2005 1 (accessed 9 January 2006).

villages.²² Twum-Danso also refers to health issues and the probability of these children contracting sexually transmitted diseases, respiratory tract infections, worm infestations and other illnesses due to poor hygiene.²³

From the research it would appear that, as members of the armed group, the children are required to participate in all aspects of contemporary warfare — they are taught to march, exposed to the manoeuvres of combat and trained in deception and camouflage. In most cases, the younger children are used as cooks, spies, porters, scouts, messengers and look-outs. However, in some conflict situations, their direct involvement in actual combat is also a reality. BBC World Service reports that in many cases the smallest boys are placed closest to the enemy because of the view that they are fearless and unpredictable.²⁴ These children are typically provided with AK-47, Kalashnikov or M-16 rifles, which they are then expected to use.²⁵ Children have also been used to serve as human mine detectors and been part of obvious suicide missions.²⁶ Girls are especially vulnerable, being used not just for soldiering but also for sexual gratification.²⁷

Another very serious consequence of child soldiering is the introduc-

²² Twum-Danso (n 1 above) 29. Similarly, based on its interviews with child soldiers in Sierra Leone, Human Rights Watch provides evidence of children being forced into the armed situation and being made to participate in beheadings, amputations, rape and burning people alive (n 2 above, 2). Another 14 year-old ex-combatant told interviewers, 'I've seen people get their hands cut off, a 10 year-old girl raped and then die, and so many men and women burned alive . . . So many times I just cried inside my heart because I didn't dare cry out aloud' (n 2 above, 1).

²³ Twum-Danso (n 1 above) 35.

²⁴ BBC World Service (n 3 above) 2.

²⁵ See Stavrou & Stewart (n 14 above) 35. It is suggested that the proliferation of light weaponry in the form of Kalashnikov, AK-47 and M-16 rifles has now made it much easier for young children to carry arms. See IRINnews.org (n 4 above) 2; also Amnesty International http://www.amnestyusa.org/child_soldiers/index.do 1 (accessed 10 November 2005). The AK-47 and M-16 rifles are also easy to operate and with this, one can only assume that more and even younger children will now be deployed into active combat, exacerbating an already vicious scourge. In fact, BBC World Service already reports that boys as young as eight years are being armed with AK-47 rifles and sent into war. BBC World Service (n 3 above) 2. See also generally the Report of the UNICEF Workshop 'Disarming children and youth' held in Ghana in September 2002, published by UNICEF.

²⁶ n 2 above, 1.

²⁷ See Stavrou & Stewart (n 14 above) 48-9 who cite the following case studies: 'I was defiled by some older boys (could not remember how many) when we were being marched to the rebel camp. After returning from Sudan, I was a wife to one rebel commander, then another junior commander and then to two "older" rebel soldiers (one was younger than she). I had one child who died when he was a few days old. I was a slave to the rebels for 19 months.' In the second case study, the young soldier states, 'I was abducted at the age of nine, I was a good soldier and by the age of 14, I was given my first wife (she was 17 years old at the time). When I turned 18, I was rewarded with a second wife (then 14 years old). I have had two children with the one and one child with the other.' In Northern Uganda, Human Rights Watch spoke to girls who were part of the rebel army who revealed how, after being impregnated by rebel commanders, they were made to strap their babies on to their backs 'and then continue to take up arms against Ugandan security forces' (n 2 above, 2).

tion of many of the children to addictive narcotic substances. Twum-Danso reports that children forced to take part in atrocities of combat are often given drugs to overcome their fear or reluctance to fight.²⁸ Boys described these pills as making them feel completely fearless during the fighting. In a Human Rights Watch interview, a 13 year-old former child soldier from Liberia stated:²⁹

They gave me pills that made me crazy. When the craziness got in my head, I beat people on their heads and hurt them until they bled. When the craziness got out of my head, I felt guilty. If I remembered the person I went to them and apologised. If they did not accept my apology, I felt bad.

For many children who participate in hostilities, the biggest problem is being accepted back as a normal child in society. Many of the community members fear the children or treat them with wariness, believing that they could easily take up arms again and threaten the stability of the community.³⁰ For those children who are accepted back into the community, many experience difficulties fitting in with their peers. A further real problem is that, in most cases, the ex-combatants would have received no education whilst in the armed forces and where education structures remain and continued learning is possible, when they are re-introduced to the schooling system, they would have to be placed in grades lower than their age and peer groups. (In many instances, however, the notion of further schooling is a *non sequitur* with the educational facilities completely destroyed by the fighting.)

5 International law

There is no gainsaying that the international world is cognisant of the problem of child soldiers. As a result, the use of child soldiers has been expressly prohibited by various international treaties under international human rights law, humanitarian law, criminal law and even the labour law.

5.1 The Additional Protocols to the four Geneva Conventions of 1949

The Geneva Conventions of 1949 set out in detail the general rules of international humanitarian law dealing *inter alia* with the rights and obligations in respect of children in situations of armed conflict. The two Additional Protocols reflect the rules as relevant to specific situa-

²⁸ Twum-Danso (n 1 above) 14. The narcotic 'cocktails' given to the children include marijuana and gunpowder, cane juice and gunpowder or, in that latter case, cane juice and gunpowder mixed with an amphetamine to make them feel 'strong and brave'.

²⁹ Human Rights Watch (n 17 above) 2.

³⁰ Reuters Foundation (1) (n 5 above) 2.

tions, namely the protection of victims of international armed conflicts (Additional Protocol I, 1977) and the protection of victims of non-international armed conflicts (Additional Protocol II, 1977).

Both of the Additional Protocols prescribe 15 years as the minimum age for children to be recruited into or used for armed hostilities — both at government and non-government levels. Specifically, article 77 of Additional Protocol I (which deals with international armed conflict) requires that:

The Parties to the conflict *shall take all feasible measures* in order that children who have not attained the age of 15 years do not take a *direct part* in hostilities and, in particular, they shall refrain from recruiting them into their armed forces (my emphasis).

Article 4(c) of Additional Protocol II — which covers non-international armed conflict — states more directly:

Children who have not attained the age of fifteen years *shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities*.

Reading the two sections, one identifies several limitations. Firstly, the cut-off age of 15 years is too young. In most aspects of legal engagement, the norm of general application is for any person under 18 years of age to be regarded as a child. Given the character of armed conflict and the consequent impact on the mental, physical and psychological well-being of the participant, one could reasonably argue that the age limit should, in fact, be raised rather than lowered. Secondly, the rule in respect of non-international armed conflict — article 4(c) — is far more peremptory than the rule in respect of international conflicts. This is difficult to understand or explain: One would have anticipated that the rule in respect of both situations would, at least, be the same. By simply requiring that state parties in international armed conflict take all ‘feasible measures’ provides a claw-back, causing the rule to be emasculated.

Furthermore, article 77 deals only with children’s engagement in ‘direct’ hostilities. However, research shows that a very large percentage of the children participating in armed conflict are used for activities collateral to the direct fighting. A serious limitation of the rule is the failure to refer to and specifically proscribe such indirect engagements, as well.

5.2 The Convention on the Rights of the Child, 1989

The Convention on the Rights of the Child, which came into effect after the Geneva Convention and the Additional Protocols, describes a ‘child’ as someone under the age of 18 years: However, for the specific purpose of engagement in armed conflict, the Convention (article 38) defers to the Geneva Conventions and specifically uses the lower age of 15 years as the minimum for recruitment or engagement in any form of armed hostilities. However, article 38 does urge state parties to take

all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.³¹ In a further effort to provide a minimal additional layer of protection, article 38 (paragraphs 2 and 3) also requires that priority be given in recruitment to the oldest of those aged between 15 and 18 years.³²

5.3 The Optional Protocol to the Convention on the Rights of the Child, 2002

The Optional Protocol, '[d]isturbed by the harmful and widespread impact of armed conflict on children' and '[c]ondemning the targeting of children in situations of armed conflict', deals specifically with the engagement of children in armed conflict. Previous international standards had permitted children as young (and immature) as 15 years to be recruited for purposes of armed conflict. The Optional Protocol takes a positive step in providing expressly for 18 years as the minimum age for a child to be compulsorily recruited into armed groups, or for direct participation in armed conflict. Article I of the Protocol states:

State parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

The Protocol, however, still does not prevent armies accepting children younger than 18 years old who voluntarily sign up for 'service', nor does it prohibit children younger than 18 years from being used for involvement other than in *direct* armed conflict situations. However, article 3 (covering voluntary recruitment) asks state parties to raise the minimum age to 18 years. Vandewiele notes that the phrasing of this article is, in fact, a compromise position. By way of explanation, he notes that the Committee on the Rights of the Child expressly supported the notion of an 18-year minimum age for voluntary recruitment; however, there was opposition from various state parties based on (i) the view that 17 years was an appropriate minimum age for voluntary recruitment based; and/or (ii) the argument that the 18 year age limit would 'undermine an important accessory purpose of military service, namely educating young people'.³³

³¹ Note again the failure to be more authoritative. Rather, the Convention also uses the phrase 'feasible measures'. Additionally, the reference in the Convention is limited to *direct* participation in hostilities.

³² G van Bueren *The international law on the rights of the child* (1998) 337.

³³ T Vandewiele *A commentary on the United Nations Convention on the Rights of the Child — Optional Protocol: The involvement of children in armed conflicts* (2006) 31. See also Harvey who confirms 'the resistance of states, and more particularly the USA, to change their practice of recruiting and deploying under-18s'; R Harvey *Children and armed conflict. A guide to international humanitarian and human rights law* (2003) 27.

Article 4 of the Optional Protocol is especially relevant, as it expressly sets out conduct applicable to armed groups that are distinct from armed groups of a state. It is a welcome development on the Convention on the Rights of the Child, which applies only to state parties.³⁴ In dealing with children participating in armed conflict on behalf of non-state armed groups, the Optional Protocol, 2002, is, however, far more vehement. Article 4 states:

- 1 Armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
- 2 State parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices.

The different standards for state and non-state parties that are prescribed in Additional Protocols I and II, 1977, are repeated in the Optional Protocol and the expressed difficulty of the writer to understand the purpose is re-iterated. In this regard, Vandewiele also notes that the distinction has the very real potential to undermine the Protocol 'since it is unlikely that armed groups are willing to obey rules that place them in a more constraining situation than their adversaries'.³⁵

The Optional Protocol clearly seeks to find a synergy with human rights and humanitarian law principles in further providing explicitly for the re-integration as well as demobilisation of former child soldiers.³⁶ There is no mention of the latter provision in the Convention on the Rights of the Child and it is an important addition in the Optional Protocol. The provisions of the Optional Protocol also seek to comply with the International Labour Organisation's Worst Forms of Child Labour Convention 182, 2000.

5.4 The International Labour Organisation's Worst Forms of Child Labour Convention 182, 2000

In describing a 'child', the Convention includes all persons under the age of 18 years and in proscribing the worst forms of child labour, article 3(a) specifically includes 'forced or compulsory recruitment of children for use in armed conflict'. Articles 3 and 38, however, provide that a child of 16 years may voluntarily present him or herself for recruitment into armed service. Article 3(3) then attempts to ameliorate the possibility of abuse, setting out specific safeguards to be met when children younger than 18 years are permitted to join the national armed forces. These include:

- (a) recruitment must be genuinely voluntary;

³⁴ Vandewiele (n 33 above) 39.

³⁵ Vandewiele (n 33 above) 41.

³⁶ Vandewiele (n 33 above) 9.

- (b) reliable proof of age must be provided;
- (c) recruitment is carried out with the informed consent of the child's parents or legal guardians. Such informed consent shall include a complete knowledge of the duties involved such as military service.

Whilst laudable in spirit, one needs to remember that in many cases of recruitment of child soldiers, poverty is a strong influencing factor. In such cases, parents may offer their children as soldiers with the understanding that the army will pay the child's wage directly to the family.³⁷ In the case of girl children joining the armed forces, another dimension emerges in respect of those young women considered to have no or limited marriage prospects. In such cases, they are actively coerced and 'sold' to the army so that they will not be a continuing burden to the family.³⁸

5.5 The Rome Statute of the International Criminal Court, 1998

The Statute is an attempt to regulate the activities of the international criminal court and to set out its parameters of activity. Within this context, the Statute defines war crimes, providing for both state conduct as well as non-governmental internecine conflict. Under this definition, article 8(2)(b)(xxvi) makes it a crime of war to conscript or enlist 'children under the age of 15 years into national armed forces' or to use them 'to participate actively in hostilities'; whilst article 8(2)(e)(vii) covers internal armed conflict referring to the conscription or enlistment of children under the age of 15 years 'into armed forces or groups or using them to participate actively in hostilities'. The Statute again refers to the cut-off age as 15 years: However, more positively, the Statute provides greater redress and takes the level of legislated protection a small step further in that it expressly proscribes both the direct participation in hostilities as well as the indirect missions for which many children are used. The problem with this provision is its enforceability. Many states do not have the necessary domestic legislation to enable them to prosecute offenders for war crimes. The introduction of such laws under municipal legislation will not only assist with the repression of such crimes at national level, but for states who are parties to the ICC, it will also facilitate the use of the principle of complementarity, allowing the International Criminal Court to have jurisdiction in situations where a state is unable or unwilling to prosecute offenders.

³⁷ n 7 above, 2.

³⁸ As above.

5.6 The African Charter on the Rights and Welfare of the Child, 1999

This is the only charter at a regional level dealing with the issue of child soldiering and children in armed conflict. It was adopted by the Organisation of African Unity (OAU) and came into force in November 1999. The Charter does not make the distinction between people younger than 18 years and those younger than 15 years: A child is simply anyone younger than 18 years. Article 22(2) provides:³⁹

State parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.

The Charter compositely addresses both issues of age and nature of hostilities that appear to confound the other international instruments. Yet, Africa remains one of the guiltier regions when it comes to child soldiers. This once again raises the age-old dilemma of the chasm between the written protections and the enforcement of the international and regional standards within the national state authorities. This is evident from the numbers of children being used in armed conflict, from the fact that little (or nothing) appears to be done to sanction the renegade parties, and also from the fact that most peace treaties have seldom remembered the existence of child soldiers and provision for remedial support and their reintegration. Special provision is seldom made and the children, despite being especially vulnerable, are left on their own. However, a positive note is the response of Burundi. It is reported that, since the signing of the peace accord, from 2004 onwards, Burundi has commenced a programme of demobilising child soldiers from the army, civil defence forces and rebel factions. The test will be to monitor the sustainability of these programmes.⁴⁰

6 Conclusion

The consequences of child soldiering for Africa must impact, directly, on the growth, development and re-generation programmes earmarked for the upliftment of the continent, on the ability of Africa to take her place as a player in the global arena, and in promoting the human rights ethos underpinning the African renaissance. *A priori*, all states have a fundamental responsibility to end the use of child soldiers in Africa.

³⁹ However, eg, in Chad, where UNICEF has identified children between eight and 11 years in the military, the government has defended their position with the argument that it has never knowingly signed up children into the Chadian army. 'It's young people who forge their birth certificates,' said the Minister for External Relations. 'If they come to sign up we cannot know they are lying.' S Hancock 'Chad demobilises child soldiers' <http://news.bbc.co.uk/2/hi/africa/6640351.stm> 1 (accessed 17 May 2007).

⁴⁰ Reuters Foundation (1) (n 5 above) 2.

7 Recommendations

Without doubt, the regional and international laws succeed in raising the issues around child soldiering. They have created visibility for the problems and have placed them squarely on the international and regional agenda — and for this the laws are laudable. However, from the foregoing discussion, there are also patent shortcomings in the rules which appear to allow (within the parameters of the law) that children (in the ordinary sense of the word) continue to be used in situations of armed hostility.⁴¹

In light of the foregoing discussions, the following recommendations are presented:

At a national level, the first step to achieving the commitment to eliminate child soldiering on the continent would be for states to sign and ratify all the relevant treaties, both international Conventions and the African Charter on the Rights and Welfare of the Child. Secondly, ratifying states must take immediate steps to reduce their international obligations to practicable domestic legislation. In many African countries, however, whilst there may not be explicit statutes dealing with humanitarian law and children in combat, there will be a code that entrenches fundamental human rights and provides for the rights and protections of children in the country. Thus, it cannot be said that at a national level Africa is completely silent on the exploitation of children in armed conflict — what must be conceded is that countries have not been as explicit as they could have been in their domestic/municipal laws on the subject and in the enforcement of the laws and the prosecution of offenders. However, having said that, the writer raises the following examples of positive

⁴¹ An example of this is the United Kingdom. *Young Minds Magazine* reports that in the British armed forces, 16 year-old children are recruited to all three branches of the military and the country continues to deploy under 18 year-olds in war fighting situations. They state: 'The British army specifically targets recruitment at low income, high unemployment, disadvantaged areas where children with few academic or career prospects are able to sign up to six year minimum service contracts at 16 years of age, seduced by glamorous images of travel, machismo, and attaining employable skills . . . For many the prospect of a secure future, with a paternalistic employer and a sense of importance will offer some hope in an otherwise bleak and impoverished life with few prospects' <http://www.youngminds.org.uk/magazine/77/walker.php> 2 4-5 (accessed 10 November 2005). In its 2000 report, Amnesty International questions the prevalence of proper informed consent when such children are taken into the armed forces. Typical to these situations, the recruiting force preys upon the children's economic and mental vulnerability. In support of their action, the government noted that once trained in the armed forces, the children are deemed to be 'professionals' and are, accordingly, treated as such. To distinguish them from the unit would destabilise the unit and impair its effectiveness, would 'be demoralising and unpopular, and add to the training burden' <http://www.youngminds.org.uk/magazine/77/walker.php> 3 (accessed 10 November 2005). Noteworthy is the fact that they are the only European country to use 18 year-old children in conflict situations: <http://www.youngminds.org.uk/magazine/77/walker.php> 2 (accessed 10 November 2005). See also Vandewiele (n 33 above) 21.

action by various African states: Firstly, it is noted that the Special Court for Sierra Leone (established in 2002 — three months after the coming into force of the Optional Protocol — to prosecute persons who committed serious violations of international humanitarian law between 1991-2002) issued its first indictments in 2003 and they included an indictment against the former Liberian President Charles Taylor. The indictment includes express charges against Taylor for recruiting or using children under the age of 15 years in combat.⁴² In Uganda, UNICEF is currently working with the Ugandan military in the process of identifying all underage soldiers in the army and seeking to get them out, and also in Chad, where the government has signed a deal with UNICEF to begin demobilising child soldiers from its national army.⁴³ Similarly, In Côte d'Ivoire, the European Commission's Humanitarian Aid Department (ECHO) and UNICEF have been working with the communities to assist in the programme to demobilise and reintegrate former child soldiers and prevent them from being recruited back into conflict.⁴⁴ Thirdly, to effectively eliminate the scourge of child soldiering, consistent and tough pressures by other African states, all governments and international agencies against those governments and armed groups that recruit children for conflict must be maintained. For example, what has had limited success in the past are travel and economic sanctions against individuals from countries and rebel movements identified as abusing children for purposes of warfare. Fourthly, public awareness, education and information campaigns within the state during peace times are integral to the success of such a programme of action. It stands to reason that the promotion of the rights of, and respect for children, in times of peace will be far more relevant and effective: Then, if war becomes a reality, the engaging parties are already imbued with the relevant principles of human rights and humanitarian law with the attendant domestic penalties attaching to intentional violations of the law. Such awareness will also promote public/community reaction to groups/states (ab)using children for military service.

At an international level, in November 2002, the report of the UN Secretary-General to the Security Council specifically identified five countries where children were being used in armed conflict. (These were not the only countries, but they happened to be amongst those countries that had been specifically placed on the Security Council's agenda.) After the chorus of disapproval from civil society at the fact that some of the worst violating countries had not been named, at its meeting in January 2003, the Security Council requested (Resolution 1640) that the Secretary-General provide information about protecting

⁴² Coalition to Stop the Use of Child Soldiers (n 5 above) 3.

⁴³ BBC News 'Uganda army recruiting children' <http://news.bbc.co.uk/1/hi/world/africa/4266789.stm> 2 (accessed 17 May 2007); Hancock (n 39 above) 1.

⁴⁴ S Westerbeek 'UNICEF and ECHO reintegrate child soldiers in C?ted'Ivoire' http://www.unicef.org/infobycountry/cotedivoire_39645.html 2-3 (accessed 17 May 2007).

children, especially children in armed conflict, in all his country-specific reports. The litmus test of efficacy and resolve to do something about the problem will be, however, to see what steps the UN takes against the offending countries. As the international NGO, Coalition to Stop the Use of Child Soldiers, noted, the issue can never be seen as settled (and therefore no longer necessitating active engagement and intervention) simply because it has been noted and its prevention has been legislated.⁴⁵

Further, those recruiting children must be identified and prosecuted. In this regard, the UN needs to be more aggressive in (i) monitoring the use of child soldiers and (ii) publicising such activities — the so-called ‘naming, blaming and shaming’ of wayward countries and/or non-government (rebel) organisations. Human Rights Watch advocates that all information on recruitment and the use of child soldiers should be submitted to the monitoring and reporting mechanisms established by the UN Security Council under Resolution 1612 of 2005.⁴⁶ In this way, a co-ordinated and coherent global plan of action can be implemented. In addition, having identified recalcitrant countries, education campaigns in the local communities, informing them of the domestic and international standards in respect of child soldiers, can help reduce the chance of children being re-recruited or enticed back into the armed forces.⁴⁷

In addition, according to the enabling International Criminal Court Statute, the recruitment and use of children under the age of 15 years is a war crime. Consequently, Human Rights Watch recommends that the International Criminal Court, in dealing with the issue of war crimes in countries, ‘should include the recruitment and use of child soldiers in [any] ICC investigation’ within an identified jurisdiction.⁴⁸ Further, the international communities must be urged to reconsider the age of participation as prescribed in the other international conventions.

Also, children who have been involved in armed conflict need to be demobilised. The Optional Protocol to the Convention on the Rights of the Child specifically recognises this fact, making it a requirement for governments to take ‘all feasible measures’ to ensure that children recruited or used in violation of the Protocol are demobilised (article 6). In such cases, governments are required to provide appropriate rehabilitation and reintegration assistance.⁴⁹ However, the efficacy of this provision may be limited. In the first instance, it must be recognised

⁴⁵ Choike (n 5 above) 1.

⁴⁶ Reuters Foundation (1) (n 5 above) 3.

⁴⁷ n 7 above, 3.

⁴⁸ Reuters Foundation (1) (n 5 above) 3.

⁴⁹ See Vandewiele (n 33 above) 54, who refers to social and financial re-integration and includes measures such as access to interim care, education and vocational training as well as compensation and support services for children traumatised or permanently injured.

that the atrocities witnessed by many of the children will never permit complete psychological rehabilitation.⁵⁰ Secondly, as far as girl soldiers are concerned, regard must be had to their circumstances, and Brett notes especially the complexities involved in re-integrating girls who are mothers after the war or who are known to have been involved in sexual relationships.⁵¹ Thirdly, after the fighting and hostilities have abated, most countries have few financial resources to accommodate plans for the demobilisation and recovery of children who were the casualties of the fighting. In many instances, if anything is to be done, it is left to the international world to take the necessary steps. However, even this is not always successful. For example, in the Human Rights Watch report it is indicated that '[a]fter Liberia's civil war ended in 2003, some 101 000 combatants — including 11 000 children — were disarmed and demobilised under a United Nations-sponsored program'.⁵² However, many of the ex-combatants interviewed for the report admitted that after being demobilised, they were approached to join the fighting mission in Côte d'Ivoire. They had themselves then been responsible for recruiting other children for the government of Côte d'Ivoire.⁵³ The reason repeatedly presented for their reversion to armed activity was often traceable back to economic desperation.⁵⁴ One cannot over-emphasise the importance of financial support and programmes of financial aid for the demobilised children. In most cases, the already few opportunities to earn a living are aggravated by the social suspicion and exclusion that follows them. Reverting to soldiering where they have a place to stay and food is sometimes the only alternative.⁵⁵ This problem has become patently evident in Uganda where

⁵⁰ As Terburgh notes, 'You may ask: "What does the psyche of a child soldier resemble?" And the answer may be: "It resembles a burned down city with an infrastructure that is in chaos."' El Terburgh 'The child soldier: Psychological trauma' in Bennett *et al* (n 3 above) 21.

⁵¹ Brett (n 3 above) 9.

⁵² Reuters Foundation (1) (n 5 above) 2.

⁵³ As above.

⁵⁴ This fact is confirmed by Brett (n 3 above, 9), who states that one of the further problems of re-integration is the difficulty of separating the child from the soldier. She notes that from her research, she identified that many of the ex-combatants 'found it difficult to cope with the loss of status, and of the physical, economic and other power without a gun, especially where the economy is in poor shape . . .'

⁵⁵ One of the reasons that may be advanced for the lack of success of the disarmament and reintegration programmes is the reality of the huge financial commitment involved. Eg, the Liberian programme notes that it is currently facing a funding shortfall of US\$10 million needed to cover the reintegration of some 43 000 ex-combatants; Reuters Foundation (1) (n 5 above) 3. Those children who have been fortunate to have participated in the educational and vocational programmes for ex-child combatants have their own concerns. They note that in many instances their personal economic plight and the lack of money in the home had forced them to abandon the programmes: Reuters Foundation (1) (n 5 above) 3. Recruiters from Liberia are, obviously, aware of this situation and exploit the circumstances to lure the children back into fighting — currently on behalf of Côte d'Ivoire, but one would imagine that they would do it for anyone, provided their fee were paid.

young children, many aged between 16 and 17 years, who were released by the Lord's Resistance Army under a special amnesty, have now returned to the military to fight for the Ugandan army. The army justifies its conduct by arguing that its route is the 'lesser of the two evils' as there is the reality that, if they do not accept the recruits, they will return to the rebel movement as 'they have no alternate employment'.⁵⁶

Too many children in Africa are engaged in the vicious activities of armed conflict and warfare. Without immediate attention to the problem and concomitant action, the plausible reality for Africa will be the creation a brutalised, violent generation who know nothing except sadism and aggression. This cannot be the twenty-first century legacy for which Africa has struggled.

⁵⁶ BBC News (n 44 above) 1-2.

Beyond justiciability: Realising the promise of socio-economic rights in Nigeria

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Summary

This article examines the status of socio-economic rights in Nigeria against the promise of better living standards which they offer. Beginning with the regional mechanism for enforcement, it directs attention to creative methods of overcoming the hurdle of justiciability and challenges the judiciary to embrace India's integrative approach as well as the African Charter's promise of equal treatment for all manner of rights. It posits that a fair resolution of the crisis of socio-economic rights enforcement demands honest answers to questions of corruption and inept leadership, poverty and ignorance, absence of a human rights culture arising out of non promotion of its ideals, apathy and indifference of the international community, the debt burden and absence of a virile civil society. In the final analysis, only a multi-sectoral and multi-dimensional approach can guarantee the promise of socio-economic rights.

1 Introduction

Africa is home to most of the world's poor and should ordinarily pay adequate attention to socio-economic rights. Unfortunately, its leaders, past and present, have yet to fully commit to this issue. The seeming

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absence of political will to guarantee these rights presents formidable obstacles to joining the world-wide movement towards interdependence and interrelatedness of all human rights.

In view of this state of affairs, individuals and groups look to the courts to resolve problems arising from violations of socio-economic rights. However, judicial enforcement of socio-economic rights is often viewed as unreasonable. The language of this specie of rights often grants considerable discretion to state authorities on the standard and timing of enforcement, which is why several states rely on the *progressive realisation* principle to avoid or delay responsibility arising under these rights. Added to this is the crisis of classification, which ensures that civil and political rights rank higher than economic, social and cultural rights.

There are two parallel regimes of socio-economic rights existing in Africa. The first, represented by South Africa, is that which specifically makes socio-economic rights enforceable in the courts. Under this regime, individuals and organisations alleging that their rights have been violated may approach the courts to seek redress. The other regime aligns with most of the Western world in the claim that socio-economic rights are 'no more than pious wishes'. Accordingly, states have adopted the Indian-styled *fundamental objectives and directive principles of state policy*.

Nigeria belongs in the latter category.¹ Specifically, its 1999 Constitution recognises and provides for these objectives and principles in chapter II. Promising as they may appear, chapter II provisions are unenforceable in the courts.² This is a fundamental point of departure from Indian jurisprudence, which has established precedence for applying the *integrative approach* ensuring that violations of socio-economic rights can be remedied by reference to their relationship with civil and political rights.

Beyond the 'integrative approach', India attributes the success of socio-economic rights litigation to its liberal attitude to public interest litigation. This is also uncommon in Nigeria. Litigants almost always have to establish *locus standi* to access the courts.

This article examines the regime of socio-economic rights in Nigeria. It posits the idea that, despite its imperfections, the African Charter on Human and Peoples' Rights (African Charter) provides a useful reference tool for domestic enforcement of socio-economic rights. It also recommends a careful adoption of the Indian model of integrative jurisprudence as well as a multi-dimensional approach to realising the promise of socio-economic rights.

¹ Other countries in this category include Lesotho (1993), Liberia (1984), Malawi (1994), Namibia (1990), Sierra Leone (1991) and Tanzania. Countries with declaratory socio-economic rights provisions in their constitutions are Ethiopia (1996), Ghana (1992) and Uganda (1995).

² By virtue of sec 6(6)(c) of the 1999 Constitution.

2 Socio-economic rights under the African Charter on Human and Peoples' Rights

The African Charter represents 'a significantly new and challenging normative framework for the implementation of economic, social and cultural rights'.³ It presents socio-economic rights free of claw-back clauses⁴ — a refreshing departure from the regime of civil and political rights, which are subject to these clauses. Additionally, it does not contain a derogation clause. Unlike the International Covenant on Economic, Social and Cultural Rights (CESCR), state parties to the African Charter assume obligations that are of immediate effect and not subject to the 'progressive realisation' requirement.⁵ Fundamentally, socio-economic rights share the same level of legal protection as other rights in the African Charter.

State parties owe obligations to respect, protect and fulfill all the rights in the African Charter, including socio-economic rights. The obligation to respect, like that arising under CESCR, means that states must 'refrain from actions or conduct that contravene or are capable of impeding the enjoyment of economic, social and cultural rights'.⁶ This obligation is neither contingent on 'availability of resources' nor subject to the notion of 'progressive realisation'. The obligation to protect involves a duty to encourage third parties, including non-state actors, to respect these rights or refrain from violating them. The obligation to fulfill creates a duty that 'requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights'.⁷

The Charter guarantees such socio-economic rights as the right to work under 'equitable and satisfactory conditions' and equal pay for equal work,⁸ the right to health,⁹ the right to education,¹⁰ family

³ CA 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) 178-218 186.

⁴ A claw-back clause is 'one that permits, in normal circumstance, breach of an obligation for a specified number of reasons'. See R Higgins 'Derogations under human rights treaties' cited in Odinkalu (n 3 above).

⁵ However, note the Pretoria Declaration on Economic, Social and Cultural Rights adopted by the African Commission in 2004.

⁶ F Morka 'Economic, social and cultural rights and democracy: Establishing causality and mutuality' in HURILAWS *Enforcing economic, social and cultural rights in Nigeria — Rhetoric or reality?* (2005) 85-100 88.

⁷ The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, formulated in Maastricht 22-26 January 1997. The Maastricht Guidelines are published in (1997) 15 *Netherlands Quarterly Journal of Human Rights* 244.

⁸ Art 15.

⁹ Art 16.

¹⁰ Art 17.

rights,¹¹ the right to economic, social and cultural development¹² and the right to a general satisfactory environment favourable to development.¹³ Although the right to housing is not explicitly recognised under the African Charter, the combination of provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property and the protection accorded to the family¹⁴ approximates to a right to shelter or housing for which a state party could be held to account. The right to food is implicit in such provisions, as the right to life,¹⁵ the right to health and the right to economic, social and cultural development.

The Charter specifically makes all rights justiciable before the African Commission on Human and Peoples' Rights (African Commission).¹⁶ Accordingly, the African Commission had no difficulty in holding Nigeria responsible for a violation of certain provisions of the African Charter namely, freedom from discrimination, the right to life, the right to property, the right to health, the right to housing (implied in the duty to protect the family under article 18), the right to food, the right of people to freely dispose of their wealth and resources and the right to a safe environment.¹⁷ All violations were the consequences of environment degradation arising from extensive oil exploration in the Niger Delta region.

The *SERAC* communication remains the most significant decision of the African Commission on socio-economic rights to date.¹⁸

In *Malawi African Association and Others v Mauritania*,¹⁹ five joined communications alleged the existence of slavery and similar practices in Mauritania. Specifically, the communication examined allegations that black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the government along with their livestock. The African Commission found that the health of prisoners deteriorated due to insufficient food, blankets and inadequate hygiene and therefore held the government of Mauritania in violation of article 16. The significance of this decision lies in the finding that acts

¹¹ Art 18.

¹² Art 22.

¹³ Art 24.

¹⁴ Art 18.

¹⁵ Art 4.

¹⁶ Art 45 of the African Charter describes the functions of the African Commission to include ensuring the protection of human and peoples' rights under conditions laid down in the Charter.

¹⁷ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). See review of the decision at <http://www.communitylawcentre.org.za/ser/casereviews/serac.php> (accessed 3 June 2006). See also F Coomans 'The Ogoni case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749-760.

¹⁸ For more on the *SERAC* decision, see sec 4.2 of this article.

¹⁹ (2000) AHRLR 149 (ACHPR 2000).

which constitute a violation of socio-economic rights may yet violate civil and political rights — an acknowledgment of the indivisibility and interdependence of all rights.

The right to health also featured in *Purohit and Another v The Gambia*,²⁰ when the applicants alleged, amongst other things, that the legislative regime in The Gambia for mental health patients violated the right to enjoy the best attainable state of physical and mental health (article 16) and the right of the disabled to special measures of protection in keeping with their physical and moral needs. Holding that The Gambia fell short of satisfying the requirements of articles 16 and 18(4) of the African Charter, the African Commission stated that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.

Regrettably, many of these decisions have not been fully implemented by defendant states. Indeed, because the African Commission is not empowered to enforce its decisions, many states do not consider enforcement a necessity.

The African Charter has been criticised as lacking in conceptual clarity. The vagueness of socio-economic rights in it makes enforcement difficult.²¹ To take an example: The right to enjoy the best attainable state of mental and physical health leaves more questions than answers. It neither describes 'standard of health' nor 'best attainable state', thereby leaving states with little guidance as to obligations arising out of it and individuals with no clue as to the standard of expectation from their governments. Although the African Commission has managed to interpret the provisions relating to health as indicated above, it is still a shortcoming of the African Charter that some of its provisions on socio-economic rights are rather vague and open to varying interpretations. It remains to add that the African Charter does not provide for all socio-economic rights. Some of the recognised rights are limited in their application. For example, the right to property is limited to the extent that it may be encroached upon in the interest of public need or in the general interest of the community.²²

The more worrisome issue is the non-justiciability of socio-economic rights in several jurisdictions in Africa. When it is realised that the African Commission is a supranational system for the promotion and protection of human rights, it becomes clearer what challenge the promise of socio-economic rights is faced with. The right of audience before the Commission is contingent on exhaustion of local remedies, except in

²⁰ (2003) AHRLR 96 (ACHPR 2003).

²¹ See M Gomez 'Social economic rights and human rights commissions' (1995) 17 *Human Rights Quarterly* 155 161.

²² This must, however, be in accordance with the provisions of appropriate laws.

cases where these remedies are either unavailable or politically inexpedient. This leads to the need to address the absence of local remedies usually sustained by the justiciability principle.

3 The justiciability of socio-economic rights

The concept of justiciability centres around two primary concerns namely, the legitimacy of judicial intervention and the competence of courts to adjudicate issues in the sphere of socio-economic rights.²³ Many courts are reluctant to decide on cases arising out of socio-economic rights claims because they believe that these rights relate to questions of social policy which best fall within the power and competence of politicians and policy makers. As a result of this judicial reluctance, socio-economic rights are often characterised as non-justiciable.

3.1 The justiciability debate

A prominent Nigerian legal scholar defines justiciability as 'a combination of judicial power and duty bestowed constitutionally on the courts to adjudicate violations of the law'.²⁴ This aligns with the idea that it is not primarily the nature of socio-economic rights that denies judicial enforcement of these rights, but the lack of competence or willingness of the adjudicating body to entertain, examine and pronounce on claims affecting these rights.²⁵

Ghai and Cottrell²⁶ provide a fitting context to the justiciability debate. They identify two sides to the justiciability principle namely, the assumption that courts are inherently incapable²⁷ of adjudicating on socio-economic rights because they do not have the capacity to make well-informed decisions about methods of implementation and are ill-equipped to ensure or supervise the enforcement of their decisions and the contention that these rights are non-justiciable because

²³ See S Muralidhar 'Economic, social and cultural rights: An Indian response to the justiciability debate' in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice — The role of judges in implementing economic, social and cultural rights* (2004) 23, citing P Hunt 'Introduction' in *Reclaiming social rights: International and comparative perspectives* (1996) 24.

²⁴ B Nwabueze *Judicialism in Commonwealth Africa: The role of the courts in government* (1977) 21.

²⁵ See *Economic, social and cultural rights — Handbook for national human rights institutions*, publication of the Office of the United Nations High Commissioner for Human Rights http://www.ohchr.org/english/about/publications/docs/train/2_e.pdf (accessed 13 April 2006).

²⁶ Ghai & Cottrell (n 23 above).

²⁷ Liebenberg echoes this sentiment, thus 'another objection that is frequently raised against the inclusion of economic and social rights as justiciable rights in a constitution is that the courts lack the institutional competence to enforce rights of this nature'. See S Liebenberg 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds) *Economic, social and cultural rights* (2001) 55, 60.

constitution makers have, for other policy reasons, chosen to exclude courts from these areas by casting these rights as Directive Principles of State Policy (DPSPs) rather than individual rights. A short excursion into history might be useful to understand this perspective.

The Irish Constitution is the first of the common law constitutions to contain DPSPs. It acknowledges the second of Ghai's explanations for the concept of justiciability in the following words:²⁸

The principles of social policy set forth in this Article are intended for the general guidance of the *Oireachtas* [the legislature]. The application of those principles in the making of laws shall be the care of the *Oireachtas* exclusively, and shall not be cognisable by any court under any provisions of this Constitution.

An-Na'im²⁹ disagrees with this principle. He thinks that the role of judicial enforcement should be assessed and developed in relation to each human right instead of 'denying it to some purported class of rights because they do not fit the model of judicial enforcement of certain civil and political rights'.³⁰

Liebenberg, for her part, believes that the argument about socio-economic rights involving complex policy choices in the realm of economics and public policy is unacceptable considering that all rights have 'social policy implications'.³¹

Lester and O'Conneide³² belong to the group of scholars who believe that it is a³³

common mistake to place these broad categories of rights into separate and rigidly watertight compartments, with civil and political rights seen as 'justiciable' and enforceable in courts of law, while socio-economic rights are seen as non-justiciable and a matter exclusively for the legislative and executive branches of government, along with voluntary action.

The learned authors seem to suggest that the three arms of government — legislative, executive and judicial — should be involved in the implementation of socio-economic rights. They, however, argue that, for reasons of democratic legitimacy, crucial resource allocation decisions are better left in the hands of the legislature and executive. In essence, they advocate a restricted judicial supervisory role³⁴ in the field of socio-

²⁸ Art 45 of the Irish Constitution of 1937, as amended.

²⁹ A An-Na'im 'To affirm the full human rights standing of economic, social and cultural rights' in Ghai & Cottrell (n 23 above) 7-16.

³⁰ n 29 above, 7.

³¹ Liebenberg (n 27 above) 60.

³² L Lester & C O'Conneide 'The effective protection of socio-economic rights' in Ghai & Cottrell (n 23 above) 17-22.

³³ n 32 above, 18.

³⁴ In this regard, they think the judiciary has an important role to play where there exists a sufficiently gross failure to uphold basic socio-economic rights and the other two branches have comprehensively failed to fulfill their responsibilities.

economic rights in view of the constitutional separation of powers and the limits of judicial expertise.

An-Na'im's response to the proposal for restricted judicial supervisory role is that it could lead to a situation where the courts 'avoid all responsibility for discrimination in effect or outcome by simply doing nothing'. He is confident that judicial enforcement is unlikely to slide into 'detailed determination of policy and practice precisely because judges are aware of the limitation of their office and the nature of the judicial process'.

Viljoen introduces a new dimension to the justiciability debate. In a paper entitled 'The justiciability of socio-economic and cultural rights: Experiences and problems',³⁵ he relies on a taxonomy devised by Shue, in terms of which justiciability becomes dependent on the obligation of states in respect of a particular right. He identifies the three levels of obligations incumbent on states namely, the obligation to respect, protect and fulfill.³⁶

The United Nations (UN) Committee on Economic Social and Cultural Rights (Committee on ESCR) offers a benchmark for states looking to meet their international obligations in respect of socio-economic rights. It invites parties, when dealing with questions relating to the domestic application of CESC, to consider them in the light of two principles of international law:³⁷

The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties, is that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In other words, states should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.

Although CESC does not contain a provision similar to article 2(1) of the International Covenant on Civil and Political Rights (CCPR), by which state parties are obliged to, *inter alia*, 'develop the possibilities of judicial remedy', the Committee on ESCR holds the view that state parties seeking to justify their failure to provide domestic legal remedy for violations of socio-economic rights would need to show either that such remedies are not 'appropriate means' within the contemplation of article 2(1) of CESC, or that, in view of other means used, they are unnecessary.³⁸ This is an arduous task for non-implementing states.

The question of justiciability is one of legal creativity and political will.

³⁵ Unpublished draft paper on file with author.

³⁶ This typology is discussed in earlier sections of this work.

³⁷ Committee on ESCR General Comment No 9 of 1 December 1998 para 3.

³⁸ As above.

Although CESCRO has yet to become Nigerian law,³⁹ lawyers could have recourse to the African Charter which is. Indeed, lessons from countries such as India suggest that clear linkages can and should be established between civil and political rights, which are justiciable, and socio-economic rights which are not. Beyond legal creativity, there is the need for some level of judicial activism without which the expected result will not be achieved.

The absence of political will to follow through on decisions of courts is one of the most frustrating aspects of enforcing them. Unless there is a genuine commitment to implement on the part of government, judicial decisions could be deprived of their utility.

Securing the socio-economic rights of the most vulnerable depends to a great extent on stakeholders' resolve to recognise and effectuate the indivisibility and interdependence of all rights. As the Economic and Social Committee on the Citizens' Europe confirms, economic and social rights are 'indissolubly linked to civil and political rights: Together these citizens' rights and accompanying duties constitute the cornerstone of a free, democratic society founded on respect for human rights.'⁴⁰

3.2 India's experience with enforcing directive principles

The Indian Constitution⁴¹ contains a chapter on fundamental rights⁴² consisting of mainly civil and political rights, which are enforceable in the High Courts and the Supreme Court. Like the Nigerian Constitution, it also contains a chapter on DPSPs,⁴³ which embodies the socio-economic rights provisions. This chapter recognises such rights as those to 'adequate means of livelihood',⁴⁴ work, education and 'public assistance in case of unemployment'.⁴⁵

While fundamental rights mentioned in part III are justiciable under the constitution, DPSPs are not justiciable and their non-compliance cannot be taken as a claim for enforcement against the state. The Constitution expressly bars the courts from enforcing the provisions of part IV, but admits that the 'principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.⁴⁶

³⁹ Nigeria operates the dualist system in relation to domestic application of international law. Therefore international treaties ratified by her still have to be incorporated into domestic legislation to be applicable. See sec 12 of the 1999 Constitution.

⁴⁰ Opinion of the Economic and Social Committee on the Citizens' Europe, 23 September 1992 (Opinion 1037) para 1.2.3.

⁴¹ See <http://indiacode.nic.in/coiweb/welcome.html> (accessed 12 April 2006).

⁴² Part III.

⁴³ Part IV.

⁴⁴ Art 39(a).

⁴⁵ Art 41.

⁴⁶ Part IV, ch 37.

At the time of drafting the Constitution, It was thought that DPSPs should remain non-justiciable until appropriate actions were taken by the state to bring about changes in the economy.

Apparently deferring to the Constitution, Indian courts stuck to the original understanding of the distinction between justiciable rights and non-justiciable principles, regarding DPSPs as subordinate to the rights and holding that measures to implement the principles could not contravene any of the rights. This was the position until Indira Gandhi, then Prime Minister, introduced a state of emergency in 1975. It has been said that this event, and the public reaction to it, wrought a major change in the attitude of the judiciary, and that the Supreme Court as a result became activist from 1978.⁴⁷

Beginning with the *Maneka Gandhi* case, the Supreme Court introduced an interesting method of interpreting socio-economic rights namely, by expanding the guarantee of the right to life in article 21 to include within it and recognise a whole gamut of socio-economic rights.⁴⁸ The same principle guided the Court in *Kesavananda Bharati v State of Kerala*⁴⁹ in holding that fundamental rights and DPSPs are complementary.

Applying the principle to the right to food, the court in *Peoples Union for Civil Liberties (PUCL) v Union of India and Others*⁵⁰ directed all state governments to ensure that all public distribution shops are kept open with regular supplies and observed that it is the primary responsibility of government to prevent hunger and starvation. Significantly, the court not only recognised the right to food as existing under article 21, it also sought to broaden the scope of the right to include distribution and access to food and the right to be free from malnutrition, especially of women, children and the aged. These orders, like several others, reinforced the argument that courts do have authority to order positive actions with financial or budgetary implications.

It needs to be noted that the new method of interpretation brought with it the advent of public interest litigation and judicial activism in India as well as a new problem in that the existing remedies, for instance damages and injunction, became inadequate to address the suffering of the disadvantaged in socio-economic rights violation cases.

⁴⁷ See S Ibe 'A multidimensional approach to enforcing economic, social and cultural rights' in HURILAWS (n 6 above).

⁴⁸ In *Francis Coralie Mullin v Union Territory of Delhi* 1981 (1) SCC 608, the Supreme Court held that the right to life includes the right to live with human dignity and all that goes along with it.

⁴⁹ (1973) 4 SCC 255.

⁵⁰ WP (Civil) No 196/2001 cited in J Kothari 'Social rights and the Indian Constitution' (2004) 2 *Law, Social Justice and Global Development Journal* (LGD) http://www.go.warwick.ac.uk/elj/lgd/2004_2/kothari (accessed 31 March 2007).

Consequently, the court evolved new remedies intended to elicit affirmative action on the part of the state and its authorities.⁵¹

Another interesting development in the jurisprudence of India lies in the approach to the right to education. In *Unni Krishnan JP v State of Andhra Pradesh*,⁵² the court was requested to interpret the provisions of article 45 of the Indian Constitution, which imposes an obligation on the state to provide 'free and compulsory education for all children until they complete the age of 14'.⁵³ In a rare display of judicial creativity, the court held that the passage of 44 years since the making of the Indian Constitution in 1950 had converted the state's obligation under article 45 (a DPSP) into a fundamental right. In its words, the right to education is implicit in and 'flows from the right to life guaranteed under article 21'⁵⁴ and a child (citizen) has a fundamental right to free education up to the age of 14 years'.⁵⁵ The state of India responded nine years later by inserting, through the ninety-third amendment to the Constitution, article 21(a) which recognises the fundamental right to education for children between the ages of six and 14.⁵⁶

In *Paschim Banga Khet Majoor Samity v State of West Bengal*,⁵⁷ the applicant sought to enforce a state obligation under article 47 to improve public health care with particular reference to the treatment of patients during an emergency. The Supreme Court specifically rejected the argument that socio-economic rights are unenforceable due to a shortage of resources, observing that 'a state could not avoid [its] constitutional obligation on account of financial constraints'. The Court did not stop at declaring the right to health a fundamental right and enforcing the right of a labourer by asking the government of West Bengal to pay him compensation for the loss suffered; it also

⁵¹ In *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802, the Supreme Court made an order giving various directions for identifying, releasing and rehabilitating bonded labourers, ensuring minimum wages payments, observance of labour laws, providing wholesome drinking water and setting up dust-sucking machines in the stone quarries. The Court also set up a monitoring agency, which would continuously check the implementation of those directions.

⁵² (1993) 1 SCC 645.

⁵³ The right to education stands on a very different footing in Indian social rights jurisprudence because of the very specific endeavour of the drafters of the Constitution to realise this right within a time frame of ten years.

⁵⁴ *Unni Krishnan* 730.

⁵⁵ n 54 above, 735.

⁵⁶ S Muralidhar 'Implementation of court orders in the area of economic, social and cultural rights: An overview of the experience of the Indian judiciary' paper presented to the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002 <http://www.ielrc.org/content/w0202.pdf> (accessed 6 May 2006).

⁵⁷ (1996) 4 SCC 37.

directed the government to formulate a blueprint for primary health care with specific emphasis on treatment of patients during an emergency.⁵⁸

According to Muralidhar, India's success in socio-economic rights jurisprudence is attributable to a few developments:⁵⁹

- (1) the declaration of the indivisibility of the fundamental rights on the one hand, and DPSPs on the other;
- (2) the recognition that the doctrine of substantive due process permeates the entire part III comprising fundamental rights. Thus, in order to pass judicial scrutiny, an executive, quasi-judicial or legislative action would have to justify the 'just, fair and reasonable' test;
- (3) the expansion of the scope and content of the fundamental right to life as encompassing 'the bare necessities of life such as adequate nutrition, clothing, and shelter and facilities for reading, writing and expressing ones self in diverse forms';
- (4) the innovation of public interest litigation as a tool to achieve social objectives by enabling easy access to courts for those disadvantaged socially and economically; a conscious effort made to relax the rules of standing and procedure and free litigants from the stranglehold of formal law and lawyering;
- (5) the expanded notion of the right to life enabled the court, in its public interest litigation jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of socio-economic rights.

In the next section, we shall consider whether and to what extent Nigeria can draw inspiration from India's success at enforcing socio-economic rights.

3.3 Justiciability in Nigeria

3.3.1 Muralidhar's principles

The first point hardly requires elucidation. It is universally accepted that all rights are interrelated, inter-connected and interdependent. The crucial point to note, though, is that the world is not unanimous in its attitude to socio-economic rights. Socio-economic rights have been discounted as 'pious wishes' in most parts of the developed world. For example, the United States holds the view that 'at best, economic, social and cultural rights are goals that can only be achieved progressively,

⁵⁸ It is instructive to note that the Supreme Court had occasion to hold, for the first time, that the right to health is an integral fact of a meaningful right to life in *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42.

⁵⁹ Muralidhar (n 56 above).

not guarantees'.⁶⁰ While this is understandable in view of the fact that social security is not a problem in most parts of the developed world, it is clearly unacceptable in the context of Africa, where the vast majority of the population struggles to make a living.

Muralidhar's reasonability test⁶¹ is one that is patently absent in Nigeria, especially in the context of socio-economic rights. This is partly due to the fact that courts are not keen to examine claims arising out of alleged violations of socio-economic rights.

The integrative approach to enforcing socio-economic rights, like the point immediately above, is yet unknown to Nigeria's jurisprudence on socio-economic rights.

The most interesting point for Nigeria is that dealing with public interest litigation. It is interesting because Indian courts made a conscious effort to relax *locus standi* rules. This is not exactly the case in Nigeria. Human rights groups like the Human Rights Law Service (HURI-LAWS) have made significant contributions to strategic impact litigation with such landmark cases as *Bayo Johnson v Lufadeju*⁶² and *Peter Nemi v Attorney General of Lagos State*.⁶³ However, in both cases, as in many others, *locus standi* was not a problem because the disputes involved persons whose rights were allegedly infringed and who were therefore seeking retrospective relief.

Locus standi is the foundation upon which any claim before the courts succeeds or fails. To establish *locus standi*, applicants must demonstrate sufficient interest in the case and this must be personal interest 'over and above' those of the general public.⁶⁴ This has been a major hurdle for groups desirous of bringing public interest cases before Nigerian courts.

The problem of *locus standi* is compounded by the non-justiciability of socio-economic rights guaranteed under section 6(6)(c) of the 1999 Constitution, to the extent that judicial powers do not extend to:

any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

The success of public interest litigation in India is traceable, in part, to its ability to expand and relax the rule of *locus standi* in two areas namely, the litigant need not have a direct or sufficient interest in the matter

⁶⁰ Comments submitted by the USA Report of the Open-ended Working Group on the Right to Development, UN Doc E/CN.4/2001/26, cited in K Tomasevski 'Unasked questions about economic, social and cultural rights from the experience of the Special Rapporteur on the Right to Education (1998-2004)' (2005) 27 *Human Rights Quarterly* 709 713.

⁶¹ Muralidhar (n 56 above).

⁶² (2002) 8 NWLR Part 768 192.

⁶³ (1996) 6 NWLR Part 452 42.

⁶⁴ See *Thomas & Others v Olufosoye* (1986) 1 NWLR Part 18 669.

brought to the court and the victim of the violation may be a social group or a collective identified only by its disadvantaged position in society. Instructively, public interest litigation emerged out of dissatisfaction with a traditional adversarial litigation system where the court plays the role of umpire without considering broader perspectives and the impact of its judgments. Public interest litigation demands continuing judicial involvement with a view to monitoring and supervising court orders in order to provide effective relief. Judicial activism is at the root of public interest litigation and an important aspect of the process of its evolution was the relaxation of the traditional rule of *locus standi*.⁶⁵ Nigerian judges must rise to the occasion by using their privileged positions to redress grievances regarding the violation of basic human rights of the poor or about the concern or conduct of government policy, which affects a large part of the society and not just the individual petitioner.

Opponents of this system could argue that adopting the Indian model would inundate the courts with reckless claims. This is indefensible in view of the inherent powers of the court to ascertain a *prima facie* cause of action at the preliminary stage. In the absence of a *prima facie* case, the court is entitled to dismiss an application without going into the merits. Fear could also be expressed that new cases arising from relaxed rules of *locus standi* would unacceptably increase courts' case loads. While this argument may be accurate, it is submitted that upholding the rights of individual citizens should be the primary objective of any effective justice system. Therefore, cases alleging infringement of individual rights or rights-related issues should enjoy primacy in our courts. The problem of case-load management is an institutional one which can be tackled by building more court rooms, appointing more judges and improving their conditions of service. Most importantly, Nigeria is long over-due for automation. An automated system of court proceedings will accelerate the administration of justice in the country.⁶⁶

4 Socio-economic rights under Nigeria's 1999 Constitution

Since independence, Nigeria's successive Constitutions have made provisions for a Bill of Rights. However, it was the 1979 Constitution that first adopted the India-styled⁶⁷ DPSPs as an explicit provision.

⁶⁵ See RK Timalseña 'Public interest litigation and the protection of human rights in Nepal' http://www.interights.org/doc/WS2_Timalseña.doc (accessed 10 May 2007).

⁶⁶ The Lagos State Judiciary and a few appellate courts now operate automated systems, but this is not enough. Other states must embrace automation to accelerate justice delivery.

⁶⁷ This is discussed in the preceding section of this work.

The 1999 Constitution recognises socio-economic rights in chapter II, consisting of DPSP provisions.⁶⁸ Chapter II was devised to fulfill the promises made in the Preamble to the Constitution, *inter alia*:

to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice and for the purpose of consolidating the unity of our people.

The Preamble and provisions of chapter II reflect the high ideals of a liberal democratic polity and thus serves as guidelines to action or major policy goals.⁶⁹ The rationale for the inclusion of chapter II in the 1979 Constitution, as in 1999, lies in the fact that governments in developing countries have tended to be pre-occupied with power and its material prerequisites with scant regard for political ideals as to how society can be organised and ruled to the best advantage of all. This is particularly true of Nigeria because of its heterogeneity, the increasing gap between the rich and the poor, and the growing cleavage between the social groupings.⁷⁰

The first section of chapter II recognises the duty and responsibility of all organs of government, and 'all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this Constitution'.⁷¹ Section 224 provides that the programmes and objectives of a political party shall conform with the provisions of chapter II. Additionally, item 60 of the Exclusive Legislative List gives the National Assembly power to make laws with respect to the establishment and regulation of authorities to promote and enforce the observance of the fundamental objectives and directive principles contained in chapter II. However, section 6(6)(c) of the same Constitution forbids the courts from entertaining claims arising under or as a result of chapter II.

To resolve the apparent conflict in these provisions, it has been suggested that the duties and responsibilities of all organs of government are limited to the extent that the judiciary cannot enforce any of the provisions of chapter II. To that extent, the executive does not have to comply with any of the provisions unless and until the legislature has enacted specific laws for their enforcement.⁷² In other words, the social and economic rights articulated in chapter II cannot be enforced with-

⁶⁸ The term was first used in the 1979 Constitution. Justice Mamman Nasir described fundamental objectives as identifying 'the ultimate objectives of the nation' and the directive principles as laying down the 'policies which are expected to be pursued in the efforts of the nation to realise the national ideals' (see *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350).

⁶⁹ O Agbakoba & U Emelonye *Test of progressive realisation of economic, social and cultural rights in Nigeria (1990-1999 Budget Analysis)* (2001) HURILAWS, Lagos 1-2.

⁷⁰ J Akande *Introduction to the Constitution of Nigeria* (2000) 52.

⁷¹ Sec 13.

⁷² Akande (n 70 above) 53.

out the enactment of a specific law, or the establishment of a specific body, for their enforcement. This is an unduly narrow interpretation as it is not in line with the current ideas on the judicial enforcement of social and economic rights. Indeed, Scheinin has demonstrated that the trend worldwide is towards justiciability of social and economic rights.⁷³

Section 14 of the 1999 Constitution provides that Nigeria 'shall be a state based on the principles of democracy and social justice'. It also recognises that 'sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority'. Perhaps the most crucial portion of this section is sub-sections 2(b) and (c), which provide that the security and welfare of the people shall be the primary purpose of government; and the participation by the people in their government 'shall be ensured in accordance with the provisions of the Constitution'. This section reiterates the principles upon which every democratic system is built. It is unclear, though, how this would be realised, in the absence of a mechanism for enforcement.

Section 16 enumerates economic objectives. It enjoins the state to direct its policy towards ensuring the promotion of planned and balanced economic development,⁷⁴ the provision of suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment and sickness benefits and welfare of the disabled.⁷⁵

Section 17 provides for a state social order founded on freedom, equality and justice, in furtherance of which the exploitation of human resources in any form shall be for the good of the community.⁷⁶ Section 17 also enjoins the government to direct its policy towards ensuring equal opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment,⁷⁷ just and humane conditions of work (including adequate facilities for leisure, social, religious and cultural life),⁷⁸ health, safety and welfare of all persons in employment,⁷⁹ adequate medical and health facilities,⁸⁰ equal pay for equal work,⁸¹ and protection from exploitation (for children, young persons and the aged).⁸²

⁷³ M Scheinin 'Economic and social rights as legal rights' in Eide *et al* (n 27 above) 29.

⁷⁴ Sec 16(2)(a).

⁷⁵ Sec 16(2)(d). The Draft 1995 Constitution elevated some of the rights from the chapter on Fundamental Objectives and Directive Principles on State Policy to the chapter on enforceable fundamental rights. The rights so elevated were the right to free and compulsory education, the right to free medical consultation at government expense and the right to eradicate corrupt practices. Unfortunately, these rights were not included in the 1999 Constitution.

⁷⁶ Sec 17(2)(d).

⁷⁷ Sec 17(3)(a).

⁷⁸ Sec 17(3)(b).

⁷⁹ Sec 17(3)(c).

⁸⁰ Sec 17(3)(d).

⁸¹ Sec 17(3)(e).

⁸² Sec 17(3)(f).

Section 18 guarantees equal and adequate educational opportunities at all levels and urges the government to provide, *as and when practicable*, free, compulsory and universal primary education, free secondary education, free university education and free adult literacy programmes. The phrase 'as and when practicable' appears to echo the mandate of CESCRR in seeking 'progressive realisation' of these rights.

It is pertinent to observe that the outgoing federal government introduced the Universal Basic Education (UBE) programme in November 1999 to replace the abandoned Universal Primary Education (UPE) policy of 1979. Unlike the UPE, UBE provides free and compulsory primary and junior secondary education to all children of school age.⁸³ It draws inspiration from a document entitled World Declaration on Education for All and Framework for Action to meet Basic Learning Needs prepared by the Women Conference on Education for All held in Jomtien, Thailand, 5 to 9 March 1990.⁸⁴

One of the innovations of the 1999 Constitution is section 20, which provides that 'the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'.

The foregoing provisions of chapter II present interesting points of argument before Nigerian courts. However, few cases have arisen out of them in view of the seemingly unfavourable judicial attitude to them deriving from lawyers' inadequate creativity in prosecuting these cases.

4.1 Judicial attitude to socio-economic rights actions

Judicial attitude to socio-economic rights litigation in Nigeria is characterised by great caution and subtle passivity. Following a strict interpretation of section 6(6)(c) of the 1999 Constitution⁸⁵ has meant that Nigerian courts are almost always incapable of or unwilling to entertain socio-economic rights claims.

The Court of Appeal had the first opportunity to define judicial attitude to socio-economic rights claims in *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*.⁸⁶ By a circular dated 26 March 1980, the Lagos State government purported to abolish private primary education in the state. The plaintiffs challenged the circular as unconstitutional. They applied, under the relevant provisions of the 1979 Constitution, for reference to the Federal Court of Appeal of, *inter alia*, the question:⁸⁷

⁸³ See ROA Ahiede 'Universal basic education in Nigeria: Matters arising' (2006) 20(2) *Journal of Human Ecology* 97-101.

⁸⁴ See DI Denga 'Evolving a new education culture: The universal basic education focus' <http://www2.ncsu.edu/ncsu/aern/educult.html> (accessed 10 May 2007).

⁸⁵ The 1979 Constitution also had a similar provision.

⁸⁶ n 69 above.

⁸⁷ As above.

[w]hether or not the provision of educational services by a private citizen or organization comes under the classes of economic activities outside the major sectors of the economy in which every citizen of Nigeria is entitled to engage in and whose right so to do the state is enjoined to protect within the meaning of section 16(1)(c) of the Constitution of the Federal Republic of Nigeria.

The Court also considered the extent of the obligation imposed on the government to 'direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels'.

In his decision, Justice Mamman Nasir set out the rationale for DPSPs. He observed that DPSPs aim to identify the ultimate objectives of the nation and lay down the policies which are expected to be pursued in the nation's quest to realise its objectives. He also examined the seemingly contradictory provisions of the 1979 Constitution⁸⁸ and concluded that:⁸⁹

While Section 13 . . . makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, Section 6(6)(c) of the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles. It is clear that section 13 has not made chapter II justiciable.

Clarifying the ambiguity as to the precise role of the judiciary, he expressed the view that:⁹⁰

the obligation of the judiciary to observe the provisions of chapter II is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the chapter are observed . . . subject to the express provision of the Constitution.

The judge also made it clear that 'the arbiter for any breach of and guardian of the fundamental objectives . . . is the legislature itself or the electorate',⁹¹ as it is clear from the provisions of section 4(2) and item 59(a) of the Exclusive Legislative List in the Second Schedule to the Constitution⁹² that the National Assembly 'has the duty to establish authorities which shall have the power to promote and enforce the observance of chapter II of the Constitution'.⁹³ Until such authorities are established, it will be 'mere speculation to say which functions they may perform or in which way they may be able to enforce the provisions of chapter II'.⁹⁴

⁸⁸ Secs 13 & 6(6)(c).

⁸⁹ *Okogie* case (n 68 above) 350 paras 1-2.

⁹⁰ n 89 above, paras 2-3.

⁹¹ n 89 above, paras 7-8.

⁹² 1979 Constitution, with equivalent provisions in the 1999 Constitution.

⁹³ *Okogie* case (n 68 above) para 1.

⁹⁴ As above.

It is easy to understand the current attitude towards socio-economic rights litigation after a careful review of the *Okogie* case. Besides the fact that the Constitution makes express provisions against entertaining such cases, there is also the challenge of precedent. Nigeria's legal system is based upon a system of judicial precedent. Consequently, High Courts to which disputes arising out of violations of chapters II and IV⁹⁵ must be instituted at the first instance, are obliged to respect the decision of the Court of Appeal until either the Court of Appeal itself or the Supreme Court varies or annuls that decision. That has been slow to come, 25 years after the *Okogie* decision was reached.

There are, however, few other cases challenging the *status quo*.

In *Oronto Douglas v Shell Petroleum Development Company Limited*,⁹⁶ the applicant sued for the protection of the right to a safe environment guaranteed by article 24 of the African Charter. He contended that, contrary to the Environmental Impact Assessment Law, the defendants engaged in the construction of a hazardous liquified natural gas plant without the requisite environmental impact assessment study. A High Court in Nigeria refused to entertain the suit on grounds of *locus standi*, but the Court of Appeal subsequently sent the case back to the lower court for hearing.⁹⁷

In December 2005, SERAC obtained a decision in the case of *Aiyeyemi and Others v The Government of Lagos State and Others*.⁹⁸ The case was against the planned forced eviction of the former Maroko evictees⁹⁹ from their present location at Ilasan Estate. Justice OA Taiwo of the Lagos High Court granted an injunction restraining the government of Lagos from demolishing the houses and accepted one of SERAC's major arguments, namely that the state government cannot demolish applicants' houses and forcefully evict them without an order of a court of competent jurisdiction.

SERAC appeals to the principles of equity, good conscience and *ubi jus ibi remedium* in its socio-economic rights litigation. This strategy is fairly successful to the extent that it draws inspiration from Nigerian case law. In *Mojekwu v Mojekwu*,¹⁰⁰ the court struck down a customary rule which requires the surviving brother of a man who dies intestate to inherit property of the deceased if the surviving wife has no son. The court neither relied on CEDAW nor on CESC, but on a principle of the Nigerian legal system which demands that, before a customary rule could be applied, it must not be repugnant to natural justice, equity and good conscience.

⁹⁵ Ch IV contains the fundamental human rights provisions of the Nigerian Constitution. In contrast to ch II, the provisions of ch IV are justiciable.

⁹⁶ (1999) 2 NWLR Part 591.

⁹⁷ The High Court's treatment of the action thereafter is not available to the present author.

⁹⁸ Unreported Suit No M/474/2003.

⁹⁹ The first eviction of Maroko residents is discussed below.

¹⁰⁰ (1997) 7 NWLR Part 283.

In *Bello v Attorney-General of Oyo State*,¹⁰¹ the Supreme Court held that the doctrine of *ubi jus ubi remedium* is a principle of universal application which ensures a remedy for every citizen who has suffered any wrong.

Finally, in *Ukeje v Ukeje*,¹⁰² the Court admitted that a customary rule which deprives a woman from inheriting her deceased father's estate as a result of her gender is a violation of the non-discrimination provision of the Nigerian Constitution. The Court also described the practice as repugnant to natural justice, equity and good conscience.

SERAC's strategies are interesting. While the principle of non-discrimination is generally applicable, the doctrine of natural justice, equity and good conscience applies in the context of Nigeria's customary law system. There is some sense in arguing that natural justice, equity and good conscience are universally acceptable principles as well. Ultimately, the courts are at liberty to apply either or both of these principles.

Judicial attitude to socio-economic rights claims remains cautious. Mindful of the possibilities that exist in other climes, Nigerian judges ought to embrace a more proactive approach to claims arising out of socio-economic rights violations. Perhaps this could act as the elixir to rouse the executive and legislative arms of government from their apathetic attitude to the 'rights of the poor'.¹⁰³ In this regard, lawyers must do more by bringing some international best practices to the attention of the courts.

This section does not exhaust the case law on the subject.¹⁰⁴ However, it does demonstrate the dilemma of litigants in this field, namely the reluctance of courts to entertain claims arising out of socio-economic rights. There is, however, another window of opportunity at the regional level.

4.2 Enforcing socio-economic rights through the African human rights system

The African Charter is part of Nigerian law.¹⁰⁵ It accords equal status to socio-economic as to civil and political rights. The fact that the African Charter does not contain a special provision like section 46 of the 1999 Constitution for the enforcement of its human and peoples' rights within a domestic jurisdiction does not matter in the context of Nigeria, because there is no *lacuna* in Nigerian law for the enforcement of its

¹⁰¹ (1986) 5 NWLR Part 45 828.

¹⁰² Unreported decision.

¹⁰³ Farmer uses this phrase to describe socio-economic rights. See P Farmer *Pathologies of power: Health, human rights and the new war on the poor* (2003).

¹⁰⁴ There are other cases which are not available to the author but they are few and far-between.

¹⁰⁵ By virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, ch 10, Laws of the Federation of Nigeria 2000.

provisions. Confirming this position, the Supreme Court, in the celebrated case of *Ogugu v State*,¹⁰⁶ held that the African Charter:¹⁰⁷

like all other laws fall within the judicial powers of the courts . . . Thus by virtue of the provisions of sections 6(6)(b), 236 and 230 of the 1979 Constitution, . . . it is apparent that the human and peoples' rights are enforceable by the several high courts depending on the circumstances of each case and in accordance with the rules and practice of each court.

The *Ogugu* decision does not establish the superiority of the African Charter in the hierarchy of Nigerian laws. The Supreme Court clarified this point in *Abacha v Fawehinmi*.¹⁰⁸ In that case, the Court agreed that, whenever a treaty is enacted into law by the National Assembly, as is the case with the African Charter, it becomes binding and effective like other laws within the judicial powers of the courts. However, Justice Ekundayo made it clear that, even though the African Charter possesses 'a greater vigour and strength' than any other domestic statute, it is not 'superior to the Constitution'. This echoes the clear provisions of section 1(1)(3) of the 1999 Constitution as to its supremacy and primacy on the hierarchy of laws.

The jurisprudence of the African Commission with respect to socio-economic rights establishes a commitment to realising the promise of these rights without the requisite capacity to enforce them. For example, in the *SERAC* communication,¹⁰⁹ the Centre for Economic and Social Rights and SERAC jointly submitted a petition to the African Commission in respect of economic and social rights violations in Nigeria. The communication focused on violations of the right to health and clean environment,¹¹⁰ housing,¹¹¹ food,¹¹² as well as life,¹¹³ in Nigeria's oil-rich Delta area.

The African Commission found Nigeria in violation of these rights and made several recommendations, including the establishment of a Development Commission for the Oil Minerals Producing Areas of Nigeria. However, the fact that the Commission relies on the Assembly of Heads of State and Government, a political organ of the African

¹⁰⁶ (1994) 9 NWLR Part 366 1.

¹⁰⁷ As above.

¹⁰⁸ (1996) 9 NWLR Part 475 710.

¹⁰⁹ n 17 above.

¹¹⁰ Arts 16 & 24 African Charter.

¹¹¹ The right to housing is not expressly protected by the African Charter. However, the African Commission held that the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health (art 16); the right to property (art 14); and the protection accorded to the family (art 18) forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected.

¹¹² The African Commission argued that the right to food is implicit in such provisions as the right to life (art 4), the right to health (art 16) and the right to economic, social and cultural development (art 22).

¹¹³ Art 4.

Union, and the good will of states for the enforcement of its decisions meant that the government of Nigeria could treat the decision with levity. This partly explains why the problems of the Niger Delta region persist.¹¹⁴

Perhaps the recently established African Court on Human and Peoples' Rights will provide the impetus for a more effective African Commission. It is, however, too early to assess the Court's capacity to achieve this.

5 Concluding remarks

Several factors militate against the realisation of the promise of socio-economic rights in Nigeria. Besides justiciability, there are problems of corruption and inept leadership, poverty and ignorance, lack of effective promotion and enforcement, apathy and indifference of the international community, the debt burden and perhaps the absence of a virile civil society.

To concentrate on justiciability alone is to miss the point. If socio-economic rights become immediately justiciable in Nigeria today, there would still be no guarantee of socio-economic rights, as enforcement of decisions could become a major issue. To resolve this issue, it is suggested that the legislative arm of government begins to take its oversight functions more seriously. The legislature can and should develop and implement effective monitoring strategies, ensuring that people enjoy the fruits of the national budget. Effective monitoring must be backed by innovative reporting to achieve maximum results. Civil society could also be useful in this regard, as they possess the skills and spread to monitor budget implementation. The executive must be alive to its responsibility for ensuring the welfare of the people by allowing popular participation in public policy making and instituting pro-poor programmes.

The challenge of corruption is one that has been difficult to tackle. The outgoing administration has provided the institutional and legal framework by establishing the Anti-Corruption Commission and the Economic and Financial Crimes Commission. Although the latter organisation has been criticised as being too partisan in the performance of its duties, no one can claim that it has not been a 'thorn in the flesh' of corrupt officials in the private or public sectors. To strengthen these organisations, it is recommended that the enabling legislations be amended to guarantee their financial and operational independence. Unless and until public officials know that their actions in and out of

¹¹⁴ See Amnesty International Report 'Ten years on: Injustice and violence haunt the oil delta' <http://web.amnesty.org/library/Index/ENGAFR440222005> (accessed 24 May 2006).

government could be the subject of investigation, accountability and transparency levels will continue on a downward spiral.

Poverty and ignorance are formidable inhibitions on the path to realising socio-economic rights.¹¹⁵ Many Nigerians struggle to meet the basic requirements of food, clothing and shelter. Some literally live from 'hand to mouth'. It is therefore inconceivable for this category of Nigerians to look in the direction of the courts. For the ignorant, enlightenment and empowerment are important tools. Civil society groups must play a role in mobilising and organising the poor and deprived populations, like SERAC did with a view to engaging the government where necessary. Morka argues, in this regard, that poverty eradication warrants the evolution of 'processes that enable the poor and other marginalised groups, communities or nationalities to participate in both envisioning and shaping outcomes on matters that concern them'.¹¹⁶

Empowerment is also essential. An example of what an empowered population can achieve is best described by the *Maroko* case.¹¹⁷ Maroko was a slum community in Lagos, Nigeria with a population of about 300 000 people and minimal access to essential infrastructure. When, in 1991, the state military government announced plans to demolish Maroko with a view to allocating the land to property speculators, Civil Liberties Organisation (CLO), a human rights non-governmental organisation (NGO) based in Nigeria, sought a restraining order from a Lagos court to stop the demolition pending its suit challenging the demolition order. The court refused to grant the restraining order and before the next adjourned date, the state government demolished the entire settlement, evicting several hundreds of thousands in the process. Fifteen years after the demolition, the struggle to redress the flagrant violation of the socio-economic rights of the Maroko people continues in the courts and elsewhere. However, following SERAC's lead, the Maroko evictees organised themselves under the auspices of the Maroko Evictees Association and made very extensive media presentations on their case and the possible threat to future evictees. The Lagos State government found the Maroko evictees a formidable force in view of the extensive media attention and public sympathy they attracted. Although the issues have yet to be fully resolved, the Lagos government has been more inclined to discussing than before.

¹¹⁵ Nigeria is ranked 158 of the 177 countries on the UNDP's 2005 Human Development Index. The 2005 Human Development Report paints a grim picture of Nigeria's state of development. According to the Report, 70,2% of Nigerians live below the poverty line. See <http://www.hdr.undp.org>.

¹¹⁶ F Morka 'Combating poverty through the international human rights framework', on file with author.

¹¹⁷ See S Amadi 'Programmatic and conceptual paralysis in protecting and promoting economic, social and cultural rights in Africa' http://www.communitylawcentre.org.-za/projects/Socio-Economic-Rights/conferences/samuel_amadi_paper.pdf (accessed 24 May 2006).

The challenge for NGOs working in the field of socio-economic rights is to follow the SERAC lead in the *Maroko* case. People need to be mobilised in their numbers to challenge certain infractions, through the courts and, more importantly, through the media and the court of public opinion.

The challenge of monitoring and enforcement is one for the National Human Rights Commission and human rights NGOs. The Commission was established by the Human Rights Commission Act of 1995 to, *inter alia*, create an enabling environment for extra-judicial recognition, promotion and enforcement of all rights recognised and enshrined in the Constitution and under the laws of the land. It was also designed to provide a forum for public enlightenment and dialogue on human rights issues. Unfortunately, it is limited by its dependence on the executive for the appointment of key officers and funding. It is therefore recommended that the Commission's Act be amended to make it financially and operationally independent with a view to guaranteeing efficiency and effectiveness. NGOs have been active in monitoring violations of civil and political rights, but very few have bothered to monitor violations of socio-economic rights. It is therefore recommended that more NGOs should focus on these important human rights, without which civil and political rights lack any significant meaning.

The indifference of the international community is one which Nigeria can do very little about. The challenge is to embrace African Charter provisions on socio-economic rights, expand and create the necessary mechanisms for protecting them. Happily, Nigeria has escaped the debt burden. Government must use resources otherwise reserved for debt servicing and repayment to improve the living standard of Nigerians.

A virile civil society is crucial to preserving socio-economic rights. From participation through monitoring to litigation, civil society can provide the environment for public accountability necessary for the guarantee of socio-economic rights. However, this is best achieved in an atmosphere of congeniality. It is therefore recommended that organisations active in the promotion of socio-economic rights should coalesce to present a united front on these issues.

The crisis of socio-economic rights enforcement could be resolved in the interest of justice. A fair resolution would require a multi-dimensional approach involving all arms of government and civil society.

A comment on the Human Rights Watch Report 'Unprotected migrants: Zimbabweans in South Africa's Limpopo Province'

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On 10 August 2006, Human Rights Watch (HRW) presented its latest report, 'Unprotected migrants: Zimbabweans in South Africa's Limpopo Province', at a seminar held at the Park Hyatt Hotel in Rosebank.¹ HRW is the non-governmental human rights organisation (NGO) with the highest global profile, ranked perhaps with Amnesty International. HRW, however, differs significantly from Amnesty International, which works in part through local chapters open to all. HRW works exclusively by having permanent and consulting staff that carry out its research and advocacy work. 'Unprotected migrants' was thus the product of Ford Foundation-funded research principally conducted by two non-resident consultants employed directly by HRW's Africa Division, one of whom travelled to Limpopo Province in late April and early May 2006, consulting with local NGOs there. While debatable, the loss in local knowledge and throughput for the local human rights community for this kind of human rights reporting is arguably offset by the gain in independence, review by New York-based persons with human rights advocacy experience² as well as perhaps by greater global exposure of

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¹ Human Rights Watch Volume 18, No 6A (July 2006) (52 pages) <http://hrw.org/reports/2006/southafrica0806/> (accessed 31 March 2007). This is not the first time that Human Rights Watch has written a report critical of the treatment of foreign nationals in South Africa. In March 1998, Human Rights Watch released 'Prohibited persons': Abuse of undocumented migrants, asylum-seekers, and refugees in South Africa' <http://www.hrw.org/reports98/sareport> (accessed 31 March 2007), which created a minor furore. The author assisted in the research and writing of that report which was principally written by a HRW staffer, Peter Bouckaert.

² The acknowledgments list three persons as having 'edited and reviewed' the report, two persons as having 'reviewed' the report, and two others as having offered 'valuable insights and helpful comments'.

the findings of the report.³ Furthermore, the Johannesburg workshop organised and hosted by HRW in an open and consultative manner demonstrates the sensitivity of HRW to the concern of facilitating and fostering local advocacy efforts.

'Unprotected migrants' does not find a happy situation in Limpopo. According to HRW:

Documented and undocumented migrants from Zimbabwe are vulnerable to human rights abuses in South Africa and occupy an ambiguous space in the law with respect to certain rights guarantees. Their constitutional rights to personal freedom and security, conditions of detention which are consistent with human dignity, and fair labour practices are infringed upon by violations of immigration and employment laws and also deficiencies in these laws. Their inability to access adequate housing presents challenging issues of unsettled law, which will require further adjudication. In the public sector, the police and immigration officials violate the lawful procedures for the arrest, detention, and deportation of foreign migrants in the Immigration Act. In the private sector, employers violate the prescribed basic conditions of employment for farm workers, including by not paying the minimum wage, making unlawful deductions from workers' wages, and calculating workers' wages based on productivity rather than the number of hours worked. Employers in the cities pay discriminatory wages to undocumented foreign migrants who do the same work as South African citizens. South African workers and private security officials discriminate and use violence against foreign workers, documented and undocumented. With respect to the right to social security, foreign migrants suffer *de facto* exclusion from workers' compensation. Existing legislation discourages farmers from investing in farm workers' housing and the government has no housing policy for farm workers, whether South African or foreign.

As is its usual practice, HRW does not simply employ a strategy of naming and shaming. 'Unprotected migrants' also makes a number of recommendations, intended as constructive suggestions to the South African government. In a short report such as this, the recommendations are two pages long. In a full-scale report, such as 'Prohibited persons', the recommendations may be targeted at a number of different governments and organisations and comprise a lengthy section. In 'Unprotected migrants', HRW summarised its recommendations as follows:

To address the human rights abuses of Zimbabwean foreign migrants, Human Rights Watch recommends that the government of South Africa

³ That one can imagine other models for the production, quality assurance and distribution of human rights research does not mean that the HRW model is not itself doing worthwhile work. One alternative model might invite proposals for human rights research from locally-based researchers, selecting some of those proposals for funding, and then editing, reviewing and publishing within HRW channels some of the reports actually completed. Informally, this perhaps occurs. Another alternative model might see HRW undertaking such a report as a joint project with a local human rights NGO. In the making of 'Unprotected migrants', two employees of the Musina Legal Advice Office are thanked in the acknowledgments. Other persons attending the seminar also raised possibilities of future joint publications with HRW.

enforce compliance with its immigration and employment laws, and amend the laws where necessary. Measures such as creating a hotline for foreign migrants to report human rights abuses by employers may complement the introduction of incentives for nongovernmental organisations to assist in monitoring and reporting on labor law violations by employers. Legal impediments to foreign migrants' receiving workers' compensation should be removed by legislative amendments. The government should acknowledge the legal disincentives for employers to provide housing for farm workers — both foreign migrants and nationals — and should devise a housing policy that will enable it to meet its constitutional obligations to progressively realise the provision of adequate housing for everyone within the understanding of the Constitutional Court. Finally, the government should address the specific situation of undocumented Zimbabwean migrants in South Africa through comprehensive rather than *ad hoc* measures that address their lack of status.

One could critique this report (and presumably nearly every other HRW report) for misplacing its focus in several ways. First, the report's major finding is that the laws are not followed. As anyone who is exposed to some of the South African news media would probably know, this is not surprising in this sector at this point. We knew that and even most government officials would not dispute such a finding. What would be particularly revealing would be information about the laws and their lack of implementation that would contribute directly towards improving the situation in Limpopo. As representatives from the Forced Migration Studies Programme (Wits) have noted, this would require a more sustained investigation of migration governance in the province. Such work ought to pay particular attention to (1) the amount of resources (both human and material) currently available to local government agencies (Department of Labour, SAPS, Home Affairs) for ensuring compliance with migrant and migrant worker protections referred to in the report, and (2) the nature and relative success of national oversight mechanisms. This could begin with parliamentary committees for the relevant departments and the Border Control Operational Co-ordinating Committee.

Thus, second, it is significant that the report neither notes nor addresses the organisational difficulties (and potential solutions to those difficulties) of the Department of Home Affairs and its capacity constraints.⁴ One could make a very good case that this department⁵ is both nearly at the bottom of the barrel in terms of resources, skills, capacity and organisational discipline and also currently under its most competent and most human rights concerned political leadership ever, noting in particular the independent inquiry commissioned into

⁴ Other HRW reports do cover issues of state capacity and this topic is thus understood to fall within the organisation's mandate. See 'Unequal protection: The state response to violent crime on South African farms' (HRW 2001). For a report that mostly finds violations of existing laws, the topic of capacity would have been worth including.

⁵ Other departments such as the SAPS, which are also part of the ongoing human rights issue, do not face capacity constraints of the same magnitude.

the operation of Lindela.⁶ There might well be a receptive audience for a report aimed at such questions.

A third criticism could be that the HRW report barely, if at all, touches upon the root cause of the economic/democratic crisis in Zimbabwe and the response or lack thereof from the South African side. But, as said, these criticisms would be valid for nearly each and every HRW report and are perhaps too broad to gauge. At the least the issue requires further discussion within the South African human rights community, including global human rights groups such as HRW and Amnesty International. Thus, the remainder of this review/comment proposes to take the report at its face value and to engage with it within the frame it itself proposes.

'Unprotected migrants' gives background to the current situation in and around the Limpopo Province by outlining the numbers of migrants heading towards South Africa, the particular vulnerability of Zimbabwean asylum seekers to abuse and delay in the refugee determination process, and the continued reliance by South Africa on a deportation rather than an employer-policing policy to control the number of undocumented migrants. Many of those deported simply return through the borders of the South African territory. Reflecting longstanding patterns, the percentage of foreign farm workers among farm labour is significant and has been increasing since South Africa's transition from apartheid. Limpopo, the most rural and poor of the provinces, has farms that depend heavily on workers from Zimbabwe. After some discussions between South Africa and Zimbabwe, led by the South African Minister of Labour, the farm owners currently take advantage of 'corporate work permits' in the Immigration Act, paying R1 520 for a variable number of foreign farm workers, each of whom must have some type of travel document from Zimbabwe (which, since October 2004, the Zimbabwean government has provided in the form of emergency travel documents). With donor funding from the United Kingdom, the International Organisation of Migration (IOM) in May 2006 opened a reception and support centre on the Zimbabwean side of the border to provide co-ordinated social services to the large numbers of persons deported from South Africa to Zimbabwe. The IOM plan, of which HRW is 'deeply sceptical' (as well as of the IOM itself), is to facilitate the employment on South African farms of qualified Zimbabweans, while providing passage to other deportees to their homes of origin. According to the report:

IOM's past failure to publicly confront and criticise the Zimbabwean government's human rights abuses in the context of international humanitarian assistance suggests it will be unlikely to defend migrants' and deportees' rights should so doing require an oppositional stance toward the government.

⁶ In May 2005, the Minister received a report from the Independent Committee of Inquiry into the Deaths at the Lindela Holding Facility.

Recognising the historical context of this situation, the report notes the two-gate character of the apartheid immigration regime, facilitating permanent immigration through individual permits (mostly for Europeans), on the one hand, and, on the other hand, encouraging employment schemes largely administered by the mines or farmers' association that exempted foreign employees from the requirements and protections afforded to immigrants.⁷ This brief history directly links the problems noted in the report to the apartheid experience of migrant workers. This increases the appeal of the report and is valuable for this report's particular emphasis on migrant workers as opposed to asylum seekers (where HRW recognises that much local research and advocacy exist).

Much of what HRW found and reports on were violations of the Immigration Act. As the report notes:

Human Rights Watch found violations of the procedures for the arrest, detention, and deportation of 'illegal foreigners' by police and immigration officials. These violations have been documented in other research and must be understood as widespread and systematic rather than idiosyncratic and anecdotal.

This is right and the report is correct to note that these violations are both widespread and revealed through prior research.⁸ It unfortunately reflects the character of human rights advocacy and violations in this area that such research, which in one sense simply replicates earlier findings, remains continuously necessary and urgent.⁹ In this category of failure to respect, the report notes officials' failure to provide assistance in verifying the status or identity of suspected 'illegal foreigners' (23-25), assault, bribery and theft by police during arrest of suspected illegal migrants (25-27), detention exceeding 30 days without proper procedures (27-28), and detention not in compliance with prescribed standards (28-32).¹⁰

In addition, HRW found problems that went beyond the failure to respect the provisions of the existing law.

⁷ HRW 18. In this respect, the report's statement that '[t]he Aliens Control Act, 1991, amended in 1996, encouraged and governed permanent immigration for Europeans' gives the inaccurate impression that only Europeans were able to obtain permanent residence under that law. While discrimination in practice continued to occur, the formal legal criterion of race was removed from the predecessor legislation to the Aliens Control Act in 1986 and was never contained in the Aliens Control Act itself, which otherwise substantially did consolidate (but not reform) the pre-existing apartheid era immigration legal framework, which had indeed encouraged European immigration.

⁸ In addition to the sources cited by the report, there is also a body of research by the South African Human Rights Commission that affirms this point.

⁹ South African Human Rights Commission 'Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act' (March 1999).

¹⁰ The Johannesburg seminar thought litigation prospects regarding violations of conditions of detention for children were good.

Human Rights Watch also became aware of legal gaps in the Immigration Act and the Immigration Amendment Act, arising from the administration of the corporate permit provisions and the arrest, detention and deportation process. These legal violations and gaps and, where applicable, their consequences for the human rights of foreign migrants as provided for in the constitution, are identified below.

Material in the report in this category includes deportation without an opportunity to collect remuneration, savings and personal belongings (32-35) and migrants' vulnerability to financial abuses by corporate permit holders (37, 49-50).

Both of these gaps are worth addressing, although, in my view, there are more legal resources to work with for addressing the second than for the first.

The first is the issue of deportation without an opportunity to collect remuneration, savings and personal belongings. While the impact on particular persons should be acknowledged, this practice is not necessarily the most serious of human rights violations. Indeed, the report itself terms it only a 'serious injustice', which in HRW language is less serious than a human rights violation. The legal authority for requiring such an opportunity is relatively thin. It is a provision in a 1990 international treaty that South Africa has not signed, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹¹ While opinion is increasingly in favour of working with this Convention, it is hardly yet a legal base. Moreover, one wonders just how the DHA would actually be able to cope with such a requirement. If implemented, such a requirement should be part of a shift in strategy towards greater attention to issues of employer workplaces and the criminal justice system. Both of these locations are indeed arguably places where such a requirement would have some effect on strengthening South Africa's migration policy.

The second gap in the law identified by HRW puts the focus on the degree of control the employers have over their employees. Indeed, one of the principled objections to the framework of the Immigration Act at the time of its drafting and adoption concerned this feature: The broad concern was raised that corporate work permits allowed the employer to control the migration status of employees and thus to exercise an additional source of authority that could easily be abused. In at least the setting of the farms of the Limpopo Province, if not the boardrooms of the gold and platinum mining companies, that legal authority has indeed been abused, as 'Unprotected migrants' finds. The particular concern of the report is a narrow if clear issue: the char-

¹¹ The Inter-American Court of Human Rights ruled that international principles of non-discrimination prohibit discrimination on the basis of work conditions and terms with respect to undocumented migration workers. See (2005) 99 *American Journal of International Law* 460-465.

ging of documentation fees beyond the cost of the actual government-issued documentation.¹² However, the problem is a broader one, since financial exploitation is only one of a number of ways that an employer (including a farmer in Limpopo Province) may exploit his workers. Indeed, the entire set of findings relating to non-compliance with employment laws could arguably be based upon this power imbalance, an imbalance sourced in, or at least ratified by, the Immigration Act and its attempt to cater to the private sector through an explicit devolution of documentary power in provisions like the corporate work permit.¹³

Before turning to that set of employment law non-compliance findings, it is worthwhile to point to some material in the report which is perhaps in a category of its own. This is the material in the section on 'migrants' vulnerability to arrest and deportation arising from government deficiencies in documenting corporate workers' (35-36). Here, the report notes:

Corporate workers who have become illegal because of a government failure to properly document them in a timely fashion should not be subjected to early morning raids, arrests or deportation. Human Rights Watch learned of migrant workers who had been subjected to police raids and even arrested and deported because the government of Zimbabwe had delayed renewing their ETDs and/or the government of South Africa had delayed renewing their temporary residence permits.

The reason that this material is perhaps in a category of its own is that HRW then recommends that the immigration law be changed in the following fashion:

To the government of South Africa:
Amend the immigration law to protect migrants who fall into irregular status because government bureaucracies and agents responsible for workers' documentation fail to implement the law and carry out their functions.

Upon closer inspection, however, this recommendation seems to me to be a bit unrealistic. Yes, migrants are caught in a variety of catch-22 and Kafka-esque situations. Yes, these result in significant part from the state's failure to implement. Yes, in these situations migrants are regularly subject to abusive inhumane and exploitative practices. But to amend the immigration law in this way — by providing a blanket exemption for those without documents due to the state's failure — would not, at least on this evidence, strengthen South Africa's migration regulatory regime or align such a policy more closely with human rights standards. Instead, it would simply be diverting attention from the true problems of a lack of capacity and misplaced policy emphasis on deportations as

¹² The report suggests two versions of an amendment to the Immigration Act to prevent charges for complying with the law. In addition, the resource of the code of conduct for immigration practitioners could be used.

¹³ In this respect, it is worthwhile to note that the corporate work permits are also a cause of concern for those at the other end of the client spectrum. See C Watters 'Immigration law update' (July 2006) *De Rebus* 47; J Pokroy 'Intracompany transfer work permits' (August 2006) *De Rebus* 42.

opposed to strengthening labour affairs and the criminal justice system and/or addressing the imbalance of employers' power with respect to migrant employees. A policy recommendation that would perhaps draw upon the same sentiment but be more effective (though perhaps beyond the HRW mandate) would be a call for a further amnesty (such as the SADC, the mineworkers' and the FMR amnesties).¹⁴

Returning to the material on compliance with employment laws, the report makes three types of findings: violations of existing laws and determinations, places where the existing law is inadequate for all workers, and places where foreign migrant workers are in particular legally and in practice disadvantaged.¹⁵ Violations of existing laws and determination includes employers' failure to pay minimum wages, their unlawful use of 'piece rate', their disregard of overtime rules (38-41) and employers' failure to comply with provisions governing deductions from wages (41-43). The report also notes instances and patterns of discrimination and violence against Zimbabwean workers by South Africans in the private sector (43-45).

Further, the report presents findings on housing and living conditions (45-48): Farm owners claim that the maximum deduction of 10% does not provide an incentive for providing housing for farm workers. This section provides a good example of how different human rights advocacy organisations can draw upon each other's work to maximise the impact of their own.

In 2002, the Department of Housing informed the South African Human Rights Commission that it intended to develop a strategy specifically for farm workers' housing in 2003. Human Rights Watch found no evidence of such a strategy (167). The government's failure to create a housing policy puts it at risk of contravening its constitutional obligation to establish measures for the progressive realisation of the provision of adequate housing for everyone.

South African housing policy is currently in a flux and this point should be raised in the ongoing policy debates.

In relation to workers' compensation, the report (48-49) finds problems with foreign workers being able to receive compensation awards through difficulties with accessing the banking system, a finding consistent with other research. Particularly in relation to this last finding, the report will provide a valuable resource for advocacy organisations

¹⁴ See J Crush & V Williams *The new South Africans? Immigration amnesties and their aftermath* (1999). The Johannesburg seminar noted that discussions of a new amnesty had been held within government in 2004. One potential defined group for an amnesty was the group of asylum seekers. Any amnesty should take into account DHA's capacity to deliver documents, both currently and in the future.

¹⁵ 'Unprotected migrants' notes that international law requires equality of rights to fair labour practices between citizens and foreigners, including irregular migrants (HRW 17-18). An important recommendation of the report is the adoption of the convention (n 11 above).

that are seeking a clear outline of the legal environment in which truly unfortunate instances occur, such as the failure to compensate a foreign migrant worker after he was driven over by a tractor.

To end this set of comments on a truly legal note: The report asserts at several points that a violation of various legislative provisions or sectoral determinations also constitutes a violation of the respective constitutional provisions. However, this transfer from the statutory or regulatory level to the constitutional one cannot be assumed quite so easily. It may well be that legislative or regulatory protections provide protections that go beyond those provided by a fair and purposive interpretation of the constitution. If so, then, in particular, there may be jurisdictional hurdles that a Legal Resources Centre or university law clinic lawyer faces in pursuing a claim on behalf of a migrant farm worker. Indeed, this (a jurisdictional obstacle) is currently and seemingly endlessly the situation with respect to procedural fairness in deportation. Because of the failure to institute magistrates' courts with subject matter jurisdiction over violations of the Promotion of Administrative Justice Act (PAJA) (and the deletion of Immigration Courts from the Immigration Act), the only forum that can adjudicate upon a claim of unfair deportation is a High Court, a court out of reach of nearly every unprotected migrant caught up in the deportation machinery. A PAJA claim available only in the High Court might as well be a constitutional claim.

That said, there is at least one constitutional right that ought nonetheless to be deployable in aid of the unprotected migrants identified by this report: the right to dignity. This right is the favourite of this court, arguably more so than the rights to equality and freedom. It is thus worth quoting one opinion of a Constitutional Court judge on the potential applicability of the right to pretty much the precise situation at issue in this report.¹⁶

Contrary to the Centre's argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity.

The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 124 (footnotes omitted) (*per Sachs J*).

Still an infant or now a toddler? The work of the African Committee of Experts on the Rights and Welfare of the Child and its 8th ordinary session

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1 Introduction

Africa is the only continent which has its own comprehensive regional instrument for the promotion and protection of children's rights. This instrument, the African Charter on the Rights and Welfare of the Child (African Children's Charter),¹ provides that its implementation and monitoring are supervised by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee or Committee).² The 11-member African Children's Committee was inaugurated in May 2002 and by the end of 2006, it had held eight ordinary

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¹ African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990). For a detailed discussion of the Charter, 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 *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 *International Journal on 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) *International Journal on 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).

² Art 32(1) African Children's Charter.

sessions.³ The Committee meets in bi-annual ordinary sessions in spring and autumn.

This article focuses on the 8th ordinary meeting of the African Children's Committee held at the African Union (AU) Conference Centre in Addis Ababa, Ethiopia, from 27 November to 1 December 2006.⁴ The meeting was held in accordance with article 37(3) of the African Children's Charter and rules 1 and 2 of the Rules of Procedure. The meeting was the first meeting of the African Children's Committee for the year 2006. This is because the first meeting, initially planned for May 2006, was cancelled as a result of unforeseen circumstances.

The 8th meeting saw some developments in a number of areas in the work of the African Children's Committee. On the agenda were various draft guidelines which were presented by Committee members and which were subsequently adopted at the end of the meeting. These were the Guidelines for the Consideration of Communications, the Guidelines for the Conducting of Investigations and the Criteria for Granting Observer Status with the African Committee.

In what follows, the article highlights the proceedings of the 8th ordinary session of the African Children's Committee. Article 46 of the African Children's Charter mandates that:

The Committee shall draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

Thus, in analysing the proceedings of the 8th meeting, the article endeavours to make recommendations based mostly on the experience of the African Commission on Human and Peoples' Rights (African Commission). This piece does not discuss in detail all the procedures involved and the issues deliberated upon during the 8th meeting. Because of space limitations, some degree of prioritisation is exercised. Finally, this is not the official report of the AU Commission or the African Children's Committee.⁵ It has been compiled to support the promotion of the African Children's Charter and the dissemination of the African Children's Committee's work.

³ For a report on the 5th, 6th and 7th meetings of the African Children's Committee, see B Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 549.

⁴ In writing this piece, the author relies, among others, on personal knowledge regarding the work of the Committee, reports of the African Children's Committee, staff members of the AU, academic writing and information gathered from members of NGOs and inter-governmental organisations who are actively involved in the Children's Committee's work.

⁵ For official reports and documents, see <http://www.africa-union.org> (accessed 30 June 2007).

2 Procedural matters

After the opening ceremony, members of the Committee held an informal closed consultative meeting to discuss some procedural and administrative issues. It was agreed that, in order to benefit from the experience of the Committee's partners, the items on draft guidelines on communications, investigations and criteria for granting observer status should be discussed in open sessions.⁶ The Draft Programme of Work was amended accordingly. This is a commendable move by the African Children's Committee as it allowed non-governmental organisations (NGOs) to give invaluable input in the discussions that followed.

On a different note, Mrs Dawlut Hassan, the new Committee member who was elected in January 2006 at the Gambia Summit to serve a four-year term until July 2010, also took part in the meeting. Mrs Hassan was called to take the oath of office by reading and signing the oath under the guidance of the representative of the AU Legal Counsel in the presence of Committee members and other observers.

Two points of major significance mark the election of Mrs Hassan. Firstly, it had previously been argued in the context of geographic and linguistic distribution that:⁷

... it is apparent that there is an absence of a member from Arabic speaking/Northern Africa countries. This happens despite the fact that Algeria, Egypt and Libya have ratified the African Children's Charter.

The election of Mrs Hassan, who is from Egypt, fills this gap. Secondly, the election of Mrs Hassan helps fill the vacancy in the Committee that had existed for some time and allows it to function with a full membership.⁸

3 Guidelines for the consideration of communications

Article 44 of the African Children's Charter stipulates that

the Committee shall be empowered to receive communications on any issue dealt with by this Charter from any individual, group or non-governmental organisation recognised by the Organization of African Unity, by a member state or by the United Nations.

The Committee had considered that directives should be elaborated for an effective application of these provisions in accordance with article 74 of the Rules of Procedure of the Committee.

⁶ The meeting was attended by 10 members of the African Children's Committee as well as representatives from UN agencies, NGOs and other organisations dealing with children's rights issues.

⁷ Mezmur (n 3 above) 556.

⁸ Until July 2005, the African Children's Committee was forced to operate short of two members.

Unlike the provisions of the African Charter on Human and Peoples' Rights (African Charter), the mandate of the African Children's Committee under the African Children's Charter, which is to receive and entertain communications, is worth noting for its relative clarity and precision.⁹ This is an innovative addition to the African Children's Charter,¹⁰ as the United Nations (UN) Convention on the Rights of the Child (UN Convention) does not contain this enforcement mechanism.

In order to fulfil this mandate of the Committee, a member of the Committee was tasked with drafting the draft guidelines during the 7th meeting and presented it to the 8th meeting. The Report on the Draft Guidelines for Considering Communications Received was presented by Mrs Diakhate, the Committee member who drafted the Report, and all Committee members commended Mrs Diakhate for a job well done.

The Report deals with a number of issues. The document is divided into three chapters and under each chapter a number of articles have been developed. Chapter one deals with general provisions, chapter two with consideration of communications, and chapter three with the Committee's deliberations.

In chapter one, the document defines 'communications' as 'any correspondence or any complaint from a state, individual or NGO denouncing acts that are prejudicial to a right or rights of the child'. It also provides the way in which communications should be received and recorded by the Committee's Secretary.¹¹ Further elaboration is added on the way in which summaries of communications, categorised according to their subject matter, are to be made and how these summaries are to be circulated at each session.¹²

'No communication shall be considered by the Committee if it is anonymous.'¹³ As is to be expected, communications must indicate who the author is, and should also include full particulars to enable the Committee's Secretary to remain in contact with the author, to keep him or her informed about the status of the communication, and to request further information if required.¹⁴ This seems to be the

⁹ However, here it should be mentioned that the procedure contained in the African Charter spans seven different articles elaborating different conditions for submission and receipt of communications. The African Committee's mandate is basic, but this does not mean it is a weaker mechanism. It simply allows room for interpretation and for guidelines and procedures to be established which set out submission and receipt conditions. This is what the Committee has done with the Guidelines for Communications — it elaborated and clarified the conditions and the procedure for consideration of communications.

¹⁰ Art 44 of the African Children's Charter provides for 'communications'.

¹¹ Ch 1, art 2(1) Guidelines for Communications.

¹² Ch 1, art 3 Guidelines for Communications.

¹³ Ch 2, art 1(2) Guidelines for Communications.

¹⁴ 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) 67.

understanding of the African Commission too.¹⁵ The experience of the African Commission indicates that the authors of the communication should give their names 'even if they desire to be anonymous with respect to the state involved'.¹⁶

Communications may be presented by individuals, including the child victim and/or his parents or legal representatives, a group of individuals or NGOs recognised by the AU, by a member state or by any other institution of the UN system. It is also an interpretation that the African Commission justifies as being¹⁷

a clear response to the practical difficulties that face individuals in Africa and, in particular, where there are serious or massive violations that may preclude individual victims from pursuing national or international legal remedies on their behalf.

It is also interesting to note that '[a] communication may be presented on behalf of a victim without his agreement on condition that the author is able to prove that his action is taken in the supreme interest of the child'.¹⁸ This section is intended to address situations in which the 'best interest of the child' principle under the African Children's Charter¹⁹ should override other circumstances.

Although no communication will be considered by the Committee if it concerns a state that is not a 'signatory' (or, rather, state party) to the Children's Charter,²⁰ an exception to this exists.²¹

The Committee may admit a communication from a state non-signatory to the Charter in the overall best interest of the child. In so doing the Committee shall collaborate with other related agencies implementing conventions and charters to which the non-signatory country is state party.

Here, with some degree of innovation by the Committee, the principle of the 'best interest of the child' seems to be given an upper hand over the question whether a country is a state party to the African Children's Charter.

Unlike the African Charter, the African Children's Charter does not deal with the issue of admissibility. As a result, it has become necessary for the African Children's Committee to address this issue under the Guidelines for Communications. Accordingly, the Guidelines provide that²²

¹⁵ As above.

¹⁶ See, eg, *Dioumessi & Others v Guinea* (2000) AHRLR 130 (ACHPR 1995) (admissibility) (interpreting article 56(1) of the African Charter).

¹⁷ As above.

¹⁸ Ch 2, art 1(I)(4) Guidelines for Communications.

¹⁹ Art 4 African Children's Charter.

²⁰ Ch 2, art 1(II)(1) Guidelines for Communications.

²¹ Ch 2, art 1(II)(2) Guidelines for Communications.

²² Ch 2, art 1(III)(a) Guidelines for Communications.

in order to take a decision on the admissibility of a communication, the Committee shall ensure that the communication is compatible with the provisions of the Constitutive Act of the African Union or with the Charter on the Rights and Welfare of the Child

and the communication is not exclusively based on information circulated by the media.²³ In addition, for a communication to be admissible, the complainant must show that the same issue has not been considered according to another investigation, procedure or international regulation;²⁴ the author has exhausted all the available appeal channels at the national level or when the author of the communication is not satisfied with the solution provided;²⁵ the communication is presented within a reasonable period after appeal channels at the national level have been exhausted²⁶ and, finally, the wording of the communication shall not be offensive.²⁷

If not all, many international and regional human rights instruments require the exhaustion of domestic legal remedies in human rights disputes against state parties to those instruments before such disputes are presented before supervisory organs. The African Children's Committee is therefore not an exception in requiring the exhaustion of local remedies. However, the phrase used in the Guidelines, stating that 'the author has exhausted all the available appeal channels at the national level', seems to suffer from a degree of ambiguity; perhaps caused by the lack of necessary technical legal drafting skills required. The term 'appeal' need not necessarily be taken to mean a higher judicial court. It could also relate to a tribunal, a commission or any other organ with judicial or quasi-judicial powers.²⁸ In addition, the main message of the whole phrase should be that a state should have the opportunity to provide redress for a wrong under its own legal system before international redress may be invoked against that state.²⁹

Obviously, where there is no local remedy in existence, there is nothing to exhaust.³⁰ This may include situations where a decree or other measure has ousted the jurisdiction of the courts; where pursuing a remedy is dependent on extra-judicial considerations; where the nature of the relief sought is not possible before domestic courts; where a situation of serious massive violations of human rights and particularly children's rights exists and where complainants are detained without

²³ Ch 2, art 1(III)(b) Guidelines for Communications.

²⁴ Ch 2, art 1(III)(c) Guidelines for Communications.

²⁵ Ch 2, art 1(3)(d) Guidelines for Communications.

²⁶ Ch 2, art 1(3)(e) Guidelines for Communications.

²⁷ Ch 2, art 1(3)(f) Guidelines for Communications.

²⁸ But this does not necessarily mean that, for a communication to be admitted, remedies of a non-judicial nature should not be required to have been exhausted.

²⁹ See *Interhandel* case, 1959 ICJ Reports 27.

³⁰ The use of the words 'if any' in art 56(5) of the African Charter implies that remedies can be exhausted only if they are available.

trial.³¹ Where court proceedings are unduly prolonged, or sometimes even just prolonged, the Committee should be flexible, and on a case-by-case basis consider the communication as having exhausted local remedies. Whether indigence should absolve a complainant from exhausting local remedies is open to debate. However, in the context of the African Commission, Viljoen rightly suggests that 'in order for access not to be denied to individuals on the basis of their indigence alone, admissibility requirements should be relaxed'.³² Interestingly, the possibility for the complainant requesting that the Committee reconsider its decision by providing additional documents or facts is also provided for.³³ Finally, it needs to be noted that, in proving exhaustion of local remedies, the onus of proof usually would be on the complainant.

The concept of provisional or interim measures, the purpose of which is avoiding irreparable damage to victims, or sometimes complainants, during the course of the consideration of a communication, has received the attention of the African Children's Committee.³⁴ The state concerned in a communication is to be given the chance to present an explanation or written statement containing its observations on a communication within six months.³⁵ However, if this deadline is not respected, the Committee may decide to consider the communication anyway.³⁶

Much emphasis seems to have been placed by the Committee on the confidential nature of the consideration of communications. Communications are to be considered in a session held *in camera*.³⁷ It is provided that 'the Committee, working group or Rapporteur shall not make public any communication, document or information relating to a communication',³⁸ further establishing the principle of confidentiality.

Here a word of caution should be shared from the experience of the African Commission. It was reported that³⁹

the Commission had placed on article 59(1) of the African Charter which prohibits disclosure of 'all measures' taken in respect of protective activities by the Commission 'until such a time as the Assembly of Heads of State and Government shall otherwise decide'. This provision ensured that very little was known or learned about the Commission relative to such recent

³¹ S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 133.

³² Viljoen (n 14 above) 90.

³³ Ch 2, art 2(II)(3) Guidelines for Communications.

³⁴ Ch 2, art 2(IV)(1) Guidelines for Communications.

³⁵ Ch 2, art 2 (II)(4) Guidelines for Communications.

³⁶ Ch 2, art 2(III)(4) Guidelines for Communications.

³⁷ Ch 3, art 1 Guidelines for Communications.

³⁸ Ch 3, art 1(3) Guidelines for Communications.

³⁹ CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transitional Law and Contemporary Problems* 367-368.

African tragedies as the conflicts in Burundi, Rwanda, and Liberia. It also confirmed the sub-ordination of the Commission to the political organs of the OAU. By late 1993, this confidentiality principle was undermining the reputation of the Commission and, it was widely felt, of its members as well. In an interview with this author in 1993, one of the then members of the Commission described the effect of this provision as 'frustrating' and asserted that the confidentiality provision was inserted into the Charter by the leaders of the OAU 'to protect' themselves from undue criticism from outside.

In the last sections of the Guidelines, article 3 of section 3 embeds one of the four cardinal principles of the African Charter, namely 'child participation', into the communication procedure. It highlights that 'the Committee should take measures to ensure the effective and meaningful participation of the child or children concerned by the consideration of the validity of the communications and its author'.

Finally, the African Children's Committee recognises the challenge faced by the African Commission of enforcing decisions. In an attempt to fill this gap, the African Children's Committee provides that '[t]he Committee shall designate one of its members to be responsible for monitoring its decisions'⁴⁰ and further indicates that '[h]e/she shall regularly report to the Committee'.⁴¹ In the context of the African Commission, it has been suggested that⁴²

a Special Rapporteur on follow-up would be an effective appointment. Without such a mechanism, the Commission often believes its job is finished once the decision is published, the communication does not get the necessary publicity, and it is not clear whether the victims received the remedy they deserved.

By establishing a follow-up mechanism to its decisions on communications, the African Children's Committee seems to intend to fill the gap that existed within the African Commission. Here, it should be mentioned that, while drafting its decisions under a communication, the Committee should clearly indicate which actions need to be taken by the state(s) concerned.

4 Guidelines on the conduct of investigations

Under item 7 of the agenda of the 8th meeting, the Guidelines on the conduct of investigations (article 45 of the African Charter) were considered. The document was divided as follows: an introduction, part A on definition, aim and types of investigation missions, part B on logistics and part C on follow-up of missions.

The document contains 24 detailed provisions. It is also accompanied

⁴⁰ Ch 3, art 4(1) Guidelines for Communications.

⁴¹ Ch 4, art 4(2) Guidelines for Communications.

⁴² R Murray 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 10.

by two appendixes on the 'form for the collection of field information' and a list indicating the principles and guarantees that mission members should have. A definition section elaborates what an investigative mission is,⁴³ while the aim and types of investigation missions are provided for in subsequent provisions.⁴⁴

Investigation missions can be initiated either by the Committee or at the invitation of a state party.⁴⁵ A preliminary report is to be prepared before each investigation,⁴⁶ which helps collect all available information on the country concerned.⁴⁷ The information on the preliminary report shall be collected from the AU, the UN, from the state concerned, official political parties and civil society.⁴⁸

The Committee, recognising the need to undertake a well-organised investigation mission, further guides the way in which the logistics are to be handled. Mission dates and mission programmes need to be prepared and communicated well in advance to all concerned.⁴⁹ The need to remain independent and impartial in all activities of the mission is underlined.⁵⁰

Article 14 deals with publicising the mission and inviting the public and all individuals likely to contribute to the mission's success. As expected, under article 15(3), the mission should also meet authorities of public and private institutions. The need to have a wide coverage, including rural areas, in the mission is also taken into account.⁵¹

At the end of the mission and before leaving the country that is visited, the mission delegation must prepare a document presenting the preliminary results of its investigation that should be communicated to the government and the media.⁵² Later the mission's final report must be prepared. The mission report is expected to make recommendations.⁵³ The mission report should be attached to the progress report submitted by the Committee to the Assembly of Heads of State and Government of the AU and can only be published after consideration by the Assembly.⁵⁴

The African Children's Committee does not consider its job done once the mission report is finalised. As a result, the Guideline establishes follow-up mechanisms. The state party visited in the mission could be

⁴³ Art 1 Guidelines on the Conduct of Investigations.

⁴⁴ Arts 2 & 3 Guidelines on the Conduct of Investigations.

⁴⁵ Arts 4(1) & (2) Guidelines on the Conduct of Investigations.

⁴⁶ Art 8(1) Guidelines on the Conduct of Investigations.

⁴⁷ Art 8(2) Guidelines on the Conduct of Investigations.

⁴⁸ Art 10 Guidelines on the Conduct of Investigations.

⁴⁹ Art 11 Guidelines on the Conduct of Investigations.

⁵⁰ Art 12 Guidelines on the Conduct of Investigations.

⁵¹ Art 17(1) Guidelines on the Conduct of Investigations.

⁵² Art 20(1) Guidelines on the Conduct of Investigations.

⁵³ Art 23 Guidelines on the Conduct of Investigations.

⁵⁴ Art 25(2) Guidelines on the Conduct of Investigations.

requested to present, within six months after the mission or the adoption of a decision by the Committee, a written reply on any measures taken in light of the recommendations made in the mission report.⁵⁵ Civil society could also be requested to furnish information on the situation on the ground.⁵⁶

5 Criteria for granting observer status with the African Children's Committee

The African Children's Committee drafted the Criteria for Granting Observer Status (Criteria), in conformity with article 42 of the African Children's Charter and articles 34, 37, 81 and 82 of the Rules of Procedure on representation and co-operation with civil society organisations.

The Criteria are divided into six sections: principles to be applied in granting observer status in the AU African Committee of Experts on the Rights and Welfare of the Child; application procedure for NGOs; procedure for consideration of applications by the Committee; participation of observers in the deliberations of the Committee; relations between the Committee and observers; and final provisions.

Under section I, the aims and objectives of NGOs/associations applying for observer status should be in keeping with the spirit, objectives and principles of the Constitutive Act of the AU and of the African Children's Committee and those enshrined in the African Children's Charter.⁵⁷ In order to reduce unnecessary duplication in the granting of observer status, the criteria stipulates that⁵⁸

when there are several NGOs/associations with similar objectives, interests and viewpoints in a given area, they should be encouraged with a view to obtaining observer status with the Committee to form a coalition.

Not only are NGOs expected to be 'registered in a member state without restriction to carry out regional and continental activities',⁵⁹ they should also⁶⁰

provide proof of at least three years registration as an organisation of the civil society or the diaspora working to defend, promote and protect the rights of the child prior to the date of submission of the application, as well as proof of operation during this three-year period.

These provisions are meant to prevent those NGOs who are either 'illegal' or inactive from obtaining observer status. However, if experi-

⁵⁵ Art 26(1) Guidelines on the Conduct of Investigations.

⁵⁶ Art 27(2) Guidelines on the Conduct of Investigations.

⁵⁷ Sec I art 1 Criteria for Granting Observer Status.

⁵⁸ Sec I art 3 Criteria for Granting Observer Status.

⁵⁹ Sec I art 4(a) Criteria for Granting Observer Status.

⁶⁰ Sec I art 4(b) Criteria for Granting Observer Status.

ence within the African Commission is anything to be guided by, the term 'registered in a member state' should be approached cautiously. It should not be interpreted to mean recognition or registration by a member state in accordance with national laws. This is because there might be a number of reasons for governments failing or refusing to recognise or register NGOs in their countries in accordance with national laws,⁶¹ which in turn means denying observer status to organisations that can actually contribute to the work of the Committee.

Among the requirements, NGOs should have a recognised headquarters,⁶² democratically adopted statutes⁶³ and a representative structure.⁶⁴ Although the Paris Principles find no mention in the criteria, it is a reasonable assumption that national human rights institutions fulfil the principles set forth therein.

During application, NGOs should submit:⁶⁵

- (a) a written application addressed to the Committee, stating its intention, at least three (3) months before the session of the Committee to consider the application in question;
- (b) its statute or charter; an updated list of its members; its sources of financing together with copies of its most recent statements; and a memorandum of its activities.

Further clarification is offered by the criteria in terms of what the memorandum of activities should contain. It is therefore indicated that⁶⁶

the memorandum of activities should contain a presentation of the past and present activities of the NGO/association; its links, including any links outside Africa and any other information which will help to define its identity, and above all, its area of activity.

However, section II on 'Application Procedure for Non-Governmental Organisations' does not clearly indicate to whom the application is to be made. Unfortunately, there is no explicit provision that prohibits applying for observer status being put forward by the Committee without having been previously processed by the Secretariat.⁶⁷ Such inclu-

⁶¹ The potential tension between NGOs and governments in the work of the African Commission has been illustrated in 1996 when the OAU Assembly 'adopted a resolution calling on the African Commission to suspend review of granting observer status for NGOs until criteria had been clarified. This seemed to be the outcome of concerns by governments of the influence of NGO in the work of the Commission. The Commission did suspend consideration of applications for a number of sessions, until it adopted criteria in 1998.' See R Murray 'The OAU/AU and the African Commission' in R Murray (ed) *Human rights in Africa* (2004) 66-67.

⁶² Sec I art 5(a) Criteria for Granting Observer Status.

⁶³ Sec I art 5(b) Criteria for Granting Observer Status.

⁶⁴ Sec I art 5(c) Criteria for Granting Observer Status.

⁶⁵ Sec II art 1 Criteria for Granting Observer Status.

⁶⁶ Sec II art 2 Criteria for Granting Observer Status.

⁶⁷ Ch 1, art 5 Criteria for the Granting of and Maintaining Observer Status with the African Commission on Human and Peoples' Rights (1999).

sions could have helped to avoid the problem that once transpired within the African Commission where representatives of NGOs simply handed to a member of the Commission all the relevant documents during a session and had their applications granted during the session without the information being processed by the Secretariat.

In the procedure for the consideration of an application⁶⁸

the Committee shall, during its ordinary sessions, in conformity with the agenda prepared, consider the applications received within the set deadline. The Committee shall decide on the applications considered during its session and inform, through the Chairperson of the Committee, the organisations and associations of the decisions of the Committee without delay.

Here, mention of the presence of a representative of the NGO during the consideration of an application for observer status is lacking. Preferably a representative should be present to answer questions or present additional information that may be required.

The benefits of being granted observer status are numerous. NGOs with observer status may request the Committee to include a particular issue on the agenda, and are also entitled to receive information on the time, location and agenda of the sessions of the Committee. During the sessions, they may present oral statements as well. They could also be invited, with the authorisation of the Chairperson, to participate in the deliberations of the meetings of the Committee.⁶⁹ But this participation is to be undertaken, obviously, with no voting rights.⁷⁰ They can also obtain documents provided these documents are not confidential⁷¹ or deal with issues concerning the observers.⁷² This right to obtain documents should include state parties' periodic reports submitted to the Committee by states to the Charter.⁷³

However, attached to the benefits exist reciprocal obligations by NGOs to the Committee. At a general level, 'the NGOs/associations enjoying observer status undertake to establish close co-operation relations with the Committee and hold regular consultations with the latter on all issues of common interest'. Similar to the African Commission's Criteria on Granting and Maintaining Observer Status, NGOs are required 'to submit analytic reports on their activities every two years (2) years'.⁷⁴ However, unlike the African Commission, the African

⁶⁸ Sec III arts 1 & 2 Criteria for Granting Observer Status.

⁶⁹ Sec IV art 6 Criteria for Granting Observer Status.

⁷⁰ Sec IV art 6 Criteria for Granting Observer Status.

⁷¹ Sec IV art 3(a) Criteria for Granting Observer Status.

⁷² Sec IV art 3(b) Criteria for Granting Observer Status.

⁷³ This should in turn allow NGOs to prepare their own alternative reports to be submitted to the Committee.

⁷⁴ Sec V art 2 Criteria for Granting Observer Status.

Committee has made it clear what the elements of the activity report should indicate.⁷⁵

Where NGOs are in default regarding their obligations, measures could be taken by the Committee. It is provided that⁷⁶

the Committee may suspend or withdraw the observer status, if it appears that an NGO/association enjoying this status has ceased to meet the exigencies of these criteria, namely: be in regular situation or function appropriately, or it loses its representational character or independence.

Apart from suspending or withdrawing observer status, in the same vein as occurs with the African Commission, the African Committee should consider the sanctions of non-participation in sessions, denial of documents and information, and the denial of the opportunity to propose items to be included in the Committee's agenda and of participating in its proceedings.⁷⁷ The decision of the Committee in this regard — namely the suspension or withdrawal of an observer status — is final and cannot be the subject of a judgment of a court or a tribunal.⁷⁸

6 State reporting⁷⁹

At the 8th meeting, the representative of the AU Commission informed the meeting that the following four state parties' reports had been received: Egypt, Mauritius, Nigeria and Rwanda. The reports have also been translated and submitted to Committee members. The representative also recalled that, during its last meeting, the Committee had selected the Rapporteurs to examine the report of Egypt and of Mauritius. The Committee then proposed the following Rapporteurs to look at the following reports:

- Egypt: Mrs Sielthamo and Mrs Diakhate
- Mauritius: Mrs Pholo and Prof Ebigbo
- Nigeria: Mrs Koome and Dr Bequele
- Rwanda: Dr Sissoko, Mrs Polo and Mrs Hassan

During the debate on the convening of pre-session meetings, it was highlighted that there was a need for the Committee to obtain addi-

⁷⁵ Sec V art 2 of the Criteria for Granting Observer Status in part provides that: 'These reports should indicate: (a) their financial situation and viability; (b) their activities during the period considered, particularly concerning the support they provided for the implementation of the African Charter on the Rights and Welfare of the Child; (c) their officers and their dates of election, and indicate if the elections were held in conformity with the statute of the organisation.'

⁷⁶ Sec V art 4 Criteria for Granting Observer Status.

⁷⁷ See Ch IV art 2 Criteria for the Granting of and Maintaining Observer Status with the African Commission on Human and Peoples' Rights (1999).

⁷⁸ Sec V art 5 Criteria for Granting Observer Status.

⁷⁹ For a more detailed discussion on state reporting under the African Children's Charter, see Mezmur (n 3 above) 559-562.

tional reports and information from the countries and NGOs, if necessary, before convening a pre-session meeting. Here, the role of NGOs should be capitalised upon, having NGOs submit alternative reports and other additional information relevant to the constructive dialogue the African Children's Committee should engage in with state parties. It was also noted that the consideration of reports should be done in a professional way in order to establish the credibility of the Committee. In this regard, therefore, proper preparations are required. It was recommended that the AU Commission should prepare a check-list on the requirements for preparing a pre-session meeting, based on the procedures for the consideration of state party reports which were adopted during the third ordinary session. The check-list, which should comprise a calendar and time-frame, should be forwarded to the Chairperson of the Committee. It was also agreed that a pre-session meeting would be held soon after the next meeting of the Committee in the first semester of 2007.

7 Interaction with civil society, the media and other matters

NGOs have provided and continue to provide crucial support in strengthening the mandate of the Committee and in improving its efficacy. In fact, without the support of NGOs, financial and otherwise, the Committee might not have been where it is today. The African Charter, itself, recognises the role that NGOs could play; and under article 42 it provides that the Committee shall 'co-operate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child'.⁸⁰ The preparation and subsequent adoption of the Criteria for Granting Observer Status by the Committee further affirm its recognition of the crucial role civil society plays in strengthening the efficiency of the Committee.

During the 8th meeting, brief presentations were made by partners. Save the Children Sweden, through its representative, pointed out that Save the Children would engage with other partners to profile the work of the Committee and maintain its visibility, as well as lobby for more resources for the Committee. However, the Committee was reminded of the need to include child's participation as a key principle in its work. The representative also called on the Committee to start examining the state party reports which had been received without delay. In this regard, the representative requested the Committee to encourage

⁸⁰ See also arts 34, 37, 81 & 82 of the Rules of Procedure on representation and co-operation with civil society organisations.

NGOs to provide supplementary reports and offered to provide technical support in that respect.

The representative of the African Child Policy Forum (ACPF) noted that the Forum had been working very closely with the Committee on a number of occasions. She recalled that the members of the Committee were very much involved in the Second International Conference on Violence against Girls in Africa, which was organised by the ACPF in May 2006.

The representative of the Institute for Human Rights and Development in Africa recalled the longstanding co-operation and partnership existing between itself and the Committee and underlined the fact that, among its activities, the Institute conducted two training workshops on the African Charter for NGOs and CSOs. However, he raised the concern that NGOs did not have observer status with the Committee and called upon the Committee to expedite the adoption of the criteria for granting observer status to NGOs to enable further interaction between the Committee and NGOs.

A thematic presentation by the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) entitled Overview on the African Charter on the Rights and Welfare of the Child and Proposals for a Renewed Popularisation Campaign was also presented. The presentation elaborated the reasons why there should be a renewed campaign to popularise the African Charter. In this regard, it was highlighted that the African Committee should learn from good practices and experiences. The Committee should be given time to carry out its mandate effectively. Furthermore, the Committee should mobilise resources, make the Charter available in all forms, targeting different groups; use institutions to conduct studies on sections of the Charter, provide training and information to ministries on the ratification and implementation of the Charter, make the Charter known and undertake missions to member states to lobby for its ratification, establish a reporting mechanism on the violation of the rights of children, and develop a strategic plan with a specific time frame on the popularisation campaign of the Charter.

It was recommended that the need exists to strengthen the Secretariat as well as the capacity of the Committee. The AU should ensure that its website is updated with a view to giving visibility to the Committee and providing more information on good practices; there was also a need to prepare a briefing kit on the African Charter and the work of the Committee which would be distributed to governments and other partners; and that advocacy missions to critical areas should be undertaken by Committee members. Joint missions with other partners such as UNICEF, Save the Children and Plan International were also envisaged.

Notwithstanding the above submissions, the African Children's Committee does not enjoy optimal support from NGOs. The number of NGOs consistently present in its sessions is very low. In comparison

with the African Commission, the African Committee could be labelled a 'step-child' as the level of NGO involvement in its work is minimal. Therefore, there is room for improvement.

In a similar vein to what has occurred with the African Commission, workshops could be arranged by NGOs in collaboration with the Committee prior to each of its sessions. These workshops could influence the work and efficiency of the Committee. These workshops could also serve as an information-sharing session where items for the agenda of the Committee, both on topics pertaining to children's rights in specific African countries and thematic issues, could be discussed. The participation of Committee members at these workshops would allow for a free exchange of views and enhance the relationship between the Committee and NGOs.⁸¹

This does not mean that the African Committee itself needs not be proactive. There are a few areas where the Committee should be able to increase its efficiency and room for improvement continues to exist.

The role of the media as a means of pushing the boundaries of the promotion and protection of children's rights cannot be gainsaid. It provides a good opportunity for the transmission of information about issues regarding children's rights on the continent. The need on the part of the Committee to use the media to promote its work should be maximised and need not be left to NGOs. The Committee should maintain a high profile so as to enhance its work and image, particularly during investigative missions. The Day of the African Child also offers a good opportunity for positive publicity. The preparation of press releases before, during and after each session is also crucial. The need to prepare an advocacy strategy that includes the media should be made a priority by the Committee.

If possible, developing a practice of determining the date and location of the next meeting of the African Committee at its previous session is advisable. If done in this way, it will help both civil society and governments to plan well in advance to take part in the sessions of the Committee. The distribution in advance of draft agendas, as is lately done by the African Commission, should be considered both as a means of increasing the visibility of the Committee and its work, as well as enhancing the crucial involvement of civil society in the process.

The need to avoid the appearance of a lack of organisation at sessions is very crucial. Discussions should be focused and debates should remain relevant. The role of the Chairperson in making this a reality cannot be overemphasised. Because there are only two sessions a year that last only five days, the Committee does not have the luxury of

⁸¹ Here it should be mentioned that, in the context of the African Commission, the participation of some governments in these workshops has prevented NGO representatives of some governments from those countries from expressing their views openly. See A Motala 'Non-governmental organisations in the African system' in Evans & Murray (n 14 above) 253.

wasting time on unnecessary discussions. The need to develop a practice of a coherent policy by the African Children's Committee for disseminating its reports, decisions and other documents at all levels — local, national and international — is also important.

8 Conclusion

The cancellation of the 8th meeting of the African Children's Committee, initially planned for May 2006, cast some doubt on the work of the African Children's Committee, since it is supposed to meet at least twice a year. The cancellation was called for, among other things, to allow the Committee members to prepare the three documents presented during the 8th meeting. Both in the interest of time and resources, there was no point in having a meeting unless concrete issues were to be presented and addressed.

Subsequent to this, the 8th meeting of the African Children's Committee saw the development of the Guidelines for Communications, Guidelines for Conducting Investigations and the Criteria for Granting Observer Status. All these documents were sent to the AU Legal Office for further technical polishing as some final touches were required. There is no doubt that a standard document will soon emerge.

The African Children's Committee also dealt with a number of other concrete issues during its 8th meeting. The discussion and adoption of the revised Work Plan (2005-2009) enjoyed some attention. The theme for the 2007 Day of the African Child was also adopted. In this regard, it was noted that the momentum of the June 2006 theme, 'Right to Protection: Stop Violence against Children', should be maintained and that the theme for Day of the African Child 2007 should be 'Combat Child Trafficking'. The need to include violence against children on the AU Summit agenda was highlighted. The consideration of the questionnaire to be sent to member states for the Mid-Term Review Meeting on the African Common Position, 'Africa Fit for Children' was also deliberated upon.

The notion that a core group of the Committee members are to follow up on the issue of resource mobilisation was also proposed. After considering the countries that have not ratified the Charter and taking into consideration the regional balance, the Democratic Republic of Congo, Liberia, São Tomé and Príncipe, Tunisia and Zambia were identified. Committee members were nominated to undertake lobbying missions to these countries.

The recurring theme of the lack of a permanent Secretary for the African Children's Committee continues to hinder the work of the Committee. It is an issue the AU Commission needs to address speedily. However, the recruitment of a Senior Policy Officer to assist the Committee under the AU/UNICEF project is notable progress.

As pointed out above, some challenges still remain to translate into

reality. The weak start of the African Children's Committee, the lack of adequate resources for its effective functioning and a lack of interest on the part of member states of the AU in meeting their obligations, particularly with regard to state reporting, still continue to prevent the African Children's Committee from maximising its potential. However, signs of improvement in recent years are abundant and it is this author's belief that the African Children's Committee is on its feet and has started to walk. So, slowly but surely, the African Children's Committee is progressing — from an infant to a toddler.

Regional Symposium on Harmonisation of Laws on Children in Eastern and Southern Africa, 9-10 May 2007

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1 Introduction

From 9 to 10 May 2007, the African Child Policy Forum (AFCPF), supported by UNICEF, Eastern and Southern Africa Office (UNICEF-ESARO), organised a Regional Symposium on Harmonisation of Laws on Children in Eastern and Southern Africa (Symposium). This Symposium was preceded by a project that studied the extent to which 18 countries in the Eastern and Southern African region had harmonised their laws on children with the United Nations (UN) Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). The Symposium brought together about 70 children's rights experts, academics and advocates from over 15 countries. This is in addition to experts from regional and international organisations such as UNICEF and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). In attendance were Mr Jean Baptiste Zougrana, who is the Chairperson of the African Children's Committee, Professor Jaap Doek, who is a former Chairperson of the UN Committee on the Rights of the Child (UN Children's Committee) and Dr Laila Gad, the Director of Social Affairs at the African Union (AU) Commission.

While almost all African countries have signed and ratified CRC and the African Children's Charter, only a handful have harmonised their laws with these instruments. However, even those countries where the laws have been harmonised, full realisation of the rights of the child is

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yet to be attained. The purpose of the Harmonisation Project, therefore, was to conduct a comprehensive review of how well African countries were harmonising their national laws on the rights of the child in response to CRC and the African Children's Charter. The Symposium, which was the second held under this project, was intended to discuss the findings of the project and to chart the way forward. The first symposium, held in Nairobi on 26 to 27 October 2006, brought together the experts from 18 countries that had been contracted to analyse and provide information on the state of children's laws in those countries. The project also involved the identification of good practices from six of the countries that could be emulated by those in the process of reviewing their laws on the rights of the child.

2 Preliminary findings of the Harmonisation Project

A preliminary report, presented at the Symposium, disclosed that children's rights are not given priority in most countries. This, amongst others, is evidenced by the number of children's rights-related legislative bills that have been pending for significantly long periods before legislative bodies of such countries as Lesotho, Malawi, Namibia and South Africa.¹

Laws on children in some of the countries surveyed have not fully been harmonised with CRC and the African Children's Charter. Out of the 18 countries, only 10 have undertaken a comprehensive review of their laws to align them with CRC and the African Children's Charter.² The study unearthed practices in a number of countries that violate children's rights in ways inconsistent with both CRC and the African Children's Charter. Both CRC and the Children's Charter require that the main aim of juvenile justice should be to reform and reintegrate into the community children in conflict with the law.³ This, though, is not the case in some countries. Children in conflict with the law are still subjected to the same criminal justice system as adult offenders. Yet the detention of children is not a matter of last resort.⁴ Only five of the 18 countries have established separate children's courts and have put in place legal guarantees that are consistent with the UN Standard Minimum Rules for the Administration of Juvenile Justice.⁵

Both CRC and the African Children's Charter, in very clear terms, define a child as anyone under the age of 18 years.⁶ In spite of this,

¹ The African Child Policy Forum, Draft Report *Realising rights for children. Harmonisation of laws on children: Eastern and Southern Africa* (2007) 1.

² n 1 above, 23. The ten are: Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, Swaziland and Uganda.

³ Art 40 CRC & art 17 African Children's Charter.

⁴ n 1 above, 76.

⁵ Adopted by General Assembly Resolution 40/33 of 29 November 1985. The countries with children's courts include Botswana, Comoros, Ethiopia, Kenya and Uganda.

⁶ Art 1 CRC & art 2 of the African Children's Charter.

there was no agreement on the definition of a child in many countries. This is in addition to there being inconsistencies in setting the minimum ages of criminal responsibility, sexual consent and marriage. In Malawi, for instance, a child is defined as a person under the age of 16 years, while in Zambia it is a person under the age of 15 years.⁷ The other problem related to age is the inconsistencies that exist in many countries between the minimum age of marriage and the minimum age of sexual consent. In Madagascar and Tanzania, for instance, the minimum age for sexual consent is 21 and 18 years respectively, in contrast with the minimum age of marriage, which is 14 and 18 years respectively.⁸

Discrimination against children on such grounds as sex, ethnicity, disability and parentage still persists in many countries. In Tanzania, for instance, children born out of wedlock are not entitled to familial relationships with their fathers.⁹ Discrimination also exists between girls and boys when it comes to inheritance and marriage. In many countries, for instance, there is a distinction in the minimum age of marriage and consent to sexual intercourse between boys and girls. In Swaziland, the minimum age of consent to sexual intercourse for girls is 16 years and 14 years for boys.¹⁰

Births still go unregistered in many countries. Although most countries have laws that mandate compulsory birth registration, these laws have not been implemented in some countries. In Eritrea and Ethiopia, for instance, there are no registration systems put in place. Yet in such countries as Burundi, Comores, Kenya and Madagascar, the registration process has been affected by the insufficiency of resources for this purpose. This is in addition to ignorance and a lack of awareness of the process.¹¹

Both CRC and the African Children's Charter protect children from physical or mental violence and abuse. While many countries have provisions that prohibit such violence, children are still subjected to violence and abuse. Many countries, for instance, have legal provisions that recognise corporal punishment as an acceptable form of administering discipline. A significant number of countries, though, have banned corporal punishment as a form of sentence for a crime and as a form of punishment in the education system.

While a number of countries have harmonised their laws with CRC and the African Children's Charter, in some countries these laws are yet to be fully implemented.

⁷ n 1 above, 24.

⁸ n 1 above, 26.

⁹ n 1 above, 30.

¹⁰ n 1 above, 2.

¹¹ n 1 above, 37.

3 Good practices

In spite of the above negative findings, a number of positive observations were made. Most notable are the good practices identified in six of the countries as outlined in the report on good practice.¹²

3.1 The inclusive and consultative children's rights law reform process in Lesotho

The process of law reform was multi-sectoral; it involved researchers, members of the community (including traditional leaders and people from rural areas), academics, government officials (including parliamentarians) and members of the judiciary. The process also involved listening to children's voices, in a number of ways. The most notable of these was the formation of a Junior Committee of the Child Law Reform Project. This forum organised a number of activities and events through which children's views on the proposed reforms were sought.¹³ The Lesotho reform process has resulted in the Child Protection and Welfare Bill, yet to be promulgated.

3.2 Free and compulsory primary education in Kenya

Section 7 of the Kenyan Children's Act, 2001, provides that every child is entitled to free basic education. This right was implemented in 2003 when government introduced free primary education.¹⁴ The government has assumed the responsibility of providing for all direct costs and overheads for primary education. Parents continue to bear the responsibility for such indirect costs such as feeding their children, the provision of school uniforms and sports equipment, and transportation of the children from home to school.¹⁵ This programme has resulted in the rapid increase in enrolment in primary schools, which has allowed many children to access education.

3.3 Promoting adoption and alternative care in Madagascar

Madagascar has promulgated the Law on Adoption, 2005, to guarantee the protection of children in cases of adoption, whether national or international.¹⁶ The Act establishes a Central Authority which is mandated with the duty to implement and monitor the implementation of the Hague Convention on Protection of Children and Co-operation in Respect of

¹² The African Child Policy Forum *Realising rights for children. Good practice: Eastern and Southern Africa* (2007) http://www.africanchildforum.org/Documents/Good_Practice.pdf (accessed 22 June 2007).

¹³ n 12 above, 5.

¹⁴ n 12 above, 11.

¹⁵ n 12 above, 12.

¹⁶ n 12 above, 18.

Inter-country Adoption.¹⁷ The Central Authority is responsible for monitoring all adoptions and had by December 2006 facilitated over 90 adoptions. The authority also monitors the activities of adoption agencies.

3.4 Recognition of the need for separate courts for children in Mozambique

Mozambique acknowledged the need for children to have a separate court as early as 1971 under the Statutes on Jurisdictional Assistance to Minors.¹⁸ Although the jurisdiction to decide children's matters lies with ordinary courts, these courts are designated as *Tribunale des Mineurs* (children's courts) when handling such matters.¹⁹ The purpose of these courts is to help children in the field of crime prevention through the application of measures of protection, assistance or education on their rights. This is in addition to the adoption of several civil measures.²⁰ This system has created an appropriate environment for children in line with international standards.²¹

3.5 Diversion from the criminal justice system in Uganda

The Children's Act of Uganda has established a system that allows children in conflict with the law to be diverted away from the formal justice and to ensure that their detention is a matter of last resort.²² Diversion in Uganda takes place at three levels: at the community level; the police station; and at the Family and Children's Court (FCC). At the community level, local administration councils have powers to try criminal offences that are not of a serious nature and are committed by children. These councils have powers to order compensation, reconciliation, restitution, apology and to issue a caution.²³ At the police station, police officers have the powers to release children without a formal charge and to dispose of cases without a resort to formal proceedings.²⁴ They are required to use detention as a measure of last resort. The FCC also has criminal jurisdiction over children and has the power to order a discharge, caution, compensation and restitution, amongst others.²⁵ Yet the procedures in the FCC are informal and avoid stigmatising a child before the Court.

¹⁷ Adopted 29 May 1993, entered into force 1 May 1995.

¹⁸ 417/71.

¹⁹ n 12 above, 24.

²⁰ n 12 above, 25.

²¹ n 12 above, 26.

²² Children's Act, ch 59, Laws of Uganda, 2000.

²³ n 12 above, 30.

²⁴ As above.

²⁵ n 12 above, 32.

3.6 Judicial activism in implementing children's rights in South Africa

The South African judiciary has, in an activist manner, played a very important role in protecting the rights of children.²⁶ The South African courts have protected children from violence, ordered fulfilment of their socio-economic rights, such as the right of access to health care services.²⁷ The courts have also protected the rights of children placed in rehabilitation centres by decreeing that the conditions in these centres improve.²⁸ The courts have used constitutional litigation to clearly flesh out the principles of international law in domestic law.²⁹

4 Conclusion

There were a comprehensive discussion and an exchange of views at the symposium. This was followed by charting the way forward. It was observed that while a comprehensive review of legislation was necessary, child rights advocates had to guard against over-ambitious reforms that would be hard to implement once the laws were adopted. This could be because of financial and human resource constraints, such as the lack of enough social workers on the continent. The need to carry out similar harmonisation projects in other regions of Africa and for countries to share their experiences was stressed. It was also emphasised that a number of instruments dealing with children's rights exist at the regional level and that there are problems with their implementation.

The findings of the project and the discussions at the Symposium will be disseminated widely. For further information on the Harmonisation Project and the symposium contact:

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²⁶ n 12 above, 37.

²⁷ n 12 above, 39.

²⁸ n 12 above, 40.

²⁹ n 12 above, 41.

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- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
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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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- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used 'Constitution'.
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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2006

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 March 2007)

	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*	09/06/06
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	08/09/06		
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
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				
So Tomé and Príncipe	23/05/86				
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06
Sierra Leone	21/09/83	28/12/87	13/05/02		
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	07/02/06	
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			02/05/06
Zimbabwe	30/05/86	28/09/85	19/01/95		
TOTAL NUMBER OF STATES	53	45	39	23	20

Ratifications after 31 July 2006 are indicated in bold