

# AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 7 No 2 2007





The financial assistance of the European Union  
is gratefully acknowledged

*First published 2001*

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Mercury Crescent  
Hillstar, Wetton 7780

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ISSN 1609-073X

Cover design: Colette Alves

Typeset in 10 on 12 pt Stone Sans by ANdtp Services, Cape Town

Printed and bound by Shumani Printers

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### Editorial

It is regrettable that we see another issue of the *Journal* appear without the African Court on Human and Peoples' Rights having become operational. One can only hope that the Court's Rules of Procedures will soon be finalised and that the Court will be up and running in 2008. In the meantime, the African Commission on Human and Peoples' Rights has undergone some significant changes.

At the Commission's 42nd session, in November 2007, four new commissioners took their seats on the Commission: three with six-year terms (Ms Catherine Dupe Atoki (nominated by Nigeria); Ms Sopyata Maiga (from Mali); and Mr Yueng Kam John Yueng Sik Yuen (from Mauritius)), and one serving the remaining two years for Commissioner Babana's term (Ms Zainabou Sylvie Kayitesi (from Rwanda)). Following her re-election, Ms Angela Melo (from Mozambique) took her seat on the Commission for a second six-year term.

With seven women among the total of eleven commissioners, the representation of women on the Commission has reached a high point. The election of an all-women Bureau (consisting of Commissioners Sanji Monageng as Chairperson and Angela Melo as Vice-Chairperson), and the appointment of Ms Mary Maboreke (from Zimbabwe) as Secretary to the Commission, further ensures the strong role of women in the Commission.

In line with African Union directives, none of the new commissioners at the time of their election and taking office held positions in the executive of their nominating countries. Two are practising lawyers (Atoki and Muiga); one is a serving chief justice (Yueng); and one is the head of the national human rights institution (Kayitesi). Ms Atoki also serves as part-time member of the National Human Rights Commission of Nigeria. Ms Kayitesi previously served as a member of the cabinet (as Minister of Public Administration and Labour). (It should be noted, however, that one of the other members of the Commission appointed in 2005, Commissioner Mumba Malila, has in the meantime been appointed as Attorney-General of Zambia.)

All the new commissioners hold legal qualifications, and all have some experience in human rights. Two of the new members (Ms

Muiga and Ms Kayetsi) were active as members of civil society, both heading NGOs dealing with women and children's rights. They are also the only new members who have previously attended sessions of and engaged with the Commission. Between 1998 and 2001, Mr Yueng served on the UN Sub-Commission on the Promotion and Protection of Human Rights.

With an average age of 53, the newly elected commissioners conform to recent trends of electing more active and energetic commissioners. Two of the new commissioners are comfortable in only one AU language (Ms Atoki, English; Ms Muiga, French). Hailing from Mauritius and Rwanda, respectively, Commissioners Yueng and Kayitesi are comfortable in both English and French.

The main focus of the Centre for Human Rights is research and education on human rights in Africa. While the *Journal* aims at furthering research, the Centre's educative goal is best served by the LLM (Human Rights and Democratisation in Africa). On a yearly basis, this programme brings together about 30 students from all over the continent to study international human rights law and democratisation from an African perspective. It is with great shock that we learnt that one of the *alumnae* of the 2000 LLM programme, Helen Kanzira, a Ugandan national, passed away recently. The cause of her death, complications arising from the birth of her sixth child, turned shock into exasperation that her death should have and could have been prevented.

In response to these circumstances, the *Journal* resolved to take up the issue of maternal mortality. In this issue, we publish a pertinent and topical contribution about access to emergency obstetric care in Uganda. We invite further contributions on issues pertaining to maternal mortality, infant mortality and reproductive health rights in Africa, for inclusion in our two forthcoming issues. More research is required on the topic, and the academic community should become involved in these issues. Without more awareness-raising programmes, the resolve may lack to reduce the world's maternal mortality rate by 75% from 1990 levels by the year 2015, as the Millennium Development Goals proclaim.

In this issue of the *Journal*, the evolving importance for human rights of regional economic communities comes under scrutiny in Ebobrah's article about the human rights jurisdiction of the ECOWAS Court. Two other contributions (by Bowman and Nicol-Wilson) focus on international courts (the ICC and the SCSL). The remaining contributions steer between issues of a continental focus (such as the APRM and the continental research agenda on children's rights) and country-specific discussions. Among these, the discussion about the new Eritrean law abolishing female circumcision stands out. A full text of this law is annexed to the discussion.

The editors thank the following people who acted as referees over the

period since the previous issue of the *Journal* appeared: Cecile Aptel, Abiola Ayinla, Gina Bekker, Unity Dow, Ibrahima Kane, Daniel Kifle, Magnus Killander, Aurelie Latoures, Els Leye, Sandra Liebenberg, Michel Ndayikengurukiye, Joe Oloka-Onyango, William Schabas, Ann Skelton, Ann Strode, Mia Swart, Johan van der Vyver, Stella Vettori and Stu Woolman.

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**THIS JOURNAL SHOULD BE CITED AS (2007) 7 *AHRLJ***

The *African Human Rights Law Journal* publishes contributions dealing with human rights, with a special focus on topics of relevance to Africa, Africans and scholars of Africa. The *Journal* appears twice a year, in May and November.

The *Journal* is included in the International Bibliography of the Social Sciences (IBSS) and is accredited by the South African Department of Education.



# Exploring judicial strategies to protect the right of access to emergency obstetric care in Uganda

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## Summary

*Maternal mortality and morbidity are serious problems in Africa in general and in Uganda in particular. Evidence shows that emergency obstetric care can play a significant role in the alleviation of these problems. However, in Uganda, there is limited access to such care, prompting an exploration of judicial strategies to protect the right to access emergency obstetric care. The article argues that the absence of an express provision guaranteeing the right in the national constitution is not a bar to its protection by the judiciary. Arguments against the judicial protection of socio-economic rights, generally, and the right in question, in particular, are misguided. Through an examination of relevant constitutional provisions and case law from a number of jurisdictions, the article finds that, in certain circumstances, the Ugandan government may be held accountable in domestic courts for failing to ensure access to emergency obstetric care to all women who need it. The judiciary can — without necessarily undermining the separation of powers — enhance women's access to emergency obstetric care by creatively and purposively interpreting constitutional provisions with a view to holding the government accountable. Nevertheless, judicial strategies must be underpinned by legislative, budgetary and other measures in order to achieve a holistic protection of the right.*

## 1 Introduction

Despite close on two decades of safe motherhood interventions, globally millions of women continue to die in pregnancy and childbirth.<sup>1</sup>

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<sup>1</sup> World Health Organisation *World Health Report* (2005).

More than 500 000 women die each year from complications during pregnancy and childbirth, while an estimated 300 million women suffer disabilities.<sup>2</sup> Maternal mortality rates in Africa are the highest in the world.<sup>3</sup> In Africa, a woman faces a one in 16 risk of dying in pregnancy or childbirth during her lifetime, while for her counterpart in Europe the risk is only one in 2 800.<sup>4</sup> In Uganda, maternal and neo-natal conditions contribute the highest percentage (20,4%) of the total burden of ill health and avoidable death.<sup>5</sup> The maternal mortality ratio in Uganda is 506 deaths per 100 000 births.<sup>6</sup>

It is now recognised that emergency obstetric care (EmOC) plays a significant role in the reduction of maternal mortality and morbidity.<sup>7</sup> EmOC refers to care provided in health care facilities to treat direct obstetric emergencies that cause the majority of maternal deaths and injuries.<sup>8</sup> EmOC services are divided into basic and comprehensive obstetric care services.<sup>9</sup> A facility is considered basic when it has six signal functions, namely, the administration of antibiotics, oxytocic drugs and the manual removal of the placenta, the removal of retained products and assisted vaginal delivery.<sup>10</sup> To be considered comprehensive, a facility should in addition to the foregoing functions perform caesarean sections and blood transfusions.<sup>11</sup> However, in Uganda there is limited access to maternal health care generally and EmOC in particular. Access to EmOC remains extremely low, at 5,1% nationally,<sup>12</sup> far below the United Nations (UN) recommended rate of 15%.<sup>13</sup> Very few health facilities offer emergency obstetric services.<sup>14</sup> The unmet need for EmOC is 86%.<sup>15</sup> In a study to establish a baseline for the availability, utilisation and quality of EmOC in 197 health facilities in Uganda, Orinda *et al* found that the met need for EmOC was

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<sup>2</sup> As above.

<sup>3</sup> As above.

<sup>4</sup> As above.

<sup>5</sup> Ministry of Health (Uganda) Health Sector Strategic Plan (2006) 33.

<sup>6</sup> As above.

<sup>7</sup> World Health Organisation *Using human rights for maternal and neonatal health: A tool for strengthening laws, policies and standards of care* (2004).

<sup>8</sup> A Paxton *et al* 'The United Nations process indicators for emergency obstetric care: Reflections based on a decade of experience' (2006) *International Journal of Gynecology and Obstetrics* 192 193.

<sup>9</sup> As above.

<sup>10</sup> As above.

<sup>11</sup> As above.

<sup>12</sup> As above.

<sup>13</sup> PE Bailey & A Paxton 'Program note: Using UN process indicators to assess needs in emergency obstetric services' (2002) 76 *International Journal of Gynecology and Obstetrics* 299.

<sup>14</sup> As above.

<sup>15</sup> As above.

only 5%, whereas it should at least be 100%, since all women with obstetric complications should be treated.<sup>16</sup>

Like most countries in the world, Uganda is currently implementing the Millennium Development Goals (MDGs). One of these goals is the improvement of maternal health, of which the target is a reduction in maternal mortality by three-quarters between 1990 and 2015.<sup>17</sup> Uganda is also a party to human rights instruments that obligate it to protect the right to health, including access to EmOC.<sup>18</sup> The Ugandan Constitution neither explicitly provides for the right to health nor for the right of access to EmOC.<sup>19</sup> However, the Constitution contains a number of provisions which may be utilised by the judiciary to ensure that the state meets its obligation to protect maternal health by enhancing access to EmOC. Against this background, this article explores judicial strategies for the protection of the right of access to EmOC. I argue that, by creatively interpreting existing constitutional provisions, the judiciary may, in certain circumstances, hold the government accountable for a failure to ensure women's access to EmOC.

The article is divided into five sections, the first of which is this introduction. The second justifies why access to EmOC should be considered a human right. It outlines the right to access EmOC within the broader concept of the right to health as stipulated in international and regional human rights instruments. The third section considers the justiciability of the right to access EmOC. In the fourth section, I examine selected provisions of the Ugandan Constitution that have a bearing on the protection of the right. Drawing on case law from a number of jurisdictions, the article concludes that the judiciary may, with a degree of creativity, surmount the challenges surrounding the judicial protection of the right.

## **2 Access to emergency obstetric care as a human right**

### **2.1 Why should access to emergency obstetric care be considered a human right?**

In addition to general health needs, which women share with the rest of

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<sup>16</sup> V Orinda *et al* 'A sector-wide approach to emergency obstetric care in Uganda' (2005) 91 *International Journal of Gynecology and Obstetrics* 285-91.

<sup>17</sup> Goal 5 <http://www.dfid.gov.uk/mdg/> (accessed 22 March 2007).

<sup>18</sup> See, eg, the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of Discrimination Against Women; the Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on the Rights of Women and the African Charter on the Rights and Welfare of the Child.

<sup>19</sup> The Constitution of the Republic of Uganda was promulgated in 1995. Amended by Constitution (Amendment) Act 11/2005 and Constitution (Amendment) Act (No 2), 21/2005.

the population, they have health needs specific to them as women. Their unique roles of reproduction and motherhood require that special attention be paid to their health needs. The right to access EmOC is specific to women. Tomasevski has pointed out that it is a biological fact that women bear children and men do not, and thus:<sup>20</sup>

Societal and legal protection aims to compensate for this biological difference and accords protection to women. This protection derives from the acknowledgment that child rearing is a societal function, hence compensation is earned by women who perform it; it is not granted to them because they are women.

It is also a fact that pregnancy and childbirth increase the risk of mortality over and above the general population. Paul Hunt, the Special Rapporteur on the Right to the Highest Attainable Standard of Health, stressed that no single cause of death and disability for men between the ages of 15 and 44 is close to the magnitude of maternal mortality and morbidity.<sup>21</sup> Hunt advocates for the availability and access to EmOC as a human right.<sup>22</sup> Fathalla is also of the view that, since women are entrusted with the survival and propagation of the human species, they have a basic right to be protected when they risk their health and life in the process of giving us life.<sup>23</sup>

Access to EmOC is therefore not merely a health or humanitarian issue. It is a human rights issue.<sup>24</sup> EmOC is essential to the achievement of gender equality and is an integral part of a woman's right to life. Without access to EmOC, a woman risks death or a life of misery if she is lucky to survive. As Hunt points out:<sup>25</sup>

For every woman who dies from obstetric complications, about 30 more suffer from injuries, infection and disabilities. Over two million women living in developing countries remain untreated for obstetric fistula, a devastating injury of childbirth. Fistula is easy to prevent and easy to treat.

It is therefore critical that medical facilities such as EmOC are made available and accessible to enable women to safely go through pregnancy and childbirth. This will enable them to live a meaningful life and contribute to the socio-economic development of their country. EmOC is not merely a need, as policy makers present it, but a human right.<sup>26</sup> Unlike human rights, needs generate promises which may be met

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<sup>20</sup> K Tomasevski 'Women' in A Eide *et al* (eds) *Economic, social and cultural rights* (1995) 275.

<sup>21</sup> P Hunt 'Statement to the United Nations General Assembly, Third Committee' (2006).

<sup>22</sup> As above.

<sup>23</sup> MF Fathalla *From obstetrics and gynecology to women's health: The road ahead* (1997).

<sup>24</sup> For a synopsis of the human rights instruments that provide for EmOC as a human right, see para 2.2 below.

<sup>25</sup> Hunt (n 21 above).

<sup>26</sup> See, eg, Health Sector Strategic Plan (n 5 above) 33.

through charity or benevolence; they do not impose duties or obligations.<sup>27</sup> Translating basic needs into human rights 'increases the moral weight of and political commitment to their fulfilment'<sup>28</sup> and gives the needs 'international legal status'.<sup>29</sup> Thus, when EmOC is considered a human right, it is possible to identify obligation bearers and rights holders. The latter are able to demand accountability from the obligation bearer, including the state.

## 2.2 A synopsis of the right to access emergency obstetric care

International and human rights instruments attach importance to the protection of women's unique position of motherhood and reproduction. The Universal Declaration of Human Rights (Universal Declaration) stresses that motherhood and childhood are entitled to special care and assistance.<sup>30</sup> The Universal Declaration guarantees women and men the right to a standard of living including medical care.<sup>31</sup> The International Covenant on Economic, Social and Cultural Rights (CESCR) enjoins state parties to 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.<sup>32</sup> The Committee on Economic, Social and Cultural Rights (ESCR Committee) stresses that state parties should take measures to improve child and maternal health services, including emergency obstetric services.<sup>33</sup> Such services should be available, accessible, affordable, acceptable and of good quality.<sup>34</sup> According to the ESCR Committee, states should remove legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality.<sup>35</sup> States are enjoined to remove restrictions on reproductive health care services.<sup>36</sup> The Convention on the Elimination of All Discrimination Against Women (CEDAW) obliges state parties to 'ensure to women appropriate services in connection with pregnancy, confinement and

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<sup>27</sup> U Jonsson *A human rights approach to development programming* (2004); F Stewart 'Basic needs: Strategies, human rights, and the right to development' (1989) 11 *Human Rights Quarterly* 347.

<sup>28</sup> Stewart (n 27 above) 350.

<sup>29</sup> As above.

<sup>30</sup> Art 25(1) Universal Declaration.

<sup>31</sup> Art 25(2) Universal Declaration.

<sup>32</sup> Art 12(1) CESCR.

<sup>33</sup> The ESCR Committee was interpreting art 12(2), which requires state parties to take steps necessary for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child. See ESCR Committee 'The right to the highest attainable standard of health' General Comment No 14 (2000), EC/12/2000/4 para 14.

<sup>34</sup> General Comment No 14 (n 33 above) paras 12 (a)-(d).

<sup>35</sup> ESCR Committee 'The equal right of men and women to enjoyment of all economic, social and cultural rights' General Comment No 16 (2005), E/C/12/2005/3 para 29.

<sup>36</sup> As above.

the post-natal period, granting free services where necessary'.<sup>37</sup> The Cairo Programme of Action underlines, *inter alia*:<sup>38</sup>

[t]he right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

The Convention on the Rights of the Child (CRC) also obliges state parties to ensure appropriate pre-natal and post-natal health care for mothers.<sup>39</sup>

The African Charter on Human and Peoples' Rights (African Charter) guarantees every person 'the right to enjoy the best attainable state of physical and mental health'.<sup>40</sup> In *Purohit and Another v The Gambia*,<sup>41</sup> the African Commission on Human and Peoples' Rights (African Commission) adopted a broad interpretation of the right to health and declared that the right included 'the right to health facilities, access to goods and services' without discrimination of any kind.<sup>42</sup> States are obliged to 'take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.<sup>43</sup> The Protocol to the African Charter on the Rights of Women (Women's Protocol) stresses the importance of respecting women's right to health.<sup>44</sup> States are enjoined to provide adequate, affordable and accessible health care services to women. States are also obliged to strengthen existing pre-natal, delivery and post-natal health services for women during pregnancy and breastfeeding.<sup>45</sup> Thus, women's right to health in general and their right to access EmOC in particular are recognised at the international and regional levels. In the next section I consider the debate about the legal status of socio-economic rights and argue that the right to access EmOC can be invoked in the courts.

### 3 Justiciability of the right to access emergency obstetric care

At the Vienna Conference of 1993, it was declared that rights are 'universal, indivisible and interdependent and interrelated' and they must

<sup>37</sup> Art 12(2) CEDAW.

<sup>38</sup> Para 7.2 Cairo Programme of Action (arose out of the International Conference on Population and Development (1994) UN Doc A Conf 171 13. See also The United Nations Fourth World Conference on Women, Beijing, China, September 1995, para 96 <http://www1.umn.edu/humanrts/instree/e5dplw.htm> (accessed 21 March 2007).

<sup>39</sup> Art 24(2)(b) CRC.

<sup>40</sup> Art 16(1) African Charter.

<sup>41</sup> (2003) AHRLR 96 (ACHPR 2003).

<sup>42</sup> n 41 above, para 80.

<sup>43</sup> Art 16(2) African Charter.

<sup>44</sup> Art 16.

<sup>45</sup> Art 14.

be treated 'globally in a fair and equal manner, on the same footing, and with the same emphasis'.<sup>46</sup> However, skeptics still question the legal existence and validity of socio-economic rights, such as the right to access EmOC.<sup>47</sup> In its Statement to the Vienna Conference, the ESCR Committee decried the neglect of economic, social and cultural rights.

States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as if they are far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.<sup>48</sup>

It has been argued that socio-economic rights are not rights because they are programmatic and must be realised gradually in accordance with broadly formulated government programmes.<sup>49</sup> According to this argument, in order to be a legal right, it must be inherently justiciable.<sup>50</sup> Justiciability is the possibility of aggrieved individuals or groups being able to institute claims involving alleged violations of human rights in courts or other related organs.<sup>51</sup> It is argued that the judiciary lacks the legitimacy and competence to adjudicate socio-economic rights, since it is the democratic majority's moral right to allocate resources.<sup>52</sup> Commentators also point out that judges lack the relevant training and information-gathering tools that are required to decide whether funds have been spent in the way they should and whether such funds have reached the intended beneficiaries.<sup>53</sup> Fuller argues that

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<sup>46</sup> Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights, 78th session, 22nd Plenary Meeting, part 1, para 5, UN Doc A/Conf 157/23 (1993).

<sup>47</sup> See eg C Sunstein 'Against positive rights' (1993) 2 *Eastern European Constitutional Review* 35. See also D Kelly 'The consequences of a "right" to health care' (1994) *Reasons Magazine — The Rights Angle* <http://www.reason.com/news/show/29402.html> (accessed 7 March 2007).

<sup>48</sup> Statement of ESCR Committee to the Vienna Conference, UN Doc E/ 1993/WW, annex III, para 5.

<sup>49</sup> See E Vierdag 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69.

<sup>50</sup> As above.

<sup>51</sup> M Ssenyonjo 'Justiciability of economic and social rights in Africa' (2003) 9 *East African Journal of Peace and Human Rights* 1.

<sup>52</sup> See eg Sunstein (n 47 above).

<sup>53</sup> As above.

certain decisions are 'polycentric' and involve complex resource allocation and are thus unsuitable for adjudication.<sup>54</sup> The *Economist* put it as follows:<sup>55</sup>

Vague laws [read socio-economic rights] would invite, and indeed require, courts rather than governments to settle arguments about social justice. Advocates may not mind this: The courts they imagine, will give them an extra lever to use in pushing policy in their desired direction. But they must recognise that in practice this amounts to subordinating the popular will to the rule, not of law, but of judges.

It is further posited that, whereas civil and political rights are negative, socio-economic rights are positive.<sup>56</sup> With positive rights, states are required to take action to provide them and they are therefore costly and non-justiciable. Negative rights merely require freedom from arbitrary interference by the state.<sup>57</sup> Others argue that treating socio-economic rights as rights undermines the enjoyment of individual freedom and distorts the function of free markets through state intervention in the economy.<sup>58</sup> In my considered opinion, these criticisms are misguided since, as practice has shown, most, if not all, socio-economic rights are amenable to judicial protection.<sup>59</sup> This is especially so for vulnerable individuals such as women in need of EmOC.

It cannot be denied that socio-economic rights are subject to 'progressive realisation'<sup>60</sup> in light of the 'available resources'.<sup>61</sup> Does this render obligations in respect, for example, of the right to health vague and meaningless? CESCR imposes on state parties two obligations of immediate effect: to ensure that relevant rights are exercised without discrimination and to take 'deliberate, concrete and targeted' steps towards meeting their obligations.<sup>62</sup> State parties must 'move as expeditiously and effectively as possible' and any 'retrogressive measures' must be fully justified.<sup>63</sup> The ESCR Committee stated that every covenant right possesses at least justiciable dimensions.<sup>64</sup> Indeed, each state party has 'a minimum core obligation to ensure satisfaction of, at the very least, minimum essential levels of each of the rights' enumerated in

<sup>54</sup> LL Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 395.

<sup>55</sup> 'The politics of human rights: Does it help to think of poverty or inadequate health care as violation of human rights?' *The Economist* 18 August 2001, 9.

<sup>56</sup> D McGoldrick *The Human Rights Committee* (1994).

<sup>57</sup> As above.

<sup>58</sup> See Kelly (n 47 above).

<sup>59</sup> On the right to a clean and a healthy environment, see, eg, the *TEAN* case (n 92 below); on the right to education, see *Dimanche Sharon v Makerere University*, Constitutional Petition No 1 of 2003 (unreported).

<sup>60</sup> Art 2(1) CESCR.

<sup>61</sup> As above.

<sup>62</sup> Arts 2(1) & (2) CESCR; ESCR Committee General Comment No 3 (1990), UN Doc E/1991/23, Annex III paras 1-3.

<sup>63</sup> ESCR Committee (n 62 above) para 9.

<sup>64</sup> As above.



the Covenant.<sup>65</sup> The state must use all the resources at its disposal in an effort to satisfy these minimum obligations and especially for 'vulnerable members of society'.<sup>66</sup> The ESCR Committee has also recommended that 'the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups, is non-derogable'.<sup>67</sup> In my view, access to EmOC is a core component of the right to health, given that a lack of it may result in the death or disability of large numbers of women. A denial of access to EmOC is a violation of women's right to life. Thus, the state is obliged to ensure that women access EmOC as a right.

Van Hoof has correctly argued that views against socio-economic rights based on cost and the requirement of state intervention are a red herring.<sup>68</sup> Both civil and political and socio-economic rights involve a specific course of action.<sup>69</sup> Take, for example, the right to vote and that to a fair hearing which involve the funding of elections, financial support to the judiciary, the construction of courts, and prisons. Can these be denied the status of rights merely because they involve budgetary implications? Alston and Quinn correctly argue that:<sup>70</sup>

The reality is that full realisation of civil and political rights is heavily dependent both on availability of resources and the development of the necessary societal structures. The suggestion that realisation of civil and political rights requires only abstention on the part of the state and can be achieved without significant expenditures is partly at odds with reality.

The main challenge may not necessarily be that socio-economic rights have budgetary implications, but what is at issue is the prioritisation of expenditure. For example, what is the cost to the state of women dying in pregnancy or childbirth because of a lack of access to EmOC? The state's legitimacy is largely a function of its ability to invest in human development. A World Bank study found that maternal health care services are the most cost-effective government health interventions in terms of death and disability prevented and that basic maternal care alone can cost as little as US\$ 2 to US\$ 3 per person.<sup>71</sup> As Busia and Mbaye note, the failure of African countries to address the socio-economic welfare of their people may be due to 'misallocation of

<sup>65</sup> n 62 above, para. 10.

<sup>66</sup> As above.

<sup>67</sup> ESCR Committee (n 33 above) para 47.

<sup>68</sup> VGJ van Hoof 'The legal nature of economic, social and cultural rights: A rebuttal of traditional views' in P Alston & K Tomasevski (eds) *The right to food* (1984) 74.

<sup>69</sup> As above.

<sup>70</sup> P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156.

<sup>71</sup> A Tinker *Safe motherhood as an economic and social investment* (1997). See also 'Maternal Health' [http://en.wikipedia.org/wiki/Maternal\\_health](http://en.wikipedia.org/wiki/Maternal_health) (accessed 21 March 2007).

resources, bad economic policies, fraudulent aggrandisement and a debilitating lack of accountability'.<sup>72</sup> Adequate investment in maternal health care has positive economic consequences. The World Health Organisation (WHO) estimates that African countries could, in a period of 10 years, achieve a net productivity gain of US \$10 billion if they invested in maternal health care to prevent maternal deaths and disabilities.<sup>73</sup>

Critics of socio-economic rights argue that the doctrine of separation of powers demands that the executive, legislature and the judiciary should not interfere in each other's mandates. This doctrine is aimed at promoting democracy, enhancing accountability and protecting the rights of citizens against tyranny.<sup>74</sup> In Uganda, Parliament has the power 'to make laws on any matter for the peace, order, development and good governance of Uganda'.<sup>75</sup> However, the power must be exercised in accordance with the Constitution, which is the 'supreme law of Uganda'.<sup>76</sup> Executive authority is vested in the President and Cabinet who must exercise it in accordance with the Constitution and the laws of Uganda for the 'welfare of the citizens'.<sup>77</sup> Judicial power 'is derived from the people and shall be exercised by the courts . . . in the name of the people'<sup>78</sup> in accordance with their 'values, norms and aspirations'.<sup>79</sup> In the exercise of their power, 'the courts shall not be subject to the control or direction of any person or authority'<sup>80</sup> and 'no person shall interfere with the courts or judicial officers in the exercise of their judicial functions'.<sup>81</sup> All organs and state agencies have to support the judiciary in carrying out its judicial functions.<sup>82</sup> However, how easily can the line of 'separation of powers' be drawn? Can the executive and the legislature be entrusted with the full protection of socio-economic rights? Who ensures that these branches of government are fully accountable to the population? As Pieterse observes, it cannot be denied that<sup>83</sup>

<sup>72</sup> N Busia & BG Mbaye 'Towards a framework for filing communications about economic, social and cultural rights under the African Charter' (1996) 3 *East African Journal of Peace and Human Rights* 30.

<sup>73</sup> WHO 'Poor maternal health care to cost Africa \$45 billion over 10 years' <http://www.afro.who.int/press/2002/pr20021025.html> (accessed 21 March 2007).

<sup>74</sup> For a discussion of the doctrine of separation of powers, see NW Barber 'Prelude to the separation of powers' (2001) 60 *Cambridge Law Journal* 71-72.

<sup>75</sup> Art 79(1) of Ugandan Constitution.

<sup>76</sup> n 75 above, art 2.

<sup>77</sup> Arts 99(1) & (3).

<sup>78</sup> Art 126(1).

<sup>79</sup> As above.

<sup>80</sup> Art 128(1).

<sup>81</sup> Art 128(2).

<sup>82</sup> Art 128(3).

<sup>83</sup> M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 387.

... the legislature has a primary role to play in giving content to human rights through the development of legal and policy frameworks ... However, legislatures are typically fairly large bodies made up of popularly elected 'laymen' who often lack the technical expertise necessary for effective socio-economic policy making ... A popular mandate further does not guarantee a commitment to social justice. This is because majority demands are often inimical to the social welfare of minorities. There is also a danger that politicians will pander to the demands of powerful members of society (whose class interests are likely to correspond with those of the politicians themselves) at the cost of the survival requirements of vulnerable or marginalised members of society.

Like in most countries, it is the Ugandan executive, especially the ministries of finance and health, that determine and control the health budget. In a country like Uganda, where the majority of members of parliament belong to the ruling party,<sup>84</sup> can the legislature effectively check executive excess? Again, Pieterse sheds some light on the exercise of power by the executive and the legislature in the socio-economic domain and the potential of the judiciary to ensure their accountability that<sup>85</sup>

... in technically specialist areas, the executive is the only branch of government that can regularly and credibly lay claim to the expertise necessary to give effect to rights ... However, executive members are usually only indirectly accountable to the citizenry ... There is accordingly a need to develop mechanisms according to which the [executive] may be held accountable to citizens, at least in so far as their actions affect basic human rights. Given the executive's stranglehold over the legislature, citizens increasingly look to the judiciary to ensure executive accountability and for protection of their basic interests ... the judiciary acts both as a watchdog over other branches' adherence to the doctrine of separation of powers as primary protector of citizen's rights within its confines ...

The judiciary has a fundamental responsibility to protect socio-economic rights such as access to EmOC. Courts have the legitimacy and competence to adjudicate socio-economic rights. In my view, the exercise of judicial power through the administration of justice includes issues of social justice such as access to EmOC. In the next section, I consider various strategies that may be employed by the judiciary in Uganda to protect socio-economic rights generally and the right to access EmOC in particular.

## 4 An exploration of judicial strategies

### 4.1 A note on judicial enforcement of human rights in Uganda

The Constitution of Uganda contains a number of novel provisions in

<sup>84</sup> There are 213 members of the National Resistance Movement (NRM) ruling party, 58 members of opposition and 40 independent members. Some of the latter have signed agreements for co-operation with the ruling party.

<sup>85</sup> Pieterse (n 83 above) 388.

the area of the enforcement of rights. It commands that 'fundamental rights and freedoms of the individual are inherent and not granted by the state'<sup>86</sup> and 'shall be respected, upheld and promoted by all organs and agencies of government and by all persons'.<sup>87</sup> The Constitution contains an inclusive clause to cater for human rights, such as the right to access EmOC, which are not explicitly mentioned. It provides as follows:<sup>88</sup>

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter [Four] shall not be regarded as excluding others not specifically mentioned.

The Constitution permits any person who claims that his or her right has been violated to seek redress in a court. Article 50 provides as follows:<sup>89</sup>

Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

The Constitution introduces the concept of public interest litigation (PIL), whereby 'any person or organisation may bring an action against the violation of another person's or group's human rights'.<sup>90</sup> PIL should be viewed as a mechanism to enable previously unrepresented groups and interests to have their voices heard by the judiciary. PIL recognises the vulnerability of disadvantaged persons or groups, such as children and poor women who may not be in a position to file actions in their own names. A person is not required to have a personal interest or injury before lodging a petition or application alleging a violation of other persons' rights. Individuals or civil society organisations working for the public good can bring the violation of specific rights to the attention of the court.<sup>91</sup>

PIL challenges the antiquated doctrine of *locus standi* in so far as the violation of human rights is concerned, and several cases have confirmed this. In *The Environmental Action Network Ltd (TEAN) v Attorney-General and National Environment Authority*,<sup>92</sup> the then Principal Judge overruled a preliminary objection by counsel for the defendants that the petitioners should have brought a representative action under the Civil Procedure Rules. The application was brought by an advocate on behalf of the applicant company and on behalf of the non-smoking public under article 50(2) of the Constitution, to protect their rights to a

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<sup>86</sup> Art 20(1) Ugandan Constitution.

<sup>87</sup> n 86 above, art 20(2).

<sup>88</sup> Art 45.

<sup>89</sup> Art 50(1).

<sup>90</sup> Art 50(2).

<sup>91</sup> GP Mukubwa 'The promotion and protection of human rights in Africa' (2000) 6 *East African Journal of Peace and Human Rights* 130.

<sup>92</sup> Misc App 39 of 2001.

clean and healthy environment, their right to life and for the general good of public health of Ugandans. The judge referred to cases that have decided that an organisation can bring a public interest action on behalf of groups or individual members of the public even though the applying organisation does not have a direct interest in the infringing act it seeks to have redressed.

Counsel for the defendants also challenged the application on the ground that it did not comply with the law, which requires that the Attorney-General and specified corporations be given a notice of intention to sue of 45 days.<sup>93</sup> The judge held that applications alleging infringement of rights and freedoms deserve urgent attention.

The question is: What amounts to 'a competent court' for the purposes of handling violations of human rights? A matter may allege the violation of a right and also necessitate interpretation of the Constitution. Assuming a person or organisation wanted to challenge discriminatory laws and practices that violate women's right to health care, which court would be competent to entertain the matter? The Constitution provides that the Court of Appeal, sitting as the Constitutional Court, shall determine any question as to the interpretation of the Constitution.<sup>94</sup> The Constitution further provides that:<sup>95</sup>

- (3) A person who alleges that —
  - (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
  - (b) any act or omission by any person or authority
 is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.
- (4) Where upon determination of the petition under clause (3) of this article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may—
  - (a) grant an order for redress; or
  - (b) refer the matter to the High Court to investigate and determine the appropriate redress.

In *Attorney-General v Tinyefuza*,<sup>96</sup> the Supreme Court held that articles 137 and 50 must be read together because the Constitutional Court is bound to hear cases involving the enforcement of human rights and freedoms. Thus, the Constitutional Court is a competent court within the meaning of article 50. In *Serugo v Kampala City Council and Another*,<sup>97</sup> it was unanimously held that the jurisdiction of the Constitutional Court is exclusively derived from article 137, but that it may entertain a petition for redress when a right or freedom is infringed.

<sup>93</sup> Sec 1 Civil Procedure and Limitation (Miscellaneous Provisions) Act 20 of 1969, as amended.

<sup>94</sup> Art 137(1) Ugandan Constitution.

<sup>95</sup> n 94 above, arts 137(3) and (4).

<sup>96</sup> Const Appeal 1 of 1997, 11-13.

<sup>97</sup> Const Appeal 2 of 1998.

Such application must be presented in the context of a petition brought under article 137 for the purposes of the interpretation of the Constitution.

In *Simon Kyamanywa v Uganda*,<sup>98</sup> the appellant was convicted by the High Court for aggravated robbery. The Court of Appeal substituted the conviction for simple robbery and sentenced him to six years' imprisonment with six strokes of the cane. He appealed on grounds that corporal punishment was unconstitutional. By a majority of four to one, the Supreme Court found that, in order to decide on the constitutionality of corporal punishment, the Court would be required to construe the meaning of article 24, an exercise that was clearly an act of interpretation under article 137. The Supreme Court referred the matter to the Constitutional Court for interpretation.<sup>99</sup> Justice Kanyehamba (dissenting) was of the view that 'any court and any tribunal which is properly constituted has jurisdiction to hear and determine any dispute arising from the application and enforcement of any provision of the Constitution'.<sup>100</sup> According to the judge:<sup>101</sup>

If it were to be held that every time any matter affecting or related to the provisions of the Constitution had to go to the Constitutional Court for interpretation or construction, the Constitution would become entirely stale and entirely unreliable. The appellant has sought the protection of this Court, and in my opinion, this Court must give him that protection or deny it to him on legal and reasonable grounds.

What the above discussion illustrates is that an individual can sue on his behalf or on behalf of others alleging a violation of such a right as access to EmOC by other persons or by government or its institutions. In my view, this permits a public-spirited individual to challenge laws, policies and other practices that violate women's health rights. If a matter does not involve the interpretation of the Constitution, any other court is 'a competent court' for the purpose of redressing violations of human rights. The *TEAN* case shows how an activist court can relax the laws of standing in order to protect human rights.<sup>102</sup> I now turn to some of the constitutional provisions that may be applied to protect pregnant women's right to access EmOC.

#### 4.2 National Objectives and Directive Principles of State Policy

The 1995 Constitution addresses issues of economic, social and cultural

<sup>98</sup> Criminal Appeal 1 of 2000 (unreported).

<sup>99</sup> Constitutional Reference 10 of 2000 (unreported). The decision of the Supreme Court is reported in 2000 (2) *EALR* 426.

<sup>100</sup> n 99 above, 433.

<sup>101</sup> n 99 above, 434.

<sup>102</sup> Following the ruling in the *TEAN* case, the National Environment Management Authority (NEMA) enacted regulations against smoking in public places except in designated areas.

rights, for example the right to education,<sup>103</sup> rights of the family,<sup>104</sup> rights of women,<sup>105</sup> children,<sup>106</sup> minorities,<sup>107</sup> cultural and economic rights,<sup>108</sup> and a right to a clean and healthy environment.<sup>109</sup> However, most of the other socio-economic rights appear in the National Objectives and Directive Principles of State Policy (NODPSP) section. The Constitution provides that the NODPSP shall 'guide all organs and agencies of the state ... in applying or interpreting the Constitution or any other law ...'<sup>110</sup> and 'in implementing any policy decisions ...'<sup>111</sup> The Constitution obliges the state 'to take all practical measures to ensure the provision of basic medical services to the population'.<sup>112</sup> The state shall also 'endeavour to fulfill the fundamental rights of all Ugandans to social justice'<sup>113</sup> and especially to ensure that 'all Ugandans enjoy rights and opportunities and access to ... health services ...'<sup>114</sup> The question is: What is the legal status of these NODPSPs? Are they justiciable?

Experiences from other jurisdictions, especially India, show that a creative court can effectively apply NODPSP when considering issues of human rights, such as access to EmOC. In *Keshanavanda Bharati v State of Kerala*,<sup>115</sup> the Supreme Court stated that although article 37 of the Indian Constitution expressly provides that the Directive Principles of State Policy (DPSP) are not enforceable by any court, they should enjoy the same status as traditional fundamental rights.<sup>116</sup>

The courts in Uganda may have to consider the 'practical measures' undertaken by the state to ensure that women have access to health care, including medical services such as EmOC. The courts can benefit from the jurisprudence of treaty bodies and case law from other jurisdictions that have considered related provisions.<sup>117</sup> In cases involving violations of human rights, the courts must be alive to international

<sup>103</sup> Art 30.

<sup>104</sup> Art 31.

<sup>105</sup> Art 33.

<sup>106</sup> Art 34.

<sup>107</sup> Art 36.

<sup>108</sup> Arts 37 & 40.

<sup>109</sup> Art 39.

<sup>110</sup> NODPSP I(i).

<sup>111</sup> As above.

<sup>112</sup> NODPSP XX.

<sup>113</sup> NODPSP XIV.

<sup>114</sup> NODPSP XIV (b).

<sup>115</sup> (1973) 4 SCC 225.

<sup>116</sup> As above.

<sup>117</sup> Generally, the position in Uganda is that international law becomes part of domestic law only where it has been specifically incorporated. However, in recent years, courts have increasingly referred to international law and case law from other jurisdictions, especially where there is an ambiguity or lack of a specific provision on the matter. See eg *Tinyefuza v Attorney-General*, Constitutional Petition 1/1997 (unreported); *Onyango Obbo & Another v Attorney-General*, Const App 2/2002 (unreported).

human rights instruments and apply them to a given case when there is no inconsistency between the international norms and the domestic legal order. In any case, the Constitution enjoins Uganda to respect international law and treaty obligations.<sup>118</sup> Consequently, in assessing the 'practicability' of measures the state has instituted to address the question of access to health or medical services, the court has to consider relevant international human rights standards. It may also refer to cases from other jurisdictions in order to answer the following questions, for example:

- To what extent do policy and budgetary measures respect, protect and fulfil the right to access health care services?
- Do these measures prioritise access to EmOC?
- How justified or reasonable are the measures in question?

Courts may face several challenges in determining whether a policy is justified or reasonable. The state may argue that, because of resource constraints, it cannot realise the right in question. However, these challenges are not insurmountable. Courts can draw on their experience in handling administrative cases involving the judicial review of legislative or executive action. Depending on the evidence adduced, the courts can subject policies or budgets to serious scrutiny without necessarily undermining the constitutional mandate of the legislature and executive. The courts will be performing their constitutional mandate to respect, protect and uphold human rights. By entertaining issues involving access to EmOC, the courts will not only be denouncing the injustice of death in pregnancy and childbirth, but guiding the design and implementation of maternal health policies and programmes.

The limits of the right not to be denied access to treatment were considered in the case of *Soobramoney v Minister of Health (KwaZulu Natal)*,<sup>119</sup> where the appellant argued that the denial of treatment (dialysis) for renal failure was a violation of his right to life and the right to access health care services, including emergency medical treatment as guaranteed under the South African Constitution.<sup>120</sup> The appellant alleged that he could not afford medical treatment at private hospitals and thus sought an order directing the public hospital to provide the treatment. The respondents argued that, because of a shortage of resources, the public hospital could only guarantee automatic access to dialysis treatment to patients whose condition could be remedied. The Court found that the condition of the appellant was not 'an emergency which calls for immediate remedial treatment', but 'an ongoing state of affairs . . . which is incurable'.<sup>121</sup> The Court also found

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<sup>118</sup> NODPSP XXVIII (i) (b).

<sup>119</sup> 1998 1 SA 765 (CC).

<sup>120</sup> Sec 27.

<sup>121</sup> Para 21.



that the Department of Health did not have sufficient funds to meet the requirements of all patients in need of treatment for chronic renal failure and to do so 'would make substantial inroads into the health budget . . . to the prejudice of other needs which the state has to meet'.<sup>122</sup> The Court highlighted the difficulty of inquiring into resource-allocation decisions and stated:<sup>123</sup>

[Health funding] choices involve difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters.

Although the *Soobramoney* case may be criticised for depicting the decision as a medical rather than a political one,<sup>124</sup> it can be relied on to advance the cause for access to EmOC in Uganda. In my view, the case may have been decided differently had the facts hinged on the need for EmOC. Whereas chronic renal failure may not call for emergency medical attention, a pregnant woman in obstructed labour would certainly require such care. As the Court pointed out, the appellant's condition required a lot of financial resources (approximately R60 000 per annum),<sup>125</sup> but EmOC may require less expenditure.<sup>126</sup> In any case, not every pregnant woman needs EmOC since most women deliver normally. Where challenged in court, the government of Uganda has a burden to demonstrate that its decisions were taken rationally and in good faith. However, litigation requires that human rights activists adduce necessary evidence to show that the state is capable of meeting its immediate obligation to ensure access to EmOC.

In a number of cases, South African courts have inquired into the reasonableness of state policy. For example, in *Government of the Republic of South Africa v Grootboom*,<sup>127</sup> the respondents were evicted from privately-owned land where they had erected shacks for settlement in order to escape floods. After eviction, the respondents returned to these sites but found that others had occupied them. They had been on a waiting list for low-cost housing for a long time without being informed of when the housing would be available. Counsel for the respondent filed an application seeking the High Court's intervention to ensure that the respondents are provided with adequate shelter until they obtain the promised housing. The Court considered the provisions of the Constitution, which guarantee everyone 'the right to have access to ade-

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<sup>122</sup> Para 28.

<sup>123</sup> Para 29.

<sup>124</sup> See eg S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 159.

<sup>125</sup> Para 28.

<sup>126</sup> n 71 above.

<sup>127</sup> 2001 1 SA 46 (CC).

quate housing'<sup>128</sup> and oblige the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.<sup>129</sup> The Court held that the right had not been violated. However, the judge relied on the provision that guarantees children the 'right to basic nutrition, shelter, basic health services and social services'.<sup>130</sup> The Court was of the view that, since the latter is not subject to progressive realisation and availability of resources, it can be enforced immediately. The state had understood its obligation as requiring it to progressively realise the right by providing permanent structures. On appeal, the Constitutional Court had to consider the concept of 'reasonableness' in the area of socio-economic rights. The Court held that, to be considered reasonable, a programme designed for the realisation of socio-economic rights should be 'comprehensive',<sup>131</sup> 'coherent',<sup>132</sup> 'balanced' and 'flexible'.<sup>133</sup> The Court observed that a programme which 'excludes a significant sector of society cannot be said to be reasonable'.<sup>134</sup> The Court emphasised:<sup>135</sup>

Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right . . . If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test.

The Court decried the fact that a 'significant sector of society' — those in urgent and immediate need of shelter — had not been catered for by the housing programme. To this extent, the Court held that the programme was invalid. The courts in Uganda can adopt such an approach in reviewing government policies and programmes on access to EmOC. Take an example of a pregnant woman who develops complications but lives in a rural area where the nearest facility offering EmOC is 20 kilometres away. Is such a woman not in 'most urgent' need and 'whose ability to enjoy all rights therefore most in peril'?<sup>136</sup>

*Minister of Health and Others v Treatment Action Campaign (TAC)*<sup>137</sup> is an appeal against an order by the High Court which found that state policy restricting the availability of Nevarapine (a drug to prevent mother-to-child transmission of HIV) breached the right of access to health services. The High Court had ordered national and provincial

<sup>128</sup> Sec 26(1) South African Constitution.

<sup>129</sup> n 128 above, sec 26(2).

<sup>130</sup> Sec 28(1)(c).

<sup>131</sup> Para 40.

<sup>132</sup> Para 41.

<sup>133</sup> Para 43.

<sup>134</sup> As above.

<sup>135</sup> Para 44.

<sup>136</sup> As above. Art 14 of CEDAW obliges state parties to pay attention to special health needs of rural women.

<sup>137</sup> 2002 5 SA 721 (CC).

governments to make Nevarapine available to pregnant women who had been tested for HIV and counselled in accordance with the prescription of the attending medical practitioner, acting in consultation with the medical superintendent. The High Court also ordered government to take 'reasonable' measures to extend testing and counselling facilities throughout the public health sector. In the Constitutional Court, the appellant argued that the High Court order was a nullity because it breached the separation of powers. The appellants also argued that, in the area of socio-economic rights, the court can only make declaratory orders. The Court repounded:<sup>138</sup>

The primary duty of courts is to the Constitution and the law . . . Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as this constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.

The Constitutional Court rejected the appellants' argument and reaffirmed the justiciability of socio-economic rights. The Court limited its role to requiring the state to take measures to meet its constitutional obligations. The Constitutional Court had to evaluate the reasonableness of the measures taken. In this way, the judiciary addressed the concerns of a vulnerable group (HIV-positive pregnant women and their children) who had previously been excluded by policy makers. Again, courts in Uganda can use such an approach to scrutinise measures the state has taken to ensure pregnant women access to EmOC. By doing so, the judiciary will be complying with its constitutional mandate: to exercise judicial power in the name of tens of thousands of women who die and are disabled in Uganda due to a lack of access to EmOC.

### 4.3 Invoking the Bill of Rights

#### 4.3.1 The right to life

The Constitution guarantees the right to life through the prohibition of arbitrary physical extermination of both living and unborn persons.<sup>139</sup> Life can be taken away in cases of capital punishment.<sup>140</sup> However, the

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<sup>138</sup> Para 113.

<sup>139</sup> Arts 22(1) & (2).

<sup>140</sup> *Simon Kyamanywa v Uganda*, Constitutional Reference 10/2000 (unreported).

state has a duty to take positive measures to protect and ensure the right to life through the prevention of death. The state must not only prevent the physical termination of life, but must work towards quality and sustenance of life. The Human Rights Committee, for example, explained that the expression 'inherent right to life' should not be 'understood in a restrictive manner, and the protection of this right requires that states adopt positive measures' aimed for example at the reduction of infant mortality and increase of life expectancy.<sup>141</sup> Consequently, it is imperative that the judiciary in Uganda interprets the right to life broadly to include socio-economic dimensions, such as access to EmOC.

Indeed, some judges have creatively interpreted the right to life. In *Salvatori Abuki and Another v Attorney-General*,<sup>142</sup> the petitioner challenged the exclusion order, which was made under section 7 of the Witchcraft Act, as being inconsistent and in contravention of the Constitution. He argued that the order deprived him of his property and the right to reside and settle in any part of Uganda. The Court held that the exclusion order was unconstitutional since it threatened the right to life through deprivation of shelter, food and essential sustenance. In *Susan Kigula and 416 Others v Attorney-General*,<sup>143</sup> the petitioners challenged the constitutionality of the death penalty on the grounds that it violated their right to life, and subjected them to cruel, inhuman, and degrading punishment. The Court held that the death penalty is an exception to the right to life under the Constitution and is therefore constitutional. However, the Court held that a prolonged delay on death row subjected the prisoners to cruel, inhuman and degrading punishment.

The judiciary can breathe life into the constitutional provision on the right to life by seeking guidance from case law from other jurisdictions. In *Paschim Banga Khet Mazdoor Sanity and Others v State of West Bengal and Another*,<sup>144</sup> the claimant suffered serious head injuries as a result of an accident. He was turned away from government hospitals and obtained treatment from a private hospital. The Indian Supreme Court stated:<sup>145</sup>

Article 21 imposes an obligation on the state to safeguard the right [to life] of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life under article 21.

<sup>141</sup> UN Human Rights Committee General Comment 6, art 6 (right to life), 1982, HRI/Gen/1/Rev 2, 6-7, para 5.

<sup>142</sup> Constitutional Petition 2/1997 (unreported).

<sup>143</sup> Constitutional Petition 6/2003 (unreported).

<sup>144</sup> (1996) 4 SCC 37.

<sup>145</sup> As above.

It should be noted that in *Soobramoney*, counsel for the appellant relied on the *Paschim Banga* case in arguing that the denial of treatment to his client amounted to a violation of the right to life. The South African Constitutional Court distinguished the two cases on grounds that, whereas in *Paschim Banga* the claimant required urgent treatment, in *Soobramoney*, the condition was chronic and did not demand such treatment. The Court confirmed the positive duty on the state to create emergency health facilities. The Court noted that the purpose of the constitutional provision on emergency medical treatment<sup>146</sup>

... seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate attention, such as the injured person in *Paschim Banga* ... should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.

In *Cruz Bermudez and Others v Ministerio de Sanida y Asistencia Social (MSAS)*,<sup>147</sup> HIV-positive persons challenged the government for its failure to protect their right to life and health under the Venezuelan Constitution. The Supreme Court ordered the Ministry of Health (i) to provide medicines prescribed to all HIV-positive Venezuelans by government doctors; (ii) to cover the costs of HIV blood tests in order for patients to obtain the necessary anti-retroviral treatments and treatment for opportunistic infections; (iii) to develop policies and programmes for treatment of affected patients; and (iv) to allocate the budget in order to implement the Court's decision.

In handling access to emergency treatment issues, the judiciary in Uganda should not shy away from holding government accountable, even if it means passing a decision with far-reaching budgetary consequences, as in the *Cruz Bermudez* case. In seeking to hold the government accountable for failing to ensure access to EmOC, the judiciary will be protecting pregnant women's right to life. In my view, EmOC is so fundamental to a pregnant woman's dignity and life that no qualification should be permitted. EmOC is neither a chronic nor an incurable condition, such as was the case in *Soobramoney*. It is a core component of women's right to health which the state is obliged to provide either from locally generated resources or through external assistance.

#### 4.3.2 Freedom from discrimination

It is trite that discrimination against women in their personal and family life is rampant. It is also true that the majority of women delay in seeking medical care due to, *inter alia*, socio-cultural factors. Women's lack

<sup>146</sup> n 119 above, para 20.

<sup>147</sup> (1999) Case 15789.

of power within the family and deeper and broader gender discrimination contribute to their delay in seeking care. There is evidence to show that because of patriarchy, women may seek their husbands' or in-laws' consent before seeking care.<sup>148</sup> Because of the skewed division of labour, women may delay seeking care because they have to perform domestic work, which is neither recognised nor valued by policy makers.<sup>149</sup> Women, especially from rural areas, may delay in accessing EmOC because of a lack of money for transport and dues demanded by a health facility. When they reach the facility, women face delays in receiving care from the providers.<sup>150</sup> These delays mask discrimination against women, which is prohibited by the Constitution.<sup>151</sup>

Being party to CEDAW, Uganda should take appropriate measures, without delay, to 'eliminate discrimination against women by any person, organisation or enterprise'.<sup>152</sup> The ESCR Committee comments that, to eliminate discrimination against women, states should develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span.<sup>153</sup> The strategy should include the provision of a full range of high-quality and affordable care with the major goal of reducing women's health risks, especially the reduction of maternal mortality.<sup>154</sup>

The state must be challenged in court to show what steps it has taken to eliminate both *de jure* and *de facto* discrimination in so far as such discrimination inhibits women from accessing health care, including EmOC. As Cook observes, the norm of non-discrimination requires the state to take appropriate action to monitor, prevent, control and discipline acts by private (third) parties through its own executive, legislative and judicial organs.<sup>155</sup> The judiciary has a duty to scrutinise state policies or programmes with a view of finding out the extent to which they address delays encountered by women in seeking and receiving care. The courts can require the state to tackle domestic violence which prevents women from seeking care, by reminding the state of its constitutional obligation to take steps to ensure that people are not

<sup>148</sup> S Thaddeus & D Maine 'Too far to walk: Maternal mortality in context' (1994) 38 *Social Science and Medicine* 1091.

<sup>149</sup> S Tamale 'Gender trauma in Africa: Enhancing women's links to resources' (2004) 48 *Journal of African Law* 50.

<sup>150</sup> Thaddeus & Maine (n 148 above).

<sup>151</sup> Art 21 Ugandan Constitution.

<sup>152</sup> Art 2(e).

<sup>153</sup> ESCR Committee General Comment No 14 para 21. See also CEDAW General Recommendation No 24 (1999) para 6.

<sup>154</sup> As above.

<sup>155</sup> R J Cook 'State accountability under the Convention on the Elimination of Discrimination Against Women' in R J Cook (ed) *Human rights of women, national and international perspectives* (1994).

subjected to 'any form of torture or cruel, inhuman or degrading treatment or punishment'.<sup>156</sup>

The Constitution permits positive discriminatory policies and programmes 'aimed at redressing social, economic, educational or other imbalances in society'.<sup>157</sup> One of the ways of achieving this goal is to 'provide facilities and opportunities necessary to enhance the welfare of women'.<sup>158</sup> The state is obliged to 'protect women and their rights, taking into account their unique status and natural maternal functions in society'.<sup>159</sup> Thus, the Constitution recognises women's distinctive characteristics and vulnerabilities. I cannot think of a better 'facility' or 'opportunity' to enhance the 'welfare' of a pregnant woman than the assurance that she can easily access good quality health care, including EmOC. The judiciary has the mandate to inquire into what the state or its organs have done or plan to do to protect women's rights, such as the right to access EmOC.

The judiciary may also challenge laws and practices that promote gender discrimination. In *Uganda Association of Women's Lawyers and 5 Others v Attorney-General*,<sup>160</sup> the petitioners challenged the constitutionality of sections 4, 5, 21, 22, 23 and 26 of the Divorce Act. The Constitutional Court unanimously held that the provisions were inconsistent with the equality and non-discrimination provisions of the Constitution, and were in effect null and void. Justice Mpagi Bahigeine noted that the divorce law is archaic in content and a colonial relic in substance 'where the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role, of being a mere appendage of the husband, without a separate legal existence'.<sup>161</sup> In *Uganda v Yiga Hamidu and Four Others*,<sup>162</sup> the accused were charged with rape. One of the accused alleged that he could not rape his wife, since consent is always presumed on the part of the wife. Justice Musoke Kibuuka rejected this defence and convicted him of rape. Although marital rape is not an offence under the Penal Code, the judge argued that the constitutional provisions on equality in marriage<sup>163</sup> and the promotion of the dignity of women<sup>164</sup> in effect amended section 123 of the Penal Code.

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<sup>156</sup> As above.

<sup>157</sup> Art 21(4)(a).

<sup>158</sup> Art 33(2).

<sup>159</sup> Art 33(3).

<sup>160</sup> Constitutional Petition No/2003.

<sup>161</sup> n 160 above 7.

<sup>162</sup> High Court Criminal Session Case 0055 of 2002.

<sup>163</sup> Arts 31(1) & (3).

<sup>164</sup> Arts 33(1) & (6).

## 5 Conclusion

The judiciary has a fundamental role to play in the protection of socio-economic rights such as the right to access EmOC. A lack of an express provision of the right in the national Constitution is not a bar to its protection by the judiciary. Through judicial activism and creativity, the judiciary may scrutinise government policies with a view to determining the extent to which they promote and protect the right. The judiciary may seek guidance from international human rights instruments and case law from other jurisdictions and also creatively interpret NODPSP and provisions such as the right to life and to non-discrimination. Judges in Uganda should learn from their counterparts in India, who have simplified the procedure of bringing claims alleging the violation of socio-economic rights before the courts. The judiciary in India converts letters written by ordinary citizens, on behalf of impoverished groups, into writ petitions.<sup>165</sup>

Obtaining a judgment may be possible, but enforcing it might be difficult. Thus, in addition to adducing substantive evidence challenging government policy, human rights lawyers and activists must mount a serious campaign to ensure that the executive respects court orders. They should publicise the orders in the media and engage the international community in order to exert pressure on the state to respect court judgments by designing and implementing measures that ensure enhanced access to EmOC within a fixed time schedule.

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<sup>165</sup> U Baxi 'Judicial discourse: The dialectics of the face and the mask' (1993) 35 *Journal of the Indian Law Institute* 7.



# A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice

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## Summary

*In 2005, the Economic Community of West African States adopted an additional protocol to complement the 1991 Protocol establishing its Community Court of Justice. One of the high points of the 2005 Additional Protocol was the conferment of a human rights mandate on the Court. Since then, the Court has entertained some cases of a human rights nature. Basis on an analysis of the documents and jurisprudence of the Court, this article examines certain issues relating to the human rights competence of the Court and addresses the question of access to the Court.*

## 1 Introduction

State security and the 'exploitation of ... human and material resources', rather than the realisation of human rights, were the motivations of some African leaders when the idea of a united Africa was conceived in the days immediately following the attainment of flag

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independence.<sup>1</sup> Hence, it was not surprising that human rights did not feature prominently in the scheme of things when the Organization of African Unity (OAU) was founded in 1963.<sup>2</sup> As human rights began to gain momentum, becoming a central issue in international law discourse, African leaders reacted by adopting the African Charter on Human and Peoples' Rights (African Charter) as Africa's first comprehensive human rights instrument.<sup>3</sup> By the time the OAU transformed itself into the African Union (AU), human rights had been entrenched sufficiently to take centre stage along with the more popular goals of political and socio-economic integration.<sup>4</sup> Thus, while the pursuit of socio-economic integration remains paramount, the link between human rights and socio-economic well-being has become so well-established that it requires deliberate action in both directions.<sup>5</sup>

In contrast to the political agenda of integration at the regional level, sub-regional integration in Africa has mostly been built around regional economic communities (RECs) which have clear economic objectives.<sup>6</sup> As a result of the nationalist fervour that raged immediately after independence, protection of sovereignty and territorial integrity reigned over other considerations so that human rights issues were relegated to the background in sub-regional fora. Years after they were founded, RECs record little or no success in the realisation of the objective of economic integration.<sup>7</sup> This failure is amplified by the fact that RECs were previously seen as potential building blocks in the attainment of the ultimate goal of a politically and socio-economically united Africa.<sup>8</sup> It became obvious that the ideal of economic integration and prosperity would remain elusive if the socio-political environment remained one of strife, conflicts, exclusion and human rights abuses. In reaction to these and other factors, some African RECs began a process of self-reconstruction, which (in some cases) included a revision of their constitutive

<sup>1</sup> See K Nkrumah *Africa must unite* (1963) 163.

<sup>2</sup> See GJ Naldi *The Organization of African Unity* (1999) 2 for a discussion of the objectives of the OAU.

<sup>3</sup> The African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 Rev 5 was adopted in June 1981 and entered into force in October 1986. Reprinted in (1982) 21 *International Legal Materials* 59.

<sup>4</sup> In art 3 of the AU Constitutive Act, the promotion and protection of human rights are listed below other issues such as political and socio-economic integration as objectives of the AU.

<sup>5</sup> See generally P Alston & M Robinson (eds) *Human rights and development towards mutual reinforcement* (2005).

<sup>6</sup> See eg the ECOWAS Treaty of 1975 and the South African Development Community (SADC) Treaty.

<sup>7</sup> See eg R Robert 'The social dimension of integration in ECOWAS' International Labour Organisation working paper No 49 [http://www.ilo.org/public/english/bureau/integration/download/publicat/4\\_3\\_310\\_wp-49.pdf](http://www.ilo.org/public/english/bureau/integration/download/publicat/4_3_310_wp-49.pdf) (accessed 23 February 2007) 3.

<sup>8</sup> The 1991 OAU Treaty establishing the African Economic Community gives a central role to the RECs. See SKB Asante *Towards an African economic community* (2001) African Institute Research Paper No 64 3.

instrument. This process of reconstruction opened a window for the inclusion of human rights concerns in the agenda of African RECs. To the extent that closer links at the sub-regional level held the promise for greater commitment by African states to common goals, this may be considered a significant development for human rights realisation in the region.<sup>9</sup>

Prominent among those RECs that passed through a reconstruction involving treaty revision is the Economic Community of West African States (ECOWAS). Beginning with the appointment of a Committee of Eminent Persons in 1992 to review the 1975 ECOWAS Treaty, the process of institutional re-organisation in ECOWAS led to the adoption of a revised Treaty in 1993. With the inclusion of the promotion and protection of human rights as one of its fundamental principles, the stage was set for building an ECOWAS human rights realisation regime in the West African region. Since then, several significant events have occurred, including the expansion of the jurisdiction of the ECOWAS Community Court of Justice (ECOWAS Court) to include a human rights competence. In the view of its prospects for human rights realisation in West Africa, this article focuses on the scope of the Court's human rights competence in the exercise of its contentious jurisdiction and examines the conditions for admissibility of human rights cases before the Court. The paper starts with a brief introductory overview of the Court.

## 2 The ECOWAS Community Court of Justice

Fifteen West African states founded ECOWAS on 28 May 1975 with the signing of the Treaty of Lagos.<sup>10</sup> At its inception, ECOWAS was aimed at 'collective self-sufficiency' through the advancement of economic integration in West Africa, intended to ultimately lead to a large trading block and a single monetary union. Various descriptions as 'a regional zone of preference allowed under article XXIV of the General Agreement on Trade and Tariffs'<sup>11</sup> or an envisioned 'economic community similar to the European Community',<sup>12</sup> ECOWAS was founded with an

<sup>9</sup> F Viljoen *International human rights law in Africa* (2007) 479-526.

<sup>10</sup> See the Treaty of the Economic Community of West African States, 1010 UNTS 17, [1975], 14 *International Legal Materials* 1200. In 1975, when ECOWAS was founded, 15 West African states were signatories to its Treaty. These were Benin, Burkina Faso (formerly Upper Volta), Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde acceded to the ECOWAS Treaty in 1977. In 1999/2000, Mauritania withdrew its membership of ECOWAS, bringing the membership to 15.

<sup>11</sup> CA Odinkalu 'Economic Community of West African States' in CH Heyns (ed) *Human Rights Law in Africa* (2004) 644.

<sup>12</sup> K Nowrot & EW Schabacker 'The use of force to restore democracy: International legal implications of the intervention of ECOWAS in Sierra Leone' (1998-1999) 14 *American University International Law Review* 321.

essentially economic focus, leading to the adoption of a 'largely market integration approach' in the 1975 Treaty.<sup>13</sup> In a bid to achieve its goals, several protocols were subsequently drafted and annexed to the original Treaty.<sup>14</sup> From a human rights perspective, the most important of these were those relating to non-aggression,<sup>15</sup> free movement of persons<sup>16</sup> and mutual assistance on defence.<sup>17</sup> These provided the closest link ECOWAS had to human rights at the time.

Recognising the need to 'adjust to the dramatic changes that were taking place in West Africa, the African Continent and in other parts of the world since the Treaty was adopted in May 1975',<sup>18</sup> the Authority of Heads of State and Government in May 1990 authorised the establishment of a Committee of Eminent Persons to review the 1975 Treaty of ECOWAS.<sup>19</sup> The outcome of the Committee's work was a draft treaty which significantly amended the original 1975 Treaty and which paid special attention to human rights in the West African sub-region. On 24 July 1993, the 16 state parties to the 1975 Treaty adopted the 1993 revised Treaty of ECOWAS. Under the revised Treaty, the institutions of ECOWAS are the Authority of Heads of State and Government (Authority), the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Executive Secretariat, the Fund for Co-operation, Compensation and Development, the Specialised Technical Commissions and any other institutions that may be established by the Authority.<sup>20</sup> This structure has been altered slightly because, in June 2006, the Authority approved the transformation of the Executive Secretariat into a nine-member Commission with a President, a Vice-President and seven commissioners.<sup>21</sup> The

<sup>13</sup> See eg ch V of the final report by the Committee of Eminent Persons appointed in 1992 to review the 1975 ECOWAS Treaty. This report is available at the ECOWAS Commission, Abuja, Nigeria.

<sup>14</sup> As at 1998, about 29 protocols and supplementary protocols had been drafted. A compendium of these protocols is available at the ECOWAS Commission in Abuja, Nigeria. Some of these protocols are available on the ECOWAS website, <http://www.ecowas.int>.

<sup>15</sup> Protocol on Non-Aggression (adopted and entered into force in April 1978).

<sup>16</sup> Protocol Relating to Free Movement of Persons, Residence and Establishment (adopted and entered into force in May 1979).

<sup>17</sup> Protocol Relating to Mutual Assistance on Defence (adopted and entered into force in May 1981).

<sup>18</sup> Ch 1 of the final report of the Committee of Eminent Persons (n 13 above).

<sup>19</sup> See Authority Decision A/DEC10/5/90 of 30 May 1990.

<sup>20</sup> Art 6 of the revised ECOWAS Treaty of 1993.

<sup>21</sup> See the ECOWAS Newsletter (Issue 1) of October 2006. With effect from January 2007, the former ECOWAS Secretariat has been transformed into a Commission with the last Executive Secretary emerging as the President of the ECOWAS Commission.

Authority also approved a slight restructuring of the Court and the establishment of an Appeals Chamber for the ECOWAS Court.<sup>22</sup>

According to article 3 of the 1993 revised Treaty, the aims and objectives of ECOWAS are to

promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples and to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African continent.

In pursuit of these objectives, the state parties affirmed and declared adherence to certain fundamental principles. These fundamental principles include 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter'<sup>23</sup> and the 'promotion and consolidation of a democratic system of governance in each member state as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July 1991'.<sup>24</sup> Together with the relevant protocols and supplementary protocols, the revised ECOWAS Treaty of 1993 forms the legal basis of the ECOWAS human rights complaints mechanism.

The ECOWAS Court is established by article 15 of the 1993 revised Treaty of ECOWAS as one of the institutions of ECOWAS.<sup>25</sup> The human rights complaints mechanism of the ECOWAS system is embedded in the Community Court. Although the original ECOWAS Treaty of 1975 did not contemplate a Community Court, article 4(e) of the Treaty made provision for the establishment of the 'Tribunal of the Community'. On the basis of articles 4(e) and 11 of the 1975 ECOWAS Treaty, the Authority of Heads of State and Government of ECOWAS first established the Community Court in 1991 through a protocol.<sup>26</sup> However, a Supplementary Protocol was drafted in 2005 to amend the 1991 Protocol of the Community Court.<sup>27</sup> Together, the 1991 Protocol and the Supplementary Protocol set out the jurisdictional competence of the

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<sup>22</sup> With the restructuring, the administration of the Court now lies with a bureau of three judges. However, as of May 2007, the Appeals Chamber of the Court had not taken off.

<sup>23</sup> Art 4(g) of the revised ECOWAS Treaty.

<sup>24</sup> Art 4(j) of the revised ECOWAS Treaty.

<sup>25</sup> See art 6 of the 1993 revised ECOWAS Treaty.

<sup>26</sup> Protocol A/P/1/7/91 of 6 July 1991 on the Community Court of Justice (1991 Protocol) adopted and provisionally entered into force in 1991. Reproduced in the official Journal of ECOWAS of July 1991. The ECOWAS Court began to function in January 2001 when the first set of judges was appointed and it now takes the place of the originally proposed Tribunal of the Community.

<sup>27</sup> Supplementary Protocol A/SP1/01/05 amending the Preamble and arts 1, 2, 9, 22 & 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and art 4 para 1 of the English version of the said Protocol (Supplementary Protocol) (adopted in 2005 and provisionally came into force upon signature in 2005). In some cases, the Supplementary Protocol merely complimented the 1991 Protocol.

Court.<sup>28</sup> A reading that combines article 4(g) of the 1993 revised ECOWAS Treaty, the 1991 Protocol and the Supplementary Protocol, provides the legal basis for the human rights complaints mechanism of the ECOWAS Community Court of Justice.

The ECOWAS Court is composed of seven members who sit as full-time judges. The members of the Court are independent judges appointed by the Authority from nationals of the member states.<sup>29</sup> These judges are required to be persons of high moral character between the ages of 40 and 60 years, and either to possess sufficient qualifications to be appointed to the highest judicial offices in their various states or to be competent and recognised international lawyers.<sup>30</sup> According to article 4 of the 1991 Protocol of the Court, the judges are appointed for a renewable term of five years, and are authorised to elect a President and a Vice-President. However, the new regime approved by the Authority fixes a single four-year term for the judges 'so as to be in harmony with the tenures of the statutory appointees of the other institutions'.<sup>31</sup> The President and Vice-President are allowed to hold office for terms of three years.<sup>32</sup> Originally, the President of the Court (and in his absence, the Vice-President of the Court) was responsible for the administration of the Court and presides at sittings and deliberations of the Court, but the reforms have created a bureau of three judges taking responsibility for the administration of the Court.<sup>33</sup> Currently, a Court Registry, made up of a Chief Registrar and Registrars, assists the President and judges in their functions.<sup>34</sup>

### 3 Human rights competence of the ECOWAS Community Court of Justice

As already noted, the ECOWAS Court was not established primarily as a forum for human rights litigation. However, having incrementally introduced a human rights regime into the ECOWAS agenda, the member states of ECOWAS realised the need to create a forum for human rights litigation. Accordingly, the member states agreed to review the 1991

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<sup>28</sup> *Ukor v Laleye* (2005) (*Ukor* case) unreported Suit ECW/CCJ/APP/01/04 7 para 23.

<sup>29</sup> FD Art 3 1991 Protocol of the Court.

<sup>30</sup> Art 3(1)(7) 1991 Protocol of the Court.

<sup>31</sup> See the ECOWAS Newsletter (n 21 above) 4.

<sup>32</sup> See art 3(2) of the 1991 Protocol of the Court. According to art 4(1) of the 1991 Protocol, four members of the first bench of the Court were required to serve a term of three years.

<sup>33</sup> See arts 7 & 8 of the Rules of Procedure of the Court. However, in the new regime, the administration of the Court is under review to give room for the judges to concentrate on their judicial functions. See the ECOWAS Newsletter (n 21 above).

<sup>34</sup> Art 29 of the 1991 Protocol empowers the Court to set out the duties of the Registry in the Rules of Procedure. Accordingly, ch III of the Rules of Procedure deals with the Court's Registry.

Protocol of the ECOWAS Court to empower the Court to hear cases relating to human rights violations.<sup>35</sup> This agreement was put into effect with the adoption of the 2005 Supplementary Court Protocol. The human rights competence of the ECOWAS Court, as introduced by the 2005 Supplementary Protocol, will be examined in terms of its material, territorial, temporal and personal jurisdictions.

### 3.1 Material jurisdiction

Generally, both the 1991 Protocol and the 2005 Supplementary Protocol empower the ECOWAS Court to adjudicate on disputes relating to the interpretation and application of the Treaty of ECOWAS, the Protocols and Conventions and all other legal instruments of the Community.<sup>36</sup> The amended article 9 goes further and gives the Court jurisdiction on matters relating to the legality of regulations, directives, decisions and other subsidiary legal instruments of the Community,<sup>37</sup> the failure of member states to honour their obligations contained in the Treaty, Protocols, Conventions and other legal instruments of ECOWAS<sup>38</sup> and on cases of human rights violations that occur in member states.<sup>39</sup>

The first point to note is the Court's competence to hear cases relating to the 'failure of member states to honour obligations' under the Treaty, Protocols, Conventions and other legal instruments of ECOWAS. In view of the obligations member states take on under ECOWAS instruments to guarantee human rights in their states, a human rights adjudication competence may be found in this provision. However, an obstacle lies in the fact that only other member states and (unless specifically excluded by a protocol) the Executive Secretary (now President of the ECOWAS Commission) have access to the Court in this

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<sup>35</sup> See art 39 of Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (ECOWAS Democracy Protocol). This Supplementary Protocol was adopted in 2001 and entered into force in 2005. As of July 2005, Niger and Togo ratified the Supplementary Protocol, satisfying the requirement that nine states must ratify it for it to enter into effect. Efforts by this author to confirm the current status of ratification have been unsuccessful. However, the Supplementary Protocol has been the basis of action by ECOWAS in the area of election monitoring. The judges of the ECOWAS Court took an active part in opening up access to the Court, especially at the 2004 ECOWAS Ministers of Justice meeting in Abuja, Nigeria.

<sup>36</sup> See art 9 of the 1991 Protocol of the Court. Also see the amended art 9(1) in art 3 of the 2005 Supplementary Protocol. The ECOWAS Court interprets art 89 of the revised Treaty to mean that Protocols made pursuant to the Treaty form an integral part of it. See para 21 of the Court's judgment in the *Ukor* case (n 28 above).

<sup>37</sup> Amended art 9(1)(c) Court Protocol.

<sup>38</sup> Amended art 9(1)(d) Court Protocol.

<sup>39</sup> Amended art 9(4) Court Protocol. Other areas of competence of the Court include actions against the Community, Community institutions and officials of the Community and its institutions.

regard.<sup>40</sup> Hence, it is comparable to the inter-state communications provisions in the African Charter. It also creates a novel situation where the ECOWAS Commission acquires access to bring human rights case against a member state where the state fails to perform its human rights obligations under the ECOWAS legal regime. Unfortunately, to date, there has not been any attempt to use these possibilities.<sup>41</sup>

From an individual human rights complaints perspective, the jurisdiction of the ECOWAS Court extends, without any limitations, to all cases of human rights violations that occur in member states. Something that strikes one immediately is the fact that there is no mention of the applicable human rights instrument on the basis of which the Court should adjudicate. This is not exactly strange, as ECOWAS does not have any single human rights instrument over which the Court can claim competence. Instead, reference to human rights promotion and protection under instruments of ECOWAS appears to refer to the African Charter and, to a lesser extent, the Universal Declaration of Human Rights (Universal Declaration).<sup>42</sup> Considering that there are a plethora of rights scattered across the revised Treaty, Conventions and Protocols of the Community, the rights contained in any of those instruments of ECOWAS would be the basis for an individual action for the violation of rights.<sup>43</sup>

With respect to rights contained in a single instrument as a source of a human rights demand, the situation becomes less straightforward and reference has to be to the African Charter and the Universal Declaration. As the Universal Declaration is not a legally binding instrument, despite

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<sup>40</sup> Revised art 10(a) in art 4 of the 2005 Supplementary Protocol is clear on this point.

<sup>41</sup> In view of the very rare use of the equivalent inter-state communications mechanism under the African Charter, it is doubtful if this provision will be used to the advantage of human rights victims in West Africa. Under the 1991 Protocol, member states had a right to bring actions before the ECOWAS Court on behalf of their nationals, but this never happened. See the case of *Olajide v Federal Republic of Nigeria* 2004/ECW/CCJ/04 (*Olajide* case) in this regard.

<sup>42</sup> Para 4 of the Preamble to the revised Treaty links to the African Charter, as does art 4(g). The latter provision makes 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' a fundamental principle of ECOWAS. In art 2 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Peace and Security Protocol), one of the basic principles upon which ECOWAS places its Peace and Security Mechanism is a re-affirmation of the commitment of member states to the principles contained in the African Charter and the Universal Declaration. Art 1(h) of the ECOWAS Democracy Protocol goes even further, as it states that the guarantee by ECOWAS member states of rights set out in the African Charter and other international instruments is one of the constitutional convergence principles upon which the Protocol is based.

<sup>43</sup> Eg, arts 59 (right of entry, residence and establishment) and 66(c) (rights of journalists) in the revised Treaty. See also the various conventions and protocols of the Community. In some cases, provisions of certain instruments of the Community are couched as state duties rather than individual rights; art 22 Democracy Protocol. It is to be doubted if such provisions can be the basis of actions before the Court.



the fact that some of its provisions have acquired the force of customary international law, it may be argued that it may serve only as an interpretative guide, rather than a source of human rights demands before the Court.<sup>44</sup> The African Charter, on the other hand, is a legally binding human rights instrument to which all member states of ECOWAS are parties.<sup>45</sup> In addition to the fact that nearly all references to human rights in the legal instruments of ECOWAS relate to the African Charter, it is the only human rights instrument specifically mentioned in the 1993 revised constitutive instrument of ECOWAS.<sup>46</sup> Taken together, these facts suggest that the African Charter is the most comprehensive material source of rights before the ECOWAS Court. This is made possible because the African Charter does not grant exclusive supervisory competence to any institution.<sup>47</sup> In any event, the African Charter is gaining ground as 'the basis of a common regional human rights standard', so that most RECs in Africa have made reference to it as a fundamental principle in their constitutive instrument.<sup>48</sup>

More importantly, the jurisprudence of the ECOWAS Court indicates that the Court itself recognises the African Charter as the material source for the exercise of its human rights competence.<sup>49</sup> Most of the

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<sup>44</sup> See eg J Dugard *International law* (2005) 314 on this point.

<sup>45</sup> The ratification status of the African Charter is reproduced in (2003) 3 *African Human Rights Law Journal*.

<sup>46</sup> By art 19 of the 1991 Protocol, the Court is required to examine disputes in accordance with the provisions of the Treaty and the Court's Rules of Procedure. Where necessary, the Court may also apply international law as contained in art 38 of the Statute of the International Court of Justice.

<sup>47</sup> Part II of the African Charter creates the African Commission and sets out its mandate, but does not confer exclusive competence of implementation on the Commission. Similarly, the African Court on Human and Peoples' Rights does not have exclusive competence over the African Charter as the Protocol establishing the Court is also silent on this point. See F Ouguergouz *The African Charter on Human and Peoples' Rights* (2003) 710. Ouguergouz notes that 'there is nothing in the Protocol to limit the freedom of state parties in the choice of methods for monitoring implementation of the African Charter . . . There is nothing to prevent them from submitting disputes of this sort to another African body . . .' In what appears to be a contrary opinion, GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16/4 *Netherlands Quarterly of Human Rights* 436 suggest that the African Court of Human and Peoples' Rights 'seems to be the only competent judicial authority' for the interpretation of the African Charter. Seeing that they do not state the basis of this opinion, one can respectfully say that the more valid opinion may be that expressed by Ouguergouz.

<sup>48</sup> See Viljoen (n 9 above) 500-502. Viljoen cites art 4(g) of the ECOWAS Treaty, art 6(d) of the 1999 East African Commission Treaty and art 6A of the IGAD Agreement. He points out that the African Charter is the only international human rights instrument ratified by nearly all African states. Morocco is the only African state that is neither a member of the AU nor a state party to the African Charter.

<sup>49</sup> See para 29 of the judgment in *Ugokwe v The Federal Republic of Nigeria* (2005) (unreported) Case ECW/CCJ/APP/02/05 (*Ugokwe* case). This is significant from the perspective of art 31(3)(b) of the Vienna Convention of the Law of Treaties, which gives subsequent practice a place in the interpretation of treaties. In the *Ugokwe* case,

human rights-related cases already brought before the Court, however, have been on the basis of both the African Charter and the Universal Declaration. While the ECOWAS Democracy Protocol also makes reference to 'other international instruments', the Court has not yet invoked any such 'other international instrument'. Rather, where it felt a need to go outside the African Charter, the Court has had resort to 'general principles of law' as contained in art 38(1)(c) of the ICJ Statute.<sup>50</sup>

The failure to create an ECOWAS-specific human rights instrument over which the Court has competence is similar to the position of most other RECs in Africa.<sup>51</sup> Not surprisingly, it stands in contrast to the constitutive instruments of all the main human rights supervisory bodies, as those clearly state the relevant instruments to be applied.<sup>52</sup> The European Court of Human Rights (European Court) and the Inter-American Court of Human Rights (Inter-American Court) restrict the mandate of the supervisory bodies to the interpretation and application of the European Convention on Human Rights (European Convention) and the Inter-American Convention of Human Rights (Inter-American Convention) respectively.<sup>53</sup> Similarly, the mandate of the African Commission is restricted to the interpretation and application of the African Charter.<sup>54</sup> With regard to the possibility of applying sources other than the African Charter, the ECOWAS regime (if it gets to that stage) may be comparable only to the African Court on Human and Peoples' Rights (African Court), because that Court is competent to apply instruments other than the African Charter.<sup>55</sup>

A final point to be raised on the material jurisdiction of the ECOWAS Court is that, as the African Charter makes no distinction between different generations of rights, the Court may very well be positioned to adjudicate on all generations of rights contained in the Charter.<sup>56</sup>

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in addition to the Nigerian Constitution, the African Charter and the Universal Declaration formed the basis of the applicant's case. The African Charter was also one of the bases for the complaint in the case of *Lijadu-Oyemade v Executive Secretary of ECOWAS & 2 Others* (2005) (unreported) Suit ECW/CCJ/APP/01/05 (*Oyemade case*).

<sup>50</sup> Para 31 of the *Ugokwe* case (n 49 above).

<sup>51</sup> See eg Viljoen (n 9 above) ch 12.

<sup>52</sup> See eg art 45 of the African Charter on the mandate of the African Commission; art 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol to the African Court) for the mandate of the African Court, arts 32, 33 & 34 of the European Convention on Human Rights for the mandate of the European Court of Human Rights and art 62(1) of the Inter-American Convention on Human Rights for the mandate of the Inter-American Court of Human Rights.

<sup>53</sup> However, the advisory jurisdiction of the Inter-American Court of Human Rights is broader than its contentious jurisdiction.

<sup>54</sup> However, note arts 60 & 61 which allow the African Commission to draw inspiration from outside the African Charter.

<sup>55</sup> Art 3 of the Protocol of the African Court of Human Rights is instructive on this point.

<sup>56</sup> See Ouguergouz (n 47 above) 550.

This is significant to the extent that it provides the opportunity for direct application of the African Charter where domestic constitutional principles require domestication before the African Charter becomes applicable within the legal system of a state or where socio-economic rights are constitutionally non-justiciable in a state.

### 3.2 Territorial jurisdiction

The human rights jurisdiction of the ECOWAS Court covers violations of human rights 'that occur in any member state' of the Community.<sup>57</sup> The choice of 'member state' as against 'state party' indicates that the jurisdiction is not limited even if a member state of ECOWAS is not a party to the Court's Protocol.<sup>58</sup> Compared to the African regime, which lends the African Court competence over state parties to that Court's Protocol, the ECOWAS regime is more liberal in terms of human rights realisation. However, considering that all member states of ECOWAS are also parties to the ECOWAS Court, there is very little significance in the provision. As of 6 July 1991, when Protocol A/P1/7/91 was adopted, 16 member states of ECOWAS signed as 'high contracting parties' to the Protocol. With the withdrawal of Mauritania from the Community in 2000, 15 member states remained as parties to the ECOWAS Court and also signed the 2005 Supplementary Protocol.<sup>59</sup> Accordingly, the human rights complaints mechanism of the ECOWAS Community Court is applicable in the territories of the 15 states that are currently parties to the ECOWAS Treaty and the Court Protocol (as amended by the 2005 Supplementary Protocol).<sup>60</sup>

As the amended article 9(4) currently stands in the Supplementary Protocol, there is nothing to restrict the jurisdiction of the Court over a member state of ECOWAS for any rights violation that such a member state allegedly carries out against any community citizen in the territory of any other member state. In analysing the less specific provisions of the African Charter that created the African Commission, Ouguergouz makes a similar argument and draws inspiration from the jurisprudence of the European Commission.<sup>61</sup> This is significant as, in cases where a victim is forced to flee the violating state for any reason, he still has the

<sup>57</sup> Revised art 9(4) as contained in art 3 of the Supplementary Protocol. See also para 28 of the Court's judgment in the *Ugokwe* case (n 49 above). The term 'territory' may very well include embassy premises of member states.

<sup>58</sup> Art 1 of the 1991 Protocol defines member state to mean a member of ECOWAS.

<sup>59</sup> See the signatures reflected on the 2005 Supplementary Protocol.

<sup>60</sup> See the amended art 9 in the Supplementary Protocol.

<sup>61</sup> *Ouguergouz* (n 47 above) 554, where he cites the European Commission's decision in *Cyprus v Turkey* European Commission of Human Rights Application 8007/77. In *Drozd & Janousek v France & Spain* Judgments and Decisions of the European Court of Human Rights, Series A, Vol 240 (also cited by Ouguergouz), the European Court of Human Rights affirmed this position.

chance to bring an action for violation of his African Charter-protected right.

### 3.3 Temporal jurisdiction

The temporal jurisdiction of the ECOWAS Court needs to be examined from the procedural and substantive perspectives of both the Court's Protocols and the African Charter. While both the 1991 Protocol and the 2005 Supplementary Protocol contain provisions relating to their entry into force, they both are silent on the temporal competence of the Court.<sup>62</sup> It is important to note that both Protocols entered into force provisionally as soon as the Heads of State and Government of member states signed them.<sup>63</sup> As the 1991 Protocol did not endow the Court with human rights jurisdiction, the relevant provision from a human rights perspective is art 11 of the Supplementary Protocol by which the Protocol provisionally came into force on 19 January 2005. In the absence of anything to the contrary, the Court can only entertain cases of violations that occur after that date. The ECOWAS Court has lent judicial backing to this position as it declined jurisdiction on this ground in the case of *Ukor v Laleye (Ukor case)*.<sup>64</sup>

What is not clear from the texts of the two Protocols is whether they come into force at the same time for all member states, regardless of whether a particular state has individually signed or ratified the Protocol. This has not come before the Court, as all the early cases touching on human rights brought before it were in respect of a single member state.<sup>65</sup> However, considering that all member states of ECOWAS had signed the Supplementary Protocol as of January 2005, this point is also now moot.

With respect to its substantive temporal competence, where the claim is based on the African Charter, reference has to be made to the position under the African Charter. As noted elsewhere, 'the texts are silent' on the temporal jurisdiction of the African Charter.<sup>66</sup> However, it goes without saying that the Charter becomes applicable upon its coming into force in respect of the state party concerned. Hence, Viljoen notes that during the early days of the African Commission's

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<sup>62</sup> See, generally, art 34 of the 1991 Protocol and art 11 of the Supplementary Protocol.

<sup>63</sup> As above.

<sup>64</sup> n 24 above. Upon the facts of that case, the Court emphasised that there was nothing in the Supplementary Protocol to suggest that the Protocol could be given a retrospective effect. In this regard, the Court relied copiously on the jurisprudence of the ICJ. See especially paras 13 to 20 of the Court's judgment. Also see art of the Vienna Convention on the Law of Treaties.

<sup>65</sup> As at January 2007, most of the cases already decided by the Court were against the Federal Republic of Nigeria. However, cases against a few other member states were already filed at the Court's registry in January 2007 when the author visited the Court's Registry.

<sup>66</sup> Oguergouz (n 47 above) 555.

work, some communications against member states of the OAU were declared inadmissible on the grounds that such states were not then parties to the African Charter.<sup>67</sup> As all member states of ECOWAS ratified the African Charter long before 2005, when the Supplementary Protocol came into force, the question of substantive temporal competence is merely academic and serves no significant purpose.

If a claim is based on the rights contained in the revised ECOWAS Treaty or any of the Community's other instruments, it would appear that the date of entry into force (with respect to the particular state) of the given instrument should be the determining consideration. With regard to 'other international instruments', as contemplated in the ECOWAS Democracy Protocol, should the Court decide to apply them in exercise of its human rights competence, the question of ratification ought to be taken into consideration. The Court needs to first satisfy itself that the instrument in question has been ratified by the state and has come into effect in respect of the state concerned before it can apply the provisions of such an instrument.

It is essential to note that, under the ECOWAS system, there is a limitation provision that prohibits actions against Community institutions and any members of the Community statute after three years from the date the right arose.<sup>68</sup>

### 3.4 Personal jurisdiction

#### 3.4.1 Plaintiff/applicant<sup>69</sup>

By virtue of the new article 10 in the Supplementary Protocol, depending on the facts, access to the ECOWAS Court is open to member states, the Executive Secretary (now the President of the ECOWAS Commission since January 2007), the Council of Ministers, individuals, corporate bodies and staff of any Community institution.<sup>70</sup> In terms of access to bring cases of a human rights nature, on the basis of the earlier argument with respect to actions for failure to fulfil a Community obligation, it may be argued that any member state or the President of the ECOWAS Commission is competent to bring a human rights-related case against a member state.<sup>71</sup> Since the obligation contained in the revised

<sup>67</sup> See F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2003) 72.

<sup>68</sup> Art 9(3) in art 3 of the Supplementary Protocol.

<sup>69</sup> In most of the cases already treated by the Court, applicants have been referred to as 'plaintiffs', which is the term used in domestic jurisdictions.

<sup>70</sup> See art 4 of the 2005 Supplementary Protocol.

<sup>71</sup> See art 9(3) of the 1991 Protocol and the new art 10(a) in art 4 of the Supplementary Protocol. It is important to note that by art 10 of the Supplementary Protocol, only provisions of the 1991 Protocol that are inconsistent with the Supplementary Protocol are null and void to the extent of the inconsistency. However, art 9 of the 1991 Protocol is no longer useful as it has been expressly repealed by art 3 of the Supplementary Protocol.

Treaty and the relevant protocols is to guarantee the promotion and protection of rights set out in the African Charter in ECOWAS member states, there is nothing to suggest that the obligation is restricted to a guarantee of those rights to citizens of the state concerned. Accordingly, access to the Court against any member state under this provision need not be enforceable only where the victim(s) of the failure to fulfil come from the offending state.

With regard to access to applicants other than state members and the President of the ECOWAS Commission, access is available to individuals and corporate bodies.<sup>72</sup> By virtue of article 10(c), access is for 'proceedings for the determination of an act or inaction of a Community official which violates the rights of the individual or corporate body'. This is a limited access, as it must only be against ECOWAS (as an institution) for the rights-violating act or inaction of a Community official and it must be claimed by the individual or corporate body alleging that their right has been violated. Hence, any body, group or institution mentioned above may be a plaintiff (or applicant) before the Court so far as the act or omission allegedly violates their right.

The provision in article 10(d) is both more and less restricted when compared to article 10(c). It is more restricted in the sense that it is only available to individuals and not to corporate bodies. It is less restrictive, as it gives access to the individual for application for relief in the event of human rights violation and does not state against whom the application should be brought. The right of access may be exercised widely. One conspicuous omission from the Supplementary Protocol of the Court relates to the competence of non-governmental organisations (NGOs) to bring actions before the Court. While it could be argued that the term 'corporate bodies', as used in the inserted article 10 (as contained in article 4 of the 2005 Supplementary Protocol), is wide enough to accommodate actions by NGOs, the couching of the provision to the extent that such actions should be in determination of acts or inactions of a Community official which 'violates the rights of the individual or corporate bodies' gives the impression that any action brought on facts that do not allege a violation of the rights of the corporate body may fail.<sup>73</sup>

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<sup>72</sup> Arts 10(c) & (d) Supplementary Protocol.

<sup>73</sup> See the inserted art 10(c) in art 4 of the Supplementary Protocol. The Court has not been asked to decide on the competence of NGOs to access the Court. An interview conducted with Mr CA Odinkalu of the Open Society Initiative for West Africa (OSIWA) suggests that that organisation will soon conclude the filing of a human rights action on behalf of some Community citizens against Côte d'Ivoire. It is anticipated that if this comes to pass, it will create the opportunity to test the position of the Court on this point. The importance lies in the fact that the economic realities of West Africa may make it impossible for some prospective litigants to pursue actions at the CCJ on their own. The experience of the African Commission is instructive on this point. See eg the communications filed by NGOs before the African Commission.

### 3.4.2 Defendant/respondent<sup>74</sup>

While both the 1991 Protocol and the 2005 Supplementary Protocol are silent on the point, it appears from a reading of the amended (and inserted) articles 9 and 10 of the Court Protocol that member states, the Community, Community institutions and Community officials may be defendants before the Court.<sup>75</sup> The most obvious respondents are member states of ECOWAS in actions for failure to fulfil human rights obligations arising from the ECOWAS Treaty, Protocols, Conventions and other legal instruments. Further, as argued above, paragraph (c) in the amended article 10 relates to rights-violating acts or inactions of Community officials. In other words, either ECOWAS itself (as the Community) or an official of ECOWAS in his official capacity may be a respondent.<sup>76</sup> In relation to paragraph (d), the question becomes more complicated as the provision does not indicate against whom the individual right of access may be exercised. This leaves room for the exercise of discretion by the Court in its interpretation and application of the Supplementary Protocol. Generally, in accordance with the African Charter and the practice and procedure of the African Commission, it may be argued conclusively that member states of ECOWAS who are parties to the African Charter are prospective respondents.<sup>77</sup> This is supported by the provisions which impose the duty on state parties to guarantee African Charter-protected rights. Naturally, such states would also be parties to the Protocol creating the ECOWAS Court. In fact, the jurisprudence of the ECOWAS Court also points to this as most of the cases already treated by the Court are against states.

A curious development in respect of the exercise of the ECOWAS Court's human rights competence is the emergence of individuals as respondents before the Court. While those provisions relating to human rights promotion and protection, as contained in the ECOWAS instruments, point to a state duty, the imprecise couching of articles 9(4) and 10(d) of the Supplementary Protocol leaves the door open for situations such as human rights action against non-state actors before the Court.<sup>78</sup> Complications arise immediately the possibility of a non-state respondent is contemplated, as the usual practice is that only states

<sup>74</sup> The term 'defendant' seems to be more popular amongst lawyers before the ECOWAS Court.

<sup>75</sup> See arts 3 & 4 of the 2005 Supplementary Protocol.

<sup>76</sup> In 2005, the action brought by a dismissed staff member of ECOWAS, was against the Executive Secretary of ECOWAS in that capacity and two staff members of the Community in their personal names. Part of the action touched on a violation of the right to a fair hearing.

<sup>77</sup> Eg see arts 47, 49 & 55 of the African Charter, where reference is clearly to state parties. Rule 102(2) of the African Commission's Rules of Procedure is also very instructive in this regard.

<sup>78</sup> See CF Amerasinghe *Principles of the institutional law of international organisations* (2005) for a discussion on interpretation of treaties.

and, to some extent, international organisations (as subjects of international law) are entitled to be parties before international courts other than international tribunals exercising criminal jurisdiction. In granting jurisdiction to the Court for the determination of cases of human rights violations that occur in member states, and access to individuals for applications for relief for such violations, the Supplementary Protocol seems to have 'issued a blank cheque' for human rights realisation. If there were expectations that the Rules of Procedure and the practice of the Court would be used to limit the provisions, the contrary has occurred so far, as the Court has entertained an action brought by a non-state applicant against a non-state respondent. In the *Ukor* case, all the parties were non-state actors, yet the Court went on to exercise jurisdiction over the matter.<sup>79</sup> If this practice continues, it may well be logical to expect non-state actors other than individuals to be brought before the Court. Although this situation could be a human rights advocate's dream, the long-term implications could be interesting. It is hoped that the opportunity will arise in the near future for the Court to make a clear statement on the issue.

There is also provision for intervention by parties who consider that their interest may be affected by proceedings going on before the Court.<sup>80</sup> While the provision was originally aimed at states, since the Supplementary Protocol came into force, individuals have relied on it to apply to join proceedings as co-respondents with a state or an individual.<sup>81</sup>

#### 4 Admissibility of human rights complaints

The importance of admissibility considerations in international human rights litigation cannot be overemphasised. Viljoen captures the relevance of admissibility considerations as a screening or 'filtering' mechanism between national and international institutions.<sup>82</sup> He adds that the admissibility requirement places a divide between states in their sovereign capacity, and international supervision of those states.<sup>83</sup> In including these requirements in international instruments, it is expected that a possible overburdening of international instruments will be

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<sup>79</sup> The *Ukor* case (n 28 above) was declared 'inadmissible for lack of merit' on grounds that the Supplementary Protocol did not apply retrospectively.

<sup>80</sup> Art 21 of the 1991 Protocol (renumbered art 22 by art 5 of the Supplementary Protocol). Art 89 of the Rules of Procedure deals with the procedure for intervention.

<sup>81</sup> Eg in the *Ugokwe* case (n 49 above), there were interveners who joined as co-respondents with Nigeria and in the *Ukor* case, there was an application to join as intervener which failed (*inter alia*) on grounds of non-observance of the time limit.

<sup>82</sup> Viljoen (n 67 above) 62. It appears his reference here relates more to the requirement to exhaust local remedies.

<sup>83</sup> As above.



avoided.<sup>84</sup> It is not surprising, therefore, that all human rights instruments contain some form of admissibility requirement. Neither the 1991 Protocol nor the Supplementary Protocol contains express provisions dealing with the question of admissibility. However, the provisions dealing with access in both Protocols contain certain conditions necessary for a party to fulfil before the right of access to the Court may be exercised.<sup>85</sup> Notwithstanding that there are no provisions on the question of admissibility, chapter II of the Rules provides for preliminary procedures, which include preliminary objections.<sup>86</sup>

The Court is allowed to hear oral arguments after the documentary procedure for the preliminary objection has been concluded. The Court may either make a decision on the objection or reserve its decision pending the final judgment.<sup>87</sup> Under the Rules, a member of the Court is appointed as Judge Rapporteur for each case filed before the Court and such a judge has a major role to play in the preliminary procedure of the Court.<sup>88</sup> Although the existing jurisprudence of the Court does not contain enough to permit a proper analysis of the admissibility procedure, it is safe to say that the Court makes some form of admissibility finding and this is sometimes based on the filing of a preliminary objection by the respondent in the case.<sup>89</sup>

Unlike the practice in most other human rights protection and supervisory mechanisms, there seems to be very few conditions precedent to bringing a human rights action in the ECOWAS Community Court. The inserted article 10 (in article 4 of the 2005 Protocol) sets out only two conditions for individuals who intend to access the Court on application for relief for a human rights violation. These conditions are that the application should not be anonymous; nor be made while the same matter is pending before any other international court for adjudication.<sup>90</sup>

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<sup>84</sup> As above.

<sup>85</sup> See art 9(3) of the 1991 Protocol and the inserted art 10(d) in art 4 of the Supplementary Protocol.

<sup>86</sup> There is also reference to admissibility in the Rules which relates to admissibility of new pleas raised during proceedings before the Court. See art 37(4) of the Rules.

<sup>87</sup> Art 87 of the Rules.

<sup>88</sup> See eg arts 1, 33 37, 39 & 41(3) of the Rules on various roles of the Judge Rapporteur.

<sup>89</sup> Eg, the Court's decision in the *Olajide* case (n 41 above), in which it declared that individuals lacked access to the Court under the 1991 Protocol, was upon the preliminary objection of the respondent. The decision in which it declined jurisdiction in the *Ugokwe* case (n 49 above) was also prompted by the preliminary objection of the defendant/respondent. See para 8 of the judgment in the *Ugokwe* case. However, the consideration in the *Ukor* case (n 28 above) was made in the absence of the defendant/respondent.

<sup>90</sup> See the inserted art 10(d) in art 4 of the Supplementary Protocol. In a recent ruling in the case of *Professor Etim Moses Essien v The Republic of The Gambia & Another* (unreported) Suit ECW/CCJ/APP/05/05 (delivered on 14/3/07), the ECOWAS Court interpreted art 10(d)(ii) as *lis pendens* in another international court. See para 27 of the ruling.

The condition of non-anonymity compares to the requirement under the African Charter that 'other communications' under article 55 of the Charter should indicate the author even if the author requests anonymity.<sup>91</sup> This provision is closer to article 27(1)(a) of the European Convention, which simply requires that an application must not be anonymous. The European Convention is similarly silent on the issue of a request for anonymity by an applicant. In relation to the European Convention, it is suggested that the condition exists in order to bar applications that are lodged for purely political or propaganda reasons.<sup>92</sup> The practice of the European Convention shows that a complainant may request anonymity notwithstanding this provision. It is yet to be seen if a request for anonymity will be allowed under the procedures of the ECOWAS Court, even though it seems possible. Although the Rules precede the Supplementary Protocol (and therefore the provisions under consideration), it may be noted that the rule requires an application for commencing a case before the Court to include the name and address of the applicant.<sup>93</sup> By article 33(6) of the Rules, failure to comply with the conditions set out in the preceding paragraphs of article 33 could lead to a formal declaration of inadmissibility after the Court has heard the opinion of the Judge Rapporteur. In other words, non-compliance with the requirement that an application should not be anonymous would lead to a decision declaring a case admissible.

The second condition for individual access to the human rights jurisdiction of the ECOWAS Court prohibits prospective applicants from filing cases if the same matter is already before another international court for adjudication.<sup>94</sup> This provision seems to differ slightly from the equivalent provision under the African Charter. Under article 56(7) of the Charter a case is inadmissible if it has been *settled by* the states concerned in accordance with the principles of the Charter of the United Nations (UN) or the Charter of the OAU (read AU) or by the provisions of the African Charter itself. Gumedze interprets article 56(7) to mean that, as a means of stopping people from seeking the protection of more than one international system, a case already heard and decided by the dispute settlement mechanisms of the UN or the AU cannot come before the African Commission.<sup>95</sup> Viljoen sees the provision as one aimed at preventing a state from being found in violation twice on the same facts (in the case of another AU mechanism) and to prevent the undesirable conflict that could arise from the concurrent

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<sup>91</sup> Art 56(1) African Charter.

<sup>92</sup> P van Dijk & GJH van Hoof (eds) *Theory and practice of the European Court of Human Rights* (1998) 109.

<sup>93</sup> Art 33(1)(a) of the Rules. The address required under this paragraph is different from the address for service required under para 2 of art 33.

<sup>94</sup> See n 85 above.

<sup>95</sup> S Gumedze 'Bringing communications before the African Commission' (2003) 3 *African Human Rights Law Journal* 118 134.

exercise of jurisdiction by different systems (in the case of exercise of jurisdiction by a competent UN mechanism).<sup>96</sup> Viljoen's interpretation is that the African Charter allows for simultaneous submission of cases to mechanisms of both the AU and the UN, but that the applicant would be required to abide by the first ruling on the matter. This, he argues, is to prevent the possibility of 'divergent conclusions'.<sup>97</sup>

The first point to be made is that the provisions of article 56(7) do not preclude a case from being entertained by the African mechanisms, even if such a matter had been *settled by* sub-regional mechanisms. There are two possible interpretations for this situation. On the one hand, it can be argued that, at the time of drafting of the Charter, it was not contemplated that RECs in Africa would go beyond their economic focus to rely on the African Charter as a standard for human rights protection and so there was no need to cater for that eventuality. On the other hand, it can be argued the provision keeps the door open for the African mechanisms to take the role of appellate tribunals over the possible decisions of the sub-regional mechanisms.<sup>98</sup> Whatever interpretation is adopted, article 56(7) gives an allowance that article 10(d)(ii) does not. The provision in the Supplementary Protocol does not require that a matter be settled by another international court before it becomes inadmissible. It precludes a matter in so far as the matter has been instituted before another international court. However, the wording used in the second condition appears to suggest that, if a matter is pending before a 'friendly solution' mechanism, that fact does not preclude the plaintiff (applicant) from bringing the same matter before the ECOWAS Court. Similarly, as the provision specifically refers to 'another international court', an elastic interpretation could exclude quasi-judicial mechanisms such as the African Commission. This is subject to the interpretation of the Court and it is expected that the opportunity will arise to test this point.

Although other admissibility requirements in the African Charter are also not replicated in the two Protocols of the ECOWAS Court, the most conspicuous omission seems to be the requirement of exhaustion of local remedies.<sup>99</sup> It is generally agreed that the principle of exhaustion of local remedies is a vital part of international law, and especially international human rights law, as it provides a compromise between state sovereignty and international supervisory mechanisms.<sup>100</sup> It is also arguable that the requirement of exhaustion of local remedies is essential to prevent the international systems from being flooded with

<sup>96</sup> Viljoen (n 67 above) 92.

<sup>97</sup> As above.

<sup>98</sup> This latter view would support the argument that the African Court is the only competent judicial authority for interpretation of the African Charter.

<sup>99</sup> Cf Amerasinghe *Local remedies in international law* (2004) provides an excellent analysis of the principle of exhaustion of local remedies.

<sup>100</sup> See generally Viljoen (n 67 above) and Gumedze (n 95 above).

human rights complaints.<sup>101</sup> Odinkalu describes the principle as the 'cornerstone of the adjudicatory and protective mandate' of the African Charter, upon which the 'linkage between domestic remedies and regional human rights mechanisms' is processed.<sup>102</sup> The principle is so important that Viljoen notes that it is part of the admissibility requirements of all international human rights systems.<sup>103</sup> In the face of its overwhelming importance, it is not clear why the ECOWAS system does not include a requirement relating to the exhaustion of local remedies for access to the human rights jurisdiction of the ECOWAS Court. Without the benefit of background materials such as the *travaux préparatoires* of the Supplementary Protocol, one can only make a speculative analysis as to the reasons for its omission.<sup>104</sup> The point must be made that, whereas the principle of exhaustion of local remedies is recognised as 'a well established rule of customary international law',<sup>105</sup> the view has been expressed that this may well be so only in the area of diplomatic protection of aliens and it may not be applicable to the same degree in respect of other forms of international adjudication.<sup>106</sup> Placing reliance on the *Iran — US Claims Tribunal (in American International Group v Iran)*, Amerasinghe suggests that the rule of exhaustion of local remedies may be made inapplicable by reason of explicit exclusion.<sup>107</sup>

If the opinion above is anything to go by, it could be argued that, while the principle of exhausting local remedies is desirable, it may not be compulsory. By all indications the principle was contemplated with respect to the human rights competence of the ECOWAS Court. In article 39 of the ECOWAS Democracy Protocol, it was proposed by the contracting parties that Protocol A/P1/7/91 on the Community Court of ECOWAS 'shall be reviewed so as to give the Court the power to hear ... cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed'.<sup>108</sup> This provision seems to imply the requirement to exhaust remedies at the domestic level. However, the final text of the 2005 Supplementary Protocol on the Court does not contain any requirement for the exhaustion of local remedies before seizing the Court. In the absence of evidence to the contrary, it can only be assumed that the requirement was deliberately dropped. Some experienced commentators have suggested that there is no need for the requirement to exhaust local reme-

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<sup>101</sup> See Viljoen (n 67 above) 62.

<sup>102</sup> CA Odinkalu 'The role of the complaints procedure in the reform of the African human rights system' (2001) 2 *African Human Rights Law Journal* 225 227.

<sup>103</sup> Viljoen (n 67 above) 81.

<sup>104</sup> Attempts by the author to have access to the *travaux préparatoires* on the Supplementary Protocol have been unsuccessful.

<sup>105</sup> See the *Interhandel* case, 1959 ICJ Reports.

<sup>106</sup> Amerasinghe (n 99 above) 4-5 37.

<sup>107</sup> As above.

<sup>108</sup> My emphasis.

dies because ECOWAS as a community can be seen as one territory.<sup>109</sup> However, there is some danger in such a view because, as Ajulo points out, ECOWAS is not a 'super state' for the simple reason that national sovereignty remains intact.<sup>110</sup> If national sovereignty remains, then it is desirable that states be given the first opportunity to address the alleged wrongs.<sup>111</sup> In any case, the system is yet to develop into the European Union model for decisions and acts of the community to apply directly in member states without the need for treaties, conventions or protocols, which require ratifications and incorporations.

Whatever arguments there may be, the drafters failed to add a requirement to exhaust local remedies under the ECOWAS system. Although there seems to be a 'silent' view that the *Ugokwe* case suggests that there is no requirement to exhaust local remedies, the present author respectfully disagrees with that view.<sup>112</sup> The facts of the *Ugokwe* case indicate that the matter was brought before the ECOWAS Court after it had failed at the Nigerian Court of Appeal.<sup>113</sup> If these facts are true, then the issue of non-exhaustion of local remedies does not arise, as the Court of Appeal is the final court in Nigeria with respect to the election matter over which the ECOWAS Court was invited to adjudicate.<sup>114</sup> Apart from factual arguments, paragraph 32 of the Court's judgment in the *Ugokwe* case, in which the Court described the ECOWAS legal order as a 'judicial monism', seems to have also fuelled the argument that the case provides jurisprudential support for the non-existence of the requirement under the ECOWAS system. With respect, it has to be pointed out that the reference to a 'judicial monism' appears to have been in relation to the Court's decision that it was not a court of appeal against the decisions of the national courts of member states.<sup>115</sup> The Court's decision in declining to see itself as a court of appeal over national courts does not necessarily mean that it was making a pronouncement on the question of exhaustion of local remedies.

<sup>109</sup> Eg Ibrahim Kane of Interights, London, during lectures at the LLM (Human Rights and Democratisation in Africa) programme in May 2007.

<sup>110</sup> SB Ajulo 'The Economic Community of West African States and international law' (1989) 27 *The Journal of Modern African Studies* 233 245.

<sup>111</sup> Van Dijk & Van Hoof (n 92 above) quote the European Court of Human Rights in respect of this point to say that the rule is based on the assumption reflected in art 13 of the European Convention, that there is an effective remedy available for breaches in the domestic systems of member states. See also Amerasinghe (n 99 above).

<sup>112</sup> West African lawyers interviewed by the author during the research for this article have expressed the view. While transcripts of the interview are on file with the author, the request of the interviewees to remain anonymous is being respected.

<sup>113</sup> See para 26 of the judgment of the ECOWAS Court in the *Ugokwe* case (n 49 above).

<sup>114</sup> As above. Also see sec 246 of the 1999 Constitution of Nigeria and the 2001 Electoral Act of Nigeria.

<sup>115</sup> This is the logical interpretation if the entire para 32 is read together the second part of para 23, taking into consideration the nature the relief sought by the applicant.

The above analysis notwithstanding, it is safe to say that there is currently no requirement to exhaust local remedies under the ECOWAS system, as the Court has now made a definite pronouncement on the issue. In its ruling on the preliminary objection filed by the defendants in the case of *Professor Etim Moses Essien v The Republic of The Gambia and the University of The Gambia*,<sup>116</sup> the Court stressed that 'the issue of local remedy (*sic*) as mentioned in article 50 of the said Charter has no bearing with cases under the premise of article 10(d) of the Supplementary Protocol'.<sup>117</sup> While the existing regime has not led to the Court being flooded with cases, there is a real danger of such an outcome in the future, especially if lawyers become familiar with the working and potential of the ECOWAS Court. Further, considering the fact that the ECOWAS Community Court is a supra-national court, this position seems to hold the potential for a disruptive conflict with the legal systems of member states.<sup>118</sup>

With respect to actions by member states or the President of the ECOWAS Commission aimed at enforcing the human rights obligations of any member states, there may well still be a requirement to first attempt friendly settlement before the Court is seized of the matter.<sup>119</sup>

## 5 Conclusion

The realisation of human rights in Africa suffers from several factors, including the poor economic situation of the vast majority of people on the continent. Owing to the various conflicts that have raged in countries of that sub-region, West Africa seems to be worse off in terms of economic woes and the attendant violations of human rights. Against the backdrop of domestic legal systems that have not lived up to the expectations of human rights advocates and the African mechanisms that are too far away and expensive for the majority of victims of human rights violations, the emergence of a viable sub-regional human rights system should be applauded. This is even more so where the legal framework for human rights realisation under the system holds so much promise if used effectively. With its unrestrictive requirements, the ECOWAS human rights system may well be a gold mine for rights realisation. However, there is a need for caution in the process of developing

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<sup>116</sup> n 90 above.

<sup>117</sup> See para 27 of the ruling.

<sup>118</sup> Interviews conducted indicate that the lawyers familiar with the system recognise this danger, but argue that it makes the system attractive over other human rights complaints mechanisms.

<sup>119</sup> This is because art 76 of the revised ECOWAS Treaty still applies to such actions. See the Court's judgment in the case of *Parliament of the Economic Community of West African States represented by Chief FO Offia v The Council of Ministers of the Economic Community of West African States & Another Suit ECW/CCJ/APP/03/05* paras 9, 10 & 11.

the system if the lurking dangers to the system are to be avoided. Despite the fact that some states in the region have legal and constitutional traditions that create room for the partial transfer of sovereignty in deference to international treaties they have ratified, other states do not have such constitutional allowances.<sup>120</sup> Thus, overzealous provisions likely to ignite tension between the ECOWAS mechanism and the domestic systems of member states may turn out to be the Achilles heel of the system if such provisions are applied in a manner that develops into a tension that threatens the sovereignty of member states. Such a situation could lead to an eruption that destroys the system as states still cherish their sovereignty and have not dismantled legal obstacles to total integration under ECOWAS. Be that as it may, only constant use of the mechanism will expose the 'landmines' that line its path. It is hoped that West African lawyers and human rights advocates will take advantage of the system and, in the process, give the Court the opportunity to iron out and perfect grey areas in the system.

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<sup>120</sup> Eg, Mali and Senegal as 'monist' states have such constitutional space which is lacking in other states such as Nigeria. However, it has to be noted that, in 2006, the Authority of Heads of State adopted institutional reforms which include the adoption of a new legal regime that allows for the use of Supplementary Acts (instead of treaties) as the main law-making instruments in ECOWAS. The intention is that such Acts may become directly applicable in member states upon signature by the Authority. As at the time of writing, the new regime had not come into effect.

# Surveying the research landscape to promote children's legal rights in an African context

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## Summary

*This article represents an initial attempt to identify research themes and topics of special relevance to the furtherance of children's rights in the African context in order to sharpen and strengthen our capacity to promote good practice and promising solutions. It surveys an array of possibilities for research to promote the implementation of children's rights in an African context. A number of theme areas are detailed, spanning from general legal reform processes and children's participation therein, to matters of social and economic policy in so far as they feed into the implementation and advancement of children's socio-economic rights. The article incorporates information from a number of different African jurisdictions, comparing and contrasting efforts at child reform in respect of children's rights.*

## 1 Introduction

Whereas until recently 'children's rights' were viewed as falling within

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the realm of charity, under the United Nations (UN) Convention on the Rights of the Child<sup>1</sup> (CRC) they have come to be regarded as part and parcel of international human rights law. The rapid accession to CRC by states all over the world — with only two exceptions: the United States and Somalia — signals that the rights which contribute towards the protection of children have outgrown the discretionary power of national legislators. As persons entitled to protection under an increasing range of international law provisions, children cannot be regarded merely as subject to their own national law. In their vulnerability, and in their need for protection and justice, children have a place on the international legal platform, growing up as world citizens.

In Africa, CRC is not alone in the quest for expanded boundaries of children's rights. It is supplemented by the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>2</sup> It was in order to give CRC specific application within the African context that the African Children's Charter — the first regional treaty on the human rights of the child — was adopted by the Organisation of African Unity OAU (now African Union (AU)) Heads of State and Government on 11 July 1990.<sup>3</sup>

The African Children's Charter, while upholding all the universal standards outlined in CRC, speaks to the specific problems that African children confront, for example the impact of armed conflicts, harmful traditional practices, apartheid that prevailed at the time and so forth. For instance, within the African culture and value system, the Children's Charter provides for the responsibilities of children to their parents, communities and to society as a whole relative to their age and ability.<sup>4</sup> The African Children's Charter came into force on 29 November 1999 and has now been ratified by 41 countries on the continent.<sup>5</sup>

The popularity of CRC and the Children's Charter suggests a high level of normative consensus among the various nations of the world (particularly in Africa) on the idea and content of children's rights as human rights. In addition, the fact that a significant number of African countries have either completed or are in the process of completing major children's law reforms also shows commitment for the furtherance of children's rights on the continent. However, it should be noted

<sup>1</sup> Entry into force 1990.

<sup>2</sup> Entry into force 1999.

<sup>3</sup> One of the reasons for a separate African Charter on the Rights and Welfare of the Child was that during the drafting process of the CRC, Africa was underrepresented. Only Algeria, Egypt, Morocco and Senegal participated meaningfully in preparatory meetings. Furthermore, specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument. For further details, see D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

<sup>4</sup> Art 31 African Children's Charter.

<sup>5</sup> List of countries available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (accessed 28 July 2007).

that the degree to which these instruments and laws will improve children's lives depends greatly on how state parties implement them and adopt domestic measures to comply with their treaty obligations. The list of adverse factors that the implementation and enforcement of children's rights has to contend with, especially in Africa, is still very long.<sup>6</sup>

Moreover, although the concept of children's rights is more widely accepted today than was the case three decades ago, it may still not have become a primary societal value informing social policy in countries in Africa. Although much of contemporary moral, political and legal discourse pertaining to children is conducted in terms of a 'rights' agenda, there is still considerable divergence of opinion about the need for research concerning the nature of the rights, their foundation and practical implications, their content, scope and, increasingly, the locus of the duties and responsibilities, that correlate with the rights. It cannot be asserted authoritatively that there is an overarching international philosophy guiding children's rights that can give meaning to what every right means in law and practice. The competing rights and duties of parents, children, and the state continue to create disharmony which ultimately can prejudice the rights of children.

The purpose of this article is to generate discussion on a rights and policy-based research agenda on the African child. It attempts to identify important issues surrounding the legal rights and empowerment of children in Africa. Thus, in the following sections, this article explores issues including, but not limited to, assessing law reform processes in support of child rights in African context; mainstreaming rights-based approaches in general legal frameworks; strengths and weaknesses in legal approaches to children's rights issues; culture, customary law and children's rights; socio-economic rights; strategies for enhancing child participation in legal and policy processes; the role of the judiciary, courts and national monitoring mechanisms; and regional mechanisms and children's rights. A conclusion on the desired orientation of research to develop children's rights on the continent sums up the work.

## **2 Assessing law reform processes in support of child rights development in African context**

Many African countries have a plethora of existing legislation relating to matters which affect children. Increasingly, inherited colonial legislation is being overhauled and replaced with modern, more accessible and

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<sup>6</sup> Notwithstanding a children's rights discourse, many children — particularly in Africa — continue to suffer the effects of war, poverty, population growth and rapid urbanisation, and exploitation.

often more comprehensive dedicated children's statutes. Whilst some of these law reform processes are complete and the final statutes passed by parliament, others are not yet at that stage and are either under development or in parliamentary processes. Examples of the former are Ghana, Kenya, Madagascar, Nigeria and Uganda, whilst examples of the latter are Botswana, Lesotho, Mozambique, Namibia, South Africa, South Sudan and Swaziland (where the review and redrafting processes are just commencing). As has been pointed out on earlier occasions,<sup>7</sup> there has been a fair degree of cross-continental collaboration in law reform endeavours, especially since the turn of the millennium. Hence, members of the Lesotho Law Reform Commission visited South Africa and Ghana. South Africans were involved in the initial phase of law reform in Mozambique and Swaziland, and the Botswana processes commenced with a South African giving input on local experiences. A South African visited South Sudan at the early stage of the development of a children's statute there, and a delegation from South Sudan visited Lesotho. There has been regular contact with Namibia as well.<sup>8</sup>

Generally speaking, these new statutes cover the broad areas of child protection and children's status, including their relationships within the family. Commonly, therefore, issues such as guardianship or affiliation, custody of and access to children (both those born in and out of wedlock), are dealt with within the new children's rights framework heralded by CRC and the African Children's Charter, that is, premised on the rights of the child rather than the powers of the parents. Child protection aspects include measures for the protection of children from abuse and neglect, as well as the interventions required to investigate and prevent child abuse. Provision for one (or more) specialised children's decision-making forum is also a fairly universal phenomenon, be it a local tribunal or a more specialised court following different procedures. It is also usual for the 'new generation' statutes to include provisions aimed at ensuring a broader array of children's rights, enshrining the principles of the best interests of the child, and children's participation rights, in particular. All these law-making endeavors are an explicit attempt to domesticate CRC and the African Children's Charter.

Some examples on the continent exist of further 'specialist' areas of concern being covered in a fair degree of detail, such as inter-country adoption and trafficking. Here the South African, Lesotho and Malawian experiences stand out. Further, there is an ongoing debate about the inclusion of juvenile justice legislation in comprehensive child law enactments, a debate which has not been resolved. Kenya, Nigeria and

<sup>7</sup> Comment by Dr I Kimane (Chairperson of the Child Law Reform Committee, Lesotho) at the African Child Policy Forum conference on Harmonisation of Child Law in Africa, Nairobi, Kenya, October 2006.

<sup>8</sup> See, eg, J Sloth-Nielsen 'Strengthening the promotion, protection and fulfilment of children's rights in African context' in A Alen *et al* (eds) *The UN Children's Rights Convention: Theory meets practice* (2007) 103.

Uganda provide examples of composite approaches to the issue, with child justice being included in the overall Children's Act. Lesotho, too, has adopted the strategy of linking child justice to child protection and welfare generally, possibly arising from the strategic concern, linked to harsh public and political perceptions about crime in Southern Africa, that separation of child offenders legislatively-speaking might eventually result in a punitive criminal justice response to children in conflict with the law.<sup>9</sup> In Ghana, a proposed joint bill was ultimately split, and two enactments passed by parliament. In Mozambique, despite initial indications that a composite statute was under development,<sup>10</sup> the bills that have been prepared subsequent to the review and consultation process separate the jurisdiction of the *Tribunales des Mineurs* (the juvenile court) from the overarching children's bill.<sup>11</sup> The Gambia proceeded to enact juvenile justice legislation under the auspices of the Attorney-General's office in 2005, but in the absence of a broader children's welfare and protection focus, as far as is known.<sup>12</sup> Finally, the South African process has been characterised by two main enactments, initially caused largely by historical events — a strong non-governmental organisation (NGO) lobby for separate juvenile justice legislation which had commenced campaigning before the end of apartheid. This led to the appointment of a project committee of the South African Law Reform Commission to investigate proposals for a new juvenile justice system shortly after the entry into force of the 1996 Constitution which ushered in a democratic government. Only subsequently was the broader need for child law reform realised, at which stage a separate project committee to undertake a more comprehensive legal review commenced work.<sup>13</sup>

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<sup>9</sup> This has been the experience in South Africa, where a Child Justice Bill that was initially premised on a child rights approach was, upon entry into the parliamentary process, imbued with increasingly punitive characteristics, especially regarding offenders aged 16 or older charged with serious offences. For a recent discussion of this, see L Ehlers 'Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America' (2006) Occasional Paper 1, Open Society Foundation for South Africa. The South African Child Justice Bill has still not been finalised by parliament, with the last debates on it having occurred in 2003. Ironically, though, the original version has served as a model for several subsequent bills elsewhere, such as Lesotho, Malawi and South Sudan.

<sup>10</sup> The first author was one of the two consultants contracted by UTREL (a governmental law reform agency) and UNICEF to undertake a legal review and consultation process with the view to the development of a new children's statute. In July 2007, a national workshop was organised to discuss the way forward in the enactment and implementation of the bills.

<sup>11</sup> The bills are scheduled to proceed to parliament in October 2007.

<sup>12</sup> See M Saine 'The new law on juvenile justice in The Gambia' (2005) 7 *Article 40* 4.

<sup>13</sup> See, eg, Childline South Africa 'Submission on the Sexual Offences Bill to the Parliamentary Portfolio Committee on Justice and Constitutional Development' <http://www.childlinesa.org.za/SexualOffences.htm> (2003) (accessed 27 November 2006).

However, there is a lack of a comprehensive assessment of the extent to which both similarities and differences have emerged in the respective statutes upon conclusion by national parliaments. A valuable initial study in one area, namely juvenile justice, was completed as a doctoral dissertation in 2005,<sup>14</sup> comparing law reforms specific to juvenile justice in six African countries, but this type of research needs to be broadened, both regionally and with respect to widening the subject areas for comparison. For instance, there is a great need for a regional study of the laws and policies pertaining to children in alternative care — both in family or community type care, and, as will be discussed in more depth below, children in institutional care.<sup>15</sup> Similarly, given the widespread growth of HIV/AIDS in Africa, and its disproportionate impact on children, there is a need to examine the extent to which recent statutes address or incorporate HIV/AIDS-related issues to ameliorate the plight of affected children. This too is elaborated below.<sup>16</sup> The impression, at this preliminary stage, is that generally statutes either do not address issues flowing from the HIV/AIDS pandemic, or that if they do, they do not do so comprehensively. Also, a trend has been noted that HIV/AIDS issues crop up at a policy level, for example with orphans and vulnerable children (OVC) policies in place in many countries, but questions remain about the extent to which these are filtered into enforceable national legislation. As the continent's law-making activities are to quite a large extent 'work in progress', all of the above would need to be further explored though, and best practice models identified. An assessment of the 'optimal' or 'ideal' mix of legal and policy provisions to promote children's rights is impossible to provide in the absence of such further detailed examination of concrete legal provisions.

A further research area emerging from the ongoing law reform processes is an examination of how law is operationalised upon finalisation, and which best practices can be identified in regard to implementation. This is because there is a marked tendency for children's legislation to be implemented only in a piece-meal fashion, or in large towns or capital cities only. Uganda, the first African country to adopt 'new generation' children's legislation, is a case in point, with limited implementation outside of Kampala having taken place in the 11 years since the adoption of the Children's Act (1996).<sup>17</sup>

Third, of some importance in the African context is the extent to which legal reforms deal with customary law and issues related to cus-

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<sup>14</sup> See G Odongo 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' unpublished LLD thesis, University of the Western Cape, 2005.

<sup>15</sup> See sec 4 below for further discussion.

<sup>16</sup> As above.

<sup>17</sup> See G Odongo 'Report on a field trip to Uganda' (2003) unpublished, copy on file at the Community Law Centre, University of the Western Cape.

tom and culture. In Namibia, for instance, debates are still raging about law reform concerning the issue of guardianship and contact of unmarried fathers with their extramarital children, which have been strongly influenced by cultural considerations, especially the perceptions of men.<sup>18</sup> In South Africa, a proposed prohibition on virginity testing and the regulation of male circumcision met with fierce resistance from traditionalists in parliament, necessitating further public hearings in the National Council of Provinces (the second chamber of parliament) which drew wide publicity.<sup>19</sup> As a result, the Children's Act 28 of 2005 permits virginity testing for persons 16 years and older, provided that they consent and that it is performed in accordance with the manner spelt out in the (still to be formulated) regulations.<sup>20</sup>

Fourth, it has been lamented that the legislative processes are often time-consuming, with bills languishing for many years before parliaments. Namibia and South Africa — in respect of the Child Justice Bill 49 of 2002 — provide concrete examples of this, and Lesotho too completed the law review and drafting process in 2004, yet the Lesotho Child Care and Protection Bill has not yet been introduced into the parliamentary process. This signals a possible parliamentary lack of concern for, or prioritisation of, children's rights. The fact that in the Kenyan Children's Act process, parliamentarians could not be swayed to increase the minimum age for criminal capacity beyond eight years, is arguably also relevant.<sup>21</sup> It points to a certain disjuncture between the drafters' intentions and those of the politicians required to vote on legislation, and here a useful analysis could be made of parliamentary debates when child-related laws are considered. Such research would of necessity have to reflect the cultural and other contexts within which children are portrayed in African parliamentary discussions.

Fifth, a gap in the substantive framework for child protection relates to the ratification of the Hague Conventions, notably the Hague Convention in respect of Inter-Country Adoption.<sup>22</sup> Only Burkina Faso, Burundi, Mauritius and South Africa have ratified this Convention, widely regarded as providing a sound and carefully considered protective structure for the regulation of this form of alternative care of children. Since African countries have become the main 'sending' countries in the last decade, lobbying for further ratifications and examining the

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<sup>18</sup> Personal Communication, D Hubbard, Advocacy Co-ordinator, Legal Assistance Centre, Windhoek (November 2006).

<sup>19</sup> See, eg, L le Roux 'Do the provisions of the Children's Act 38 of 2005 on virginity testing and male circumcision adequately protect children?' unpublished LLM thesis, University of the Western Cape, 2006.

<sup>20</sup> Sec 12 Children's Act 38 of 2005.

<sup>21</sup> It must be pointed out that General Comment No 10 of the CRC Committee on Children's rights in juvenile justice (2007) provides 12 to be the internationally acceptable minimum age of criminal responsibility.

<sup>22</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993 and entered into force 1 May 1995).

manner of implementation of the Hague Convention via the establishment of Central Authorities would be a valuable adjunct to other child protection efforts. In addition, following the example set by the first conference of judges from Southern and Eastern Africa on the Hague Conventions,<sup>23</sup> judicial and other forms of co-operation (for example between designated central authorities) regarding the specificity of inter-country child protection collaboration should be promoted with the view to addressing not only relations with countries external to Africa, but as importantly, relationships between countries within Africa.

Further to the above, scope exists for further promotion of the ratification of the two optional protocols to CRC<sup>24</sup> and ILO Convention 182 on the Elimination of the Worst Forms of Child Labour in African context. ILO Convention 182 provides centrally for the adoption at country level of concrete, time-bound programmes of action to reduce the involvement of children both in the specified (worst) forms of child labour, and in those forms of labour identified by individual countries as being especially harmful to children's well-being and development.

### **3 Mainstreaming rights-based approaches in general legal frameworks (ie outside of dedicated children's legislation)**

Child-related issues may crop up in relation to a vast array of laws and policies, outside of legislation developed specifically for child protection or child justice, and in relation to policies that do not necessarily have as their primary purpose to impact directly on children. Examples in point are succession and inheritance; immigration control; prisons; criminal procedures impacting on children, for instance as witnesses; labour laws; legislation dealing with drug control, publication or possession of pornographic material, and regulation of the media in general; licensing laws in spheres which may have a bearing on child protection, for example nightclubs, places of sale of alcohol or tobacco; environmental safety laws and urban planning legal issues; health and mental health laws, and so forth.

All too frequently, the children's rights dimension inherent in other legislation where children are not the specific focus is overlooked or accorded minimal weight. A recent South African example in this regard was in the process development of the mandatory and minimum sentencing laws in 1997, when the issue of their applicability to

<sup>23</sup> Convened by the Permanent Bureau of the Hague Conference and held in The Hague, September 2006.

<sup>24</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (entered into force in January 2002) and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force in February 2002).

sentenced children was not even considered until directly raised in parliament by NGO advocates who got wind of the pending legislation.<sup>25</sup> Other countries are overhauling criminal justice legislation (Ethiopia), sexual offences laws (Malawi), inheritance laws (Mozambique), to mention but three areas where children's rights issues, although not central, play a role. This is indicative of the fact that there is a need to audit the child's rights interest in legal frameworks more broadly.

In regard to criminal justice legislation, for instance, the UN Guidelines on Justice for Child Victims and Witnesses of Crime, 2005,<sup>26</sup> provide a practical framework for achieving more child-sensitive responses to child victims and witnesses, including through legal reforms, rules of procedure and evidence, attitudes and training of professionals, and through elaborating the right to effective assistance for victims and witnesses who are aged below the age of 18 years. An 'assessor toolkit' describing the application of these guidelines at a country-specific level, including requirements pertaining to the need for special measures for child witnesses, was recently released by the UN Office for Drug Control and Criminal Justice and UNICEF.<sup>27</sup> Obviously, the correct place for provisions of this sort would be legislation governing the criminal procedure and hearing of testimony.

In summary, there is probably a need for quite considerable further research in specialised sectors to assess where opportunities and gaps exist for ensuring that the rights of children are included. Transport and planning issues come to mind, as do health services, approaches to disability, and country strategies affecting food security. This research should aim to identify how linkages between the children's rights sector and others outside that sector can be fostered in order to mainstream children's rights perspectives in law and policy initiatives outside of dedicated child law reform efforts.

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<sup>25</sup> See J Sloth-Nielsen 'The influence of international law on South Africa's juvenile justice reform process' unpublished LLD thesis, University of the Western Cape, 2001; J Sloth-Nielsen & L Ehlers 'A pyrrhic victory? Mandatory and minimum sentencing legislation in South Africa' (2005) ISS Occasional Paper 111; A Skelton 2005 'The influence of the theory and practice of restorative justice in South Africa with special reference to child justice' unpublished LLD thesis, University of Pretoria, 2005.

<sup>26</sup> UN Guidelines on Justice for Child Victims and Witnesses of Crime, 2005.

<sup>27</sup> See this toolkit, entitled 'Cross-cutting measures: Juvenile justice' <http://polis.osce.org/library/f/2709/541/UN-AUS-RPT-2709-EN-Juvenile%20Justice.pdf> (accessed 10 July 2007). See further J Sloth-Nielsen 'UNODC develops juvenile justice assessor toolkit' (2006) (8) art 40(3) for a basic analysis of the contents of the toolkit and how it can advance children's rights.



## 4 Strengths and weaknesses in legal approaches to children's rights issues

Apart from the considerations mentioned under section 2 above, notably the fact that legal reform is very much 'work in progress', a significant number of possibilities emerge in answering this question. Answers may also be heavily influenced by the approach of the observer concerned. For instance, it is quite common at international fora and conferences to hear papers delivered by (African) academics either describing the applicable legal architecture formalistically without reference to practicalities or to implementation-related issues, or, in a contrary vein, to listen to accounts of the dire situation that children face at grass roots level (as child soldiers, victims of war and hostilities, as refugees, children exposed to debt bondage and serfdom, and so forth), legislative enactments notwithstanding.<sup>28</sup> This latter approach is premised on the belief that 'the law' constitutes mere words on paper, and that it is ultimately of little use in addressing children's plight.

However, we are of the view that neither of these approaches is particularly helpful. The law should rather be viewed as a primary tool of development, especially (but not only) in post-conflict and post-colonial societies. Since the enactment of legal rules can and should determine a host of implementation-related, governance and procedural issues, legal research should primarily be orientated towards the assessment of the efficacy of legal measures at a practical level to highlight developmental best practices.

An example in point relates to Southern Sudan, in respect of which in 2005, consultations with legal drafters of a new Children's Protection Act were held by one of the authors. It could have been contended that, in a society which lacked even basic data on its population, and where the very bedrock of governance was still being ironed out, the development of children's protection law was not a priority. However, a different stance would proceed from the premise that starting out with the basics of a children's rights framework is crucial to ensuring the eventual fulfilment — and not marginalisation of — children's rights. Thus, issues such as birth registration, implementation of the right to education, access to primary health care as well as maternal health care, primary measures aimed at ensuring child protection, and so forth, should be elaborated statutorily even where fulfilment of more resource-intensive 'luxuries', such as specialised courts and child-dedicated legal services, are not really on the horizon yet.<sup>29</sup>

<sup>28</sup> Eg R Winter 'Child soldiers' Paper presented at the International Conference on the Rights of the Child, 14-17 March 2007, Ottawa, Canada.

<sup>29</sup> Sloth-Nielsen (n 8 above).

Another developmental example derives from the implementation of an embryonic social grant system to provide social assistance to orphaned and vulnerable children in some regions of Kenya. This has been assessed to be beneficial, and not merely because the children concerned benefited directly, but because additional donor efforts were harnessed to the project and government was able to begin to mainstream implementation of the right to social assistance at a policy level too.<sup>30</sup>

Research on children's rights, legal issues and policies which promote and further sustainable development, and which extends to the maximum extent the protection of children, should therefore be the focus of any research agenda, rather than merely narrow, technocratic analyses of legal provisions. The capacity of the law to 'add value' to development is a key theme in this endeavour.

In this regard, a useful lesson can be learnt from experiences in the field of juvenile justice, which is currently a priority area in the international arena. Starting in the early 1990s, inter-country skills transfers in the area of diversion, social work practice with youth in conflict with the law, restorative justice, reintegration work, the legal regulatory environment to protect the due process rights of children in the juvenile justice system, effective monitoring structures for juvenile justice, and judicial training have been occurring at an ever increasing rate. Sharing between countries such as Ghana, Lesotho, Malawi, Mozambique, Namibia, Somaliland, South Africa and Zambia, to name but a few, has enhanced the conclusion that there is an emergence of a pan-African approach to children in conflict with the law and one that has been 'home-grown' (rather than being borrowed from the north).<sup>31</sup> It is therefore recommended that further research and capacity building should seek to expand this area of collaborative best practice.<sup>32</sup>

Further to the issues surrounding diversion and programming for children at risk or in conflict with the law, there is a great need for research into the regulation of, and prevailing conditions at, alternative institutions for sentenced children, which, it is suggested, is an area of weakness in the region as a whole. Some preliminary work has been

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<sup>30</sup> South Consulting 'Evaluation of SIDA support to UNICEF and the government of Kenya 2004-2006' (November 2006, copy on file with the author).

<sup>31</sup> Eg, the experience of handling children in conflict with the law by local councils in Uganda is exemplary (B Mezmur 'It takes a village to raise a child' (2007) 9 *Article 40* 1).

<sup>32</sup> J Sloth-Nielsen & J Gallinetti (eds) 'Child justice in Africa: A guide to good practice' Children's Rights Project, Community Law Centre, University of the Western Cape (2004); Odongo (n 14 above); F Steyn (2005) 'Review of South African innovations in diversion and reintegration of youth at risk' Open Society Foundation for South Africa <http://www.osf.org.za/Publications/default.asp?PubCatID=30> (accessed 31 July 2007).

done in regard to children in prisons,<sup>33</sup> but the whole field of borstals, reformatory schools, juvenile training centres, schools of industries and so forth remains largely unexplored in regional context.<sup>34</sup> The issue of the treatment of children in trouble with the law who are deprived of their liberty is one which has merited special attention under international law, and host of treaties, non-binding (but comprehensive) UN rules and guidelines can be cited in this regard. The UN Standard Rules for Children Deprived of their Liberty (1990) are the most specific and comprehensive, but there is also a need to look at more recent documents such as the Optional Protocol to the Convention against Torture (OPCAT) which is finding comparatively widespread acceptance on the African continent<sup>35</sup> and entered into force in November 2006. The national and international visiting mechanism proposed by this treaty, and which ratifying states will have to set up and maintain, applies to all forms of deprivation of liberty. Hence, monitoring of the treatment of children in alternative institutions will have to be covered by the mechanisms of OPCAT as well, and we submit that this represents an emerging area for further examination.

However, apart from OPCAT, there is a larger challenge when looking at the transformation of children's institutions, institutions that were frequently established under colonial rule.<sup>36</sup> The challenge is to begin to grapple with questions such as what 'African' alternative institutions should look like. What skills should they convey or impart, and what are acceptable levels of provisioning to comply with international standards, yet not create the impression that children have to offend in order to access services and skills development? What should the role of donor agency and intergovernmental aid be in relation to institutions, which at the end of the day may well require long term maintenance and support? Is there a role for private interests, and if so, what then is the role of government?<sup>37</sup>

<sup>33</sup> See J Sloth-Nielsen 'Born free: Children in prison in Africa' Paper presented at the XIV Conference of the International Association of Youth and Family Court Judges and Magistrates, Belfast, September 2006.

<sup>34</sup> The authors are aware of some country specific-studies, eg one in Kenya, one in Zambia and one in Egypt, and one pertaining to juvenile facilities managed by the provincial government of the Western Cape, South Africa in 2004. But these have generally been evaluations for donors, rather than being a comprehensive assessment of the alternative care environment for children in conflict with the law.

<sup>35</sup> Having already been ratified by Benin, Liberia, Mali, Mauritius, Senegal and South Africa.

<sup>36</sup> This is also noted against the context of the fact that many new children's statutes (ie post-1996) provide for sentencing to alternative institutions, Kenya, The Gambia, Ghana, South Africa and Uganda, being cases in point. See Odongo (n14 above) ch 7.

<sup>37</sup> The last is mentioned because of the increasing involvement of private sector companies in the management of outsourced South African juvenile institutions (at least 7 so far) and there is some evidence that the same companies who are involved in this sector have made approaches to other Southern African countries to market their capabilities.

Also located in the juvenile justice sphere are issues concerning restorative justice. Although much international fanfare has been accorded the restorative justice approach which characterises traditional African decision-making processes, and although some documented work in South Africa exists,<sup>38</sup> as well as considerable acclaim that has been accorded the Gacaca courts in Rwanda<sup>39</sup> as a best practice response to post-conflict situations because of their restorative focus, there is undoubtedly further research that can be done to unearth and record best practice examples of the use of restorative justice principles (both in relation to juvenile justice and in the child protection sphere). The focus here should include both an examination of legal frameworks for restorative justice (either in civil or in customary law) as well as documenting actual case studies and real-life examples which can inspire and create best practice replication.

Street children, an increasing phenomenon in the era of HIV/AIDS and growing urbanisation, are to be found in most major cities and towns. Some country-specific and regional work on legal and policy responses to street children has been undertaken,<sup>40</sup> but, as an issue which is cross-cutting with juvenile justice, child welfare, trafficking and a host of other issues, much more regional work in this thematic area is recommended. The problem of refugee and migrant children, which is showing new trends of being mostly caused by internal displacement, also calls for attention. Again, cross-regional best practice in legal and policy responses would be a fruitful avenue of enquiry.

In a similar vein, as mentioned earlier, there is a need to document legal and policy responses to the impact of HIV/AIDS upon children in sub-Saharan Africa. A valuable starting point is provided by the recently released book *Legal and policy frameworks to protect the rights of vulnerable children in Southern Africa*, compiled for Save the Children (United Kingdom), and analysing the position in 10 Southern African countries.<sup>41</sup> This document explores the applicable legal and policy responses with reference to birth registration; inheritance; physical

<sup>38</sup> J Redpath *et al* 'Race, class and restorative justice in South Africa: Achilles heel, glass ceiling or crowning glory?' (2004) 17 *South African Journal of Criminal Justice* 17-40; See, too, the Lesotho Children's Protection and Welfare Bill, 2004, which contains extensive restorative justice provisions, warranting the conclusion that it represents the most restorative justice-oriented children's protection and welfare legislation developed so far in Africa.

<sup>39</sup> See eg C le Mon 'Rwanda's troubled Gacaca courts' (2007) (14) 2 *Human Rights Brief* 16; L Tully 'Human rights compliance and the Gacaca jurisdictions in Rwanda' (2003) 26 *Boston College International and Comparative Law Review* 385.

<sup>40</sup> B Owasanoye & M Wernham (eds) *Street children and the juvenile justice system in Lagos State* (2004); G Odongo 'Report on a field trip to Kenya' (2003) unpublished, copy on file at the Community Law Centre, University of the Western Cape; LM Muntingh 'Report to Unicef Zambia on an evaluation of the street children programme' (2006) (copy on file with the author).

<sup>41</sup> Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Tanzania and Zambia.

and sexual abuse; the age of marriage (focusing on early marriage in particular); social assistance to orphaned and vulnerable children; movement across national borders, especially focused on unaccompanied children; and education, more particularly the access of orphans and vulnerable children to education.

In summary, a legal and policy research agenda in African context should be embedded in an approach which is informed by two variables. First, where areas of strength have been identified, such as in relation to juvenile justice and restorative justice practices, as well as the emergence of concrete OVC policies throughout the region, the focus should be on documenting sustainable and indigenous solutions for replication. Second, the obvious need to focus on especially vulnerable groups (migrant children, street children, children deprived of their liberty, OVCs and so forth) dictates that this is where energies should be spent on improving legal and policy frameworks, not to mention programmatic responses.

## 5 Children's socio-economic rights

Although not very common, the issue of children's access to socio-economic rights is mentioned in some African constitutions.<sup>42</sup> However, generally, what can be discerned from constitutional analysis<sup>43</sup> in African countries is that socio-economic 'rights' (of children) tend rather to be included as 'directive principles of state policy' which are not directly justiciable<sup>44</sup> but serve only as guiding principles.

Nevertheless, one notable socio-economic right that often finds its way into African constitutions and legislation is the right to education and particularly the right to free and compulsory primary education.<sup>45</sup> Although a good number of African countries have nominally provided for the right to free and compulsory primary education, according to the former Special Rapporteur on the Right to Education, only three African countries<sup>46</sup> could be declared, in 2006, to provide a 'proper' free and compulsory primary education. There seems to be a lack of guidance in what constitutes free primary education as an obligation of

<sup>42</sup> See, eg, Constitution of the People's Democratic Republic of Algeria art 59, Constitution of the Republic of Angola art 31, Constitution of the Republic of Burundi art 39. For further discussion, see Sloth-Nielsen (n 8 above).

<sup>43</sup> See Sloth-Nielsen (n 8 above) 91-96.

<sup>44</sup> It needs to be noted that this assertion must be qualified in so far as case law from abroad, notably India, has supported the use of such directives of state policy as a basis for elaborating the normative content of socio-economic rights.

<sup>45</sup> Arts 28(1)(a) of CRC and 11(3)(a) of the African Children's Charter clearly provide for this right.

<sup>46</sup> Madagascar and Mauritius are the two examples.

governments.<sup>47</sup> Questions pertaining to the real cost to the family of the child's education and incentives provided to encourage school entrance; regular school attendance and school retention; the purchase of uniforms and school books, at least for children of poor families; transportation; voluntary contributions by parents; school meals; payments for extracurricular activities; and the responsibility for building and maintaining schools are crucial issues that make themselves available for further research and better understanding of the normative content of the right.<sup>48</sup>

Because economic upliftment and gradual recovery of financial health can rightly be identified as continental priorities, research on measures to enhance the fulfilment of children's socio-economic rights must be regarded as a key objective. In regard to South Africa, mention must be made of the work done to assess the effects of the child support grant which was rolled out from 1998, and which currently reaches 7,2 million children, and extent to which this programme has impacted on child poverty.<sup>49</sup> Extensive work has been done in the sphere of looking at barriers to accessing education, for example by the Child Education Policy Unit at the University of the Witwatersrand,<sup>50</sup> and there is a vibrant body of work on notable other areas within the sphere of social and economic rights, such as the right of access to water, the right to food, and environmental rights.

Although South Africa's Constitutional Court has not been persuaded by arguments that international bodies (such as the body responsible for oversight of the International Covenant on Economic Social and Cultural Rights)<sup>51</sup> have propounded concerning a possible 'minimum core' content which should attach to each social or economic right,<sup>52</sup> it cannot be denied that nuanced research on the nature, scope and

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<sup>47</sup> See generally J Sloth-Nielsen & BD Mezmur 'Free education is a right for me: A report on free and compulsory primary education' (2007) (Save the Children).

<sup>48</sup> As above.

<sup>49</sup> Eg Children's Institute (2005) 'Child gauge, 2005'.

<sup>50</sup> See ch 11 'Education rights' in S Khosa (ed) (2007) *Socio-economic rights manual* Community Law Centre, University of the Western Cape.

<sup>51</sup> The UN Committee on Economic, Social and Cultural Rights (ESCR Committee). The ESCR Committee has said that it 'is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights, is incumbent upon every state party'. General Comment No 3, The nature of state parties' obligations (5th session, 1990) UN Doc E/1991/23, annex III 86 (1991), para 10. For further discussion, see S Russell 'Minimum state obligations: International dimensions' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 15; D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1—26.

<sup>52</sup> See, eg, C Mbazira & J Sloth-Nielsen 'Incy wincy spider went climbing up again: Prospects for constitutional interpretation of section 28(1)(c) in the next decade of democracy' paper presented at the conference 'Law in a Transformative Society' University of Fort Hare, 4-6 October 2006.

content of socio-economic rights in African context would dovetail well with regional agendas concerning economic integration and sustainable development. This area should therefore not be neglected in any overarching research agenda.

In the view of the authors, all countries in Africa would probably struggle to give effect to a minimum core content of any socio-economic rights, even though discernable efforts have recently been adopted to give effect to the rights to free compulsory basic education in various countries (Ethiopia, Kenya, Lesotho and Mozambique being recent examples). The universality of coverage must, however, be questioned. But with children as a focus, there is potentially vast scope — and need — for the continued expansion of research on the nuances of the realisation of children's socio-economic rights within the context of African realities, focusing on minimising the all too frequent reliance on resource constraints as barriers to their realisation, and turning instead to programmatic approaches which promote progressive realisation of socio-economic rights.

## 6 Strategies for enhancing child participation in legal and policy processes

Both CRC and the African Children's Charter recognise that rights talk is of particular value for children, providing them with a status and a stake in the debates about issues which affect them. It is no longer feasible to ignore children's voices and child-centered perspectives that recognise children as individual persons.<sup>53</sup>

There is some documented evidence of child participation in legal and policy processes, and limited initial analysis of the benefits a child participation process can hold, as well as the pitfalls that can be encountered along the way.<sup>54</sup> Examples present themselves from around the continent. For instance, in Uganda, NGOs have used participatory research with children and their families as a basis for planning policies and programmes that respond to their concerns and give children priority.<sup>55</sup> In The Gambia, the Children Protection Agency has developed a National Plan of Action on Child Protection which includes children's participation and raising awareness of child abuse.<sup>56</sup> Regionally, the African Forum in Cairo (in the preparatory process for the

<sup>53</sup> See the provisions of art 12 of CRC.

<sup>54</sup> L Ehlers 'Children's participation in law reform in South Africa and Mozambique' unpublished MPhil thesis, University of Cape Town, 2005.

<sup>55</sup> J Boyden 'Childhood and the policy makers: A comparative perspective on the globalisation of childhood' in A James & A. Prout (eds) *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood* (1997) 223.

<sup>56</sup> See for details the website of the organisation <http://www.cpagambia.gm/Aboutus.htm> (accessed 31 July 2007).

Special Session on Children), held in May 2001, marked the discovery by the African community (ministries, civil society, international institutions and all kind of experts), of the 'healthy' nature of children's self-expression and participation in a debate that was going to lay down the fundamental guidelines for action towards building an 'Africa fit for children'.

Key research was undertaken by Ehlers, in describing child participation processes in law reform initiatives in South Africa (both in relation to child justice and child protection law reform processes) and Mozambique.<sup>57</sup> The Lesotho law reform process was characterised by innovative ways in which youth participated in formulating and providing their views, and a permanent youth group that was established has continued to be part of the ongoing process as the bill moves into parliament. A child participation study of 600 children in prisons and institutions awaiting trial (with one control group of children in a school setting) was crucial to the findings of a situational analysis on the extent to which children are used by adults in the commission of offences, one of the targeted worst forms of child labour referred to in ILO Convention 182.<sup>58</sup> Zambian children were involved in a participation exercise on violence and the use of corporal punishment, commissioned by Save the Children Sweden. An extensive child participation process characterised the recent UN Study on Violence, and during which the voices of African children were heard in all three regional consultative meetings. Mention can also be made of Egypt, where children participated in making a video about corporal punishment and violence to provide their views,<sup>59</sup> and there are doubtless many other examples from around the continent where useful exercises to involve children have been undertaken.

As part of the right to participation, it is encouraging to note that more and more children are being given the possibility of filing complaints in cases of violations of their rights, either via specially-created procedures (for example, the limited opportunities for children in institutions to register complaints) or more generally via independent institutions for the monitoring of children's rights like child commissioners or a children's ombudsperson.<sup>60</sup> There are a growing number of these

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<sup>57</sup> Ehlers (n 54 above). Also see C Frank & L Ehlers 'Child participation in African context' in J Sloth-Nielsen (ed) 'Children's legal rights in African context' forthcoming, 2007 and 'What the children said . . .' Community Law Centre, University of the Western Cape, 1998 .

<sup>58</sup> C Frank & LM Muntingh 'A consultation with children on their use by adults in the commission of offences' (2005) Programme towards the Elimination of Child Labour, Community Law Centre, University of the Western Cape.

<sup>59</sup> Referred to in Frank & Ehlers (n 57 above).

<sup>60</sup> 'Ombudsman' (a Scandinavian word) describes a person or office which deals with complaints from a defined group of people. The Ombudsman is an independent, non-partisan agent, spokesperson, arbitrator or referee, ensuring that the authorities and others fulfil their duties and obligations. MG Flekkoy *A voice for children, speaking out as their ombudsman* (1991) 225.



institutions, particularly in Europe, as well as in other parts of the world,<sup>61</sup> and their further development and possible adaptation in Africa in a cost-effective and culturally sensitive way could further facilitate child participation.

The areas and contexts in which children participate need to be expanded from the conventional 'family matters', such as in adoption and in custody disputes, to a broader child-centered range of interventions. These could include criminal proceedings, civil proceedings, education, health, child protection, placement in alternative care, reviews under article 25 of CRC, immigration and asylum-seeking hearings, town and housing planning, and environmental upliftment, social security, employment and so forth.<sup>62</sup> The specific details of how participation is to be guaranteed in a child-centered manner and the extent to which views of the child are given due weight might be an area that needs to be explored particularly within the African context, building on the limited research available, and focusing in addition on meta-analyses of existing evaluations.

The growing involvement of children in law reform processes, as well as in policy assessment and policy formulation, appears to be a key strength on a continent where children are more likely to be seen than heard, and focus on analyses of the implementation of children's right to participate in this sphere would be advantageous.

## 7 Culture, customary law and children's rights

It is said that, in Africa, traditional value systems recognise human dignity and human dignity entails that all humans, including children, are entitled to humanity, respect and dignity by virtue of being human.<sup>63</sup> The African view of human rights manifests itself in the recognition that children are a valuable constituency in society,<sup>64</sup> and recognises

<sup>61</sup> See UNICEF Research Centre Florence, *Independent Institutions Protecting Children's Rights*, (2001) 8 *Innocenti Digest* and the website of the European Network of Ombudspersons for Children (ENOC) <http://www.ombudsnet.org>. See also The role of independent national human rights institutions in the protection and promotion of the rights of the child (General Comment No 2, UN CRC, 32nd session, UN Doc CRC/GC/2002/2 (2002)).

<sup>62</sup> R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2002) 183.

<sup>63</sup> DW Wai 'Human rights in sub-Saharan Africa' in A Pollis & P Schwab (eds) *Human rights: cultural and ideological perspectives; A quest for consensus* (1991) 19; see also A Pollis 'A new universalism' in A Pollis & P Schwab (eds) *Human rights: New perspectives, new realities* (2000).

<sup>64</sup> See generally Wai (n 63 above).

childhood as a special, precarious and fragile stage which requires special protection.<sup>65</sup>

Nurturing this cultural understanding of children to further promote and protect their rights is important, and some instances where this is under way have been recorded. For example, communities in Malawi have a history of caring collectively for children and community-based programmes, such as community crime prevention committees, have been re-formed, in a return to traditional ways of handling children's issues.<sup>66</sup> Another example supporting the idea that culture and tradition can be mobilised to promote children's rights is to be found in the relationship of grandparent-grandson in some traditional African cultures (for instance among the Tonga of Zambia). This relationship functioned as an intergenerational bridging institution for the benefit of children.<sup>67</sup> For instance, a child who got into trouble with his or her parent could confide his troubles in the grandparent, and even seek redress for his grievances with his or her parents via the grandparent, thereby promoting child participation and the best interests of the child. How to identify and support similar instances in Africa to implement measures that respect children's rights within traditional practice calls for further thought. This is all the more cogent as a large number of African children are regulated by customary law rather than growing up under the formal law.

The question of cultural relativism and children's rights in Africa cannot be separated from the problem of harmful cultural practices, such as female circumcision, as the 2 000 year-old practice is widespread on this continent.<sup>68</sup> Many harmful traditional practices are gender-biased,<sup>69</sup> in that they affect the girl child because she is female and a child — both positions of vulnerability in many African societies.<sup>70</sup> The need for comparative research, for instance, that examines different legal frameworks, particularly to indicate effective strategies to prohibit and ultimately eliminate the harmful effect of the practice on children, could be worthy of perusal. Indeed, in so far as other forms of violence

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<sup>65</sup> W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998).

<sup>66</sup> (2006) 15 *Chronicle* 15.

<sup>67</sup> See A Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) 3 (3) and (4) *International Journal of Children's Rights* 333-368.

<sup>68</sup> An estimated 80 million women and girls in more than 25 countries are circumcised. A Funder 'De minimis non curat lex: The clitoris, culture, and the law' (1993) 3 *Transnational Law and Contemporary Problems* 435.

<sup>69</sup> Female excision, bride burning, female infanticide, sex slavery and servile marriage all affect the female child because she is female and a child.

<sup>70</sup> Eg, most mothers (communities) circumcise their daughters because they believe in the procedure and want their daughters to have the social benefits and acceptance that come with circumcision.

against children are concerned, including corporal punishment in the home, the recent Global Study on Violence against Children released in 2006 has illustrated the knowledge gap that currently exists in relation to children's experiences of violence, and the report of the independent expert should be carefully studied to examine the extent to which it suggests further research topics.

Religious law also sometimes poses a problem. For instance, in states that apply Shari'a law, challenges of ensuring implementation of the principle of non-discrimination principle as it pertains to children born out of wedlock appears problematic.<sup>71</sup> However, a recent publication of UNICEF<sup>72</sup> provides a good illustration of how Islamic jurisprudence pays special attention to children and childhood. Research of this sort which analyses religious practices and interpretations from a child rights perspective will prove helpful in harmonising children's rights and religious practices.

Another difficulty arises when customary law co-exists (legally speaking) with statutory law, as is the case in a large number of African countries including Ethiopia, Nigeria, South Africa, Swaziland, and others. In countries like Swaziland, civil and criminal courts have the mandate to apply customary law and this may impact on children's rights, sometimes negatively (for example when courts impose corporal punishment). But where customary law is clearly regulated, such as in the case of Botswana, where the Customary Law Act<sup>73</sup> attempts to incorporate the concept of the best interest of the child, the degree of possible negative impact on children's rights could be minimised. On the positive side, some African countries<sup>74</sup> have incorporated CRC and the African Children's Charter's standards in their constitutions, and it is clear that a constitutional guarantee cannot and should not be overridden by custom.

In summary, human rights documents continually recognise that culture is an area that must be protected. However, culture should not be relied on as a basis for diminishing protected rights. Where positive, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by a cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed

<sup>71</sup> S Syed 'The impact of Islamic law on the implementation of the Convention on the Rights of the Child: The plight of non-marital children under Shari'a' (1998) 6 *International Journal of Children's Rights* 391.

<sup>72</sup> UNICEF and Al-Azhar University *Children in Islam: Their care, upbringing and protection* (2005).

<sup>73</sup> 1969, Laws of Botswana: Act 51, Cap 16:01.

<sup>74</sup> These include Ethiopia, South Africa, and the draft constitutions of Kenya and Zambia. In South Africa, the case of *Bhe & Others v Magistrate, Khayelitsha & Others* 2004 1 BCLR 27 (C) is a good example of the transformative nature of a rights-based approach in the Constitution.

against each other. How to strike the necessary balance between culture and children's rights is an issue that should continue to engage the minds of scholars.

## 8 The role of the judiciary and courts and national monitoring mechanisms

South Africa has been hailed as a best practice model in regard to the role of the judiciary in giving effect to children's rights.<sup>75</sup> In relative terms, the courts' appreciation of human rights in general and children's rights in particular is improving as time goes by. The reasons for this are varied. There has been some evidence of judicial training and specialisation on children's rights-related issues, and reference has already been made to the first seminar on the Hague Conventions on inter-country adoption and inter-country abduction convened in The Hague in September 2006, an initiative which is to be followed up by a regional conference in 2008. A similar event covering the judiciary from Western and Central African countries is scheduled to take place in August 2007. Increased judicial collaboration at the regional and continental level might well see judges outside of South Africa expanding their sphere of activity concerning children's rights. Research to investigate the potential strengthening of the role of the judiciary and courts in furthering children's rights could be valuable.

Apart from courts, the role of other supplementary institutional machineries for the promotion and protection of children's rights calls for some attention. In general, no fewer than 20 countries in Africa have established national human rights commissions or institutions.<sup>76</sup> Some are provided for in constitutions while others are enacted by statutes with no explicit mention in the constitutions. Their role — or

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<sup>75</sup> J Sloth-Nielsen 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *International Journal of Children's Rights* 137; African Child Policy Forum 'Best practice: Harmonisation of child law in Eastern and Southern Africa' (2007) <http://www.africanpolicyforum.org>; J Sloth-Nielsen & B Mezmur '2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence 2001-2006' *International Journal of Children's Rights* (2007, forthcoming).

<sup>76</sup> CRC Committee General Comment No 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child provides, under art 1, that '[i]ndependent national human rights institutions (NHRIs) are an important mechanism to promote and ensure the implementation of the Convention, and the Committee on the Rights of the Child considers the establishment of such bodies to fall within the commitment made by state parties upon ratification to ensure the implementation of the Convention and advance the universal realisation of children's rights. In this regard, the Committee has welcomed the establishment of national human rights institutions and children's ombudspersons/children's commissioners and similar independent bodies for the promotion and monitoring of the implementation of the Convention in a number of state parties.'

potential role — in children's rights protection warrants further study. Also, over 10 ombudsmen or public protectors are also provided for in African constitutions. In addition, children's 'parliaments' and children's ombudspersons and how they contribute in the promotion and protection of children's rights in Africa are areas on which there is a dearth of accessible information. A careful and nuanced study of strengths and weaknesses of different forms of oversight in respect of child law would be of benefit. Does a dedicated body such as a children's commission carry sufficient political and economic weight to mainstream children's legal rights, or is oversight better located in specific government departments? How helpful to the overall monitoring project have human rights commissions and similar bodies been? What co-ordinating structures are suitable and effective in ensuring inter-sectoral and multi-disciplinary service delivery to children? Answers to these questions might be dependent on particular socio-political contexts, but could nevertheless serve to highlight areas of strength and weakness.

## 9 Regional mechanisms and children's rights

The UN has recognised and promoted regional arrangements for the protection of human rights. At its 92nd plenary meeting in December 1992, the UN General Assembly reaffirmed that 'regional arrangements for the promotion and protection of human rights may make a major contribution to the effective enjoyment of human rights . . .'<sup>77</sup>

When considering the regional protection of human rights in Africa, the African Commission on Human and Peoples' Rights (African Commission)<sup>78</sup> comes to mind. However, the main regional body mandated to promote and protect children's rights in Africa is the African Committee of Experts on the Rights and Welfare of the Child (African Committee), the body to whom the African Children's Charter entrusts the functions of promotion and protection of its provisions.<sup>79</sup> The need to clarify the relationship of the African Committee with other AU organs, such as the African Commission, is also an important issue for the effective operation of the Committee and the optimal use of resources. Although the actual work of the African Committee is still in its

<sup>77</sup> Regional arrangements for the promotion and protection of human rights, UN General Assembly Resolution A/RES/47/125. The following year, in June 1993, the World Conference on Human Rights (held in Vienna) also reaffirmed the fundamental role that regional and sub-regional arrangements can play in promoting and protecting human rights.

<sup>78</sup> The African Charter came into force in 1986, creating the African Commission with the mandate of promoting and ensuring the protection of human and peoples' rights (see arts 30 & 45 of the Charter). Further see M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002).

<sup>79</sup> Art 32 African Children's Charter.

infancy,<sup>80</sup> with the necessary financial and technical support, it can prove itself to be a major tool for promoting and protecting children's rights in Africa.

The establishment of an NGO group for the African Children's Charter, similar to the NGO group for CRC, as a coalition of international, regional and national NGOs which works together to facilitate the implementation of the African Children's Charter, could be an idea to which some thought could be given, as well as a project to compile the jurisprudence that will come out from the work of the African Committee now that country reports are beginning to be received. Publication of the Committee meeting proceedings could play a role in information dissemination and in highlighting areas for further action and research.

In addition, the role of regional courts for the promotion and protection of children's rights is very significant. The practice of the European Court and the Inter-American Court testifies to this fact.<sup>81</sup> In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on 25 January 2004.<sup>82</sup> African intergovernmental organisations may also submit cases to the African Court,<sup>83</sup> including the African Committee.<sup>84</sup> By undertaking comparative research from other regional courts, suggestions may be devised as to how to positively influence the jurisprudence of the African Court for the advancement of children's rights in Africa.

Apart from the AU, a research opportunity that could be explored is through the New Partnership for Africa's Development (NEPAD). Although the main concerns of NEPAD are economic issues,<sup>85</sup> the African Peer Review Mechanism (APRM) could possibly address issues of

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<sup>80</sup> For the work of the African Committee, see A Lloyd 'How to guarantee credence? Recommendations and proposals for the African Committee of Experts on the Rights and Welfare of the Child' (2004) 12 *International Journal of Children's Rights* 21 and 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.

<sup>81</sup> See, eg, B Dohrn 'Something's happening here: Children and human rights jurisprudence in two international courts' (2004) 6 *Nevada Law Journal* 749 (2006 Special Issue on Legal Representation of Children).

<sup>82</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (entered into force 25 January 2004) <http://www.africa-union.org/innopac.up.ac.za:80/home/welcome.htm> (accessed 3 July 2005). Currently, the seat of the Court has already been decided and the judges elected.

<sup>83</sup> Art 5(1)(e) Protocol to the African Charter.

<sup>84</sup> While the question of the relationship between the Court and Commission has received some attention and suggestions, scant attention has been paid to the relationship between the Court and other relevant bodies, such as the African Committee. One question which arises is whether the Court has any role to play in cases that are submitted to the African Children's Charter Committee or whether cases alleging a breach of the Children's Charter may be brought directly to the Court under art 5(3) of the African Charter Protocol.

<sup>85</sup> African Peer Review Mechanism Base Document, AHG/235(XXXVII) Annex II.

human rights<sup>86</sup> under its 'democracy and political stability' focus.<sup>87</sup> Thus, as a child rights dimension is not entirely absent, the continued monitoring of developments at a regional level should focus on the extent to which children's rights fulfillment become a mainstream item for the regional development agenda.

## 10 Conclusion

That research on child rights-related issues is part of the implementation requirement of both CRC and the African Children's Charter is clear. For instance, in its General Comment No 5 on the 'General measures of implementation of the Convention on the Rights of the Child', the CRC Committee states that the '[c]ollection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights, is an essential part of implementation'<sup>88</sup> and thus 'states should collaborate with appropriate research institutes and aim to build up a complete picture of progress towards implementation, with qualitative as well as quantitative studies'.<sup>89</sup> In line with the child participation and best interests of the child principles, the involvement of children in research should be given the due attention it calls for.<sup>90</sup> This article represents an initial attempt to identify research themes and topics of special relevance to the furtherance of children's rights in the African context in order to sharpen and strengthen our capacity to promote good practice and promising solutions.

<sup>86</sup> The APRM is an instrument voluntarily acceded to by member states of the AU as an African self-monitoring mechanism. It is a mutually agreed instrument for self-monitoring by participating member states.

<sup>87</sup> The other three are Economic Governance and Management (EGM); Corporate Governance (CG) and Socio-Economic Development (SED). In relation to children affected by armed conflict, children's issues have been incorporated into peace negotiations and peace accords, hence the role of the Peace and Security Council of the AU could also be important.

<sup>88</sup> CRC Committee, General Comment No 5 'General measures of implementation of the Convention on the Rights of the Child' (2003) para 48.

<sup>89</sup> As above.

<sup>90</sup> In the context of juvenile justice, the CRC Committee has suggested that children should be involved in evaluation and research, 'in particular those who have been in contact with parts of the juvenile justice system'. See CRC Committee General Comment No 10 'Children's rights in juvenile justice' (2007) para 99.

# Assessing the effectiveness of the African Peer Review Mechanism and its impact on the promotion of democracy and good political governance

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## Summary

*Since the inception of the African Union, which superseded the now defunct Organisation of African Unity, the legal and political landscapes on the African continent have changed and are set to change further. Unlike the OAU, the AU takes democracy, good political governance and human rights seriously. Democracy and good political governance feature prominently among the objectives and principles of the AU. They are also entrenched in the objectives and principles of the New Partnership for Africa's Development, which is an initiative of the AU devised to accelerate the development of the continent and to pave the way for the African renaissance project championed by many African leaders and intellectuals. The African Peer Review Mechanism was established to assess the extent to which AU member states participating in NEPAD comply with the principles and objectives of NEPAD. Key among them are democracy and good political governance which are stressed in the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance. More than half of the AU member states have to date acceded to APRM and participate in NEPAD. This article aims to assess the effectiveness of APRM and its impact on the promotion of democracy and good political governance in AU member states. It argues that APRM is an unprecedented mechanism in interna-*

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*tional law and African politics. Despite shortcomings and challenges, it has the potential to impact positively on the promotion of democracy and good political governance on the African continent.*

## 1 Introduction

Since the inception of the African Union (AU), which superseded the now defunct Organisation of African Unity (OAU), the legal and political landscapes on the African continent have changed. Unlike the OAU, the AU takes democracy, good political governance and human rights seriously. The many declarations, statements and commitments to this effect made by African leaders over the past five years bear testimony to this.

The rhetoric of democracy and good political governance in Africa reached a climax with the establishment of the New Partnership for Africa's Development (NEPAD).<sup>1</sup> NEPAD received the support of the United Nations (UN) General Assembly, which commended it as an innovative and important development.<sup>2</sup>

The 2001 OAU Lusaka summit established the NEPAD Heads of State and Government Implementation Committee (HSGIC), which was placed under the chairmanship of Olusegun Obasanjo, then President of Nigeria.

At the AU inaugural summit, held in July 2002 in Durban, South Africa, African leaders adopted a Declaration on the Implementation of NEPAD<sup>3</sup> that endorsed the Progress Report and Initial Action Plan<sup>4</sup> and encouraged member states to adopt the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG)<sup>5</sup> and to accede to the African Peer Review Mechanism (APRM).<sup>6</sup>

APRM is a self-monitoring mechanism adopted by AU member states within the framework of NEPAD.<sup>7</sup> It aims at promoting democracy and good political governance alongside economic and corporate governance.<sup>8</sup> The APRM Base Document<sup>9</sup> and Memorandum of Understand-

<sup>1</sup> To foster economic development of the continent, OAU Heads of State and Government adopted the Strategic Policy Framework and a new vision for the revival and development of Africa, the New African Initiative (NAI), during the 37th and last session of the OAU Assembly of Heads of State and Government held in July 2001 in Lusaka, Zambia. The NAI later became NEPAD. See AHG/Declaration 1 (XXXVII).

<sup>2</sup> UN General Assembly Declaration A/RES/57/2, A/RES/57/7, A/RES/57/300.

<sup>3</sup> Assembly/AU/Declaration (n 2 above).

<sup>4</sup> AHG/235 (XXXVIII).

<sup>5</sup> n 4 above, Annex I.

<sup>6</sup> n 4 above, Annex II.

<sup>7</sup> n 4 above, para 1.

<sup>8</sup> n 4 above, para 6.

<sup>9</sup> n 4 above.

ing (MOU)<sup>10</sup> were adopted at the 6th summit of the NEPAD HSGIC held in March 2003 in Abuja, Nigeria.<sup>11</sup> APRM was officially launched during the 9th summit of the HSGIC held in Kigali, Rwanda, from 13 to 14 February 2004.<sup>12</sup> The APRM process has been completed for Ghana, Kenya and Rwanda.<sup>13</sup>

As I have argued elsewhere, democracy is a precondition for the success of the African renaissance project endorsed by South Africa's President, Thabo Mbeki, and other African leaders.<sup>14</sup>

With scholars such as Kabongo,<sup>15</sup> Nzongola-Ntalaja,<sup>16</sup> Ake,<sup>17</sup> Hinden,<sup>18</sup> Kaba,<sup>19</sup> Max Liniger-Goumaz<sup>20</sup> and Wiseman,<sup>21</sup> I share the view that, contrary to the Eurocentrist and Afro-pessimist conventional wisdom, democracy is not a Western invention, alien to Africa or at variance with African traditions or culture. Democracy also belongs to Africa and is feasible in Africa.<sup>22</sup>

Against this background, the article assesses the effectiveness of APRM and its impact on the promotion of democracy and good political governance in AU member states.

## 2 Democracy and good political governance in Africa

The debate on democracy and good political governance has assumed

<sup>10</sup> NEPAD/HSGIC/03-2003/APRM/MOU.

<sup>11</sup> n 10 above, para 17.

<sup>12</sup> AMB Mangu 'The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court' (2005) 23 *Netherlands Quarterly of Human Rights* 379-408.

<sup>13</sup> South Africa and Algeria were reviewed during the AU summit in Accra, Ghana, in June-July 2007. However, the review reports have not yet been published.

<sup>14</sup> AMB Mangu *The road to constitutionalism and democracy in post-colonial Africa* (2002) 277-282.

<sup>15</sup> I Kabongo 'Democracy in Africa: Hopes and prospects' in D Ronen (ed) *Democracy and pluralism in Africa* (1986) 35.

<sup>16</sup> G Nzongola-Ntalaja 'The state and democracy in Africa' in G Nzongola-Ntalaja & M Lee (eds) *The state and democracy in Africa* (1997) 246-247.

<sup>17</sup> C Ake *Democracy and development in Africa* (1996) 130, 138, 139.

<sup>18</sup> R Hinden *Africa and democracy* (1963) 2-3.

<sup>19</sup> L Kaba 'Power and democracy in African tradition: The case of Songhay, 1464-1591' in Ronen (n 15 above) 101.

<sup>20</sup> M Liniger-Goumaz *La démocratie, dictature camouflée, démocratie truquée* (1992).

<sup>21</sup> JA Wiseman *Democracy in black Africa. Survival and revival* (1990) 10 186; JA Wiseman 'Introduction: The movement towards democracy' in JA Wiseman (ed) *Democracy and political change in sub-Saharan Africa* (1995) 1-10; JA Wiseman *The new struggle for democracy in Africa* (1996) 157 160-162.

<sup>22</sup> See Ake (n 17 above) 129-159; Hinden (n 18 above) 3-5; Kabongo (n 15 above) 35-39; Kaba (n 19 above) 101; Mangu (n 14 above) 264, 270, 272, 275, 281; Nzongola-Ntalaja (n 16 above) 19-22; D Ronen 'The state and democracy in Africa' in Ronen (n 15 above) 202.

new vigour and more dimension in Africa since the 1980s,<sup>23</sup> especially with the creation of the AU and the launch of NEPAD and APRM.

## 2.1 Democracy and good political governance

### 2.1.1 Democracy

Hoffman, Ihonvbere, Mamdani and Schochet hold that, alongside such concepts as constitutionalism and the state, democracy remains one of the most contested notions of political theory.<sup>24</sup> According to Nwabueze, 'no word is more susceptible of a variety of tendentious interpretations than democracy'.<sup>25</sup>

In Themba Sono's words:<sup>26</sup>

Throughout history, the ideal of democracy has been the mother of all mischief. No concept has spawned such a multitude of devotees as democracy, however contradictorily conceived; nor has one, in the annals of political theory and conduct, been as disfigured, debased, and distorted as this one.

Wiseman deplored the way in which so many governments, of quite different types, choose to describe themselves as democratic. In some cases, the term has even been incorporated into the official names of some states, although it is a noticeable paradox that in most of the cases where this has happened, the states concerned appear significantly undemocratic.<sup>27</sup> Democracy has acquired different, even contradictory, meanings. Even its fiercest enemies have claimed to be democrats and professed their faith in democracy.<sup>28</sup> Democracy has been deified, while wars were waged in its name. Democracy has walked through history surrounded by these paradoxes.<sup>29</sup>

Ronen holds that 'defining democracy is a challenge'.<sup>30</sup> Wiseman adds that many writers have spent their lifetimes teasing out the subtleties and nuances associated with the term democracy. In spite of those endeavours, the absence of a universally-accepted definition remains,

<sup>23</sup> Mangu (n 14 above) 59.

<sup>24</sup> On these 'polemic', 'contested' and 'controversial' concepts in political theory, see J Hoffman *State, power and democracy: Contentious concepts in practical political theory* (1988) 31; GJ Schochet 'Introduction: Constitutionalism, liberalism and the study of politics' in JR Pennock & JW Chapman (eds) *Constitutionalism* (1979) 6; J Ihonvbere *Towards a new constitutionalism in Africa* (2000) 13; M Mamdani 'Social movements and constitutionalism in the African context' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 239.

<sup>25</sup> BO Nwabueze *Constitutionalism in the emergent states* (1973) 1.

<sup>26</sup> T Sono 'Comments on democracy and its relevance to Africa' (1992) 3 *African Perspectives: Selected Works* 29.

<sup>27</sup> Wiseman *Democracy in black Africa* (n 21 above) 4.

<sup>28</sup> Mangu (n 14 above) 172.

<sup>29</sup> D Ronen 'The challenges of democracy in Africa: Some introductory observations' in Ronen (n 15 above) 1.

<sup>30</sup> As above.

and so too does the concept that is still highly contested in analytical and ideological discourse.<sup>31</sup> I do not wish to enter this debate at any length, except to emphasise the two main conceptions of democracy that have dominated the definitional terrain, namely, the minimalist and the maximalist conceptions.

Minimalist conceptions were inspired by liberalism. Democracy was defined as a specific political machinery of institutions, processes and roles<sup>32</sup> that allowed for what Abraham Lincoln<sup>33</sup> referred to as the 'government of the people, by the people, for the people'. The notion of procedural or institutional democracy is of the sort found in Robert Dahl's concept of polyarchy,<sup>34</sup> defined by Sorensen as a political order characterised by competition for government power, political participation in the selection of leaders and policies, and civil and political rights.<sup>35</sup>

In minimalist views, democracy is synonymous with competitive, multiparty and electoral democracy and emphasises civil and political rights. Criticism is levelled against this type of democracy which is considered 'formal',<sup>36</sup> 'bourgeois',<sup>37</sup> 'elite-driven'<sup>38</sup> or 'impoverished'.<sup>39</sup>

The overwhelming majority of African scholars, including Ake,<sup>40</sup> Shivji<sup>41</sup> and Amin,<sup>42</sup> are 'maximalist' and champion a 'substantive', 'popular', and 'people-driven' democracy, which is based on values, constitutionalism and a respect for all human rights and not only civil and political rights. Maximalist scholars go far beyond a purely political democracy to consider social and economic democracy.

This broad definition of democracy is the kind of democracy that African leaders adopted under NEPAD and APRM, wherein democracy

<sup>31</sup> Wiseman *The new struggle* (n 21 above) 7-8.

<sup>32</sup> Ronen (n 22 above) 200.

<sup>33</sup> Quoted by Mangu (n 14 above) 187.

<sup>34</sup> See R Dahl *Polyarchy: Participation and opposition* (1971); R Dahl *Democracy and its critics* (1989) 220-224; G Sorensen 'Democracy and the developmental state' in JE Nyang'oro (ed) *Discourses on democracy in Africa: Africa in comparative perspective* (1996) 42; Wiseman *The new struggle* (n 21 above) 8; Mangu (n 14 above) 176.

<sup>35</sup> Sorensen (n 34 above).

<sup>36</sup> D Glaser 'Discourses of democracy in the South African left: A critical commentary' in Nyang'oro (n 34 above) 270.

<sup>37</sup> R Sandbrook 'Liberal democracy in Africa: A socialist-revisionist perspective' in Nyang'oro (n 34 above) 145; S Amin 'The issue of democracy in the contemporary Third World' in Nyang'oro (n 34 above) 61.

<sup>38</sup> JE Nyang'oro 'Discourses on democracy in Africa' in Nyang'oro (n 34 above) X.

<sup>39</sup> Ake (n 17 above) 132. See also A Olukoshi 'State, conflict and democracy in Africa: The complex process of renewal' in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 457.

<sup>40</sup> Ake (n 17 above) 132-134 137.

<sup>41</sup> IG Shivji 'Contradictory class perspectives in the debate on democracy' in Shivji (n 24 above) 254-255.

<sup>42</sup> Amin (n 37 above) 70.

is defined as a system of governance in which people effectively and meaningfully participate in the decision-making processes that affect their lives and livelihood, and politics as the process by which values, goods and services are allocated in society.<sup>43</sup> Democracy is closely related to, and refers to good political governance.

### 2.1.2 Good political governance

The discourse on 'governance' was developed by the World Bank and the International Monetary Fund (IMF), following the failure of the 'dictatorships of development'<sup>44</sup> that they sponsored in the Third World, in general, and in Africa, in particular.

Hyden held that the language of governance was applied by these financial institutions to serve their narrow purposes.<sup>45</sup> As early as 1987, a World Bank report already related to 'governance'.<sup>46</sup>

In its 1989 report on the prospects for development in sub-Saharan Africa, the World Bank defined governance as the exercise of political power to manage a nation's affairs.<sup>47</sup> It did not refer to 'good' governance or to 'democratic' governance. It is only in a paper presented at a World Bank conference on development economics in 1992 that Boeninger suggested that governance was the same as 'good government'.<sup>48</sup>

Under NEPAD and APRM, governance is defined as 'the art and skill of utilising political or collective power for the management of society at all levels'.<sup>49</sup>

According to the APRM review report on Kenya:<sup>50</sup>

... [T]he practice of good governance is ideally based on, and guided by the existence of a sound democratic constitution that enables the government to manage the affairs of the state effectively while empowering the citizenry to participate in governance and hold the government accountable.

Contrary to what may have happened in the East Asian states — known as the Tigers — where development is said to have been achieved

<sup>43</sup> Country Review Report (CRR) of the Republic of Ghana (Ghana Report) 12 para 2. See [http://www.polity.org.za/article.php?a\\_id=99408](http://www.polity.org.za/article.php?a_id=99408) and <http://www.nepad.org/aprm> (accessed 4 September 2007).

<sup>44</sup> See RL Sklar 'Developmental democracy' in Nyang'oro (n 34 above) 1-30; Mangu (n 14 above) 43-44.

<sup>45</sup> G Hyden 'Governance and the reconstitution of political order' in Joseph (n 39 above) 184.

<sup>46</sup> World Bank *Sub-Saharan Africa: From crisis to sustainable development* (1987).

<sup>47</sup> Hyden (n 45 above) 184.

<sup>48</sup> E Boeninger *Governance and democracy: Issues of governance?* (1992) 24-38; Hyden (n 45 above) 184.

<sup>49</sup> Ghana Report (n 43 above) 12 para 2.

<sup>50</sup> Country Review Report (CRR) of the Republic of Kenya's Report (Kenya Report) 16. See [http://www.polity.org.za/article.php?a\\_id=99422](http://www.polity.org.za/article.php?a_id=99422) and <http://www.nepad.org/aprm> (accessed 4 September 2007).

under some 'benevolent authoritarianism', African leaders acknowledged that development was 'impossible in the absence of true democracy, respect for human rights, peace and good governance'.<sup>51</sup> Good political governance is, therefore, democratic governance, based on respect for the rule of law, the separation of powers, the supremacy of the Constitution, the independence of the judiciary and the promotion of human and peoples' rights.

## 2.2 Democracy and good political governance in the AU Constitutive Act

In the Preamble to the AU Constitutive Act, African Heads of State and Government undertook to 'promote and protect human and peoples' rights, consolidate democratic institutions, and ensure good governance and the rule of law'.<sup>52</sup>

The objectives of the AU include the promotion of 'democratic principles and institutions of popular participation and good governance'<sup>53</sup> as well as the promotion and protection of human and peoples' rights.<sup>54</sup>

The principles of the AU include the following:

- the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity;<sup>55</sup>
- promotion of gender equality;<sup>56</sup>
- respect for democratic principles, human rights, the rule of law and good governance;<sup>57</sup>
- respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;<sup>58</sup> and
- condemnation and rejection of unconstitutional changes of governments.<sup>59</sup>

The AU's emphasis on democracy, good political governance and respect for human rights is unprecedented, as they did not feature in the objectives and principles of the OAU.

<sup>51</sup> NEPAD Declaration para 71.

<sup>52</sup> Preamble AU Constitutive Act.

<sup>53</sup> n 52 above, art 3(g).

<sup>54</sup> n 52 above, art 3(h).

<sup>55</sup> n 52 above, art 4(h).

<sup>56</sup> n 52 above, art 4(l).

<sup>57</sup> n 52 above, art 4(m).

<sup>58</sup> n 52 above, art 4(o).

<sup>59</sup> n 52 above, art 4(p).

### 2.3 Democracy and good political governance under NEPAD

Democracy and good political governance constitute one of the major commitments of NEPAD.<sup>60</sup> They are also reaffirmed in the DDPECG.<sup>61</sup>

As African leaders pointed out:<sup>62</sup>

One of the tests by which the quality of democracy is judged is the protection it provides for each individual citizen and for the vulnerable disadvantaged groups. Ethnic minorities, women and children have borne the brunt of the conflicts raging on the continent today.

In terms of the DDPECG, democracy and good political governance include the following:<sup>63</sup>

- the rule of law;
- respect for individual and collective fundamental human rights and freedoms, including the right to form and join political parties and trade unions, equality before the law and equality of opportunity for all, respect for minorities, women's and children's rights, the right to participate in free, credible and democratic elections to elect leaders for a fixed term of office; and
- adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments.

In support of democracy and good political governance, African leaders agreed to ensure that their respective national constitutions reflect a democratic ethos and provide for demonstrably accountable governance; to promote political representation and the participation of all citizens in the political process in a free and fair political environment; to enforce strict adherence to the position of the AU on unconstitutional changes of government and other decisions of the AU aimed at promoting democracy, good governance, peace and security; to strengthen and, where necessary, to establish an appropriate electoral administration and oversight bodies and provide the necessary resources and capacity to conduct free, fair and credible elections; to reassess and, where necessary, strengthen the AU and its election monitoring mechanism and procedures and to heighten public awareness of the African Charter on Human and Peoples' Rights (African Charter), especially in educational institutions.<sup>64</sup>

Democracy and good political governance also relate to the fight to eradicate corruption, which retards economic development and undermines the moral fabric of society.<sup>65</sup> Stability, peace and security are also considered essential conditions for sustainable development, alongside

<sup>60</sup> Ghana Report (n 43 above) para 1.

<sup>61</sup> DDPECG (n 5 above) para 7.

<sup>62</sup> n 5 above, paras 10-11.

<sup>63</sup> n 5 above, para 7.

<sup>64</sup> n 5 above, para 13.

<sup>65</sup> n 5 above, paras 8 & 14.

democracy, good governance, human rights, social development, protection of environment and sound economic management. Accordingly, African leaders undertook to unite their efforts to prevent, manage and resolve all conflicts in Africa.<sup>66</sup>

In support of good governance, they agreed to:<sup>67</sup>

- adopt clear codes, standards and indicators of good governance at the national, sub-regional and continental levels;
- establish an accountable, efficient and effective civil service;
- ensure the effective functioning of parliaments and other accountability institutions, including parliamentary committees and anti-corruption bodies; and
- ensure the independence of the judicial system to prevent abuse of power and corruption.

To promote and protect human rights, they agreed to:<sup>68</sup>

- facilitate the development of a vibrant civil society, including strengthening human rights institutions at the national, sub-regional and regional levels;
- support the African Charter, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights;
- strengthen co-operation with the UN Commissioner for Human Rights; and
- ensure responsible free expression, including the freedom of the press.

DDPECG refers to standards and codes of democracy and good political governance, which consist mainly of international and regional human rights instruments. Finally, it stresses the nine objectives of APRM in the area of democracy and good political governance. These objectives include the following:<sup>69</sup>

- prevention and reduction of intra- and interstate conflicts;
- constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, citizens' rights, and supremacy of the Constitution;
- promotion and protection of cultural, civil and political rights;
- upholding the separation of powers, including the protection of the independence of the judiciary and of an effective legislature;
- ensuring accountable, efficient and effective public office holders and civil servants, and promoting the development and participation of civil society and the media;

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<sup>66</sup> n 5 above, para 9.

<sup>67</sup> n 5 above, para 14.

<sup>68</sup> n 5 above, para 15.

<sup>69</sup> n 5 above, para 15.



- fighting corruption in the public sphere;
- promotion and protection of the rights of women;
- promotion and protection of the rights of children; and
- promotion and protection of vulnerable groups, including internally displaced persons and refugees.

The APRM process is based on assessing whether an AU member state participating in NEPAD complies with the above standards, codes and objectives.

## 2.4 Democracy and good political governance under APRM<sup>70</sup>

### 2.4.1 Mandate, purpose, and leadership of APRM

The mandate of APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the DDPECG.<sup>71</sup>

Its primary purpose is to encourage and build responsible leadership through a self-assessment process and constructive peer dialogue, to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and the reinforcement of successful and best practices, including identifying deficiencies and assessing the capacity-building needs of participating countries.<sup>72</sup>

APRM is led by the Committee of Participating Heads of State and Government (APR Forum). The overall responsibility of APRM falls on the Panel of Eminent Persons (APR Panel), who are recognised experts in one of the four thematic areas of APRM appointed by the APR Forum. These experts are persons of high moral stature who have demonstrated a commitment to the ideal of pan-Africanism. The members of the APR Panel lead the Country Review Teams (APR Teams). One of them is appointed the Chairperson of the Panel for a maximum period of five years.<sup>73</sup> The mission and duties of the Panel, as well as reporting arrangements to the APR Forum, are spelled out in a charter that also secures the independence, objectivity and integrity of the Panel.<sup>74</sup>

<sup>70</sup> On APRM, also see Mangu (n 12 above) 391-395; AMB Mangu 'What future for human and peoples' rights under the African Union, New Partnership for Africa's Development, African Peer Review Mechanism and the African Court?' (2004) 29 *South African Yearbook of International Law* 144-151.

<sup>71</sup> n 4 above, para 2.

<sup>72</sup> n 4 above, para 3.

<sup>73</sup> n 4 above, paras 6-8.

<sup>74</sup> n 4 above, para 10. The Charter provided for in the APRM Base Document has not been adopted. This matter is therefore regulated by the Rules of Procedure of the Panel and Secretariat (see NEPAD/HGSIC-3-2003/APRM/Guidelines/O&P of 9 March 2003 <http://www.nepad.org/2005/files/documents/48.pdf> (accessed 4 September 2007)).

The APR Panel ensures the integrity of the review. It is assisted by a secretariat (the APR Secretariat), which should be competent and technically capable to undertake the analytical work that underpins peer review and also conforms to the principles of APRM.<sup>75</sup>

#### 2.4.2 Reviews and stages of APRM

APRM entails periodic reviews of the policies and practices of participating states to ascertain progress made towards achieving mutually-agreed goals and compliance with agreed political, economic and corporate governance values, codes and standards as outlined in the DDPECG.<sup>76</sup>

The cardinal principle of APRM is that every review must be technically competent, credible, and free of political manipulation.<sup>77</sup>

There are four types of reviews under APRM:<sup>78</sup>

- a country review, which is the base review, carried out within 18 months of a country becoming a member of the APRM process;
- a periodic review, which takes place every two to four years;
- a review that can be solicited by a member country for its own reasons in addition to the above; and
- a review that can be instituted by participating Heads of State and Government in a spirit of helpfulness to the government of a participating country where there are early signs of impending political or economic crisis.

APRM is a peer-review process consisting of five stages.<sup>79</sup> Stage one is the preparatory phase, both at the level of the APRM Secretariat and at the national level. It involves a study of the political, economic and corporate governance and development environment in the country to be reviewed.

It is based on up-to-date background documentation prepared by the APRM Secretariat and material provided by national, sub-regional, regional and international institutions.<sup>80</sup>

Under the leadership of the APR Panel, a questionnaire on the four focus areas of APRM is forwarded by the APR Secretariat to the country to be reviewed. The country establishes a Focal Point (a member of the Cabinet) and constitutes an independent National Governing Council (NGC) or a National Commission, consisting of all the stakeholders, to conduct the self-assessment exercise on the basis of the questionnaire, and with the assistance, if necessary, of the APR Secretariat and/or

<sup>75</sup> n 61 above, paras 11-12.

<sup>76</sup> AHG/235 (n 4 above) para 15; APRM MOU (n 10 above) para 5.

<sup>77</sup> n 4 above, para 4; n 10 above, para 12.

<sup>78</sup> n 4 above, para 14; n 10 above, para 13.

<sup>79</sup> n 4 above, paras 18-25; Mangu (n 12 above) 393-394.

<sup>80</sup> n 4 above, para 18.

relevant partner institutions. A Country Support Mission (CSM) is then sent to assist in the preparation of a country self-assessment report (CSAR) and a preliminary programme of action (POA). Both the CSAR and the POA are submitted to the APR Secretariat. During the same period, the APRM Secretariat develops a background document on the country (Country Background Document) and the Country Issues Paper (CIP) on the four thematic areas and cross-cutting themes to guide the country review process. The CIP identifies areas that require further information, as well as major shortcomings and deficiencies and areas for capacity building for further investigation by the Country Review Mission (CRM). This is done through desk research and gathering available, current and pertinent information on the governance and development status of the country in the four assessment areas.

At this stage, the MOU for Technical Assessment and the Country Review Visit are signed between the government of the participating country and the APR Team led by a member of the APR Panel.

Stage two is the Review Team Visit, or CRM, to the country concerned to carry out the widest possible range of consultations with the government, officials, political parties, parliamentarians and representatives of civil society organisations, including the media, academia, trade unions, business, and professional bodies.<sup>81</sup>

During stage three, the Country Review Report (CRR) is drafted on the basis of the briefing material prepared by the APR Secretariat and the information gathered in stage two.<sup>82</sup> The draft CRR is first discussed with the government concerned to ensure the accuracy of the information and to provide the government with an opportunity both to react to the findings and to put forward its own views on how the identified shortcomings may be addressed.

The response of the government is appended to the CRR,<sup>83</sup> which should be clear on a number of points in instances where problems are identified. It must state whether the government is willing to take the necessary decisions and measures to put right any identified shortcomings, what resources are needed to take the corrective measures, how much of these resources the government can provide, how much needs to come from external sources, and how long the process of rectification will take.<sup>84</sup> At this stage, the country finalises its POA, taking into account the conclusions of the draft report.

Stage four begins with the submission of the final CRR, plus the final POA to the APR Forum through the APR Secretariat and the Panel. It ends with the consideration and adoption of the final report, including their decisions in this regard.<sup>85</sup>

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<sup>81</sup> Para 19.

<sup>82</sup> Para 20.

<sup>83</sup> Para 21.

<sup>84</sup> Para 22.

<sup>85</sup> Para 23.

If the government of the country in question shows a demonstrable will to rectify the identified shortcomings, the participating governments will provide whatever assistance they can, as well as urge donor governments and agencies to come to the assistance of the country being reviewed.

If there is no such political will, the APR Forum will do everything practicable to engage reluctant governments in constructive dialogue, offering, in the process, technical and other appropriate assistance. If dialogue proves fruitless, they may wish to put the government on notice of their intention to proceed with appropriate measures by a given date. Such measures are to be utilised only as a last resort.

In the meantime, the government should consider a further opportunity to address the shortcomings identified under a process of constructive dialogue.<sup>86</sup> The anticipated duration of each peer review, from the start of stage one to the end of stage four, is six months, but this has never been adhered to.<sup>87</sup>

Stage five is the final stage of APRM. It is the formal and public tabling of the report in key regional and sub-regional structures, such as the Pan-African Parliament, the African Commission, the Peace and Security Council and the Economic, Social and Cultural Council (ECOSOCC) of the AU. This should happen within six months after the report was considered by the APR Forum.<sup>88</sup> The APRM process as a whole is to be reviewed once every five years.<sup>89</sup>

### 2.4.3 Accession and funding of APRM

Accession to APRM is subject to the signing of the Memorandum of Understanding and the depositing of the signed document at the NEPAD Secretariat. Participation in the APRM process is therefore subject to the signing of the MOU, the notification to the Chairperson of the NEPAD HSGIC and the adoption of the DDPECC.

This will entail an undertaking to be subjected to periodic peer review, as well as to facilitate such review, and be guided by agreed parameters for good political, economic and corporate governance.<sup>90</sup>

The governments of the AU member states under APRM are themselves responsible for the funding of the review of their countries.<sup>91</sup> Subjecting oneself to peer review, and accepting to bear the costs of such a review, even though it may result in adverse findings, is yet evidence that a country is committed to democracy and good governance under APRM.

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<sup>86</sup> Para 24.

<sup>87</sup> Para 26.

<sup>88</sup> Para 25.

<sup>89</sup> Para 28.

<sup>90</sup> Para 5.

<sup>91</sup> Para 27.

### 2.4.5 The first AU member states reviewed

It was expected that Algeria, Egypt, Nigeria, Senegal and South Africa, whose leaders initiated NEPAD, will likewise take the lead and become the first countries to be reviewed. Unfortunately they did not, and this sent the message that even those who are the most vocal about NEPAD and APRM may not be very committed to the process.

Instead, leadership in this regard came from Ghana, the first black and sub-Saharan country to achieve independence in 1957. The CRR described Ghana as a 'country of firsts'.<sup>92</sup> It was followed by Rwanda, which had emerged from genocide, and by Kenya, a country still embroiled in a constitutional process.

The APR process started with the appointment of the members of the NGC to preside over the review process at the national level. It consisted of seven members in Ghana, 50 in Rwanda, and 33 in Kenya.

Ghana presented us with the best practice of NGC. This NGC enjoyed great autonomy and independence and did not comprise any single cabinet member. To safeguard their independence, the members of the NGC were not sworn in by the President, but were inaugurated.<sup>93</sup> Reportedly, other NGCs were *de jure* or *de facto* chaired by a member of the cabinet who tended to exclude or silence other stakeholders, especially civil society, as stated by some of their members.

The APRM teams for Ghana, Kenya and Rwanda were led by Dr Chris Stals, Prof Dorothy Njeuma and Dr Graça Machel, members of the APR Panel of Eminent Persons from South Africa, Cameroon, and Mozambique. CRMs to Ghana, Kenya and Rwanda were fielded from 4 to 16 April 2005 (Ghana), from 18 to 30 April 2005 (Rwanda), and from 3 to 14 October 2005 and 10 to 14 April 2006 (Kenya). The teams consisted of 16 (Ghana), 14 (Rwanda) and 18 (Kenya) members.

The country review of Ghana was finalised at the 3rd APR Forum Summit in Khartoum, Sudan, on 22 January 2006. Kenya and Rwanda were peer reviewed at the 5th APR Forum meeting held in Banjul, The Gambia, on 30 June 2006.

## 3 Assessment of democracy and good political governance in Ghana, Kenya and Rwanda: Findings and recommendations of the APR Panel

The findings and recommendations of the APR Panel for the first three countries to be reviewed were based on NEPAD codes and standards and the nine APRM objectives in the area of democracy and good political governance. The Panel also identified 'overarching' or 'cross-

<sup>92</sup> Ghana Report (n 43 above) 4 para 14.

<sup>93</sup> n 43 above, 5 para 17.

cutting' issues. The governments of the reviewed countries were approached to comment on the APR Panel's reports.

### 3.1 Compliance with APRM codes and standards

The APR Panel found that the three countries had signed or ratified several international treaties with a bearing on democracy and good political governance. However, where ratification occurred, it was not always followed by the incorporation of these instruments into domestic law. On the other hand, treaties were not always enforced when they had been domesticated and the states concerned hardly complied with their reporting obligations on ratification of some instruments.

The CRR found that Ghana had been enthusiastic in acceding to, and ratifying, some regional and global standards and codes, but the country had still to adopt a binding time-frame to accede to, or ratify, outstanding universal and regional instruments such as the African Charter on the Rights and Welfare of the Child (African Children's Charter) (1990), amendments to the AU Constitutive Act (2003), the AU Convention Against Corruption (2003), the AU Non-Aggression and Common Defence Pact (2005), the Protocol on the African Court on Human and Peoples' Rights (1998), the Protocol on the African Court of Justice (2003), and the Protocol on the AU Convention on the Prevention and Combating of Terrorism (2004).

The Panel recommended the ratification of the Optional Protocol to the Convention against Torture (CAT, 2002); the Optional Protocol to the Convention Against All Forms of Discrimination Against Women (CEDAW, 1999); the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of the Others (1949); the Convention on the Rights of the Child (CRC, 1995); the UN Convention against Corruption (2003); the UN Convention against Transnational Organised Crime (2000); the Supplementary Protocol Against the Smuggling of Migrants by Land, Sea and Air (2000); the Protocol against Human Trafficking in Women and Children (2000); the Convention on the Rights of the Child (CRC) on the Involvement of Children in Armed Conflicts (2000); and the Protocol on the Illicit Manufacturing of and Trafficking in Fire-Arms (2002).

Ghana was also advised to adopt a deliberate plan to clear outstanding arrears and institute a mechanism for automatic compliance with its reporting obligations, to develop a plan and programme to incorporate into Ghana's domestic law the ratified covenants and conventions, so as to make them an integral part of the country's own enforceable standards.<sup>94</sup>

The APR Panel complained that Rwanda had not signed or ratified the International Covenant on Civil and Political Rights (CCPR) First and

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<sup>94</sup> n 43 above, 15-16 paras 11-13.

Second Optional Protocols and the Optional Protocol to CEDAW as well as the Statute of the International Criminal Court.

Rwanda also made reservation against the jurisdiction of the International Court of Justice (ICJ) with regard to disputes with other states parties, against freedom of movement of refugees under the UN Refugee Convention and against the African Children's Charter. On the other hand, when international instruments had been incorporated, there was a demonstrable lack of enforcement capacity and the country had not complied with its reporting obligations.<sup>95</sup> For instance, the only report on the implementation of the African Charter was the consolidated report submitted in 2004, many years after its ratification by Rwanda.<sup>96</sup>

In Rwanda, the CRM confirmed that the most common problems in relation to regional and international standards and codes on democracy and good political governance were (a) tardiness in acceding to them; (b) ensuring timely reporting on implementation; and (c) inadequate domestication.

The CRM advised the government of Rwanda to adapt and harmonise its domestic laws to be consistent with its international commitments and to set up an inter-ministerial structure to co-ordinate actions to enhance the rights of its citizens.<sup>97</sup>

Although Kenya had signed and ratified several international conventions, and the Constitution has sought to implement most of the human rights obligations of Kenya, including civil and political rights, Kenya has not yet comprehensively translated its international commitments into domestic laws, particularly the codes and standards dealing with the rights of women, children, refugees and migrant workers. Kenya signed, but did not ratify, the AU Peace and Security Protocol, the AU Convention on Preventing and Combating Corruption and the Protocol on the Rights of Women in Africa.

Kenya has not signed or ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Geneva Convention on the Protection of Civilian Persons in Times of War, the Convention on the Political Rights of Women, the Convention for the Protection of Rights of Migrant Workers and their Families or CEDAW.<sup>98</sup>

### 3.2 Compliance with NEPAD objectives

As pointed out earlier, there are nine NEPAD objectives that should be

<sup>95</sup> CRR of the Republic of Rwanda (Rwanda Report) 32-33 paras 79-83. See [http://www.polity.org.za/article.php?a\\_id=99411](http://www.polity.org.za/article.php?a_id=99411) and <http://www.nepad.gov.rw/aprm.php> (accessed 4 September 2007).

<sup>96</sup> n 95 above, para 80.

<sup>97</sup> n 95 above, para 84.

<sup>98</sup> Kenya Report (n 50 above) 60-61.

achieved by any country under APRM in the area of democracy and good political governance.

### 3.2.1 Prevention and reduction of intra- and interstate conflicts

The CSAR noted that Ghana is a stable country in a neighbourhood that has been characterised by violent conflicts, insecurity and instability, and represents an oasis in an otherwise volatile sub-region.<sup>99</sup>

Ghana was also commended for its contribution to (sub)-regional and international peace-keeping.<sup>100</sup> However, there were several potential and real areas of internal conflict that needed appropriate attention. These include land ownership, land use and chieftaincy. 'Underlying land and chieftaincy disputes were issues of inheritance and succession, which, in turn, [were] due to the absence of uniform and legally enforceable set of governing principles.'<sup>101</sup>

The CRM found that discussions around the first objective were dominated by chieftaincy institutions and their roles.<sup>102</sup> It therefore recommended that the chieftaincy should be more responsive to the needs and demands of the rapidly changing Ghanaian society and to the aspirations of people across the gender divide. It urged that the capacity of the Traditional Houses of Chiefs should be enhanced.

Ghana was also advised to reform its land law in order to provide for easy access to land, and to adopt an action plan to complete the process of accession to, and to ratify outstanding international protocols, particularly those related to human rights.<sup>103</sup>

The CRM commended Rwanda for the establishment of a National Unity and Reconciliation Commission to reconcile its people and advised the government to deepen its national reconciliation effort.<sup>104</sup>

However, the CRM made no recommendation<sup>105</sup> and failed to advise on the prevention and reduction of interstate conflicts in the Great Lakes region, where the CSAR established that Rwanda invaded the DRC twice, and the real causes of its conflict with Uganda remained unclear.<sup>106</sup>

As compared to its neighbours, who are often plagued by civil unrest and insurrections, Kenya was credited with Best Practice as an 'Island and Haven of Peace for the Region'.<sup>107</sup> Nevertheless, the CRM found

<sup>99</sup> n 43 above, 16 para 15.

<sup>100</sup> n 43 above, 17 Box 2.2.

<sup>101</sup> n 43 above, 17 para 17.

<sup>102</sup> n 43 above, 18 para 22.

<sup>103</sup> n 43 above, 19 para 26.

<sup>104</sup> Rwanda Report (n 95 above) 34 37-55 paras 85 & 98-156.

<sup>105</sup> n 95 above, 37 para 98.

<sup>106</sup> n 95 above, 35 para 91.

<sup>107</sup> Kenya Report (n 50 above) 63 Box 3.1.



that internal conflict in Kenya was rife.<sup>108</sup> The Kenyan society remained deeply divided on tribal and ethnic lines and confronted with the issue of managing diversity and with the challenge of building a relevant constitutional framework acceptable by all.<sup>109</sup>

Ethnic politics was responsible for much of the trouble. There have been inequalities between ethnic groups and between Europeans and Asians on the one hand and among Africans on the other.

The CRM recommended that the government should establish a strong and enduring framework for the management of diversity. It also advised the government and political parties to design and engage in conflict resolution mechanisms to reduce factional frictions, build consensus on crucial national issues, defuse ethnic tension and promote tolerance. The government was also required to take legal and administrative steps to remove all forms of discrimination prevailing in Kenyan society.<sup>110</sup>

### **3.2.2 Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, citizens' rights and the supremacy of the constitution**

Under this objective, collated and analysed data in the CSAR indicate that, although the rule of law is a reality in Ghana, some sections of the populace are routinely denied access to justice because they cannot afford legal representation. Due to poverty, the judicial system in Ghana is inaccessible to the majority of the population. The high cost of justice is a serious cause for concern.

The judiciary still suffers from a lack of adequate capacity to administer justice. The availability of office space and courtrooms is a major problem. Budgetary allocations have been insufficient to meet the growing infrastructure needs of the judiciary.<sup>111</sup>

Created in 1992, the Electoral Independent Commission (EIC) suffers from certain deficiencies in institutional capacity that affect the effective performance of its functions.<sup>112</sup> The EIC also suffers from the general perception that it is partisan and in favour of the incumbent government. To the extent that this perception affects its integrity, its efficacy is undermined.

The CSAR also stressed that the pronouncements of the Human Rights Commission (HRC) were not always respected and the government attempted to influence or manipulate its work. The situation of women was also cause for concern.<sup>113</sup>

<sup>108</sup> n 50 above, 62.

<sup>109</sup> n 50 above, 63 Box 3.1; 62-66.

<sup>110</sup> n 50 above, 62-66.

<sup>111</sup> Ghana Report (n 43 above) 21 para 32.

<sup>112</sup> n 43 above, 22 para 34.

<sup>113</sup> n 43 above, 23 para 37.

Few women hold decision-making positions. Out of 200 members of parliament, only 19 are women, despite the fact that the affirmative action policy of 1998 provided for at least 40% of women. Dr Stals's team found that there was a lack of political will or commitment to gender equality by the political class.<sup>114</sup> The CRM also recommended the lifting of the ban on political party activity in decentralised systems, including political party campaigns on the basis of party affiliations.<sup>115</sup>

In Rwanda, the CRM found that the existence of core aspects of democracy and political freedoms was not clearly visible. There could not be healthy competition for power without equity of access to the political space for all contending political organisations, and the environment was not sufficiently liberal to allow for free and fair competition.<sup>116</sup> The political pluralism entrenched in the Constitution was, *de facto*, impossible.<sup>117</sup>

More resources were recommended for the EIC, and the CRR called on the government to respect the constitutionally-entrenched principle of the secret ballot, which was denied in local elections where voters lined up behind their candidates.<sup>118</sup>

Rwanda was, however, commended for its new Constitution that provides for the sharing of power among political organisations and ethnic groups to deal with the legacy of genocide. A ceiling of 50% is placed on the representation of the majority party in the cabinet and in the Chamber of Deputies to allow for a government of national unity.<sup>119</sup>

In Kenya, the APR Panel confirmed the finding also made in Ghana that the electoral system lacked requisite capacity<sup>120</sup> and there were areas of no respect for, and non-implementation of, the rule of law<sup>121</sup> by the judiciary and the police. The judiciary was not independent, while parliament was subordinate to the executive in law making and could not perform its oversight functions.<sup>122</sup> The president could unilaterally dissolve parliament at any point.<sup>123</sup> Decentralisation has been replaced with 'de-concentration'.<sup>124</sup>

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<sup>114</sup> n 43 above, 23 para 37.

<sup>115</sup> n 43 above, 24 para 42.

<sup>116</sup> Rwanda Report (n 95 above) 39 para 102.

<sup>117</sup> n 95 above, 39-40 paras 103-106.

<sup>118</sup> n 95 above, 40 para 107.

<sup>119</sup> n 95 above, 38 para 101.

<sup>120</sup> Kenya Report (n 50 above) 67.

<sup>121</sup> n 50 above, 68 71.

<sup>122</sup> n 50 above, 71.

<sup>123</sup> n 50 above, 72.

<sup>124</sup> n 50 above, 68 73.

Kenya's political parties are regional, ethnic-based and poorly institutionalised.<sup>125</sup> Internal democracy within political parties is also lacking.<sup>126</sup>

The CRM recommended that a political parties bill be adopted to prohibit the registration of parties based on ethnic, age, tribal, religious or regional membership,<sup>127</sup> but APRM experts stopped short of addressing the question of constitutional reform to provide for the supremacy of the Constitution and the rule of law, the independence of the judiciary, decentralisation, and the effectiveness and autonomy of parliament.

### 3.2.3 Promotion and protection of civil, political, economic and social rights

The CSAR noted that the majority of the elite and household respondents were satisfied with the steps taken to protect civil and political rights in Ghana. However, there were concerns that economic rights were virtually non-existent.<sup>128</sup>

The CRM found that a lot still needed to be done to improve and strengthen human rights, particularly the rights of marginal and vulnerable groups, including women, children and disabled persons.<sup>129</sup>

The CRM recommended that the government should adopt a self-binding plan to ratify all the international human rights treaties, to take measures to domesticate them and to comply with state-reporting obligations towards various treaty bodies. Other recommendations were made to strengthen the Commission on Human Rights and Administrative Justice (CHRAJ).<sup>130</sup>

Rwanda was commended for best practice in promoting the rights to health<sup>131</sup> and access to education.<sup>132</sup> The CRM also advised the government to ensure fair justice under the *Gacaca* system.<sup>133</sup>

The current Constitution of Kenya was blamed for its conspicuous silence on the rights to health, education, food, healthcare, clean and safe environment, and to the preservation of cultural heritage despite the ratification of relevant international instruments such as CESC. <sup>134</sup>

The CRM encouraged the Kenyan authorities to accord economic, social, and cultural rights the necessary recognition and relevance and

<sup>125</sup> n 50 above, 69.

<sup>126</sup> n 50 above, 70.

<sup>127</sup> n 50 above, 76.

<sup>128</sup> Ghana Report (n 43 above) 26 para 46.

<sup>129</sup> n 43 above, 26 para 48.

<sup>130</sup> n 43 above, 27 para 54.

<sup>131</sup> Rwanda Report (n 95 above) 43 para 117, Box 2.1.

<sup>132</sup> n 95 above, 55 para 156, Box 2.3.

<sup>133</sup> n 95 above, 43 para 117.

<sup>134</sup> Kenya Report (n 50 above) 77-84.

the ministry of health to regard private health care providers as well as health-related non-governmental organisations (NGOs) as partners and support them.<sup>135</sup>

### **3.2.4 Upholding the separation of powers, including the protection of an independent judiciary and an effective legislature**

The CRM found that parliament was neither effective nor independent of the executive branch, and parliamentary committees were too weak to provide the much-needed oversight and power to countervail executive power in Ghana<sup>136</sup> and in Kenya (where the President could at any time dissolve parliament).<sup>137</sup>

The CRM rightly recommended that appropriate capacity should be provided to parliamentary committees to enable them to perform their functions efficiently in overseeing and providing effective checks and balances against the executive, as stipulated in the Constitution. The fact that most ministers come from parliament is no reason why it should not be effective or autonomous.

The CRM in Rwanda confirmed the CSAR's finding that, though declared to be independent, the judiciary is in practice an appointee of the executive branch. There is no judicial service commission, but instead the Superior Council of the Judiciary, a powerful body with responsibility to appoint and discipline judges and other judicial officers. This council is presided over by the President of the Supreme Court who is appointed by the President. The CSAR noted that 'instead of separation of powers, there is in fact, fusion of powers' in the hands of the President.<sup>138</sup> The CRM rightly recommended that the Rwandan authorities ensure that the Supreme Court and the judiciary are independent of the executive branch and the bar association should be represented on the Superior Council of the Judiciary.<sup>139</sup> Unfortunately, no finding or recommendation was made in relation to the effectiveness of parliament.

### **3.2.5 Ensuring accountable, efficient and effective public office holders and civil servants, and promoting the development and participation of civil society and the media**

The CSAR and CRM noted a number of obstacles to the emergence of an effective and efficient public service in Ghana.<sup>140</sup> Sexual harassment and issues of gender equality and gender mainstreaming in the public

<sup>135</sup> n 50 above, 84.

<sup>136</sup> Ghana Report (n 43 above) 29 para 63.

<sup>137</sup> Kenya Report (n 50 above) 72.

<sup>138</sup> Rwanda Report (n 95 above) 44 paras 119-120.

<sup>139</sup> n 95 above, 44-45, paras 120-121.

<sup>140</sup> Ghana Report (n 43 above) 31 para 69.

sector were singled out as major problems that should be addressed urgently and vigorously. The development of an enforceable code of conduct for public officials and a policy aimed at mainstreaming gender in the public service were recommended.<sup>141</sup>

The CRM advised that financial, legal, moral and ethical measures should be taken to enable the public service to deliver more effectively and efficiently.<sup>142</sup>

Measures were also recommended to the government of Kenya to fight corruption in the public service and to speed up the strengthening of capacity for investigating and evidencing cases in the Attorney-General's office.<sup>143</sup> Rwanda was commended for its reforms to improve the administration's capacity and for instituting a Civil Service Commission.<sup>144</sup>

### 3.2.6 The fight against corruption in the public sphere

The CRM found that 'corruption is regarded as a major governance problem' in Ghana.<sup>145</sup> It encourages the implementation of the recommendations of anti-corruption bodies and the establishment of a central organ within the government, but independent of it, which would be vested with exclusive jurisdiction to fight corruption.<sup>146</sup> Drastic measures were also proposed to fight rampant corruption in the public sphere in Kenya.<sup>147</sup>

Although Rwanda was commended for its efforts to combat corruption, the CRM advised Rwanda to consider creating an all-embracing institution comprising all existing agencies dealing with corruption, instituting an offence for a false declaration of assets and strengthening the right of access by citizens to administrative documents and information.<sup>148</sup>

### 3.2.7 Promotion and protection of the rights of women

The CRM identified gender equity as one of the overarching issues in Ghana.<sup>149</sup> The CSAR noted that more than half of the Ghanaian population is female and that good governance demands that all people, both men and women, be involved in the development and democratic

<sup>141</sup> n 43 above, 32 para 71.

<sup>142</sup> As above.

<sup>143</sup> Kenya Report (n 50 above) 97.

<sup>144</sup> Rwanda Report (n 95 above) 47 para 128.

<sup>145</sup> Ghana Report (n 43 above) 33 paras 75-76.

<sup>146</sup> n 43 above, 35 para 84.

<sup>147</sup> Kenya Report (n 50 above) 25.

<sup>148</sup> Rwanda Report (n 95 above) 49 para 135.

<sup>149</sup> Ghana Report (n 43 above) 122 paras 6-7.

processes.<sup>150</sup> Women are still victims of domestic violence,<sup>151</sup> and many of their rights are not fully recognised.

The APR Panel recommended that Ghana adopt a binding time frame within which to ratify the 2003 AU Protocol to the African Charter on the Rights of Women in Africa, take additional measures to enforce the law against abusers of women's rights, speed up efforts to enact the Domestic Violence Bill, domesticate CEDAW, increase budgetary allocations to the Ministry of Women and Children's Affairs and other institutions dealing with the protection of women's rights and initiate a policy framework to be implemented over an agreed reasonable time frame in order to bind the government and all political parties to adopt a 40% quota for women in all spheres of society.<sup>152</sup>

Rwanda was commended for best practice in promoting the rights of women.<sup>153</sup> Nearly half (49%) of the seats in the Chamber of Deputies are held by women, an unprecedented representation of women in positions of responsibility in Africa and the largest in the world, a shining model of best practice worthy of emulation.<sup>154</sup>

Nevertheless, the CRM recommended that the government engage in more capacity-building activities to enhance the effectiveness of women parliamentarians.<sup>155</sup> The situation of women in Kenya also deserved improvement.<sup>156</sup>

### 3.2.8 Promotion and protection of the rights of children

The CSAR held that Ghana was the first country in the world to ratify the UN Convention on the Rights of the Child and other relevant instruments. The CRM recommended that Ghana adopt the UN Protocol against Human Trafficking in Women and Children, review the Children's Act to mirror closely international standards on the rights of the child, and adopt a binding time frame within which to accede or ratify UN instruments on the rights of the child. It also suggested that the Minister of Women and Children Administration (MWCA) recommend a policy instrument on behalf of the government for possible representation of the youth in the legislature. 'This could be rationalised on the grounds of affirmative action of the youth constituency in Ghana.'<sup>157</sup>

<sup>150</sup> n 43 above, 35 para 85.

<sup>151</sup> n 43 above, 37 para 94.

<sup>152</sup> n 43 above, 38, para 96.

<sup>153</sup> Rwanda Report (n 95 above) 51-52 para 143, Box 2.2.

<sup>154</sup> n 95 above, 50 para 138.

<sup>155</sup> n 95 above, 51 para 143.

<sup>156</sup> Kenya Report (n 50 above) 107.

<sup>157</sup> Ghana Report (n 43 above) 40 para 105.

Recommendations were also made to the government of Kenya to better promote and protect the rights of the children.<sup>158</sup> The CRM recommended that Rwanda ratify the African Children's Charter to better protect these rights.<sup>159</sup>

### 3.2.9 Promotion and protection of the rights of vulnerable groups, including displaced persons and refugees

The CRM recommended that the international community assist Ghana with the necessary support to cope with the demands of its refugee population, especially women and children, and that Ghana should review its internal capacities and constraints to cater for the rights and needs of internally displaced peoples.<sup>160</sup> Unfortunately, no recommendation was made in relation to ethnic minorities, refugees, migrant workers, the aged, disabled persons, people living with, and children orphaned by HIV/AIDS.<sup>161</sup>

The CRM recommended that the government of Rwanda undertake an in-depth dialogue with the Batwa minority.<sup>162</sup>

### 3.3 Identification and recommendations on over-arching issues

The APR Panel identified some overarching issues related to democracy and good political governance in the reviewed countries.

It clearly demonstrated that Ghana made significant and commendable progress in institutionalising democracy and promoting good governance. Ghanaians have created unique institutions and processes that other African countries might consider emulating or adapting for their own use<sup>163</sup> namely, the Annual Governance Forum<sup>164</sup> and the Peoples' Assembly.<sup>165</sup>

The Forum and Assembly have expanded the political space for ordinary people and have brought the government somewhat closer to them. These institutions have certainly demystified the government, rendering it less abstract and remote. Other examples of best practices that can be emulated include the National Commission for Civil Educa-

<sup>158</sup> Kenya Report (n 50 above) 110.

<sup>159</sup> Rwanda Report (n 95 above) 53 para 149.

<sup>160</sup> Ghana Report (n 43 above) 42 para 111.

<sup>161</sup> n 43 above, 41 para 106.

<sup>162</sup> Rwanda Report (n 95 above) 55 para 156.

<sup>163</sup> Ghana Report (n 43 above) 14 Box 2.1: Dividends of Democracy in Ghana.

<sup>164</sup> The Annual Governance Forum has been held every year since 1998, initially under the auspices of the National Institutional Renewal Programme and Parliament and, more recently, the National Governance Programme. It allows stakeholders to discuss selected issues on democracy and good governance.

<sup>165</sup> The Peoples' Assembly was instituted in 2001 as an annual unstructured interaction between the President and the people. The Peoples' Assembly allows Ghanaians from all walks of life to pose any question to the President.

tion (NCCE)<sup>166</sup> and the Commission for Human Rights and Administrative Justice (CHRAJ).

However, the CRM identified a number of major deficiencies to be addressed by the Ghanaians to achieve the objectives of NEPAD. These deficiencies were found in the practical workings of the Constitution and democracy, the institutional capacities, the delivery of public services, the electoral process and the performance of governance institutions at the various levels of the governance system.<sup>167</sup>

Cross-cutting or overarching issues include the following:<sup>168</sup>

- capacity constraints and the marginalisation of women (gender equity);
- corruption;
- decentralisation;
- land issues (ownership of land, access to land, the transfer and registration of land, the protection of land ownership);
- chieftaincy;
- unemployment (especially unemployment of the youth); and
- external dependency and over-reliance on external policy analysis and aid.

In Rwanda, the promotion of political pluralism and competition of ideas, separation of powers and the protection of the rights of vulnerable groups were originally identified as overarching issues.<sup>169</sup>

The CRM recommended that the government should improve democratic processes, especially political pluralism, and recognise the need for political parties and civil society to operate freely and express competitive ideas for governance within the rule of law. On the other hand, all restrictions on political rights and freedoms should be removed.<sup>170</sup>

Overarching issues in Kenya included the following:<sup>171</sup>

- managing diversity in nation building;
- implementing gaps (poor implementation of government policies and programmes);

<sup>166</sup> The NCCE is constitutionally mandated to create and sustain within the Ghanaian society an awareness of the principles and objectives of the Constitution as the fundamental law of the people of Ghana, and to educate or encourage its people to defend the Constitution. It is intended to promote and consolidate citizenship transparency and accountability in public life. It is competent to formulate programmes for consideration by the government aimed at realising the objectives of the Constitution. It should design, implement and monitor programmes for educating Ghanaians about their citizenship entitlements and responsibilities. See Ghana Report (n 43 above) 22 paras 35-36; 23, Box 2.3: Successful democratic institutions in Ghana.

<sup>167</sup> Ghana Report (n 43 above) 14 para 9.

<sup>168</sup> n 43 above, 121-125.

<sup>169</sup> Rwanda Report (n 95 above) 136 para 439.

<sup>170</sup> n 95 above, 136-137 paras 439-441.

<sup>171</sup> Kenya Report (n 50 above) 23-25.



- constitutional reform and consensus building;
- corruption;
- poverty and wealth distribution;
- land;
- gender equality;
- youth unemployment; and
- transformative leadership.

The CRM found that the lack of a suitable constitution was probably the main challenge to democracy and good political governance in Kenya.<sup>172</sup> Unfortunately, it made no recommendation as to the principles that should underlie the new constitution.

### **3.4 Governments' comments on APR Panel findings and recommendations**

The governments of Ghana, Kenya and Rwanda responded to the APR Panel's reports.

#### **3.4.1 Comments from Ghana**

The best response to a CRR has so far come from Ghana, the first country to complete the peer review process.<sup>173</sup> Instead of objecting to the CRR, Ghana took note and congratulated the APR Panel 'for a report that lives up to the expectations of APRM'<sup>174</sup> and reiterated its commitment to the process.

Moreover, contrary to the comments made by the governments of other countries reviewed so far, Ghana's comments did not come directly from the government of Ghana, but from the NGC on its behalf. The government of President Kufuor involved all the stakeholders and let the NGC that had led the country self-assessment process also comment on the CRR.

Although the APRM instruments provide that comments should come from the government, there is no rule that the NGC and other stakeholders involved in the CSAR should not be involved in the comments.

#### **3.4.2 Comments from Kenya**

The Kenyan government agreed with the panel on a number of comments. It undertook to submit other comments to parliament, making it clear that parliament, which plays a key role in the adoption and domestication of codes and standards and even in the implementation

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<sup>172</sup> n 50 above, 24-25 27.

<sup>173</sup> Ghana Report (n 43 above) Appendix II 129-132.

<sup>174</sup> n 43 above, 129.

of the POA, was actually excluded from the process. This raised the issue of the ownership of the process by the people of Kenya.

### 3.4.3 Comments from Rwanda

The CRR reported that political parties were not able to operate at grassroots level, and pointed out that this amounted to a denial of much of political activity to citizens; and that there was no separation of powers, as the independence of the judiciary was compromised by the fact that the Supreme Council of the Judiciary had no representation from the bar association, and was chaired by the President of the Supreme Court appointed by the President.<sup>175</sup>

The Rwandan government held that the establishment of a consultative forum involved in the activities of political parties was an internal peer review mechanism<sup>176</sup> and that the nomination of the President of the Supreme Council of the Judiciary by the president was not uncommon in democratic regimes. Nor was it arbitrary, since the President nominated two candidates among whom the senate had to choose freely.<sup>177</sup> President Kagame reaffirmed this position in response to the APR Panel's comments during the 5th summit of the HSGIC in Banjul, The Gambia, on 30 June 2006. Comments from the government and the President of Rwanda were appended to the APR Panel's report on this country.<sup>178</sup>

Surprisingly, the APR Panel made and appended its own comments after submission of the CRR to the APR Forum.<sup>179</sup> In their comments, the APR Panel conceded and agreed with the government of Rwanda.<sup>180</sup> So far, this has been the only case where additional comments were received from a government and considered after submission of the CRR to the APR Forum, and where the Panel's comments have been appended to a CRR, making these last-minute comments very controversial for a number of reasons. First, the presence of those comments was not announced in the introduction of the CRR.<sup>181</sup> Second, they should not have been allowed, based on the Panel's own contention that no further comments from a country would be allowed after submission of the CRR to the Forum by the APR Panel.<sup>182</sup> Third, they contradicted some of the findings in both the CSARs and the CRRs. The CSAR earlier found that, although declared to be independent, the

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<sup>175</sup> Rwanda Report (n 95 above) 142-144 paras 3, 4 & 5.

<sup>176</sup> n 95 above, Appendix I.

<sup>177</sup> As above.

<sup>178</sup> As above.

<sup>179</sup> n 95 above, Appendix II.

<sup>180</sup> n 95 above, Appendix II 148-149.

<sup>181</sup> n 95 above, 29 paras 69-70.

<sup>182</sup> n 95 above, v.

judiciary was, in practice, an appointee of the executive branch and instead of separation of powers, 'there is in fact, fusion of powers'.<sup>183</sup>

The CRM also found that restricting the operation of political parties to the guidelines of a consultative forum does indeed restrict political pluralism, and that the existence of core aspects of democracy and political freedom was not clearly visible, and hence no healthy competition for power was possible. The environment was not sufficiently liberal to afford an equal chance for all individuals appropriately qualified to compete and political parties could not operate freely, although authorised *de jure*.<sup>184</sup>

As far as the independence of the judiciary is concerned, the fact that the President nominates both candidates changes very little when the Senate can hardly choose the second nominee due to a lack of autonomy *vis-à-vis* the executive.

The APR Panel's contention that 'the review process is a permanent dialogue rather than a scorecard'<sup>185</sup> was not enough to dismiss altogether its earlier findings or those made by Rwandan stakeholders in the CSAR issued by the National Commission, which has been presided over by the government of Rwanda.

#### 4 Problems and challenges to the success of APRM

With regard to the APRM instruments, the conduct of the APR process, the findings of the NGCs, the conclusions and recommendations of the APR Panel and the comments from the governments of the countries reviewed, APRM is fraught with a number of problems and challenges that need to be addressed urgently to promote and consolidate democracy and good political governance.

First, when assessing compliance with codes and standards, the peer review process consists only of the listing of international conventions, agreements or treaties that have been or should have been signed, ratified and domesticated, without paying attention to their actual enforcement in domestic law.

Second, the nine objectives of APRM could be reduced to six or five, as some seem redundant. The promotion and protection of civil, political, economic and social rights (Objective 3) could, for instance, be dealt with under Objective 2 (Constitutional democracy, including periodical political competition and opportunity for choice, the rule of law, citizen's rights and the supremacy of the constitution) and Objective 7 (Promotion and protection of the rights of women), while the promotion and protection of women's rights could also be considered under

<sup>183</sup> n 95 above, 44 paras 119-120.

<sup>184</sup> n 95 above, 39-40 paras 102-106.

<sup>185</sup> n 95 above, Appendix II 248.

Objective 9 (Promotion and protection of the rights of vulnerable groups).

Third is a critical problem regarding the inclusiveness and broadness of the process. APRM is cabinet-driven and centred. The procedure for the selection of stakeholders to sit on NGCs is unclear. Civil society organisations that are soft on governmental policies are more likely to be selected than those which take a hard stance or are close to the opposition. Universities, research institutions and academics are marginalised.

So far, the NGC that has been the friendliest towards civil society is the NGC of Ghana, which consists exclusively of members of civil society and comprises a former university vice-chancellor, a catholic bishop and a former Chairperson of the Bar Association.<sup>186</sup>

Fourth is the problem regarding the credibility and objectivity of the CSAR, given the dominant role played by the cabinet in the process and the critical issue of its public ownership. NGCs are so cabinet-centred that they even exclude other branches of state authority, such as parliament and the judiciary, despite their respective roles in the adoption of codes and standards, the achievement of NEPAD objectives and the implementation of the POA.

The self-assessment process is instead conducted by the cabinet that chairs the NGC, establishes a focal point, controls the APRM national secretariat, and claims responsibility for the drafting of the CSAR.

NGCs have tended to use the CSARs to showcase what their countries consider — and want the rest of the world to consider — their democratic and good governance credentials in order to get much needed external financial resources. This is wrong, for if African countries had already achieved democracy and good political governance, there would be no need for them to embark on APRM. On the other hand, the popular ownership of APRM would require that all three branches of state authority and the administration be fully involved. However, the people should demand, and receive, ownership of the process. There should be public campaigns, the media should be widely used and the APRM instruments translated in national languages that the people speak and understand. The people must be brought in for APRM to achieve its results. The POAs will never become a reality without the involvement of the people. On the other hand, it is only because of public ownership that the government of the day can be held accountable for compliance with APRM.

At the end of the day, except for that of Ghana, the cabinets of countries have excluded all other stakeholders in commenting on the CRR. The rule that the latter should be made public six months after its consideration by the APR Forum is unfortunate, as it runs counter to the principles of NEPAD and favours authoritarian governance, instead of

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<sup>186</sup> Ghana Report (n 43 above) 5 paras 16-17.

the preferred democratic one characterised by accountability and transparency. Surprisingly, this rule is firmly supported by all AU member states, including the champions of NEPAD.

Another problem, or challenge, relates to the integrity and independence of the APR Panel. Cabinet, which already dominates the self-assessment process, is tempted to manipulate the work and to undermine the independence of members of the APR Panel, who are viewed more as prosecutors than as experts to assist them. When they do not receive the findings and recommendations they expected from the APR Panel, cabinets use their comments to engage in disputes over the accuracy of the information, putting pressure on APR Panel members, who are sometimes compelled to make concessions where CSARs may have concluded on bad political governance. African leaders should not recognise the competence and independence of the APR Panel, and then expect the CRRs to reflect their own views on the quality of their governance.

It is also worth stressing that positions on the APR Panel are never advertised. The mandate of the eminent persons is equally unclear, and so are the criteria for their appointment. Without challenging their integrity and competence, one should admit that the members of the APR Panel and Secretariat are appointed and may also be dismissed by the heads of state and government of the participating countries according to their own criteria.

Accordingly, they are accountable to them and cannot be said to be immune to political pressure from African heads of state and government in the APR Forum, especially those who nominated them. This may affect their independence and integrity if their status is not secured in a binding instrument.

CRRs from the APR Panel are also questionable on a number of grounds. The APR Panel's findings are generally incomplete. The recommendations do not always cover all the findings, nor do they relate to all the areas of deficiency. Some of these recommendations do not touch on 'hard' issues of democratic or good political governance.

The APR Panel commended Kenya as a 'model' of best practice in organising the review process.<sup>187</sup> This was quite surprising, as this was contradicted by many findings in the CSAR and the CRM. Civil society organisations also complained that the CRR had focused on the delivery of services and did not tackle the more challenging task of institutional reform that was vital for the country's democratic transition.<sup>188</sup> The same goes for Rwanda. The APR Panel made no recommendation as to the role the country could play in preventing or reducing interstate conflicts in the Great Lakes region. They also dismissed the findings and recommendations made earlier in the CSAR and CRR on the issues of

<sup>187</sup> Kenya Report (n 50 above) 38.

<sup>188</sup> J Okungu 'Civil society wrong on NEPAD' *The East African* 21-27 May 2007 655 15.

separation of powers, independence of the judiciary, and political pluralism.

Another problem with the CRR is that the APR Panel commended the POAs without questioning their enforceability and enquiring whether the required resources would come from national budgets or from external donors. APRM is costly. Therefore, its funding is a critical issue that should be addressed by African countries. Africans should understand that they cannot long for democracy and good political governance, which is in their best interest, and yet rely on others to pay for it.

Once they sought resources to finance their authoritarian rule, to silence the opposition and confiscate the rights of their people. Now, they should find resources to finance the democratic project. Even if the international community will, and should, assist, APRM should first be funded by Africans themselves.

One of the most serious problems with APRM is that it has no teeth. There are no effective sanctions for the persistent lack of democracy and good political governance in a country. On a number of occasions, leaders of countries participating in NEPAD and APRM, including some of its architects, have been eloquently silent and supportive of colleagues who behave badly in terms of democracy, good governance and human rights or whose elections had been manifestly rigged. This is reminiscent of the criticism once levelled against the OAU, considered a 'club' of authoritarian leaders supporting one another to remain in power. The club mentality seems to have survived in some leaders. Unfortunately, it is not possible for socially responsible African intellectuals, who should be 'organic' intellectuals of their people, to keep quiet when genocide is occurring, when massive human rights violations are being committed, and when democracy and good political governance are being denied to Africa.

The success of APRM will depend on political and intellectual commitment and continental leadership. African Heads of State and Government have already shown leadership by adopting the NEPAD instruments and by endorsing APRM. Such commitment should be sustained throughout the process. They should undertake to adopt all the codes and standards and strive to achieve the NEPAD objectives even if this cannot be achieved overnight.

On the other hand, as recommended in the Bible, those who are 'strong' should assist their 'weak' and take the lead instead of unnecessarily seeking to compromise. This would be in the interest of all. In these endeavours, they will count on a committed intellectual and pan-Africanist leadership that already exists on the continent.

As we have stated time and time again in CODESRIA and other African scientific organisations, there is no reason to entertain a scholarship of silence, compromise or sycophancy just to please our leaders when millions of our people are dying as victims of authoritarianism and bad political, economic, social and corporate governance.

With due respect to their Excellencies, when the continent and its people are suffering and remain underdeveloped, albeit by foreign powers and companies with the complicity of some local leviathans, and when the dream of an African renaissance is being shattered, African intellectuals should tell the truth to those in power and society. Therefore, 'diplomacy' is not part of the academic and scientific language to be used at truly African universities, including the University of South Africa (UNISA), whose motto is 'Towards an African university in the service of humanity'.

Sustained and courageous political and intellectual leadership is critically needed for the success of APRM, for the establishment and consolidation of democratic and developed states in Africa and for an African renaissance.

## 5 Conclusion

APRM is a self-monitoring mechanism established by AU member states to ensure that the policies and practices of the countries participating in NEPAD conform to the agreed political, economic, and corporate governance values, codes and standards contained in the NEPAD Declaration on Democracy, Good Political, Economic and Corporate Governance adopted during the AU inaugural summit in Durban. It is pivotal to NEPAD and the most essential test of its credibility.

Out of the 53 AU member states, 26 have acceded to APRM, which represents 652,5 million (or 73,6%) of the total African population of 886 million. Accordingly, APRM carries the hopes of millions of African peoples after decades of colonialism, apartheid, neo-colonialism, exploitation and disenchantment.

In the current context of our continent, scholarship would be useless and universities irrelevant should they fail to make the most of the opportunities that occur to address the problems confronting our people and fail to contribute to the improvement of their living conditions.

Gone are the days when African intellectuals could accept their leaders' injunction: 'Silence: Development in progress' or 'Silence! We are developing!'<sup>189</sup> when there was no visible sign of development or democratic governance, despite tons of slogans released for popular and foreign consumption. AU, NEPAD and APRM were devised as part of the African renaissance project. As Mamdani argued, 'there can be no African renaissance without an African-focused intelligentsia'.<sup>190</sup>

<sup>189</sup> J Ki-Zerbo 'African intellectuals, nationalism and pan-Africanism: A testimony' in T Mkandawire (ed) *African intellectuals rethinking politics, language, gender and development* (2005) 82.

<sup>190</sup> M Mamdani 'There can be no African renaissance without an African-focused intelligentsia' in W Makgoba (ed) *African renaissance: The new struggle* (1999) 125-134.

Joseph-Kizerbo also insisted on the role of intellectuals in generating the driving force of the African renaissance.<sup>191</sup> This renaissance is not possible without democracy and good political governance implemented as the rule of the political game across the continent.

As far as codes and standards are concerned, the peer reviews of Ghana, Kenya and Rwanda have demonstrated that these AU member states have signed, ratified and domesticated a number of international conventions. This is the case of many other AU member states, despite the fact that some key instruments remain to be signed, ratified or domesticated and states are still to comply with their reporting obligations.

As for the nine NEPAD objectives in the area of democracy and good political governance, African countries have made tremendous progress in the prevention and reduction of intra- and interstate conflicts and in the promotion of constitutional democracy, including periodic political competition, the rule of law, citizens' rights and the supremacy of the constitution. Human rights, including civil, political and economic rights are better promoted than ever before on the continent. There is more respect for the separation of powers, including the protection of an independent judiciary and an effective administration. An accountable and efficient public service is being promoted. Civil society has developed tremendously, and the media has been making an important contribution, while at the same time benefiting from the new environment characterised by the emergence of democracy.

The scourge of corruption in the public sphere is being combated. African leaders show more commitment to the promotion and protection of the rights of vulnerable groups, such as women and children, and internally displaced persons and refugees.

The number of success stories has increased since the beginning of the century. However, there are still many cases of failure characterised by the persistence of conflict and the rise of new ones, the survival of the tropical leviathan, the lack of independence of the judiciary and autonomy of the legislature, the absence of an effective administration and an accountable and efficient public service, and of a strong civil society, rampant corruption in the public sphere, a violation of the rights of citizens and non-citizens, including the rights of women, children, displaced persons, refugees and other vulnerable groups, and by vote rigging.

Ake never minced his words when he criticised the electoral democracies based on vote-rigging and where people were 'voting without choosing'<sup>192</sup> and which Mkandawire labelled 'choiceless democracies'.<sup>193</sup>

<sup>191</sup> Ki-Zerbo (n 189 above) 88.

<sup>192</sup> Ake (n 17 above) 137.

<sup>193</sup> T Mkandawire 'Crisis management and the making of choiceless democracies, in Joseph (n 39 above) 119-136.



In all these areas of deficiency, the APR Panel has made helpful recommendations aimed at improving the situation, even if these recommendations were not always consistent with and appropriate to the findings, and even if some governments attempted to manipulate the process. This is no reason to indulge in Afro-pessimism, particularly rife among non-African policy makers and analysts as well as those quarters of African scholarship which tend to be critical of anything coming out of the continent.

Arguably, the overall objective of NEPAD is to make an assessment and pave the way for a brilliant future for democracy and good governance in Africa. Had the AU member states already achieved democracy and development, then the need to devise NEPAD and its APRM would not have arisen.

Despite criticism, shortcomings and challenges, APRM is an unprecedented development in international law and in comparative constitutional and human rights law. It constitutes yet another contribution by Africa to the development of the law of nations.

For the very first time in the history of international law, states that used to cling to the sacrosanct principles of state sovereignty, independence and non-interference in their respective national affairs, agreed to subject their governance to comprehensive peer review.

To borrow from Barney Pityana, UNISA's Vice-Chancellor and Principal, when he reflected on the African Charter which was adopted by a OAU Assembly of Heads of State and Government, whose leadership could hardly be considered a democratic one, the launching of APRM at a time when these principles continued to be worshipped was yet another 'miracle'.<sup>194</sup>

Under structural adjustment programmes imposed by international financial institutions such as the World Bank and the International Monetary Fund, the review was part of the conditions for foreign aid. It only concerned economic governance and was mainly undertaken by Western experts despatched to Third World countries.

However, under APRM, the review process, which includes democracy and good political governance, is led by Africans, as African leaders whose ears used to be finely tuned to the voices of foreign experts and deaf to local voices, except when they threatened state authority, have come to realise that African experts and 'eminent persons' also exist.

The peer reviews of Ghana, Kenya and Rwanda have demonstrated the effectiveness of APRM. Despite the way the review process was conducted, the findings arrived at and the challenges that remain, the leaders of these three countries should be commended for their

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<sup>194</sup> NB Pityana 'Hurdles and pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' (2003) 28 *South African Yearbook of International Law* 112.

courage and commitment to making Africans believe that this was feasible on the continent.

Arguably, APRM has the potential to impact positively on democracy and good political governance in AU member states. No matter how critical one may be about it, APRM constitutes a step forward on the path to democracy and development in Africa. To achieve this result, deficiencies, shortcomings and challenges need to be recognised and addressed, while best practices, which also exist, should be commended or emulated.

Critical among the challenges are those related to the inclusiveness of the process. It should cease to be government- and state-centred and driven, the integrity and independence of the members of the APR Panel and Secretariat, the question of funding, which should primarily come from Africans themselves, the need for sustained political and intellectual commitment and leadership, and the ownership of the process which should not be left in the hands of African leaders, but rather become and remain the people's and an African affair. Until now, the AU, NEPAD and APRM have proceeded without the people. It is time for the people to be included for them to be truly successful.

As Shivji would warn, confiscating the process from the hands of those who devised it in good faith, to finally make them accountable and to ensure that they deliver on their commitments, will be a 'fight'.<sup>195</sup> Africans have already won many struggles, including the struggles against slavery, colonialism, apartheid and one-party and military rule. There is little doubt that committed, united, informed and driven by informed scholarship produced by African intellectuals and universities, Africa's people will fight and win this struggle for democracy and good political governance. As Joseph and Ake remind us, beyond the instrumentalist versus idealist debate, democracy is good for development, but it is also a matter of survival.<sup>196</sup>

As Pliny the Elder taught centuries ago, *Ex Africa semper aliquid novi* - there is always something new coming out of Africa.<sup>197</sup> APRM is one of these rare, new and good things which have come out of Africa in a century that some of our leaders have vowed to make an 'African century'. As African intellectuals, we should invest in this new era that has begun and work for an African renaissance, which will not be fully possible until development and a respect for democracy and good political governance, featured prominently in the AU, NEPAD and APRM instruments, become a reality.<sup>198</sup>

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<sup>195</sup> IG Shivji *Fight my beloved continent: New democracy in Africa* (1992).

<sup>196</sup> See CI Ake *L'Afrique vers la démocratie* (1991) 1 14; Ake (n 17 above) 138 139; R Joseph 'State, conflict and democracy' in Joseph (n 39 above) 6.

<sup>197</sup> Mangu (n 12 above) 379-380.

<sup>198</sup> n 12 above, 380.

# The abolition of female circumcision in Eritrea: Inadequacies of new legislation

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## Summary

*Female circumcision is one of the predominant and most prevalent forms of violence against women in Eritrea. In an effort to tackle the formidable challenges of such a harmful traditional practice, a growing international awareness has emerged in the last few decades, resulting in the adoption of international conventions and declarations at the international level, and policies and legislation at the national level. Eritrea has recently adopted legislation banning female circumcision, joining the ranks of a few African countries which have adopted similar mechanisms to eradicate female circumcision as a form of violence against women. This article critically discusses the shortcomings of the new legislation and the overall strategy of the Eritrean government in the eradication of female circumcision. It is submitted that, in countries such as Eritrea where female circumcision is culturally deeply rooted, outright criminalisation without effective accompanying mechanisms is not always advisable. Female circumcision can only be eradicated by a multidimensional approach. Such an approach must encompass, among other things, meaningful and comprehensive education and campaign programmes, the involvement of independent democratic institutions and processes, as well as community and civil society engagement, all of which are vitally important in the eradication of female circumcision.*

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## 1 Introduction

Eritrean history is predominantly characterised by a constant threat of natural and man-made calamities. Foremost among such disasters are the 30-year war for independence (1961-1991); the major famines of the 1940s, 1970s, 1980s, and the continued challenges of food security; the border conflict with Ethiopia (1998-2000); the suppression of fundamental rights by former colonial rulers and its continuation by the current government; and harmful traditional practices which still persist, affecting several segments of the Eritrean society. The overall impact of the above unfortunate developments has given rise to an impoverished society with women being one of the major groups affected by the imbalances. Of particular relevance to this study is the persistence of female circumcision (FC), one of the harmful traditional practices which inflict immense suffering on the wellbeing, health and human rights of Eritrean women. FC is one of the major causes of discrimination and violence against women (VAW) in Eritrea.

In an effort to tackle the formidable challenges of FC, the Eritrean government has recently promulgated legislation<sup>1</sup> which bans the practice of FC in Eritrea. The major objective of this article is to critically interrogate the role of the new legislation in the eradication of FC in Eritrea. The first part of the article discusses the practice and prevalence of FC in Eritrea and the societal attitude towards the practice. This is followed by an appraisal of the international obligations of Eritrea and a brief discussion of the national strategies and policies on FC before and after the independence of the country in 1991. The article evaluates the new legislation and its inherent shortcomings in the light of the prevailing legal and political context in Eritrea. Finally, based on the experi-

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<sup>1</sup> Proclamation 158/2007: The Female Circumcision Abolition Proclamation (FC Proclamation); a copy of the legislation is available at <http://www.nuew.org/resources> (accessed 6 June 2007). It is also annexed to this article. The FC Proclamation uses the terms 'circumcision', 'cutting' and 'mutilation' intermittently. Without delving too deeply into the circumcision-cutting-mutilation dichotomy and following the approach adopted by the Eritrean legislation, the term FC will be used consistently in this article. However, the author is fully aware of the growing global concern that the term FC may undermine the harmfulness of the practice. For effective legal policy and action, a wide range of women's health and human rights organisations, including UN bodies, prefer the term female genital mutilation to FC. For further discussion on the issue of terminology, see RJ Cook *et al* *Reproductive health and human rights: Integrating medicine, ethics, and law* (2003) 262-263; A Rahman & N Toubia (eds) *Female genital mutilation: A guide to laws and policies worldwide* (2001) x; L Favali 'What is missing? Female genital surgeries: Infibulations, excision, clitoridectomy in Eritrea' (2001) 1 *Global Jurist Frontiers* 4 6; EH Boyle *et al* 'International discourse and local politics: Anti-female-genital-cutting laws in Egypt, Tanzania and the United States' (2001) 48 *Social Problems* 526; SA Dillon 'Healing the sacred *yoni* in the land of Isis: Female genital mutilation is banned (again) in Egypt' (2000) 22 *Houston Journal of International Law* 321; L Nyirinkindi 'Female genital mutilation as manifestation of gender-based violence in Africa' in E Delport (ed) *Gender-based violence in Africa: Perspectives from the continent* (2007) 147.

ence of other countries, the article draws lessons and makes practical recommendations for Eritrea.

## 2 Practice and prevalence

According to the definition adopted by the three major United Nations (UN) specialised agencies working in the area of women's and children's rights, the World Health Organisation (WHO), the United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA), FC is a procedure 'involving partial or total removal of the external genitalia or other injury to the female genital organ, whether for cultural or other non-therapeutic reasons'.<sup>2</sup> Basically, it involves four different types of cutting, commonly known as excision, clitoridectomy, infibulation and other acts comprising a set of procedures such as pricking, piercing, incising or stretching of the clitoris or labia, and other procedures. All procedures result in irreversible and lifetime effects. The Joint Statement characterises excision as the commonest type of FC, accounting for up to 80% of all the cases around the world. Infibulation is the most extreme procedure and constitutes about 15% of all procedures.<sup>3</sup>

The FC Proclamation adopts a broader definitional spectrum, similar to that adopted by the Joint Statement. Article 2 of the Proclamation defines FC as:

- (1) the excision of the prepuce with partial or total excision of the clitoris (clitoridectomy);
- (2) the partial or total excision of the labia minora;
- (3) the partial or total excision of the external genitalia (of the labia minora and the labia majora), including stitching;
- (4) the stitching with thorns, straw, thread or by other means in order to connect the excision of the labia and the cutting of the vagina and the introduction of corrosive substances or herbs into the vagina for the purpose of narrowing it;
- (5) symbolic practices that involve the nicking and pricking of the clitoris to release drops of blood; or
- (6) engaging in any other form of female genital cutting and/or cutting.

The three major types of FC practised in Eritrea are infibulation, clitoridectomy and excision.<sup>4</sup> According to the 1995 Eritrean Demographic

<sup>2</sup> *Female genital mutilation — A joint WHO/UNICEF/UNFPA statement (1997)* 3 (Joint Statement), also available at [http://www.who.int/reproductive-health/publications/fgm/fgm\\_statement.html](http://www.who.int/reproductive-health/publications/fgm/fgm_statement.html) (accessed 6 June 2007); see also WHO Fact Sheet No 241 *Female Genital Mutilation* (June 2000), also available at <http://www.who.int/mediacentre/factsheets/fs241/en/> (accessed 6 June 2007); WHO *Female Genital Mutilation: Report of a WHO Technical Working Group (1996)* 6.

<sup>3</sup> Joint Statement (n 2 above) 5.

<sup>4</sup> *Combined Initial, Second and Third Periodic Report of the Eritrean Government to the Committee on the Elimination of Discrimination Against Women*, UN Doc CEDAW/C/ERI/1-3/2004 (Report to the CEDAW Committee) 39.

and Health Survey,<sup>5</sup> 95% of Eritrean women (about nine out of ten) had undergone some of form of FC. The 2002 Eritrean Demographic and Health Survey<sup>6</sup> presents a slight (6%) decline in the prevalence of FC in Eritrea. The difference between the 1995 and 2002 EDHS is insignificant as far as the practice and prevalence of FC are concerned. Because of the insignificant difference, this article heavily relies on the 1995 EDHS. However, it is worth noting that the slight decline in the 2002 EDHS is understandably a result of the slow pace of progress in education, economic growth and urbanisation observed in the 1990s.<sup>7</sup>

In its initial report to the Committee on the Rights of the Child (CRC Committee),<sup>8</sup> the Eritrean government recognises custom and tradition as the major reasons for the continued practice of FC in Eritrea. The prevalence of FC in Eritrea is one of the worst in the world.<sup>9</sup> In some Eritrean ethnic groups, infibulation is commonly exercised. In the Afar ethnic group, notes Favali, the wound of a woman is sewn up with long mimosa thorns bound with cotton. During intercourse, 'the bridegroom deinfibulates the bride, who is held down during this usually painful defloration by two of his friends'. The practice of infibulation and deinfibulation continues 'until she has had three children'.<sup>10</sup>

Eritrean society is virtually evenly divided between Christianity and Islam in addition to minimal adherence to indigenous belief. The Eritrean lowlands are inhabited by nomadic Muslim communities, while the highlands are populated by Christian sedentary populations. Statistically, 99% of Muslim and 92% of Christian Eritreans have undergone FC. However, the disparity between the two religions as regards the practice of infibulation is remarkably noticeable:<sup>11</sup> 82% of Muslim Eritreans have undergone infibulation as compared to only 2% of Christians. The high prevalence of infibulation in the Eritrean lowlands indicates the need for an intensified awareness campaign and

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<sup>5</sup> 1995 EDHS. See also I Olenick 'Female circumcision is nearly universal in Egypt, Eritrea, Mali and Sudan' (1998) 21 *International Family Planning Perspectives* 47-49.

<sup>6</sup> 2002 EDHS.

<sup>7</sup> On the role of these factors in changing societal attitude, see Olenick (n 5 above) 48. However, with high levels of illiteracy and poverty, Eritrea is still one of the least developed countries in the world. According to the UN Development Programme (UNDP) Human Development Report 2006, available at <http://hdr.undp.org/hdr2006/statistics/> (accessed 11 October 2007), the human development index (HDI) for Eritrea is 0,454, which gives Eritrea a rank of 157th out of 177 countries.

<sup>8</sup> *Initial Report of the Eritrean Government to the Committee on the Rights of the Child*, UN Doc CRC/C/41/Add.12/2002 (Report to the CRC Committee) para 215. See also R Odede & E Asghedom 'The continuum of violence against women in Eritrea' 2001 43 *Development* 71.

<sup>9</sup> Report to the CRC Committee (n 8 above) para 456.

<sup>10</sup> Favali (n 1 above) 22 (footnotes omitted).

<sup>11</sup> Favali (n 1 above) 18.

education programmes in those parts of the country. Excision and clitoridectomy are widely practised in the highlands.<sup>12</sup>

Although the detrimental effect of FC on the wellbeing, health and human rights of women is hardly controversial,<sup>13</sup> there are claims that the harmfulness of the practice can be reduced by medicalising the procedure.<sup>14</sup> However, studies indicate that surgical precautions do not completely eliminate the risks associated with FC.<sup>15</sup> Moreover, leading authorities in reproductive and sexual rights confirm that there are no scientifically proven advantages of FC and as such 'the procedure carries no health benefit'.<sup>16</sup> Above all, the practice is contrary to the obligations Eritrea has assumed under international law.

### 3 Eritrea's international obligations

At the heart of the debate on the abolition of FC rests the commitment of nations to respect the fundamental rights of women. According to Favali, by now a global consensus has almost developed with regard to the harmfulness of FC. Citing Sussman, Favali argues that what is not conclusively resolved is how to eradicate the practice.<sup>17</sup> With its general mandate to promote human rights and the specific mandates of its specialised agencies, the UN has been at the forefront of efforts to eradicate FC. Regional and international bodies as well as non-governmental organisations (NGOs) and civil society organisations are also contributing immensely towards this end.

From an international human rights perspective, FC involves the infringement of several rights which are protected in various international instruments and commitments in declarations of non-binding nature. Favali recognises three major international dimensions to tackle the problem of FC, namely: the human rights dimension, the women's

<sup>12</sup> Report to the CRC Committee (n 8 above) para 215. There are nine officially-recognised ethnic groups in Eritrea. According to the 1995 EDHS, women of all these groups have undergone some form of FC: 100% of Hidarib; 100% of Nara; 99% of Afar; 99% of Bilen; 99% of Tigre; 98% of Kunama; 96% of Saho; 92% of Tigrinya. Rashaida constitutes by far the smallest of the nine Eritrean ethnic groups. Data on this ethnic group is not readily available. See also Favali (n 1 above) 17.

<sup>13</sup> See Joint Statement (n 2 above) 7 for further details on the health complications of FC. See also the Preamble of the FC Proclamation.

<sup>14</sup> See, eg, BM Tekeste 'Might is right, govt bans female circumcision' *Sudan Tribune* 7 April 2007 [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=21217](http://www.sudantribune.com/spip.php?page=imprimable&id_article=21217) (accessed 6 June 2007). Another argument by Tekeste seems to emanate from cultural relativism and finds itself somehow contrary to the widely held theory, the universality of human rights. See also Nyirinkindi (n 1 above) 147.

<sup>15</sup> Dillon (n 1 above) 323.

<sup>16</sup> Cook *et al* (n 1 above) 265.

<sup>17</sup> Favali (n 1 above) 68; E Sussman 'Contending with culture: An analysis of the Female Genital Cutting Act of 1996' (1998) *Cornell International Law Journal* 31 193.

rights dimension and the children's rights dimension.<sup>18</sup> The first approach relies on general international human rights principles<sup>19</sup> that protect the rights of men and women equally. Support to the second approach emanates from regional and international instruments that specifically protect the fundamental rights of women.<sup>20</sup> The third approach is based on international instruments that specifically protect the rights of children, including the girl child.<sup>21</sup> There are also non-binding international declarations and commitments with a firm call for the eradication of FC in the world.<sup>22</sup> Rahman and Toubia assert that while such declarations are not legally binding, they represent international consensus on key norms.<sup>23</sup> The most important rights commonly discussed in the eradication of FC are:<sup>24</sup> the right to life and physical integrity;<sup>25</sup> the right to health;<sup>26</sup> the right to protection against discrimination;<sup>27</sup> the right to freedom from torture, inhuman,

<sup>18</sup> Favali (n 1 above) 68-69. Favali attributes the formulation of this approach to S Meuwese & A Wolthuis 'Legal aspects of FGM: Legislation on international and national level in Europe' in E Leye *et al* (eds) *Proceedings of the Expert Meeting in Female Genital Cutting* (1998) 52-75. In combating FC, international anti-FC activists employ medical and human rights frames. See also EH Boyle & K Carbone-López 'Movement frames and African women's explanations for opposing female genital cutting' 2006 47 *International Journal of Comparative Sociology* 435-465; Rahman & Toubia (n 1 above) 15-43.

<sup>19</sup> These are to be found mainly in the Universal Declaration of Human Rights, the UN Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the African Charter on Human and Peoples' Rights and other instruments.

<sup>20</sup> The most important gender-based regional and international instruments that help combat FC in the African context are the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>21</sup> The international movement against FC can borrow legal support from the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

<sup>22</sup> These include the documents emanating from the Vienna World Conference on Human Rights (1993), the Beijing Fourth World Conference on Women (1995), the Copenhagen World Summit on Social Development (1995), the International Conference on Population and Development (1996).

<sup>23</sup> Rahman & Toubia (n 1 above) 32.

<sup>24</sup> See generally Rahman & Toubia (n 1 above) 15-43; Nyirinkindi (n 1 above) 135-143; Favali (n 1 above) 68-73.

<sup>25</sup> See arts 1 & 3 of the Universal Declaration; arts 6 & 9(1) of CCPR; the Preamble of CESC; and art 4 of the African Charter.

<sup>26</sup> See art 25 of the Universal Declaration; art 12 of CEDAW; art 12 of CESC; arts 19(1) & 24(3) of CRC; arts 16 & 18(3) of the African Charter; art 14 of the Protocol to the African Charter; arts 14 & 21(1) of the African Children's Charter; see also CEDAW General Recommendation No 24. For further discussions on the right to health under international law, see C Ngwenya & RJ Cook 'Rights concerning health' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 107-151.

<sup>27</sup> See art 2 of the Universal Declaration; arts 1 & 55 of the UN Charter; art 2(1) of CCPR; art 2(2) of CESC; arts 1, 2 & 5 of CEDAW; art 18(3) of the African Charter; art 2 of the Protocol to the African Charter; see also CEDAW General Recommendation No 14.



and degrading treatment;<sup>28</sup> the rights of the child;<sup>29</sup> the right to culture;<sup>30</sup> and the right to religious freedom.<sup>31</sup>

Eritrea has ratified several international instruments which protect the fundamental rights of men and women. The following treaties ratified by Eritrea are of particular relevance to the current debate: the International Covenant on Civil and Political Rights (CCPR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). The commitment of Eritrea to ratify these instruments is commendable. There are, however, formidable challenges. As noted by the World Organisation Against Torture (OMCT), Eritrea has yet to sign other treaties and protocols, such as the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the Optional Protocols to CRC, the Optional Protocol to CEDAW and the Optional Protocols to CCPR, all of which are vital for the full realisation of women's rights.<sup>32</sup>

A similar concern about Eritrea's international commitment was noted by the 34th Session of the Committee on the Elimination of Discrimination Against Women. While praising the Eritrean government for ratifying CEDAW and other international instruments, the CEDAW Committee regretted that Eritrea had yet to sign the Optional Protocol to CEDAW and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>33</sup> Eritrea has also not signed the Protocol to the African Charter on the Rights of Women in Africa.

Moreover, the Eritrean government was criticised by the CEDAW Committee for its delay in the submission of the report to the CEDAW Committee, which also did not comply with the guidelines for the preparation of reports. The Eritrean government was specifically

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<sup>28</sup> See art 5 of the Universal Declaration, art 7 of CCPR, art 1 of CAT, art 37(a) of CRC, art 5 of the African Charter and arts 3 & 5 of the Protocol to the African Charter on Human and Peoples' Rights.

<sup>29</sup> See arts 2(1), 3(1), 6(1), 6(2), 16(1), 19(1), 24(1) & 24(3) of CRC; arts 4(1), 5(2), 10, 14(1) & 21(1) of the African Children's Charter.

<sup>30</sup> See arts 27(1) & 30 of the Universal Declaration; arts 5(1) & 15(10)(a) of CESCR; art 29(7) of the African Charter.

<sup>31</sup> See art 30 of the Universal Declaration; art 5(1) of CCPR; and arts 8 & 27(2) of the African Charter.

<sup>32</sup> World Organisation Against Torture (OMCT) 'Violence against girls in Eritrea — A report to the Committee on the Rights of the Child' (2003) [http://www.omct.org/pdf/VAW/Publications/2003/Eng\\_2003\\_05\\_Eritrea.pdf](http://www.omct.org/pdf/VAW/Publications/2003/Eng_2003_05_Eritrea.pdf) (accessed 6 June 2007).

<sup>33</sup> Concluding Comments of the 34th Session of the Committee on the Elimination of Discrimination Against Women on Eritrea, UN Doc CEDAW/C/ERI/CO/3/2006 (Concluding Comments of the CEDAW Committee) paras 2 33-37.

urged to ratify the Optional Protocol to CEDAW and involve its parliament in the preparation of periodic reports before their submission to the CEDAW Committee.<sup>34</sup> The CEDAW Committee also urged the government to implement other obligations under CEDAW and relevant international declarations.<sup>35</sup> In principle, Eritrea demonstrates some degree of commitment in the eradication of FC, at least by ratifying some of the major international instruments. However, the country needs to do a lot in the realisation of women's rights as is required by its international obligations.

#### 4 National strategy on the abolition of female circumcision

The Eritrean struggle for gender equality is as old as the underlying ideological transformations of the two major liberation fronts — the Eritrean Liberation Front (ELF) and the Eritrean People's Liberation Front (EPLF). As in all other cases, the pioneering liberation front in the empowerment of women is ELF.<sup>36</sup> What has been achieved by EPLF can only be seen as a continuation of what ELF has initially pioneered. EPLF, by continuing its struggle for the self-determination and empowerment of women, assumed an important role when it liberated the country in 1991. Throughout the struggle for self-determination, women played an active role. For example, of the tens of thousands of EPLF combatants, female freedom fighters constituted one-third of the liberation forces in active combat.<sup>37</sup> According to Odede and Asghedom, the mobilisation of women in the armed struggle has created a measure of equality between men and women, marking the beginning of awareness about gender disparity and the issue of reproductive and sexual rights, at the centre of which rests FC.<sup>38</sup>

This was a breakthrough in the history of gender justice in Eritrea. Odede and Asghedom, for example, mention the transformation of

<sup>34</sup> As above. The recommendation of the CEDAW Committee on parliamentary involvement is particularly relevant in the context of the discussion in sec 5.4 below.

<sup>35</sup> n 33 above, paras 35 & 38. See also Concluding Observations of the 33rd Session of the Committee on the Rights of the Child on Eritrea, UN Doc CRC/C/15/Add.204/2003 para 62, in which the Eritrean government was similarly urged to ratify the Optional Protocols on CRC.

<sup>36</sup> See, eg, *The Eritrean Newsletter*, April and September 1979 issues (a publication of the ELF).

<sup>37</sup> See Statement of Ms Luul Gebreab, Head of the Eritrean Government Delegation to the 34th Session of the CEDAW Committee (24 January 2006) <http://www.un.org/womenwatch/daw/cedaw/cedaw34/statements/intstatements/eri.pdf> (accessed 6 June 2007); see also Odede & Asghedom (n 8 above) 69-70.

<sup>38</sup> Odede & Asghedom (n 8 above) 69-70. See also the National Charter of the Eritrean People's Front for Democracy and Justice (PFDJ), the successor to the EPLF, as adopted in 1994 (PFDJ Charter) 15.

marriage among EPLF fighters as a paradigm shift resulting from a revolutionary approach. For the first time in the history of Eritrea, assert the authors, 'men and women fighters were able to choose their marriage partners, contrary to the Eritrean tradition and culture of arranged marriages'.<sup>39</sup> During the armed struggle, EPLF has also forbidden the practice of FC by its members.<sup>40</sup> The social mobilisation towards emancipation of women heralded by the liberation struggle era served as a springboard for further planning and implementation after the liberation of the country in 1991. In the post-independence era, educational campaigns were also carried out, especially before 1998, with project activities supported by the National Union of Eritrean Youth and Students (NUEYS) and the National Union of Eritrean Women (NUEW), and the Ministries of Health, Education and Information.<sup>41</sup> All such initiatives were, however, seriously undermined by the 1998-2000 'border conflict' with Ethiopia. After 2001, when Eritrea was formally turned into a police state,<sup>42</sup> there existed no credible degree of commitment on the part of the government in the protection of human rights. By implication, the government's commitment in the eradication of FC is hardly plausible.

In the context of a clearly-defined national strategy, the first ever national anti-FC strategy of the Eritrean government was developed in 1999 as an outcome of a national workshop which was conducted in Asmara from 11 to 15 October 1999.<sup>43</sup> The workshop involved government ministries, traditional midwives, religious groups, UN agencies, bilateral donors and academics. Anything relevant to the discussion of a comprehensive national strategy on the eradication of FC, therefore, understandably begins in 1999. This was the time when the government claimed to have seriously committed itself to work for the eradication of FC in a comprehensive manner which gives priority to education and awareness campaigns. Prior to this, the government had in principle and in general terms demonstrated a commitment to gender equality via several pronouncements and documents of a binding and non-binding nature, such as the 1993 Interim Constitution,<sup>44</sup> the

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<sup>39</sup> Odede & Asghedom (n 8 above) 69-70. See also Report to the CRC Committee (n 8 above) para 215. For further details on EPLF's anti-FC policies during the armed struggle, see Favali (n 1 above) 78-79.

<sup>40</sup> Rahman & Toubia (n 1 above) 146.

<sup>41</sup> Odede & Asghedom (n 8 above) 71; Rahman & Toubia (n 1 above) 146.

<sup>42</sup> On the sad state of affairs since 2001, see generally DR Mekonnen 'The reply of the Eritrean government to ACHPR's landmark ruling on Eritrea: A critical appraisal' (2006) 31 *Journal for Juridical Science* 26-56.

<sup>43</sup> Report to the CRC Committee (n 8 above) para 219.

<sup>44</sup> Proclamation to Provide for the Establishment, Powers and Functions of the Government of Eritrea (Interim Constitution). This Proclamation together with Proclamations 23/1992 and 57/1994 constitute the Interim Constitution of Eritrea.

1994 Macro Policy,<sup>45</sup> the 1994 PFDJ Charter and the 1997 Eritrean Constitution. However, as has been argued previously by this author,<sup>46</sup> the 1997 Eritrean Constitution has little practical significance in terms of human rights protection in Eritrea. This Constitution, adopted in 1997, has never been implemented. Moreover, the critical issues of legitimacy revolving around it make any discussion on the role of the 1997 Constitution inherently futile. In principle, however, the Constitution recognises the equal rights of men and women and prohibits discrimination based on gender.<sup>47</sup>

## 5 The criminalisation of female circumcision

With a proclamation<sup>48</sup> promulgated in March 2007, the Eritrean government adopted a radical approach in the eradication of FC. Article 3 of the FC Proclamation outrightly abolished FC when it provided that '[f]emale circumcision is hereby abolished'. Article 4(1) prescribes that a person who performs FC 'shall be punishable with imprisonment of two to three years and a fine of five to ten thousand (5 000,00 to 10 000,00) Naqfa'.<sup>49</sup> The remaining part of this provision prescribes a more severe punishment for a practice of FC which causes death. The punishment may be more severe if FC is performed by a member of the medical profession. Moreover, the law intends to punish individuals who incite or promote the practice of FC. Individuals who are aware that the procedure is taking place, but who fail to inform or warn the relevant authorities, are also liable for punishment.

A legal ban is a major strategy in the abolition of FC.<sup>50</sup> The FC Proclamation states that FC is an invasive practice that 'seriously endangers the health of women, causes them considerable pain and suffering and

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<sup>45</sup> Macro Policy of the Government of Eritrea (1994); Report to the CEDAW Committee (n 4 above) para 3. Although there is no functional parliament in Eritrea since 2002, arts 10(2) & 10(3)(a) of Proclamation 86/1996 (Local Government Proclamation) reserve 30% of parliamentary and regional assembly seats for women.

<sup>46</sup> See, eg, Mekonnen (n 42 above) 49-50. The overall issue of the 1997 Eritrean Constitution deserves urgent and special assessment in a separate contribution.

<sup>47</sup> Arts 7(2) & 14 of the 1997 Eritrean Constitution. Noting the historical role of women in the struggle for independence, the Preamble of the 1997 Constitution commits the nation to basic equality and mutual respect between men and women. On gender reference, see art 5 of the Constitution and B Habteselassie *The making of the Eritrean Constitution: The dialectic of process and substance* (2003) 127.

<sup>48</sup> FC Proclamation (n 1 above). By criminalising FC, Eritrea joined the camp of a few African countries which have adopted similar mechanisms to eradicate FC as a form of VAW. Only 14 countries out of the 29 in which FC is practised has thus far criminalised FC: Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Niger, Nigeria, Senegal and Tanzania. (Nyirinkindi (n 1 above) 148).

<sup>49</sup> One US dollar is approximately equivalent to 15 Eritrean Nakfa, the Eritrean currency.

<sup>50</sup> Joint Statement (n 2 above) 15. See also art 5 of the Protocol to the African Charter, which explicitly calls for criminalisation of FC; Nyirinkindi (n 1 above) 147-149.

threatens their lives'. FC 'violates women's basic human rights by depriving them of their physical and mental integrity, their right to freedom from violence and discrimination, and in the most extreme case, their life'.<sup>51</sup> In the light of its detrimental effects on the wellbeing, health and human rights of women, FC is a practice which certainly has to be banned by legislation. This will be substantiated in the next subsection.

### 5.1 The need for legislation

The role of law in the abolition of FC was stressed by the Joint Statement in that 'legislation against female genital cutting is important both because it represents a formal expression of public disapproval and because it is the means by which governments can establish official sanctions'.<sup>52</sup> In one of its latest publications, UNICEF has similarly reiterated the need for legislation which, according to the agency, must ban the practice of FC and penalise practitioners accordingly.<sup>53</sup> The critical question remains, however, whether the legal sanction and the point at which it is introduced are compatible. In this regard, the Joint Statement has warned:<sup>54</sup>

If most people in a society value female genital cutting highly and consider it a necessary practice, then legislation in the absence of community-based action is an insufficient and inappropriate strategy. Legislation against female genital cutting is most effective when a system of child monitoring and protection is in operation, when there is widespread education of communities and mobilisation of public opinion against the practice, and when women and communities are involved in efforts to abolish the practice.

Reports by the Eritrean government claim that the promulgation of the FC Proclamation was preceded by nationwide and inter-sectoral campaigns, awareness raising and education programmes, involving all segments of society and stakeholders. For example, the head of information and research at the NUEW, Ms Dehab Suleiman, has 'expressed optimism that efforts to combat ... [FC] were bearing fruit, saying the campaign against the practice was gaining support in rural villages where *excision* was most common'.<sup>55</sup> This was revealed a month before the FC Proclamation was promulgated and indicated that Eritrea was ready by then to implement the ban.

However, Ms Suleiman was commenting mainly on one form of FC, that is, excision. The comments are indicative of the trends observed in

<sup>51</sup> Paras 1 & 2 of the Preamble of the FC Proclamation (n 1 above).

<sup>52</sup> Joint Statement (n 2 above) 15.

<sup>53</sup> UNICEF Child Protection Information Sheet: Female Genital Mutilation/Cutting (May 2006) <http://www.unicef.org/protection/files/FGM.pdf> (accessed 0 October 2007).

<sup>54</sup> Joint Statement (n 2 above) 15.

<sup>55</sup> IRIN News 'Campaign against FC "is working"' <http://www.irinnews.org/Report.aspx?ReportId=70174> (accessed 14 February 2007) (my emphasis).

the highlands of Eritrea, because it is in those parts of Eritrea where excision is practised widely. Without mentioning one or another form of FC, the Minister of Health, Mr Saleh Meki, has made similar comments.<sup>56</sup> None of the officials elaborated on the other procedures of FC prevalent in Eritrea, namely, clitoridectomy and infibulation. The latter, which is the most radical form of FC, is mainly practised in the Eritrean lowlands, where it is traditionally deeply-rooted. The Eritrean lowlands, mainly inhabited by pastoral nomadic communities, are the most disadvantaged parts of the country in which campaign and awareness should naturally have intensified. If anything, the comments of officials indicate that the purported campaign and awareness programmes focused only on certain parts of the country, disproving the claim that awareness programmes have been successfully conducted nationwide.

Neither is it evident whether awareness and education programmes have borne fruitful results in other parts of the country. Official information in this regard is severely lacking and, if available, too sketchy. There are no measurable indicators on the progress achieved through outreach and campaign programmes, including formal education. Ms Suleiman admitted this when she indicated that no statistics were available to prove the developments allegedly achieved.<sup>57</sup> In the absence of measurable benchmarks, it is difficult to claim that campaigns, awareness and education programmes have really achieved the desired end.

Any law adopted within such a context would, therefore, be hard to enforce. As in other African countries,<sup>58</sup> the social forces that motivate Eritreans to continue the practice of FC are still endemic. Criminalisation is, therefore, an inadequate response to a formidable challenge. Its impact on the eradication of FC is unlikely, at least at this stage. For any legislation to have the desired effect, there must also be a clear plan of implementation. As will be seen later, this is currently severely lacking in Eritrea. Another visible shortcoming in the FC Proclamation is that there is no clearly defined organ mandated with the responsibility to oversee and monitor the eradication of FC.

## 5.2 The theory of functional relevance

In societies such as Eritrea, where the practice of FC is inseparable from

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<sup>56</sup> As above.

<sup>57</sup> She said: '[W]e do not have the statistics yet, but we have seen a positive response.' See IRIN News (n 55 above). Similarly, the President of the NUEW, Ms Luul Gebreab, was not quite sure when she said: 'We do not believe [the ban] will automatically eradicate circumcision.' See J Kimbau 'Eritrea bans female circumcision' Reuters <http://www.reuters.com/article/LatestCrisis/IdUSL05181425> (accessed 5 April 2007).

<sup>58</sup> See, eg, Egypt as discussed by Dillon (n 1 above) and Tanzania, as discussed by Boyle *et al* (n 1 above) 533-535; Nyirinkindi (n 1 above) 147. See also IRIN News 'Burkina Faso: Girl's death prompts search for new strategies to fight FGM' <http://www.irinnews.org/Report.aspx?ReportId=74529> (accessed 8 October 2007).

the cultural identity and social values of all population groups, issues of FC are relevant virtually to the whole society. In such kind of scenarios, anti-FC policies are the most contested. Boyle *et al* attribute this to the theory of functional relevance of laws.<sup>59</sup> Examining two African countries which have recently adopted a legal ban on FC — Egypt and Tanzania — the authors argue that in the context of the theory of functional relevance, laws have to fit into a local cultural, religious and political context.<sup>60</sup>

In Egypt, where the prevalence of FC has a remarkable similarity to Eritrea, the adoption of anti-FC policies has always been widely controversial.<sup>61</sup> Similarly, in Tanzania, local custom underscores the functional relevance of anti-FC policies in the sense that in some population groups ‘an uncircumcised woman is never called a “mother”, even if she has children’. In other groups, women who have not undergone FC are assigned demeaning names and ‘laughed at by other women when they go to bathe’.<sup>62</sup> These attitudes are remarkably comparable to the Eritrean experience, as discussed in the preceding sections.<sup>63</sup> If anything, this implies that hasty criminalisation of the practice is not the best approach at all. In the absence of grassroots support, rushed criminalisation only paves the way for surreptitious but intensive efforts to persist with the practice.<sup>64</sup> Support for this argument is to be borrowed, for example, from the experience of Burkina Faso where, in the absence of effective anti-FC strategies, legislation plays little role. The latest reports from Burkina Faso indicate that children are cut during their early age (with some reports of death)<sup>65</sup> to avoid the report of such practices by girls against whom FC is practised. Furtive practices persist regardless of a legal ban if there is an apparent lack of a comprehensive multi-dimensional anti-FC strategy.

Conversely, in countries such as the United States of America (US), where the practice of FC is not common and has no direct cultural relevance to the vast majority, anti-FC policies are largely symbolic,

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<sup>59</sup> Boyle *et al* (n 1 above) 531-533.

<sup>60</sup> Boyle *et al* (n 1 above) 531. This must not be confused, however, with cultural relativism.

<sup>61</sup> In this regard, Boyle *et al* (n 1 above) 532 quote a pertinent comment by an Egyptian FC opponent who asserted: ‘For us, the struggle against FC involves promoting the welfare of women and their right to take full control of their lives, not conducting a battle against women who circumcise their daughters.’

<sup>62</sup> Boyle *et al* (n 1 above) 533.

<sup>63</sup> See the discussion in part 2 above. Compare this with the observations of the Eritrean government as reflected in the Report to the CRC Committee (n 8 above) para 215: ‘[W]omen who have not undergone some form of circumcision are seen as being “impure”, having uncontrollable sexual impulses which drive them to sexual deviation and prostitution, and often put them in the category of being “unmarriageable”. Genital mutilation is also considered a social rite of passage that can be avoided only at the cost of ostracism.’

<sup>64</sup> See, eg, Dillon (n 1 above) 312-318.

<sup>65</sup> See, eg, *IRIN News* (n 58 above).

and a legal ban on FC is not controversial. According to Boyle *et al*, the US is one of the countries whose FC policy is 'extra-national' or substantially more international. The FC law was weighed in terms of the message it would send to other countries, where the practice is more common.<sup>66</sup> This debate is linked to the current issue, along with another important factor in the eradication of FC, international aid and pressure, as discussed in the next section.

### 5.3 International aid and pressure

The development of FC strategies in African countries, write Boyle *et al*, was influenced by growing international pressure aimed at the eradication of FC.<sup>67</sup> Apart from the UN, international civil society, regional and international NGOs and concerned individual countries, the developed world and international donor organisations (which are most of the time driven by the interests of the former) are also playing a prominent role in the eradication of FC. This is done mainly by linking development aid with human rights and democratisation.

Boyle *et al* identify the US as one of the leading countries which have linked its 1996 anti-FC Federal Act<sup>68</sup> with foreign aid in such a way that the law enabled the American government to adopt punitive measures to ensure that other countries also develop anti-FC strategies. A concrete example mentioned by the authors is Egypt, which in the 1990s was pressurised to develop a strategy on the eradication of FC under constant threat from the US to cut off financial aid.<sup>69</sup>

Favali has also commented on the practice of the US. The US government pressurises countries to adopt anti-FC policies through its prominent development agency, USAID, by threatening to withhold assistance from those countries that have not taken positive steps.<sup>70</sup> Dillon argues that in countries such as Germany, there are NGOs which lobby 'the government to make a clear policy statement against FC and to make financial aid contingent on government campaigns against FC'.<sup>71</sup> This means that at times governments can adopt anti-FC laws, not out of a genuine commitment towards such an end, but mainly due to wanting to secure or fear of losing aid from the developed world.

By the time the FC Proclamation was adopted, there was no visible pressure from the side of the US against Eritrea. However, the role of the

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<sup>66</sup> Boyle *et al* (n 1 above) 536.

<sup>67</sup> Boyle *et al* (n 1 above) 529. See also, eg, Joint Statement (n 2 above) 17, which proposed the eradication of FC in three generations.

<sup>68</sup> Public Law No 104-208, 1 10 Stat. 3009-3708, 1996, as quoted in Boyle *et al* (n 1 above) 535.

<sup>69</sup> n 68 above, 533-535; see also Dillon (n 1 above) 320.

<sup>70</sup> Favali (n 1 above) 66.

<sup>71</sup> Dillon (n 1 above) 302.



European Union (EU) deserves critical examination. The diplomatic relationship between Eritrea and the EU was a strained one since Eritrea expelled the representative of the EU in 2001. Relations began to improve in January 2007 when the EU Commissioner for Development and Humanitarian Aid, Mr Louis Michel, paid a surprise visit to Eritrea, becoming the first and highest EU official to visit the country in several years. In the meeting, 'the two sides agreed to open a new chapter in their relations'.<sup>72</sup> The Eritrean government adopted the FC Proclamation in March 2007. In May 2007, in what became his first visit after several years of isolation from the international arena, President Isaias Afwerki was officially invited to visit Brussels.<sup>73</sup> On 4 May 2007 in his meeting with President Afwerki, Commissioner Michel singled out the legal ban on FC and praised Eritrea for that. On 7 May 2007, the EU approved a development assistance of €122 million to Eritrea.<sup>74</sup>

Although such a claim may not be conclusive, the Eritrean case somehow fits into a scenario where the government had to, at a certain stage, expedite the promulgation of the law, not only to attract development aid but also to further other ends motivated by ulterior motives. The FC Proclamation has possibly developed as a tactful plan designed to ease international pressure against Eritrea and to refurbish the tarnished image of the Eritrean government, known for its alarming record of human rights violations.<sup>75</sup> The political and diplomatic developments before and after the legal ban on FC are indicative of hastiness on the part of the Eritrean government, if not pressure from the EU. Most importantly, however, the stance of the EU gives rise to other legitimate concerns. By allowing unconditional aid to one of Africa's notorious dictatorships, the EU has seriously undermined its commitment to human rights and democratisation.<sup>76</sup>

The above inquisitive analysis on the speedy adoption of the FC Proclamation must be seen against the long-standing 'strategy' of the Eritrean government which emphasised that FC should be seen as a

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<sup>72</sup> ReliefWeb 'President holds talks with EU delegation' <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6XZR82?OpenDocument> (accessed 6 June 2007).

<sup>73</sup> See Reuters AlertNet 'EU embraces Eritrea in search for Horn peace' <http://www.alertnet.org/thenews/newsdesk/L04519421.htm> (accessed 4 May 2007).

<sup>74</sup> Europe Information Service 'Commission seeks to strengthen political dialogue' [http://www.meskerem.net/EU\\_ERITREA%20COMMISSION%20SEEKS%20TO%20STRENGTHEN%20POLITICAL%20DIALOGUE.htm](http://www.meskerem.net/EU_ERITREA%20COMMISSION%20SEEKS%20TO%20STRENGTHEN%20POLITICAL%20DIALOGUE.htm) (accessed 7 May 2007).

<sup>75</sup> See in this regard DR Mekonnen 'Prosecuting the human rights violations of Eritrean government officials: Possibilities under international law' *International Journal of Transitional Justice* (forthcoming, 2008).

<sup>76</sup> In contrast, in 2006, the EU turned down a desperate application for funding by a prominent Eritrean civil society organisation, which works in the area of human rights and democratisation. The application was made by the Eritrean Movement for Democracy and Human Rights (EMDHR), but was turned down on peripheral grounds.

public health concern and not as a matter of prosecution.<sup>77</sup> The government has firmly emphasised the futility of outlawing FC without being able to convince and educate the public to abandon the deeply-rooted harmful practice. In the words of the government, 'simply banning the practice will not wipe it out'. Instead, the government held that '[l]ong-term community education is the only effective means of bringing about [a] change'. This position, which in some ways supports the conclusions of this article, was strongly voiced by the Eritrean government as recent as in 2004.<sup>78</sup> When the FC Proclamation was promulgated in 2007, the Eritrean government offered no quantifiable indicators on the effective transformation of the deeply-rooted belief associated with FC. In fact, circumstances on the ground disprove any positive development in that regard. Government accounts claim that in recent years campaigns have been conducted with the two non-independent 'civil society' organisations, NUEW and NUEYS, assuming a leading role in such campaigns. However, with the poor record of the government's commitment to human rights protection and the discouraging legal and political situation in the country, the government's commitment in the above regard is questionable. Furthermore, there are no clear justifications as to why the Eritrean government changed its position from that which it held in 2004. Until that time, the government's position on the eradication of FC was squarely opposed to criminalisation on the grounds that the practice remained deeply rooted in culture. In a practical sense, it is also impossible to assume that a deeply-entrenched cultural and social pressure attached to FC can vanish in a very short period of time (between 2004 and 2007). As noted by Rahman and Toubia, legislative action, unsupported by other plans, can hardly change social behaviour.<sup>79</sup>

#### 5.4 The issue of legitimacy

The legal and political situation under which the FC Proclamation was developed is informative of the government's flawed commitment in the eradication of FC. As is common with the promulgation of other laws, the legislative history of the FC Proclamation is not easily traceable. Eritrean legislative process is uniquely characterised by secrecy and opaqueness. The same is true about the legislative history of the FC Proclamation. Gebremedhin defines the law-making process in Eritrea as a development which offers the worst experience; and the Eritrean

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<sup>77</sup> Rahman & Toubia (n 1 above) 145.

<sup>78</sup> See the position of the government as noted in the Report to the CRC Committee (n 8 above) para 215.

<sup>79</sup> Rahman & Toubia (n 1 above) xiv.

National Assembly (parliament) is one which 'does not even have the luxury of "rubberstamping"'.<sup>80</sup>

The issue of access to laws and official documentation is another critical challenge in Eritrea. There is no easily-accessible depository of laws in Eritrea, making academic research extremely difficult and at the same time reflecting on the unresponsive, undemocratic and unaccountable nature of the Eritrean government. When other misleading and propagandist information is abundantly available on the official websites of the government, there is a dearth of information on laws and policies of paramount importance. For example, a copy of the FC Proclamation is not yet publicly accessible on the official government website, [www.shabait.com](http://www.shabait.com). The only copy available is from the website<sup>81</sup> of NUEW, which is less known by the public than the official government website.

The entry into force of the FC Proclamation also raises critical concerns. There is an absurd contradiction in this regard, with three different dates being given. According to the FC Proclamation, the law was '[adopted] at Asmara, on [the] 20th day of March 2007'.<sup>82</sup> However, it was made public only on 4 April 2007 by the Ministry of Information. The Ministry of Information indicated that the legislation 'has gone into force as of 31 March 2007'.<sup>83</sup> This underscores the government's flawed commitment, not only in the eradication of FC, but also in the broader objectives of democratisation.<sup>84</sup> In terms of legality, the FC Proclamation falls short of legitimate authority for the following major reasons.

As is now widely reported by credible sources,<sup>85</sup> Eritrea is a country where a democratic culture and participatory processes are severely lacking. This is true, particularly since September 2001, when the country was literally turned into a police state as a result of a wide-ranging crackdown on popular demands for democratisation. Eritrea is now a country with no independent parliament, no independent judiciary, no

<sup>80</sup> Y Gebremedhin *The challenges of a society in transition: Legal development in Eritrea* (2004) 136. See also SM Weldehaimanot & DR Mekonnen 'The nebulous lawmaking process in Eritrea' *African Human Rights Law Journal* (forthcoming, 2008).

<sup>81</sup> n 1 above.

<sup>82</sup> See the last paragraph of the FC Proclamation (n 1 above).

<sup>83</sup> 'Proclamation issued to abolish female circumcision' 4 April 2007 [http://www.shabait.com/staging/publish/article\\_006428.html](http://www.shabait.com/staging/publish/article_006428.html) (accessed 4 April 2007).

<sup>84</sup> On the forgotten promises of democratisation and the resultant repercussions on the Eritrean legislative process, see generally Weldehaimanot & Mekonnen (n 80 above).

<sup>85</sup> See, eg, Freedom House *The worst of the worst: The world's most repressive societies* (2007). See also the annual and periodic reports of Amnesty International, Human Rights Watch, Committee to Protect Journalists (CPJ), Reporters without Borders (RSF), UK Home Office Country of Origin Information Report: Eritrea (2007), and US State Department Country Reports on Human Rights Practices: Eritrea (2007).

independent press and no implemented constitution.<sup>86</sup> Eritrea is in fact the only country in Africa, perhaps also in the world, without an implemented constitution. The country has never seen free and fair elections since its independence in 1991. According to the Committee to Protect Journalists (CPJ)<sup>87</sup> and Reporters without Borders (RSF),<sup>88</sup> Eritrea is the biggest prison of journalists in Africa and remains without a free press for several years. Most of all, there is no independent law-making process in Eritrea from which the FC Proclamation should have emanated. This point deserves a little more explanation.

One of the adverse consequences of the 2001 crackdown was that it has severely weakened state institutions, such as the judiciary and parliament, thereby necessitating an unfettered concentration of power in the hands of the President. Although a rubberstamp since its inception, the Eritrean National Assembly was the major state institution severely affected by the 2001 crackdown.<sup>89</sup> Since then, the National Assembly was only convened in February 2002. This was done only to denounce a group of reformers, who criticised the President and by reason of which all remained in detention without trial.<sup>90</sup> Afterwards, contrary to the requirements that it be convened every six months,<sup>91</sup> the Eritrean National Assembly has never convened and remained in hibernation. In its report to the relevant UN bodies, the Eritrean government has made it clear that the promulgation of laws in Eritrea is a major task reserved to the National Assembly.<sup>92</sup> It is not clear, however, how the FC

<sup>86</sup> For the adverse political developments after the September 2001 crackdown, see generally Awate Team 'The chronology of the reform movement' <http://www.awate.com/cgi-bin/artman/exec/view.cgi/17/578/printer> (accessed 5 December 2002); D Connell *Conversations with Eritrean political prisoners* (2005); Mekonnen (n 42 above).

<sup>87</sup> Committee to Protect Journalists (CPJ) 'Special reports from around the world: In imprisoning journalists, four nations stand out' [http://www.cpj.org/Briefings/2005/imprisoned\\_04/imprison\\_release03feb05na.html](http://www.cpj.org/Briefings/2005/imprisoned_04/imprison_release03feb05na.html) (accessed 5 February 2005).

<sup>88</sup> Reporters without Borders (RSF) 'Africa's biggest prison for the press since 18 September 2001' [http://www.rsf.org/article.php3?id\\_article=11422](http://www.rsf.org/article.php3?id_article=11422) (accessed 20 September 2004).

<sup>89</sup> The judiciary was also affected by the summary dismissal of the President of the High Court of Eritrea, the highest court in the country, Judge Teame Beyene. Judge Beyene was dismissed as a result of his widely acclaimed public statement which denounced the unjustified interference of the executive branch in the domains of the judicial organ. See T Beyene 'The Eritrean judiciary: Struggling for independence' (paper presented at the Conference on the 10th Anniversary of Eritrea's Independence, Asmara, May 2001), also available at [http://news.asmarino.com/Comments/August2001/kidaneHG\\_08\\_23.asp](http://news.asmarino.com/Comments/August2001/kidaneHG_08_23.asp) (accessed 6 June 2007).

<sup>90</sup> See Mekonnen (n 42 above) 28.

<sup>91</sup> See art 4(3) of the Interim Constitution (n 44 above). Compare this with the Concluding Comments of the CEDAW Committee (n 33 above) paras 2 33-37, in which the Eritrean government was advised to involve its parliament in the preparation of periodic reports to the CEDAW Committee. This implies that there is no parliamentary role of whatsoever nature in Eritrea.

<sup>92</sup> See, eg, the Report to the CRC Committee (n 8 above) paras 14 & 41 and the Report to the CEDAW Committee (n 4 above) 32.

Proclamation was adopted in March 2007. In reality, there is no functioning parliament in Eritrea and this was the case when the FC Proclamation was adopted.<sup>93</sup>

What is worst, there are no independent alternative mechanisms in Eritrea by which the general public could participate in the adoption of laws which affect the rights and interests of individuals and communities. Inherently, the FC Proclamation falls short of the requirements of legitimacy from which the power and enforceability of the law should emanate. Such a sad development may also possibly frustrate future anti-FC strategies in Eritrea.

### 5.5 Inter-sectoral involvement

Any strategy that aims at the eradication of FC can bear fruitful outcomes only if the adoption of such a strategy is augmented by inter-sectoral involvement. In its Report to the CEDAW Committee, the Eritrean government clearly stated that deeply-rooted traditional practices such as FC can only be eradicated by 'a well-co-ordinated and integrated inter-sectoral campaign among all stakeholders (public sector, local and community authorities, religious community, local NGOs, etc)'.<sup>94</sup> Inter-sectoral involvement should also mean the participation of international civil society organisations as well as opposition groups. The emergence of innovative approaches and the introduction of new ideas are crucial in this regard. However, the overall legal and political situations in Eritrea do not allow for the adoption of a multi-dimensional approach towards FC. In Eritrea, there are neither opposition parties nor independent civil society organisations or NGOs which could have added independent input in the adoption of pertinent national policies such as the FC Proclamation. Since 1997, as a result of a harsh anti-NGO policy, several international civil society organisations have been expelled from Eritrea, leaving a huge gap in different areas of expertise.<sup>95</sup> The few still operating in the country are only involved in humanitarian and emergency assistance programmes such as de-mining, the reintegration of internally displaced communities, and so forth.

The major NGOs involved in the adoption of anti-FC strategy were the NUEYS and the NUEW. These two organisations are the youth and

<sup>93</sup> Art 4(4) of the interim Constitution (n 44 above) proclaims that the National Assembly is the highest legal authority in Eritrea. Art 5(h) has explicitly reserved 'the promulgation of laws' to the National Assembly.

<sup>94</sup> Report to the CEDAW Committee (n 4 above) 39.

<sup>95</sup> The latest report by Human Rights Watch, eg, indicates that in 2006, the Eritrean government expelled six Italian aid NGOs and confiscated their equipment and supplies. The government told Mercy Corps, Concern Worldwide and the Agency for Co-operation and Research in Development (ACORD) to leave. These were some of the last NGOs remaining in Eritrea. See Human Rights Watch 'World Report 2007: Eritrea' <http://hrw.org/englishwr2k7/docs/2007/01/11/eritre14698.htm> (accessed 6 June 2007).

the women's leagues (arms) of the ruling party, whose leaders are single-handedly appointed by the party. In other words, they are typical examples of government-operated non-governmental organisations (GONGOs). In contemporary civil society discourse, GONGOs are set up or maintained by undemocratic governments as 'NGOs' to disguise foreign aid and pay lip service to civil society participation.<sup>96</sup> A clear indication in this regard is that the delegation of the Eritrean government to the 33rd session of the CEDAW Committee was headed by the President of the NUEW.<sup>97</sup> In all such sessions, state parties to CEDAW are represented by an official government delegation. If the NUEW was an NGO, the story would have differed. The NUEYS and the NUEW are part and parcel of the ruling party apparatus. In a real sense, there was no meaningful inter-sectoral involvement in the adoption of the FC Proclamation.

There is also a general understanding that education, awareness raising, advocacy, economic growth and urbanisation are important factors in changing societal attitude favourably. Nyirinkindi is of the view that attitudes towards FC can be influenced by customised interventions aimed at the demystification of the practice and diversion of circumcisers into other professions. She also suggests that the cultural rite of passage associated with FC can be neutralised by the introduction of innovative alternative rituals.<sup>98</sup> The education of women is regarded as the most important factor in this regard. Olenick asserts that, in most countries, education plays a pivotal role in achieving lower levels of support for FC. As a reflection of this, FC is supported by 75% of Eritreans with no education, 34% of those with a primary education, and 18% of those with secondary or higher education.<sup>99</sup> In spite of this, the educational system in Eritrea is alarmingly unpromising. Since 2003, the government has implemented a stringent educational policy, the effects of which have severely undermined academic freedom and research, impacting on the essence of the educational curricula.

As a result of brutal martial rule, which has prevailed in the country over the last several years, demagoguery, indoctrination and militarisation have effectively overtaken the educational curricula in Eritrea. The

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<sup>96</sup> Examples of GONGOs in other countries are the Myanmar Women's Affairs Federation; Nashi, a Russian youth group; the Sudanese Human Rights Organisation; Saudi Arabia's International Islamic Relief Organisation; Chongryon, the General Association of Korean Residents in Japan; etc. See M Naím 'What is a GONGO?' *Foreign Policy* May/June 2007 [http://www.foreignpolicy.com/story/cms.php?story\\_id=3818&fp\\_src=ealert070430](http://www.foreignpolicy.com/story/cms.php?story_id=3818&fp_src=ealert070430) (accessed 6 June 2007).

<sup>97</sup> See Statement of Ms Luul Gebreab (n 37 above). It must also be noted that the defection of the former Chairperson of the NUEYS, Mr Muhyedin Shengeb, in 2004, is another indication of the non-independence of the NUEYS. Ever since, Mr Shengeb lives in exile.

<sup>98</sup> Nyirinkindi (n 1 above) 143-145 150.

<sup>99</sup> 1995 EDHS (n 5 above); Olenick (n 5 above) 48.

country's 'high schools' and 'colleges' have been turned into militarised schools, where students are regimented and disciplined under stringent martial rule. In 2004, the militarisation of education was criticised by the UNICEF representative in Eritrea as a violation of the African Children's Charter, because it separated children from their families and forced them into a military environment.<sup>100</sup> As such, the current educational policy and the substance of its curricula are neither student-friendly nor conducive to nurture critical thinking with the ultimate objective of transforming harmful traditional practices. Similarly, in terms of educating women, little influence has been had by the government, the NUEYS and the NUEW in recent years, especially since 2001. Moreover, the role of the media in the eradication of FC is understandably indispensable. With the right to freedom of expression severely curtailed, there is no space for an independent media to play any role in anti-FC strategy.

## 6 Conclusion

FC is an exceedingly prevalent harmful practice in Eritrea. It is inherently detrimental to the enjoyment of the fundamental rights of women as protected by international human rights standards. Although a consensus has by now developed with regard to the harmfulness of the practice, the debate on how to eradicate the practice remains controversial. In countries such as Eritrea, where the practice of FC is inspired by the cultural identity and social values of all population groups, anti-FC issues are virtually relevant to all local communities. In such an environment, outright legislative abolition of the practice without supporting mechanisms may prove counterproductive.

Although criminalisation is one of the most important approaches in the eradication of FC, experience in some countries tells us that FC cannot be eradicated merely by criminalising the act. Anti-FC strategies must be supported by a multidimensional approach involving different measures and policies. A legislative action inherently suffering from severe inadequacies, merged with apparent lack of government commitment in the promotion of human rights and democratisation, will continue to seriously undermine anti-FC strategies in Eritrea.

The new legislation is not the outcome of a genuine government commitment towards the eradication of FC. In any event, the law lacks the required legitimate foundation that gives it enforceability and popular acceptance by the general public. The legal and political contexts under which the FC Proclamation was adopted have dire implications for the strategy. All national strategies and policies in

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<sup>100</sup> Amnesty International "You have no right to ask". Government resists scrutiny on human rights' 24 May 2004 (AI Index: AFR 64/003/2004).

Eritrea can only bring the desired effect when the country commits itself to a genuine and accountable democratic culture, the foundation of which is the protection of fundamental rights. This is severely lacking in Eritrea and will continue to undermine the realisation of women's rights in the country.

## **Annexure**

### **Proclamation No 158/2007 (A Proclamation to Abolish Female Circumcision)**

Whereas, female circumcision is a procedure that seriously endangers the health of women, causes them considerable pain and suffering and threatens their lives;

Whereas, this procedure violates women's basic human rights by depriving them of their physical and mental integrity, their right to freedom from violence and discrimination, and in the most extreme case, their life;

Whereas, the immediate or long-term harmful consequences of this procedure vary according to the type and custom of the procedure performed;

Whereas, its immediate consequences include severe pain, haemorrhage which can cause fainting or death, ulceration of the genital region and injury to adjacent tissues, urine retention and dangerous infection;

Whereas, its long-term consequences include recurrent infection of the urinary system, permanent infection of the fertility system, complications in child-birth (barrenness) and scar formation such as increasing abscess in the labia minora and, prevention of menstruation;

Whereas, it has been traditionally practiced and is prevalent in Eritrea; and

Whereas, the Eritrean Government has decided to abolish this harmful procedure which violates women's rights;

Now, therefore, it is proclaimed as follows:

#### **Article 1 Short citation**

This proclamation may be cited as 'The Female Circumcision Abolition Proclamation No. 158/2007'.

#### **Article 2 Definition**

In this Proclamation, 'female circumcision' means:

- (1) the excision of the prepuce with partial or total excision of the clitoris (clitoridectomy);
- (2) the partial or total excision of the labia minora;
- (3) the partial or total excision of the external genitalia (of the labia minora and the labia majora), including stitching;
- (4) the stitching with thorns, straw, thread or by other means in order to connect the excision of the labia and the cutting of the vagina and the introduction of corrosive substances or herbs into the vagina for the purpose of narrowing it;
- (5) symbolic practices that involve the nicking and pricking of the clitoris to release drops of blood; or



- (6) engaging in any other form of female genital cutting and/or cutting.

### **Article 3 Prohibition of female circumcision**

Female circumcision is hereby abolished.

### **Article 4 Punishment**

- (1) Whosoever performs female circumcision shall be punishable with imprisonment of two to three years and a fine of five to ten thousand (5,000.00 to 10,000.00) Nakfa. If female circumcision causes death, imprisonment shall be from five to ten years.
- (2) Whosoever requests, incites or promotes female circumcision by providing tools or by any other means shall be punishable with imprisonment of six months to one year and a fine of three thousand (3 000,00) Nakfa.
- (3) Where the person who performs female circumcision is a member of the medical professions, the penalty shall be aggravated and the court may suspend such an offender from practicing his/her profession for a maximum period of two years.
- (4) Whosoever, knowing that female circumcision is to take place or has taken place, fails, without good cause, to warn or inform, as the case may be, the proper authorities promptly about it, shall be punishable with a fine of up to one thousand (1 000,00) Nakfa.

### **Article 5 Effective date**

This Proclamation shall enter into force as of the date of its publication in the Gazette of Eritrean Laws.

*Done at Asmara, this 20th day of March, 2007*  
*Government of Eritrea*

## ***Lubanga*, the DRC and the African Court: Lessons learned from the first International Criminal Court case**

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### **Summary**

*Thomas Lubanga Dyilo will be the first person tried under the jurisdiction of the International Criminal Court. His case will have an important effect, not only on his home country, the Democratic Republic of the Congo, but on the world. Through an analysis of Lubango's case and the current development of the International Criminal Court's case load, the positives and negatives of International Criminal Court jurisdiction become apparent, particularly in relation to national or international primary jurisdiction. While the International Criminal Court is crucial for the development of international judicial authority, the Court is extending its reach too eagerly and willingly. In so doing, the Court is destroying the autonomy and development of governments and judicial systems in African countries. Therefore, the International Criminal court should show more restraint in its acceptance of cases and instead pursue alternative methods of bolstering national judiciaries. To be effective, the Court's mission must first focus on teaching and encouragement of local rule of law. The Court should focus on judicial decision making only as a secondary option. Finally, the Court should be increasingly subject to United Nations Security Council referrals than to state referrals or the prosecutor's own powers.*

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[S]upporters of the Court hope that this trial will help to ease many doubts about the direction of the Court as the *Tadic* case was able to do for the ICTY.<sup>1</sup>

## 1 Introduction

Thomas Lubanga Dyilo will be the first man tried under the jurisdiction of the International Criminal Court (ICC). His case will have an important effect, not only on his home country, the Democratic Republic of the Congo (DRC), but on the world. This first ICC decision will affect state sovereignty and current international organisations, such as the United Nations (UN). It will increase the possibility of universal jurisdiction. It could also potentially threaten some of the world's unrestrained superpowers.

This paper will begin with general information on Thomas Lubanga Dyilo, the DRC, and the DRC's present use of the ICC. It will analyse the development and current case load of the ICC and provide general information on the African Court on Human and Peoples' Rights (African Court), a potential corollary for judicial authority in Africa. This paper will then look at the benefits and drawbacks of a nation's referral of a case to the ICC, compared to jurisdiction in-country or in a regional court such as the African Court. It will continue by arguing that countries such as the DRC should maintain primary jurisdiction whenever possible. If that is not possible, regional courts, such as the African Court, should have secondary jurisdiction. Cases should be referred to the ICC only as a last resort and only when criteria for referrals are better defined.

It will conclude that while the ICC is crucial for the development of international judicial authority, the ICC is extending its reach too eagerly and willingly. In so doing, the ICC is destroying the autonomy and development of governments and judicial systems in African countries. Therefore, the ICC should show more restraint in its acceptance of cases and instead pursue alternative methods of bolstering national judiciaries.

This paper will argue that, to be effective, the ICC's mission must first focus on teaching and the encouragement of local rule of law. The ICC should focus on judicial decision making only as a secondary option. Finally, this paper will contend that the ICC should be subject more to UN Security Council referrals than to state referrals or the prosecutor's own powers. That is, in order to control the ICC's potentially dangerous over-wielding use of power over nations, the ICC should be increasingly restricted to referred cases from the UN Security Council.

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<sup>1</sup> MC Bassiouni 'The ICC — *Quo vadis?*' (2006) 4 *Journal of International Criminal Justice* 421 425.

## 2 Background on the DRC, Thomas Lubanga Dyilo and the DRC's jurisdictional options

### 2.1 The history of the DRC conflict

The DRC is a struggling nation. The beginning of the 'current conflict dates back to May 1997, when the Alliance of Democratic Forces for the Liberation of Congo, led by Laurent Kabila, overthrew the dictatorship of Mobutu Sese Seko'.<sup>2</sup> Shortly after, in 1998, Uganda and Rwanda invaded the DRC, allegedly interested in Tutsi-Hutu issues.<sup>3</sup> As the Ugandan and Rwandan interference threatened Laurent Kabila's power, Angola, Namibia and Zimbabwe sent troops to support Kabila.<sup>4</sup> A temporary peace ensued. In 1999, the major parties gathered to sign 'the Lusaka Peace Accords, resulting in the deployment in 2000 of a UN force, the UN Organisation Mission in the Democratic Republic of the Congo (MONUC)'.<sup>5</sup> Unfortunately, the accords did not stop the violence.<sup>6</sup> Laurent Kabila 'managed to retain power until his assassination in January 2001, when his son Joseph was appointed to succeed him'.<sup>7</sup> Joseph has remained in tentative control since his father's death.

One especially volatile region of the DRC is an area known as Ituri. Various forces have vied for its control. From 1998 to 2003, Uganda occupied Ituri.<sup>8</sup> This Ugandan occupation of Ituri exacerbated tensions between local Hema and Lendu communities. Instead of working with the local groups, '[t]he Ugandan army helped arm and train the approximately ten armed insurgent groups that currently exist in Ituri, instigating ethnic feuds between the Hema and Lendu militias . . .'.<sup>9</sup> As the Hema and Lendu groups dominated the population in the region, almost all of the ethnic groups there became associated with the conflict.<sup>10</sup> Thomas Lubanga Dyilo, the man currently held by the ICC, was involved with the conflict as a leading Hema member.<sup>11</sup> Lubanga led the Union of Congolese Patriots (UPC).<sup>12</sup> Using the slogan 'Ituri for Iturians', Lubanga and his UPC fought for autonomy.<sup>13</sup>

<sup>2</sup> J Graff 'Corporate war criminals and the International Criminal Court: Blood and profits in the Democratic Republic of Congo' (2004) 11 *Human Rights Brief* 23.

<sup>3</sup> n 2 above, 23-24.

<sup>4</sup> n 2 above, 24.

<sup>5</sup> Human Rights Watch *Democratic Republic of Congo: Ituri: 'Covered in blood'. Ethnically targeted violence in Northeastern DR Congo* (2003) 15.

<sup>6</sup> As above.

<sup>7</sup> Graff (n 2 above) 24.

<sup>8</sup> Human Rights Watch (n 5 above) 2.

<sup>9</sup> Graff (n 2 above) 24.

<sup>10</sup> 'Ituri is home to 18 different ethnic groups with the Hema/Gegere and Lendu/Ngiti communities together representing about 40 per cent of the inhabitants.' Human Rights Watch (n 5 above) 14.

<sup>11</sup> Human Rights Watch (n 5 above) 5.

<sup>12</sup> As above.

<sup>13</sup> Human Rights Watch (n 5 above), citing Human Rights Watch interview, Bunia (February 2003).

As ethnic tensions rose, the Ituri region became especially contentious because of its abundant mineral reserves. 'Ituri is one of the richest areas of Congo with deposits of gold, diamonds, coltan, timber and oil.'<sup>14</sup> By exacerbating the tension between local ethnic groups, countries such as Rwanda and Uganda gained untold riches from the Ituri region. Human Rights Watch noted that<sup>15</sup>

[t]rade statistics show the extent to which Uganda has profited from the riches of the DRC. Gold exports from Uganda more than doubled after their troops crossed into the DRC . . .

Rwanda aimed to attain the same position of exploitation. 'Rwandan authorities allegedly also hoped to profit from the gold of Ituri.'<sup>16</sup> The prospect of great wealth struck a deep chord.

In addition to gold, Uganda also flagrantly took advantage of Ituri's diamond resources.<sup>17</sup>

No diamond exports were recorded from Uganda in the decade before their troops arrived in the DRC. Then from 1997 to 2000, diamond exports jumped from 2 000 to 11 000 carats.

Because of these economic incentives, the neighbouring countries of Rwanda and Uganda gave little thought to the ethnic troubles they exacerbated.

As Rwanda and Uganda created friends and enemies based on mineral reserves, the DRC devolved into a continual cycle of war and terror. Human Rights Watch believed that 'at least 5 000 civilians died from direct violence in Ituri between July 2002 and March 2003'.<sup>18</sup> Civilians felt the greatest losses, and not only in the Ituri region. Human Rights Watch noted that the losses felt in Ituri 'are just part of an estimated total of 3,3 million civilians dead throughout the Congo, a toll that makes this war more deadly to civilians than any other since World War II'.<sup>19</sup> Tragically, millions died for the sake of mineral reserves exploited through the use of ethnic and political tensions.

The world community has done little to quell the violence and inhumane practices. The UN did decide to send in a small team of international observers, known as the UN Organisation Mission in the DRC (MONUC). However, between 1999 and April 2003, MONUC 'had only a small team of fewer than ten observers covering this volatile area of some 4,2 million people'.<sup>20</sup> Not until April 2003 did the UN

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<sup>14</sup> Human Rights Watch (n 5 above) 12.

<sup>15</sup> Human Rights Watch (n 5 above), citing Security Council, Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, S/2001/1072 (13 November 2001).

<sup>16</sup> Human Rights Watch (n 5 above), 13, citing 'UPC rebels grab Mongbwalu's gold' *African Mining Intelligence* 15 January 2003 53.

<sup>17</sup> Human Rights Watch (n 5 above), citing Security Council (n 15 above).

<sup>18</sup> Human Rights Watch (n 5 above) 1.

<sup>19</sup> As above.

<sup>20</sup> Human Rights Watch (n 5 above) 2.

increase MONUC forces, and then only to several hundred representatives.<sup>21</sup> This nominal increase came too late. Because little was done to stop the violence in the DRC, it remained unchecked for many years. Unfortunately, the problems, which were never stopped, continue to be a force which the DRC must now struggle to confront.

## 2.2 Charges against Lubanga

As mentioned previously, Lubanga headed the Union of Congolese Patriots (UPC). Lubanga's UPC stands accused of numerous atrocities. For example, the UPC took an area known as Bunia in August 2002. They forced workers to dig at the gold mines without pay.<sup>22</sup> The UPC also murdered non-Hemas. When controlling the Bunia area, 'Lubanga's UPC launched a campaign of arbitrary arrests, executions and enforced disappearances. Witnesses described it as a 'man hunt for Lendu, Ngiti, "non-originares" and others . . .'<sup>23</sup> In addition to civilian murders and enforced work, the armed forces central to the Ituri region are accused of numerous other egregious crimes. As an example, Lubanga's UPC, along with other groups in the area, stands accused of systematic campaigns of cannibalism directed against civilians.<sup>24</sup>

However, these are not the charges for which Lubanga is presently at the ICC. Instead, Lubanga is first charged with the recruitment of child soldiers. Admittedly, Lubanga is not alone in this crime. The recruitment of child soldiers occurred across the country during the conflict. Human Rights Watch noted that the forced military recruitment of children involved boys and girls as young as seven.<sup>25</sup> However, Lubanga's UPC might be accused of showing the least restraint in its forced recruitment of child soldiers.<sup>26</sup>

On November 8, 2002 at 8:00 am, the UPC reportedly entered the Ecole Primaire of Mudzi Pela and forcibly rounded up the entire fifth grade, some forty children, for military service. A similar operation was carried out in Salongo where the UPC surrounded a neighborhood and then abducted all the children they could find.

The recruitment numbers from these operations were minor compared to the total number of child soldiers enlisted by Lubanga's UPC. All together, Lubanga's force allegedly might have enlisted approximately 30 000 children in the Ituri region.<sup>27</sup>

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<sup>21</sup> As above.

<sup>22</sup> Human Rights Watch (n 5 above) 24.

<sup>23</sup> Human Rights Watch (n 5 above) 27.

<sup>24</sup> WW Burke-White 'Complementarity in practice: The International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557 587.

<sup>25</sup> Human Rights Watch (n 5 above) 46.

<sup>26</sup> Human Rights Watch (n 5 above) 47.

<sup>27</sup> Bassiouni (n 1 above) 425.

By alleged child recruitment, Lubanga's UPC has violated international law. He has potentially violated Protocol II of 1977 to the 1949 Geneva Convention. Protocol II 'prohibits all combatants in an internal armed conflict from recruiting children under the age of fifteen or allowing them to take part in hostilities'.<sup>28</sup> In addition to Protocol II violations, Lubanga's alleged action violates article 38 of the Convention on the Rights of the Child (CRC), which the DRC ratified in 1990.<sup>29</sup> Therefore, authorities may charge Lubanga in an international forum.

### 2.3 DRC's choice of jurisdiction

If Lubanga's alleged crimes occurred today, authorities could charge him in three different judicial forums. His trial could be held in the DRC, the African Court or in the ICC. As it stands, the African Court did not come into force until 25 January 2004.<sup>30</sup> However, since the African Commission on Human and Peoples' Rights (African Commission) has existed since 1987,<sup>31</sup> it is arguable that the African Court could claim jurisdiction over any cases violating African Commission standards since 1987 (see part 5). For the current sake of argument, any future cases similar to Lubanga's which occurred after 25 July 2004 could legitimately be held in the African Court as well as the ICC.

Instead of having this case heard in the state of primary jurisdiction or at the regional African Court, Kabila referred Lubanga's case directly to the ICC. From its beginning, the ICC has struggled in its attempts to charge Lubanga. For example, the court postponed Lubanga's confirmation hearing originally scheduled for June 2006 to September 2006 due to violence in Ituri.<sup>32</sup> Human Rights Brief updated the situation: 'The prosecutor delayed full disclosure of evidence to the defence, due partially to the escalating violence and in the interest of protecting

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<sup>28</sup> Human Rights Watch (n 5 above) 46: 'Although the DRC is not a party to Protocol II, many of its provisions are widely accepted as customary international law', citing Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 4(3)(c) (8 June 1977).

<sup>29</sup> Human Rights Watch (n 5 above) 46, citing Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) (entered into force 2 September 1990).

<sup>30</sup> F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 1. See African Commission on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights [http://www.achpr.org/english/\\_info/court\\_en.html](http://www.achpr.org/english/_info/court_en.html) (accessed 28 January 2007).

<sup>31</sup> First Annual Activity Report of the African Commission on Human and Peoples' Rights, para 4.

<sup>32</sup> EJ Rushing *et al* 'Updates from the International Criminal Courts' (2006) 14 *Human Rights Brief* 38 41.

victims and witnesses.<sup>33</sup> The lack of peace on the ground in Ituri led to increased unwillingness of the ICC to continue with the prosecution. While the ICC asserts jurisdiction, it is proving slow and ineffective in its prosecution.

The ICC asserted its jurisdiction over Lubanga too quickly. In so doing, it potentially destabilised rather than stabilised the situation in the DRC. This choice of the ICC to claim jurisdiction over the Lubanga case threatens the DRC and the African Court. Also, the ICC has set a poor precedent in overreaching the extent of its authority in this case. This mistake could have extensive ramifications for many countries in Africa and for all peoples across the world. However, before one criticises the ICC's handling of the DRC case, a rudimentary understanding of both the ICC and the African Court is necessary.

### 3 Development and current caseload of the ICC

#### 3.1 Background on the ICC

In order to understand the threatening direction the ICC is taking, it is important to look at its development, organisational structure and current case load. Then one can analyse whether the current precedent set by ICC with the Lubanga case is helpful or harmful for African nations and for the world in general.

The ICC began as a forum for prosecuting individual criminals through international jurisdiction. Unlike the International Court of Justice (ICJ), which prosecutes states under UN supervision, the ICC is a somewhat distinct legal entity. The ICC has a dissimilar mandate compared to the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). The ICTY and ICTR operated directly under UN Security Council supervision.<sup>34</sup> As one writer notes, '[t]he ICC, by contrast, is largely independent of the Council and vests the power to investigate and prosecute . . . in a single individual, its independent prosecutor'.<sup>35</sup> That is, the ICC has no direct authority over it. The prosecutor is limited only to a very minimal extent by ICC member states. 'The Rome Statute makes the prosecutor formally accountable to the ICC Assembly of State Parties and to the ICC judiciary.'<sup>36</sup> That is, the prosecutor's powers are reasonably boundless compared to previous international courts.

The initial formulations of how the ICC and its prosecutor might operate went through many revisions. 'The first draft of the treaty that would eventually become the Rome Statute was produced by

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<sup>33</sup> As above.

<sup>34</sup> AM Danner 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510.

<sup>35</sup> As above.

<sup>36</sup> Danner (n 34 above) 524.



the International Law Commission (ILC) in 1994.<sup>37</sup> It would take eight more years before the proposed treaty would evolve into and eventually create the ICC. Finally, in 2002, 104 countries joined to sign the Rome Statute, thereby creating the ICC.<sup>38</sup>

As a new institution with uncertain power and restraints, the ICC is still experimenting in its attempts at commanding power. The Rome Statute requires that the ICC not unduly infringe on national jurisdiction. This is laid out in the idea that '[t]he ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine ...'<sup>39</sup> In other words, the ICC should never interfere unless absolutely necessary. As national courts have the primary responsibility for the prosecution of crimes, 'the ICC is "complementary" to national criminal jurisdictions and may exercise jurisdiction only when certain criteria are satisfied'.<sup>40</sup> Unfortunately, this idea of 'complementarity' is vaguely construed and loosely interpreted. Therefore, the issue of 'complementarity' will be essential later in determining whether the current ICC is overstepping its mandate.

The Rome Statute is explicit on how a case referral may begin and as to what crimes may be prosecuted. Three forces may instigate ICC prosecutions. First, member states of the ICC may refer their own cases.<sup>41</sup> 'Second, the UN Security Council may refer a situation to the prosecutor under its chapter VII powers. Finally, the prosecutor may himself trigger the ICC's jurisdiction ...'<sup>42</sup> through *proprio motu* power. For jurisdiction, ICC cases are limited to the gravest crimes. The ICC may try only three crimes: genocide, crimes against humanity and war crimes.<sup>43</sup> Another rule restricts the ICC's prosecution. ICC cases, as under the Rome Statute, are limited to occurrences after

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<sup>37</sup> Danner (n 34 above) 513, citing Draft Statute for the International Criminal Court, Report of the International Law Commission on the Work of its 46th session, UN GAOR, 49th Sess, Supp No 10 43, UN Doc A/49/10 (1994), reprinted in (1994) 2 *Yearbook of the International Law Commission* 46, UN Doc A/CN.4/Ser.A/1994/Add 1 (Part 2) (ILC Draft); see also RS Lee (ed) *Introduction to the International Criminal Court: The making of the Rome Statute* 1 3 (describing the ILC draft).

<sup>38</sup> International Criminal Court 'About the Court' <http://www.icc-cpi.int/about.html> (accessed 28 January 2007).

<sup>39</sup> As above.

<sup>40</sup> P Akhavan 'The Lord's Resistance Army case: Uganda's submission of the first state referral to the International Criminal Court' (2004) 99 *American Journal of International Law* 403 412-413.

<sup>41</sup> Danner (n 34 above) 516, citing the Rome Statute of the International Criminal Court, 17 July 1998, art 15(1), UN Doc A/CONF.183/9 (1998), reprinted in (1998) 37 *International Legal Materials* 999, corrected through 8 May 2000 by UN Doc CN.177.2000.TREATIES-5 (Rome Statute) <http://www.icc-cpi.int> (accessed 28 January 2007).

<sup>42</sup> As above.

<sup>43</sup> International Criminal Court (n 38 above).

1 July 2002, when the treaty came into effect.<sup>44</sup> These rules form the general basis for ICC jurisdiction as they have developed through the Rome Statute.

### 3.2 Current cases at the International Criminal Court

As soon as the ICC began, it was inundated with referrals. By March 2005, the ICC had received 'around fifteen hundred communications from around the world — from individuals, non-governmental organisations, and professional associations . . .'<sup>45</sup> Sifting through those referrals brought the ICC to its current case load.

The ICC currently has three primary situations listed on its case load. All three of these cases come from Africa. These include the *Situation in Democratic Republic of the Congo*, ICC-01/04 and the corollary *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06; the *Situation in Uganda*, ICC-02/04 and the corollary *The Prosecutor v Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, ICC-02/04 -01/05; and the *Situation in Darfur, Sudan*, ICC-02/05.<sup>46</sup> Another case, the *Situation in Central African Republic*, ICC-01/05;<sup>47</sup> is temporarily stalled.<sup>48</sup> Of these four cases, three countries have self-referred them to the ICC. The UN Security Council has referred Darfur, Sudan, to the ICC.<sup>49</sup>

## 4 Home countries should maintain primary jurisdiction: The *Lubanga* case should have remained in the DRC

The *Lubanga* case should have remained in the DRC. First, holding the *Lubanga* case nationally would have enhanced government legitimacy. Second, it would have provided the people of the DRC with the benefits of national prosecution. Third, it would have encouraged domestic legal changes. Fourth, the DRC would have had a sufficient police and legal force to hold the case. Instead, by not holding the case in the DRC, the ICC delegitimised the government, took away potential benefits from the citizens of the DRC, slowed domestic legal changes and harmed the potential strength of the present police and legal system in the DRC.

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<sup>44</sup> n 41 above.

<sup>45</sup> S Fernandez 'Remarks' (2005) 99 *American Society of International Law* 278.

<sup>46</sup> International Criminal Court 'Situations and cases' <http://www.icc-cpi.int/cases.html> (accessed 28 January 2007).

<sup>47</sup> As above.

<sup>48</sup> See Appendix: Central African Republic.

<sup>49</sup> n 46 above.

#### 4.1 Better in general

Not only in the DRC, but worldwide, national prosecutions are preferable. First, they allow for prosecuting a larger number of alleged criminals. As one writer notes, national prosecutions are important 'because international courts can only prosecute a small fraction of the large-scale human rights violations that occur'.<sup>50</sup> Second, national prosecutions reinforce the government and the rule of law in a particular nation. 'National prosecutions are a valuable opportunity both to force the local justice system to perform better and to build public confidence in that system.'<sup>51</sup> This public confidence is needed, especially in the DRC's case.

#### 4.2 Government legitimacy

A trial in the DRC would have greatly enhanced the stability of the government and therefore of the people. The DRC's current government, led by Joseph Kabila, needs a respectable judicial system in order to uphold its legitimacy. Following the assassination of Joseph's father in 2001, Joseph Kabila became President of the transitional government; he was 'joined by four vice-presidents representing the former government, former rebel groups, and the political opposition'.<sup>52</sup> While those competing leading forces threatened the DRC's growth, Kabila's government presently seems to be relatively stable. 'The transitional government held a successful constitutional referendum in December 2005 and elections for the presidency, National Assembly and provincial legislatures in 2006.'<sup>53</sup> In December of 2006, Kabila was inaugurated President.<sup>54</sup> Kabila is slowly asserting control of his nation.

One way that the international community can support Kabila's government or simply the rule of law in the DRC is by supporting the DRC's judicial system. In order to increase the Kabila government's legitimacy, it is important that Kabila's government take charge of the prosecutions. Instead, by taking away the DRC's judicial authority, the ICC has potentially de-legitimised Kabila's government.

#### 4.3 Timing of the crimes

Kabila's government will gain legitimacy if it is encouraged to try the crimes which allegedly took place before the enactment of the Rome

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<sup>50</sup> B Concannon Jr 'Beyond complementarity: The International Criminal Court and national prosecutions: A view from Haiti' (2000) 32 *Columbia Human Rights Law Review* 201 225.

<sup>51</sup> As above.

<sup>52</sup> *The world factbook, Congo, Democratic Republic of the* <https://www.cia.gov/cia/publications/factbook/geos/cg.html#Gvt> (accessed 30 January 2007).

<sup>53</sup> As above.

<sup>54</sup> As above.

Statute. Legislation under the Rome Statute will apply too late to charge many of those responsible for earlier atrocities. If the DRC wants to reinforce the government and rule of law, it must be able to prosecute all the guilty throughout the war.

#### 4.4 Citizens benefit from national prosecutions

Citizens benefit when prosecutions are conducted nationally. For example, national prosecutions work more efficiently for victims. One researcher found that 'victims generally prefer a local prosecution to an international one'.<sup>55</sup> Costs are cut down, and citizens see justice unfold before them. 'National prosecutions should remain the primary option, wherever feasible, because they . . . are usually preferable from the perspectives of victims and local justice systems.'<sup>56</sup> In other words, citizens feel that they are part of the justice when prosecutions are conducted nationally.

If the ICC asserts jurisdiction, alleged national criminals are no longer judged by their peers. No national reconciliation or justice is achieved. As Morris notes, the accused 'is called to account not before the court of any state, but before an international institution. In essence, this is a supra-national solution to the problem of national transgressors.'<sup>57</sup> This does not solve the national problem that the people of the DRC need to confront.

#### 4.5 Incentives for effective local systems

National crimes encourage national laws that work. By charging Lubanga internationally, the DRC loses its incentive to create an effective local legal system. First, by ICC overseeing the charges, the government does not need to encourage local police to charge criminals. This creates a problem. While one high-ranking official is prosecuted in a lengthy and costly trial at the ICC, individuals back on the ground in the DRC can remain aloof and violent. There is no real rule of law to constrain them. That is, with the ICC's removal of jurisdiction, Kabila's government might face a continuing spiral of violence as the perpetrators realise that it is unlikely that they will be punished for their actions. Therefore, taking this case out of the DRC encourages protracted violence and anarchy.

Second, by giving jurisdiction to the ICC, the Kabila government has had no reason to change its criminal codes to prosecute the alleged wrongdoers. In the DRC, '[n]one of the international crimes proscribed in the Rome Statute have been implemented into the civilian penal

<sup>55</sup> Concannon (n 50 above) 227.

<sup>56</sup> Concannon (n 50 above) 202.

<sup>57</sup> M Morris 'The democratic dilemma of the International Criminal Court' (2002) 5 *Buffalo Criminal Law Review* 591-594.

code'.<sup>58</sup> The DRC has lost its incentive to change its law. Attempts at changing the law to include Rome Statute provisions are not necessary. 'While the Congolese legislation implementing the Rome Statute will rectify many of these shortcomings, it has yet to be passed and will not apply retroactively.'<sup>59</sup> With no incentive to adopt or apply the Rome Statute, the DRC's legal system remains ineffective.

Instead of being encouraged to reform, President Kabila has acted very loosely in his prosecutions. In 2003, Kabila granted amnesty for acts 'committed during the period from 2 August 1998 and 4 April 2003 ... excluding war crimes, genocide and crimes against humanity'.<sup>60</sup> In essence, Kabila granted amnesty and then looked to the international community in order to improve his rule of law. While little reform takes place in the DRC, Kabila realised that he could send the worst offenders to an outside court to be tried.

This creates two problems. First, it means that criminals are not being prosecuted. Only one has been sent to the DRC. Second, it means that Kabila's government is not legitimate. If Kabila's hand is forced to give amnesty to criminals by political pressures, he does not control his government. In order to regain control, Kabila and the ICC must encourage prosecution in the DRC.

#### 4.6 The DRC has a sufficient police force

Police ability to arrest alleged criminals and maintain peace during a national trial is crucial for a government to work. Therefore, police capability should be one factor that the ICC should use to determine a country's ability to conduct prosecutions nationally.

In the DRC, policing is sufficient to hold the *Lubanga* case at home. Granted, '[t]o date there has not been a systematic study of the policing capacity of the new transitional government'.<sup>61</sup> However, international forces are stabilising the authority of the police force in the DRC. As Burke-White notes, the Congolese government police forces are backed by MONUC's Civilian Police Component (CIVPOL).<sup>62</sup> With the support of the MONUC forces, enough police stability should be afforded to handle cases such as *Lubanga*'s.

The international community must buttress the local police force before the ICC concedes that the DRC's ability to handle problems is non-existent. Instead of buffering the police force, the ICC's usurping of

<sup>58</sup> Burke-White (n 24 above) 583, citing *Organic Law* 30 July 2004, cited in 'A few first steps: The long road to a just peace in the Democratic Republic of the Congo', International Centre for Transitional Justice Occasional Paper, October 2004 20 <http://www.ictj.org/downloads/ICTJ.DRC.Eng.pdf> (accessed 30 January 2007).

<sup>59</sup> Burke-White (n 24 above) 583.

<sup>60</sup> Burke-White (n 24 above) 584.

<sup>61</sup> As above.

<sup>62</sup> Burke-White (n 24 above) 585 (2005), citing MONUC CIVPOL Mandate <http://www.monuc.org/Civpol/> (accessed 28 January 2007).

authority created the impression that the DRC police force is not capable. This delegitimised police efforts to maintain peace and security. In the future, this action might also cause a dependency. That is, the DRC might require increased support from the international community. Therefore, as a general rule, before the ICC imposes itself, it should consider the nation's present police situation and not be too quick to impose delegitimising intervention.

#### 4.7 The DRC has a sufficient legal system

The ICC should give more deference to a given country's ability to prosecute in a national court. In giving deference, it should not ignore the country's weaknesses, but instead encourage the local government to enhance its legal system. In the case of the DRC, the ICC failed to take either action of giving deference or of encouraging local enhancement.

Burke-White noted that the DRC has a sufficient number of lawyers and judicial officials.<sup>63</sup> 'One report suggests that there are at least 1 500 lawyers and 700 other judicial officials in the country.'<sup>64</sup> While the actual number may be smaller, Burke-White comments that 'for an extremely poor African state, Congo has a respectable enough pool of lawyers to operate a judiciary'.<sup>65</sup> The ICC failed to recognise this trained body of professionals as a potential way to manage the DRC's problems without claiming jurisdiction for the ICC. Admittedly, the problem with the DRC's judges is the way they are funded: '[J]udges often lack both political independence and financial impartiality.'<sup>66</sup> This under-funding leaves judges searching for methods to supplement their salaries. 'Rumour has it that for roughly US \$1 000, the official police and judicial apparatus can be purchased to assure the arrest and incarceration of an individual.'<sup>67</sup> This supplementation threatens the judicial system. However, that problem must be dealt with rather than simply ignored through the removal of jurisdiction.

Financial problems in the legal system will not be taken care of by the ICC retaining jurisdiction over Lubanga. Instead, the problems will be exacerbated as nothing is done to stop them. The ICC needs to

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<sup>63</sup> Burke-White (n 24 above) 577.

<sup>64</sup> Burke-White (n 24 above) citing Dominique Kamuandu and Theo Kasonga, *Avocats Sans Frontières*, personal interview, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga. Human Rights Watch confirms that 'the latest figures released by the Ministry of Justice show that as of 1998, there were only 1 448 judges and prosecutors in the entire country'. See 'Democratic Republic of the Congo Confronting impunity' Human Rights Watch Briefing Paper, January 2004 IV(b).

<sup>65</sup> Burke-White (n 24 above) 577.

<sup>66</sup> As above.

<sup>67</sup> Burke-White (n 24 above) 578, citing Jo Wells, Human Rights Law Group, personal interview, Kinshasa, Congo, 25 October 2003 (interview conducted by Yuriko Kuga and Leslie Medema).

demand that the DRC reform its judicial system. As Burke-White noted, international support could develop the stability of the DRC's court system. He argued that with national and international attention and MONUC co-operation, 'it seems quite possible that a small group of effective courts could be established ...'<sup>68</sup> To make DRC courts effective, the ICC should demand that Kabila's government pay its judicial officials more and that those officials be controlled whenever implications of judicial impartiality appear. As a start, MONUC forces or other similarly independent international bodies could oversee cases to evaluate judicial impartiality. This might work as a way to keep jurisdiction in the DRC. The ICC must remember that the DRC has trained lawyers and judges. Instead of encouraging their poor, but survival-oriented, habits, the ICC can encourage the DRC's system to actually work.

The ICC can be most helpful as a mechanism for encouraging international judicial standards in national courts. As it was created as a way of fomenting international standards, the ICC must focus its energies on national implementation of the ICC Statute.<sup>69</sup> As in the Congolese case, 'the ability of the Congolese government to undertake genuine prosecutions depends largely on whether judges are willing to directly apply international legal instruments in domestic law'.<sup>70</sup> If the ICC would be willing to teach the DRC judiciary how it can implement international law, it would help not only now, but far into the future. By encouraging the development of the judicial system rather than delegitimising it by taking away its authority, the ICC will prove much more helpful to the DRC and other nations like it. Again, the immediate focus of the ICC should not be on taking away jurisdiction from a country, but rather on boosting the system so that the national government and judiciary are independent and self-sufficient in their ability to handle internal issues.

## 5 The African Court, a potential corollary for judicial authority

Instead of commanding too much jurisdictional power for itself, the ICC should look to alternative means of regional court authority. The African Court system provides just such a corollary. However, to understand the potential for jurisdiction of the new African Court, one must first look back to the development of the African Charter on Human and Peoples' Rights (African Charter).

The African Charter arose under the auspices of the Organisation of African Unity (OAU), a body composed of member African nations. The

<sup>68</sup> Burke-White (n 24 above) 586.

<sup>69</sup> JB Terracino 'National implementation of ICC crimes' (2007) 5 *Journal of International Criminal Justice* 421 439.

<sup>70</sup> Burke-White (n 24 above) 584.

African Charter is the primary human rights instrument for Africa.<sup>71</sup> The Charter has proven somewhat helpful. One writer claims that the African Charter has impacted 'the development of constitutional law with particular reference to human rights'.<sup>72</sup> Countries have achieved this through measures, including incorporation of the African Charter into domestic law.<sup>73</sup>

However, the African Charter alone lacks the ability to enforce its rules. In order to create a more enforceable African Charter, the OAU wanted to develop a regional court. 'In 1998, the OAU Assembly of Heads of State finally adopted the Protocol establishing an African Court on Human and Peoples' Rights ...'<sup>74</sup> However, this Protocol never effectuated an actual functioning court. 'It is the lack of an effective enforcement mechanism under the African Human Rights Charter that necessitated the adoption of the Protocol on the African Human Rights Court.'<sup>75</sup>

Therefore, the African Charter is helpful but ineffective. Its original guiding organisation, the OAU, could be criticised on the same grounds. The international community largely regarded the OAU as an ineffective body. Reform came through the new African Union (AU), the successor organisation of the OAU. With the development of the AU, the course of regional court authority changed.

The AU put into action the OAU's pipe-dream: the formation of an African Court. Six years after the Protocol, in 2004, the African Charter would officially incorporate the African Court. 'The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court ... entered into force on January 25, 2004.'<sup>76</sup>

The African Court gained strength from a remainder entity of the OAU known as the African Commission. The Protocol states that the African Court shall 'complement the protective mandate of the African Commission on Human and Peoples' Rights'.<sup>77</sup> Inaugurated in 1987,<sup>78</sup> the African Commission serves as a quasi-judicial body, often only for

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<sup>71</sup> Y Akinseye-George 'New trends in African human rights law: Prospects of an African Court of Human Rights' (2001-2002) 10 *University of Miami International and Comparative Law Review* 159 160.

<sup>72</sup> Akinseye-George (n 71 above) 168.

<sup>73</sup> As above.

<sup>74</sup> Akinseye-George (n 71 above) 170.

<sup>75</sup> VO Nmehielle 'Development of the African human rights system in the last decade' (2004) 11 *Human Rights Brief* 6 11.

<sup>76</sup> Viljoen (n 30 above).

<sup>77</sup> African Commission on Human and Peoples' Rights Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art 11 [http://www.achpr.org/english/\\_info/court\\_en.html](http://www.achpr.org/english/_info/court_en.html) (accessed 28 January 2007).

<sup>78</sup> n 31 above.



'cases concerning massive or serious violations'.<sup>79</sup> Today, the African Commission coincides with the African Court. As one writer explained, the regional African Court is composed of two reinforcing bodies; the African Commission is the 'quasi-judicial human rights institution', while the African Court is the 'main judicial institution'.<sup>80</sup> Together, these two bodies create an operable judicial system for Africa.

It is to the ICC's benefit to bolster the African Court. Currently, there are just too many cases for the ICC to handle alone.<sup>81</sup> The African Court provides a forum for the rising case load. This would also encourage ICC standards to be implemented in the African Court and hopefully be filtered into national laws. However, the AU, the African Commission and, most importantly, the African Court, all need support from the international community and the ICC. First financial support needs to be addressed. 'The provision of adequate financial and human resources for the African system is a *sine qua non* for the effective functioning . . . of the African Commission and African court.'<sup>82</sup> Second, the Court lacks a case. No one will argue that the regional African court system is untested, unknown and in its infancy. However, given an opportunity, it is likely that the regional court would work. It is precisely for these reasons that the ICC and African nations should refer cases to the African Court — in order to give the African Court a trial run, notoriety, authority, and the chance to function fairly and effectively.

## 6 Regional courts should have secondary jurisdiction rather than the ICC: The African Court

The African Court is a fledgling institution that requires support not only from its own member states, but from the international community as well. That said, institutions like the ICC directly undermine the impact of the African Court, African Commission, and African Charter. Therefore, the ICC should be careful not to overshadow, or indeed de-legitimise regional courts' authority.

As mentioned previously, all three of the main cases currently under ICC jurisdiction come from Africa. Given that the African Court is a continuation of the African Charter and that the current cases could all fall within its auspices, all three cases could and should be tried in the African Court. First, the countries of DRC and Uganda, which referred their cases to the ICC, might both have referred their cases to the

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<sup>79</sup> Viljoen (n 30 above) 7, citing *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>80</sup> Viljoen (n 30 above) 65.

<sup>81</sup> M Sterio 'Seeking the best forum to prosecute international war crimes: Proposed paradigms and solutions' (2006) 18 *Florida Journal of International Law* 896.

<sup>82</sup> Nmeielle (n 75 above) 11.

African Court instead. Under the African Charter, a state party whose citizen is a victim of a human rights violation may submit its case to the African Court.<sup>83</sup> However, this did not happen. With the knowledge that the African Court might also have jurisdiction over cases, the ICC should refrain from asserting primacy.

Second, it is possible that the ICC could defer the Sudan case to the jurisdiction of the African Court. Because the Sudan case was referred to the ICC by the UN Security Council, it might seem to fall more legitimately within the ICC's jurisdiction. Nonetheless, there is nothing prohibiting the prosecutor of the ICC from making a referral to the African Court. The ICC should consider this option.

### 6.1 The African Court will help national governments and judiciaries

The African Court is a good development for all of Africa and for the world in general. The African Court could strengthen the rule of law in African countries by creating regional judicial norms which are more culturally appropriate. It could also encourage inter-reliance between nations and their co-operation towards democratic governance. One writer contends that the African Court 'would place Africans, individuals and non-governmental organisations (NGOs) alike, in a better position to defend democratic rule in their countries'.<sup>84</sup> Where people feel that they are engaged in their own destiny, they will be much more apt to encourage national reform. 'In this way the Court possesses the potential to strengthen the rule of law and help consolidate African democracies.'<sup>85</sup>

Indeed, the development of the African Court will help everyone, not only the governments of Africa. If used, it will serve especially in the area of civil society empowerment.<sup>86</sup> Previously, 'African human rights NGOs used to work only with NGOs based in Europe and America ... However, the Charter ... has created a platform for NGOs to meet twice every year ...'<sup>87</sup> Therefore, African governments will have the opportunity to listen to African NGOs and *vice versa*. In this way, the African Court will create a forum of communication between governments and civil society that the ICC cannot replicate.

<sup>83</sup> African Commission (n 30 above) art 11.

<sup>84</sup> Akinseye-George (n 71 above), citing F Viljoen 'Arguments in favour of and against an African Court on Human Rights' (1998) 22 *Proceedings of the American Society of International Law* (ASIL Proc) 10.

<sup>85</sup> As above.

<sup>86</sup> Akinseye-George (n 71 above) 169.

<sup>87</sup> As above.

## 6.2 Misallocated funds

While the benefits of the African Court are easy to recognise, the African Court lacks financial support. By funding the ICC rather than regional courts, the world community is damaging regional efforts towards judicial reform. Instead of funding the ICC alone, international allocations should first fund the development of regional courts and second finance the ICC. Instead, international funding is presently being misallocated.

The African Court is especially in need of financial support. 'A preliminary report on the financial implications of the African Court already indicates that the Court will not have adequate resources to meet its needs.'<sup>88</sup> For example, financial backing for legal representation in the African Court is limited. In order to deal with the problem, one commentator recommends that 'either a special fund should be established to provide legal aid or states should assume responsibility for providing it'.<sup>89</sup> Perhaps those funds could come from the ICC or be withdrawn from African nations' regular judicial budgets. Regardless of where the money comes from, without it, the African Court cannot function as it potentially could.

Instead of the ICC ciphering the money away from African nations and international donors, the African Court should have first claim to financial support from its members and from the international community. Without this support, the African Court as a regional authority will fail. 'First and foremost, the African Court must not become a white elephant — all institution and no cases to decide.'<sup>90</sup> This white elephant syndrome is a definite possibility. Without money and without cases, the African Court will again lose its legitimacy and move from being a potentially strengthened and independent force for judicial autonomy and African democracy to being a lackey or, worse yet, a leach of the ICC.

## 7 The ICC's loose interpretation of complementarity sets a poor precedent

Now that the case has been made for the importance of local and regional court jurisdiction, one must understand how the ICC is taking this power away. The ICC has taken jurisdiction from national and regional African courts by a principle known as complementarity. Complementarity, under article 17 of the Rome Statute, makes a case inadmissible if it is 'being investigated or prosecuted by a state which has

<sup>88</sup> Viljoen (n 30 above) 64, citing 'Practical issues relating to the African Court' reprinted in C Heyns (ed) *Human rights law in Africa* (1999) 293.

<sup>89</sup> Viljoen (n 30 above) 50.

<sup>90</sup> Viljoen (n 30 above) 65.

jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution'.<sup>91</sup> The theory of complementarity is that individual nations should have primary jurisdiction. As one writer explains, '[t]he ICC Statute recognises the primacy of national courts, since one of its guiding principles is that the International Criminal Court (ICC or Court) shall be complementary to national criminal jurisdictions'.<sup>92</sup> However, the ICC has loosely and flagrantly interpreted the principle of complementarity thus far. By this loose interpretation, the ICC has set a poor precedent for its future use of the principle of complementarity.

### 7.1 Failure to define better standards than 'unwilling or unable' creates an unchecked universal jurisdiction

One critical problem with the ICC is that when or how to determine an instance of complementarity is not clearly defined. Generally, complementarity is understood to mean 'that cases will only be admissible before the ICC if and when states are unwilling or unable genuinely to carry out investigations or prosecutions'.<sup>93</sup> However, no set of standards explains how to determine 'unwillingness' or 'inability'. As suggested by Burke-White, an authority such as ICC member states should implement a set of standards to determine when the complementarity principles apply. Key categories might include policing power,<sup>94</sup> ability of the judicial system to function impartially,<sup>95</sup> potential for outside or international interference, the ability of the international community to support and reinforce the given country's rule of law, or other applicable standards.

However, as it currently stands, no such standards are used. Only the vague terms of 'unwillingness' and 'inability' come into play. Based on the prosecutor's interpretation alone, virtually any country could fall within the loose purview of the 'unwilling' or 'unable'. This gives the prosecutor considerably more leeway in claiming jurisdiction than any other agent of justice.

The lack of clear guidance as to the use of the 'unwilling or unable' standard creates a number of problems. As Morris points out, 'under complementarity, the ICC is the ultimate judge of whether the territorial state has genuinely exercised jurisdiction over a case'.<sup>96</sup> Through

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<sup>91</sup> Art 17 Issues of admissibility, Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/statute/romefra.htm> (accessed 4 February 2007).

<sup>92</sup> Concannon (n 50 above) 202.

<sup>93</sup> JK Kleffner 'The impact of complementarity on national implementation of substantive international criminal law' (2003) 1 *Journal of International Criminal Justice* 86-87, citing Preamble, para 10 arts 1, 17 & 20(3).

<sup>94</sup> See Burke-White (n 24 above) 557.

<sup>95</sup> As above.

<sup>96</sup> Morris (n 57 above) 594.

complementarity, the ICC is more powerful than national courts. Morris notes that the ICC has ‘genuinely “supra-national” powers — which are to be used in those particular instances where a state is unable or unwilling to render accountability at the state level’.<sup>97</sup> Morris sums up the problem quite succinctly:<sup>98</sup>

What is ultimately at stake, beneath the heated controversy concerning ICC jurisdiction over non-party nationals, is a tension embodied in the Rome Treaty between the human rights embodied in humanitarian law (rights to freedom from genocide, war crimes, and a crimes against humanity) and the human right to democratic governance.

Granted, the ICC’s jurisdiction is currently limited to genocide, war crimes or crimes against humanity. However, there is no reason to doubt that the ICC will not gain from customary international law and extend its reach to more crimes as its power and authority increase. ‘The simple substitution model of complementarity suggests that the ICC will merely step in when domestic courts are unable or unwilling to act.’<sup>99</sup> Unchecked complementarity, without limits, is a danger to national jurisdiction everywhere.

## 7.2 The DRC’s case defeats the ‘unwilling or unable’ standard

Even if the ICC prosecutor claims that the Rome Statute clearly defines unwillingness and inability, these two prerequisites of complementarity have not been met in regard to the DRC case. First, a self-referral inherently cannot meet an ‘unwillingness’ standard. As noted before, one of the ways that the ICC’s jurisdiction is retained is through a self-referral. A self-referral, however, automatically shows some degree of willingness from a national government to prosecute an alleged criminal. If article 17 of the Rome Statute mandates that ‘unwillingness’ is one of the ways to assert jurisdiction, but the country has already exhibited its willingness to prosecute, then the self-referral related to unwillingness to prosecute is essentially nugatory. The unwillingness standard for self-referrals goes against its own wording. It should either be further

<sup>97</sup> As above.

<sup>98</sup> Morris (n 57 above), citing Symposium ‘The United States and the International Criminal Court’ (2001) 64 *Law and Contemporary Problems* 1; art 21 Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810 71; art 25 International Covenant on Civil and Political Rights, adopted 16 December 1966, GA Res 2200A (XXI), UN GAOR, 21st session, Supp No 16, UN Doc A/6316 (1966), 999 UNTS 171.

<sup>99</sup> Burke-White (n 24 above) 568. For a commentary on the complementarity provisions of the Rome Statute based on the substitution model, see J Holmes ‘Complementarity: National Courts versus the ICC’ in A Cassese (ed) *The Rome Statute of the International Criminal Court. A commentary* (2002) 667. See also F Lattanzi ‘The International Criminal Court and national jurisdictions’ in M Politi & G Nesi (eds) *The Rome Statute of the International Criminal Court* (2001) 177.

defined or removed from the Rome Statute in relation to the self-referral-by-nations provision for the ICC.

In addition, the DRC has the ability to prosecute. Therefore, the 'unable' provision of article 17 is not met for the ICC to retain jurisdiction. In the case of the DRC, commentators such as Burke-White argue that the government might be able to prosecute Lubanga or others similarly positioned.<sup>100</sup> As noted previously, there are plenty of trained lawyers and judges.<sup>101</sup> Granted, the government has gone through tumultuous transitional years; however, the DRC is able to prosecute Lubanga.

### 7.3 Different criteria are needed

Burke-White criticised the Rome Statute for its lack of specified criteria on when complementarity principles arise.<sup>102</sup> Instead of using the 'unable or unwilling' standard, Burke-White used article 17 of the Rome Statute and other sources of international law to create four judicial 'best practices'.<sup>103</sup> These 'best practices' could determine when judicial systems are capable of functioning or not.<sup>104</sup> Burke-White's best practices included having 'experienced and unbiased judicial personnel, the presence of a viable legal infrastructure, the existence of adequate operative law, and a sufficient police capability . . .'.<sup>105</sup>

ICC member states must develop these or similar criteria in order to protect nations from the prosecutor's over-zealous seizing of jurisdiction. However, one criterion is missing: potential for change. The prosecutor must fairly analyse whether the given nation is capable of experiencing enough change to be able to hold a case itself. Before the ICC establishes jurisdiction, it must analyse the country's current reform movements towards judicial strengthening. The ICC must also offer its own support and resources to reinforce the changing local judicial system before the ICC damages the local system by taking away its authority.

### 7.4 Court of last resort

Before prosecuting further cases, the ICC should consider whether it has met its burden of being the court of last resort. In the three cases currently on the ICC's docket (all concerning African nations), the court has not met this burden. The ICC should either remove jurisdiction to the nation itself or to the regional African Court. If not possible

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<sup>100</sup> Burke-White (n 24 above) 577.

<sup>101</sup> n 64 above.

<sup>102</sup> Burke-White (n 24 above) 575-76.

<sup>103</sup> Burke-White (n 24 above) 576.

<sup>104</sup> As above.

<sup>105</sup> As above.

with current cases, future cases should not be accepted by the ICC if the national or regional court might have a primary assertion of jurisdiction and thus a better forum for justice.

## **8 Benefits and drawbacks of ICC jurisdiction**

While the presumption of the Rome Statute's 'complementarity' principle gives the ICC jurisdiction as a last resort, there are numerous benefits and drawbacks of ICC jurisdiction to be weighed for any case. The following refer to benefits and drawbacks specific to the ICC case with the DRC. These might be applicable to other nations upon further analysis. Taken together, however, they prove that the DRC case and other similar cases before the ICC have more drawbacks than benefits when weighing the assertion of ICC's international jurisdiction.

### **8.1 The ICC charges criminals — Benefit**

Primarily, the ICC prosecutes the world's most heinous criminals. Obviously, the world's most dangerous men and women need to be stopped. If the ICC is the only way to stop them, then the ICC provides a great benefit to the world at large.

### **8.2 Criminals escape charges — Drawback**

The ICC does not prosecute criminals who might otherwise be charged. Because of its small size and limited capability, the ICC may only prosecute a few of the many potential cases concerning violations of international law. While the person accused of hundreds of murders is prosecuted, the one accused of only ten murders is not.

Because the ICC prosecutes those charged with the most heinous crimes, national governments lose their incentive to prosecute the great majority of wrongdoers. Only if the ICC reinforces national judicial systems will all the guilty be brought to justice. That is, to prosecute most if not all of the guilty, it must be done nationally.

### **8.3 Deterrence — Benefit and drawback**

Proponents of the ICC would presumably argue that ICC action and presence create a deterrence against would-be criminals. The ICC does have some deterrent effect. In the DRC case, 'Lubanga was not alone among Congolese warlords to recognise the ICC's possible deterrent effect'.<sup>106</sup> However, the ICC's deterrent effect is placed in the wrong judicial body.

That is, even if the threat of international prosecution provides a deterrent effect on rebel leaders, it would be much more effective to

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<sup>106</sup> Burke-White (n 24 above) 588.

have the rebels feel that threat from their own government rather than from the international community. While the ICC sets a standard, governments such as the DRC must be able to follow through with that standard for all of the alleged criminals. Only in that way will all national criminals be deterred. Otherwise, Lubanga's ICC trial operates as a mere token gesture and does little to create a long-lasting deterrent effect in the DRC.

#### 8.4 Universal jurisdiction- Monist/dualist debate — Benefit and drawback

The concept of universal jurisdiction is heralded and harangued throughout the world as both a benefit and a drawback to national jurisdictions. Whether a benefit or a drawback, the ICC is a step towards universal jurisdiction. As Kleffner notes, 'the ICC would fill the void that underlies the concept of universal jurisdiction'.<sup>107</sup>

In order to decide whether universal jurisdiction is a benefit or a drawback, one must take either the monist or dualist perspective. According to the monist perspective, 'the Law of Nations and the law of each nation form an integrated, universal legal order. International law is inherently woven into the legal fabric of every nation . . .'.<sup>108</sup> If the world were perfect and everyone lived by the same rules and values, then the monist system would be ideal. However, this perspective is dangerous.

The monist position functions on the belief in some type of natural law, or some type of right or wrong for any given situation. No country, including the DRC, could find that its customary rules and laws match the rights and wrongs of every nation. To immediately take a monist perspective would subjugate the DRC to any customary international law that the ICC adopts. To accept this would be to delegitimise the values of the DRC people, and to adopt international community standards as better than one's own. This monist view threatens the strength of the DRC's culture and nationhood. Therefore, the monist belief in universal jurisdiction creates a tremendous drawback for countries like the DRC.

Instead, the DRC and all countries should accord themselves with the ICC using the dualist approach. Under dualism, international and national law are separated. 'Each nation retains the sovereign power to integrate or isolate the norms of international law. National and international law are *not* parts of a unified whole.'<sup>109</sup> As it stands, DRC law is uniquely customised to the history and culture of its people. By recognising the needs of the DRC people as people of a sovereign nation, the DRC

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<sup>107</sup> Kleffner (n 93 above) 108.

<sup>108</sup> WR Slomanson *Fundamental perspectives on international law* (2003) 38-39.

<sup>109</sup> Slomanson (n 108 above) 39.



will retain some of its own unique attributes. The DRC's current monist approach to the ICC must be replaced with a dualist approach.

### 8.5 Encouragement of judicial reforms — Benefit and drawback

In many ways, countries whose sovereignty is threatened by the ICC may feel encouraged to reform. As Burke-White notes, to avoid an ICC investigation, a state may be encouraged to prosecute at home. 'For states with failed domestic institutions, such an assertion of primacy will often involve significant domestic reform.'<sup>110</sup> In the DRC's case, significant reform did begin to some extent. For instance, when the ICC prosecutor announced that he would follow the DRC situation, some Congolese government elements 'responded by launching reforms of the national judiciary and establishing a truth and reconciliation commission'.<sup>111</sup> This reform was largely driven by nationalistic pride and the country's desire to manage its own problems. Nonetheless, the ICC still chose to step in.

By stepping in, the ICC disrespected the DRC's people in their ability to control judicial reform. Efforts which might work better for the DRC, such as a truth and reconciliation commission, rather than a trial were thwarted. Minister of Justice Honorius Kisimba-Ngoy's words summed up his feelings on the matter: 'Congolese citizens should be tried in Congo.'<sup>112</sup> In other words, the ICC should stay out of national affairs.

In addition, the ICC weakened the potential for any future judicial reform in the DRC as the ICC's actions have created a dependency-type situation. The DRC no longer has a reason to attempt to reform its judicial system. As Burke-White noted, if the DRC 'does seek ICC action, there is no need to reform the judiciary in an attempt to assert primacy'.<sup>113</sup> This is tied to the previous mention that the need to prosecute criminals is diminished. An ICC proceeding 'could serve to discourage national prosecutions by decreasing the pressure on the state to prosecute'.<sup>114</sup> The DRC is now dependent on the ICC for its law, rather than being in a position to create its own judicial reforms. Therefore, little will be done to change the current judicial system or to prosecute additional criminals. The ICC has discouraged rather than encouraged initial attempts at judicial reform in the DRC.

<sup>110</sup> Burke-White (n 24 above) 569.

<sup>111</sup> Burke-White (n 24 above) 570, citing Luis Moreno-Ocampo, Second Assembly of State Parties to the Rome Statute of the International Criminal Court. Report of the Prosecutor of the ICC, Luis Moreno-Ocampo, 8 September 2003 [http://www.icc-cpi.int/otp/030909\\_prosecutor\\_speech.pdf](http://www.icc-cpi.int/otp/030909_prosecutor_speech.pdf) (accessed 30 September 2007). For a discussion of how an enhanced judiciary could serve this purpose, see Holmes (n 99 above).

<sup>112</sup> Burke-White (n 24 above) 570.

<sup>113</sup> Burke-White (n 24 above) 569.

<sup>114</sup> Concannon (n 50 above) 240.

## 8.6 Financial costs — Benefit and drawback

The ICC places the financial burden on outside countries when national governments should be paying for the bulk of their internal affairs. For example, while Europeans might be concerned with justice in Africa, citizens of African nations are undoubtedly more concerned and directly affected by the outcome of any judicial decision. However, the Europeans will be the ones paying for the ICC trials. The most significant burden will fall on the European Union, especially since neither the United States nor Japan have adopted the Rome Statute. Without the United States and Japan, 'one NGO estimates that the European Union could be responsible for funding up to 78,17% of the total cost of the ICC'.<sup>115</sup> This is a tremendous drawback for, and unfair burden upon Europeans.

In the same way, this lack of prosecutorial costs is of tremendous benefit to the DRC. That is, much of the financial burden for the *Lubanga* case will be transferred to countries other than the DRC. Taking the case out of the DRC and into the ICC's forum, transfers the financial burden to the wrong people. If a nation is legitimately interested in prosecuting domestic war criminals, that country should face the primary financial burden. This is not to say that the ICC cannot reinforce a struggling judiciary's financial stability. Instead, the ICC's funds should primarily serve as a back-up for training local systems on effective judicial matters.

In addition, the ICC's assertion of jurisdiction increases the overall cost of any case. As there is a tremendously increased cost for the transportation and care of the accused, witnesses, investigators, and such, the trial's cost shoots upward. The total financial cost might be significantly diminished if local authorities serve as the primary decision makers.

## 8.7 Subservience — Benefit and drawback

The ICC system does provide a benefit to the developed world in that it ensures that developing countries follow developed world standards. It correspondingly furthers a dependency on developed countries' aid and jurisprudence. Developing countries are encouraged to submit their problems to an international forum rather than dealing with their own issues. In this way, the developed world maintains its control over the internal affairs of developing countries such as the DRC.

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<sup>115</sup> MA Newton 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 24, citing 'Project on international courts and tribunals, financing of the International Criminal Court' annex III (undated discussion paper distributed at the meeting of the Preparatory Commission in June 2000) (on file with author) (Hypothetical Scale of Assessment for the ICC).

However, this can create a tremendous drawback for developing countries. One commentator argues that the ICC acts as a check against foreign interference. 'Across the developing world, participation in the ICC represents the possibilities of having a voice in international affairs and more peaceful regional development.'<sup>116</sup> Unfortunately, this is incorrect. Rather than equalising the rule of law among nations, the ICC actually delegitimises developing national governments and makes them subservient to government standards of the developed world. This is because the ICC imposes universal law standards that are not necessarily implemented or followed in developing countries.

The imposition of ICC rules is an imposition of Western values as to right and wrong. When developing countries sign on to ICC jurisdiction, they might not realise the future ramifications of their signing and instead continue in a subservient relationship to Western values. By retaining jurisdiction, the ICC is not only creating a system of subserviency, but also a system of dependency. That is, African nations must become dependent on the international community to mete out justice. This system of subservience is the wrong approach.

### 8.8 Political manoeuvrings — Drawback

Depending on whose side one is on at the moment, prosecutions at the ICC may be beneficial or detrimental. 'The ICC Statute, as it is currently written, creates substantial risks of unfair trial proceedings and politically motivated prosecutions.'<sup>117</sup> The ruling government, in having the power of self-referral, has the political upper hand in any prosecution. If one is in power, then that is good. If not, then that is very bad. Many countries have hesitated to join the ICC for these very reasons. Walker claims that governments in countries such as Columbia or Mexico, 'that have active rebel forces, may want to resist joining the ICC out of concern that its governance could allow prosecution upon the recognised government'.<sup>118</sup> If overthrown and removed from political control, these government leaders might have a good chance of being prosecuted by the ICC.

Instead of promoting unbiased justice, the ICC encourages prosecutions of developing country leaders against their enemies rather than against enemies of the world. The DRC exhibits an excellent case study of the political benefits inherent in the ICC system. President Kabila's referral of the *Lubanga* case to the ICC was a political manoeuvre:<sup>119</sup>

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<sup>116</sup> AJ Walker 'When a good idea is poorly implemented: How the International Criminal Court fails to be insulated from international politics and to protect basic due process guarantees' (2004) 106 *West Virginia Law Review* 245 255.

<sup>117</sup> Walker (n 116 above) 259.

<sup>118</sup> Walker (n 116 above) 255.

<sup>119</sup> Burke-White (n 24 above) 564.

The existence of the Court sufficiently shifted the incentive structure for the national government such that President Kabila perceived it to be in his own interests to refer the case.

President Kabila realised that national prosecution would be difficult due to the fact that two of his vice-presidents in the transitional government could have potentially been charged under the ICC.<sup>120</sup> In order to assert control of the factions surrounding him, he used international force. As Burke-White surmises, Kabila's referral might indicate a 'phenomenon of weak states self-referring situations to the ICC, when sitting governments can benefit from prosecutions but the political costs of prosecuting at home are too great'.<sup>121</sup> This means that, instead of dealing with the problems directly, Kabila used the ICC as a political tool to slowly tear away at his enemies.

Burke-White's comprehensive study into the implications of the ICC's investigation in the DRC noted the prosecution's political ramifications. Primarily, 'the existence of the ICC has offered a politically expedient solution for the Congolese president to deal with potential electoral rivals'.<sup>122</sup> Kabila might legitimately be accused of using the ICC as a political weapon to eliminate any rivals. Wielding the power of international prosecution, Kabila has undoubtedly benefited. Those on the other side have likewise suffered.

While this might be good for Kabila's political power, it is not good for the democratic functioning of the DRC. In effect, the international community is politically propping up one man while the DRC's political problems remain. In effect, a regime may<sup>123</sup>

use compulsion at the international level as a cover or an excuse to undertake its own domestic policies that may undermine legitimate opposition groups and violate citizens' rights.

Kabila's political policy is using the ICC as a weapon.

### 8.9 Conclusion about benefits and drawbacks

In conclusion, the DRC's use of the ICC shows more drawbacks than benefits. The fact that one man, Lubanga, is prosecuted, is outweighed by the fact that untold other criminals escape prosecution. The view that the ICC acts as a deterrent against would-be criminals is outweighed by the reality that to be effective, deterrence must come nationally. The monist belief in the benefits of universal jurisdiction is overcome by the differing values and rules of every nation which require a dualist system.

<sup>120</sup> Burke-White (n 24 above) 565.

<sup>121</sup> Burke-White (n 24 above) 567.

<sup>122</sup> Burke-White (n 24 above) 559.

<sup>123</sup> A Slaughter & W Burke-White 'The future of international law is domestic (or, the European way of law)' (2006) 47 *Harvard International Law Journal* 327 347.

The hopes for encouragement of judicial reforms are dashed as soon as the ICC asserts jurisdiction. In addition, while the individual nation's costs are reduced by ICC jurisdiction, the costs to the rest of the world, especially Europe, unfairly increase. The truth that the ICC creates a beneficial subservient relationship to developed countries creates a tremendous drawback for dependent developing nations. Finally, while one political group benefits by submitting its enemies to the ICC, the people of that country, and the world in general, suffer from the use of the ICC as a political tool. Therefore, the drawbacks of the DRC's and other countries' use of the ICC significantly outweigh the value of any benefits.

## 9 No more DRC cases

In light of the analysis of all the benefits and drawbacks of the ICC, the prosecutor should consider deferring back some of his present cases to their home countries or to the African Court. Even though the *Lubanga* case might already have proceeded too far, the prosecutor should be encouraged to return or defer any future DRC cases. The exact opposite has happened.

In its August 2006 report to the UN General Assembly, the ICC report noted that the prosecutor<sup>124</sup>

opened a second case in the continuing investigation into the situation in the Democratic Republic of the Congo. The Office also continued to analyse the possibility of opening a third case.

The opening of additional cases in the DRC is not necessary or helpful. As stated previously, the DRC has sufficient control of its judicial system. By continuing to extend itself into different cases, the ICC delegitimises both the judicial and executive powers currently operating in the DRC.

## 10 The Uganda case should be referred back to Uganda

In addition, the LRA referral to the ICC should be referred back to Uganda or to the African Court. First, Uganda defeats the 'unwilling or unable' standard of article 17 complementarity. As one analyst believes, taking into account Uganda's recent amnesty policy, 'Uganda is no longer "unwilling" to prosecute LRA leaders, though, as indicated previously, such willingness is based on the availability of an ICC

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<sup>124</sup> The Secretary-General, Report of the International Criminal Court, 19, delivered to the General Assembly, A/61/217 (3 August 2006).

referral'.<sup>125</sup> This means that the ICC can still function as a back-up of international law to Uganda, but Uganda itself can take care of its national cases.

Uganda is also 'able' to prosecute. 'Uganda also possesses a judicial system that is recognised for its independence and that has not collapsed as a result of the armed conflict in the north.'<sup>126</sup> Uganda has the capacity to handle its own problems through its judicial system.

If the ICC retains jurisdiction over the LRA leaders charged in the Uganda case, it creates three major effects. First, it delegitimises the government and judiciary of Uganda in the eyes of the people. Second, it transfers the costs of a national trial to the international community. Third, it makes Uganda unnecessarily more dependent on the international community, rather than dependent on itself. Therefore, where the possibility to prosecute in the home country of Uganda is available, the ICC should relinquish its jurisdiction.

## **11 The ICC should show more restraint in its acceptance of cases and instead pursue alternative methods of bolstering national judiciaries**

### **11.1 The ICC should be a teacher first and an enforcer second**

The ICC must first function as a teacher and second as an enforcer. The old popular adage is particularly appropriate for this situation. 'Give a man a fish, and he eats for a day; teach a man to fish, and he eats for a lifetime.' In this instance, the ICC's control of the *Lubanga* case serves only to stop the temporary hunger of a nation needing a strong national judiciary. Instead, the ICC should act as a teaching institution.

As Stromseth contends, ICC-type proceedings impact the rule of law.<sup>127</sup> One critical component of the ICC's impact on the rule of law is 'the extent to which systematic and meaningful efforts at domestic capacity-building are included as part of the accountability process'.<sup>128</sup> While the ICC might not have a mandate declaring that it specifically must build domestic judicial processes, an implied responsibility exists. The ICC exists to encourage laws, to punish law-breakers, and to

<sup>125</sup> Akhavan (n 40 above) 415, citing ICC Press Release 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (29 January 2004). For a general discussion of Uganda's intent to prosecute LRA leadership, see Integrated Regional Information Networks, UN Office for the Co-ordination of Humanitarian Affairs 'New amnesty law to exclude top LRA leaders' (16 December 2003) <http://www.irinnews.org> (accessed 28 January 2007).

<sup>126</sup> Akhavan (n 40 above) 415, citing US Department of State 'Background note on Uganda' (January 2005) <http://www.state.gov/r/pa/ei/bgn/2963.htm> (accessed 28 January 2007).

<sup>127</sup> JE Stromseth 'Pursuing accountability for atrocities after conflict: What impact on building the rule of law?' (2007) 38 *Georgetown Journal of International Law* 257.

<sup>128</sup> As above.

develop systems of justice which will work. Therefore, the ICC must work to strengthen national judiciaries and law-making authorities.

Burke-White identifies four keys by which the ICC may be effective beyond prosecution. These include modifying the 'preferences and policies of the national government [*sic*] catalysing reform efforts; offering benchmarks for judicial effectiveness; and providing a deterrent from future crimes'.<sup>129</sup> This is exactly what the ICC should be doing. It should be creating international standards through national implementation. If the ICC really wishes to create reform, it must act as a teacher working with the people who will effect change at the national level.

Concannon gives the right solution to how the ICC can use its jurisdiction as a teaching mechanism. 'The ICC could most effectively aid national judiciaries with human rights cases by hiring and training staff from countries that need the most help, and by providing jurisprudence.'<sup>130</sup> This would encourage judicial reform in the long-run.

The Court's resources would be better spent on reinforcing the judicial systems of implicated nations. The ICC has done this to some extent. In its August 2006 report, the Court noted that in the DRC, it had 'organised workshops and seminars for such groups as judicial authorities, the legal community, non-governmental organisations and journalists'.<sup>131</sup> These efforts should receive more attention. The ICC 'should actively assist local judiciaries trying to prosecute human rights cases, and this assistance should be systematic and central to the Court's work'.<sup>132</sup> Though counterintuitive for a judicial system, this action by the ICC will encourage independence instead of dependence.

## 11.2 Encouraging engagement

Slaughter and Burke-White offer three ways by which domestic institutions can be encouraged rather than discouraged. 'The three principal forms of such engagement are strengthening domestic institutions, backstopping them, and compelling them to act.'<sup>133</sup> While strengthening and compelling are easy to understand, Slaughter and Burke-White refer to instruments such as the ICC's complementarity principle in explaining the concept of backstopping. They offer that complementarity is a perfect example of backstopping. 'The ICC is designed to operate only where national courts fail to act as a first line means of prosecution.'<sup>134</sup> Unfortunately, the ICC's interpretation of complementarity has not involved backstopping. It has utilised a more aggressive

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<sup>129</sup> Burke-White (n 24 above) 590.

<sup>130</sup> Concannon (n 50 above) 230.

<sup>131</sup> n 124 above.

<sup>132</sup> Concannon (n 50 above) 225.

<sup>133</sup> Slaughter & Burke-White (n 123 above) 328.

<sup>134</sup> Slaughter & Burke-White (n 123 above) 340.

approach, making the potentially encouraging reforms of engagement through backstopping inapplicable.

While Slaughter and Burke-White offer ways for the ICC to encourage individual nations, regional court development should also be encouraged. Capacity building is one way to foment the needed development. It can be encouraged 'directly, through training and technical assistance programs, and indirectly, through their provision of information, coordinated policy solutions, and moral support'.<sup>135</sup> Regional institutions can provide the needed locus for capacity-building dissemination.

In addition to helping through capacity building, international organisations can aid governments, police, and judicial reform across nations through other techniques. 'International institutions can provide aid and assistance specifically targeted for the domestic institutions of the recipient state.'<sup>136</sup> The key is how the ICC approaches the task. If the ICC aims to encourage reform, it can be a guiding force for change. According to the Chayes 'managerial model',<sup>137</sup> encouraging nations to comply with international rules using management rather than enforcement techniques, ensures 'that all parties know what is expected of them, that they have the capacity to comply, and that they receive the necessary assistance'.<sup>138</sup> However, if the ICC's goal is to enforce rules by taking away jurisdiction, it may seriously hurt local institutions.

Based on its experience and effect in the DRC, the ICC should now choose to help governments and the rule of law through encouraging reform rather than by over-extending jurisdiction. The DRC case is a test run for the ICC 'both to learn how it can be used by a national government and, in turn, to provide incentives and guidance to that government to further the quest for domestic and international accountability'.<sup>139</sup> Hopefully, the ICC will learn from the DRC case to become more of a teacher for change.

## 12 The ICC's case load should be bound more by recommendations from the UN Security Council

The ICC has overextended its jurisdictional reach. It should be encouraged to withdraw its over-extensive jurisdictional efforts in favor of becoming more of an encouraging force for national judicial efforts. Therefore, ICC jurisdiction should be limited almost exclusively to Security Council referrals. The ICC's first, and perhaps only reason to

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<sup>135</sup> Slaughter & Burke-White (n 123 above) 335.

<sup>136</sup> Slaughter & Burke-White (n 123 above) 338.

<sup>137</sup> Slaughter & Burke-White (n 123 above) 339, citing A Chayes & AH Chayes *The new sovereignty* (1995) 3.

<sup>138</sup> Slaughter & Burke-White (n 123 above) 339.

<sup>139</sup> Burke-White (n 24 above) 590.



act should come from Security Council referral — not from country referrals or the prosecutor's use of his *proprio motu* powers.

Security Council action requires a degree of necessary reflection not found in a national referral or in the prosecutor's use of his *proprio motu* power. Two steps are required to bring about Security Council action under chapter VII.<sup>140</sup> First, it must find a 'threat to the peace' under article 39 of the Charter.<sup>141</sup> 'Only then may it take action under article 41 (not involving the use of force) or 42 (involving the use of force).'<sup>142</sup> Therefore, Security Council referrals to the ICC are preferable because the Security Council has a set procedure by which to demand international action.

The Security Council will not let crimes go unpunished. Indeed, the Security Council has not been lax in its assertion of power. For instance, Le Mon and Taylor argue that the Security Council has shown an increasing willingness to use chapter VII of the Charter to combat abuses against international peace and security.<sup>143</sup>

For example, the ICC's situation regarding Sudan is under the referral and influence of the Security Council. As noted in the August 2006 report to the UN General Assembly, '[t]he Prosecutor regularly briefed the Security Council on his investigation into the situation in Darfur, pursuant to Security Council Resolution 1593 (2005)'.<sup>144</sup> This reporting to the UN Security Council performs many vital functions. It keeps the ICC on track and responsible to another authority.

For example, in the ICC report on Sudan, 'the prosecutor updated the Council on the status of the investigation, including the selection of a number of alleged criminal incidents for full investigation'.<sup>145</sup> This permits the UN to monitor the actions of the ICC. It also allows the UN to decide whether additional intervention is needed in areas such as Sudan. In this way, the UN can prove more effective as a legislative body while monitoring the ICC as a judicial body. A better transmission of knowledge between the two entities is created, and a check is put against ICC jurisdiction.

In relation to the DRC problems, the Security Council has already shown active intervention.<sup>146</sup>

The Council, in determining a response to atrocities in the DRC, showed little compunction about invoking chapter VII in attempting to halt the violence through multilateral intervention.

<sup>140</sup> C] Le Mon & RS Taylor 'Security Council action in the name of human rights: From Rhodesia to the Congo' (2004) 10 *UC Davis Journal of International Law and Policy* 197 206.

<sup>141</sup> As above.

<sup>142</sup> As above.

<sup>143</sup> Le Mon & Taylor (n 140 above) 200.

<sup>144</sup> n 124 above.

<sup>145</sup> As above.

<sup>146</sup> Le Mon & Taylor (n 140 above) 223.

Also, as evidenced by the Security Council's referral of the Sudan issues to the ICC, there is no reason to doubt that the Security Council would refer an appropriate DRC case to the ICC if necessary. If anything, given its inherent supervision of much of the world's activities, the Security Council is in a superior position to oversee individual countries in order to be able to determine when a case needs ICC attention.

In addition, Security Council action takes care of the ICC's current loose use of the complementarity principle. Because states and the prosecutor will not be able to self-refer, only the Security Council will be able to judge when a country is unable or unwilling to prosecute. This use of complementarity should ensure that states do not lose their jurisdiction to the ICC as quickly as they are currently.

In an ideal world, the only time that the ICC should exercise jurisdiction is where both the national court and the regional court (in this case the African Court) have failed to act, or have purposefully protected a person who has flagrantly violated the Rome Statute. That is, neither a country's self-referral mechanism nor the prosecutor's *proprio motu* powers would be required because each country would have a self-sufficient judiciary, and the Security Council would be unbiased enough that the prosecutor would not need to use his *proprio motu* powers. However, for the present-state of the world and the ICC, the Security Council should be the primary, if not the only referral source for ICC action.

### 13 Conclusion: Scale back the ICC

Thomas Lubanga Dyilo's ICC case might determine the future of the ICC. While the DRC struggles to assert itself and the African Court wishes to try its wings, the ICC has asserted itself as the highest authority and taken away control from potential other sources of jurisdiction.

As nations look to the precedent set by the *Lubanga* case, they should analyse the benefits and drawbacks of giving up their jurisdiction. They should ponder whether nationwide or even regional courts might offer a better alternative. They should realise that it is in the best interests of home countries faced with situations similar to the DRC's, to retain primary jurisdiction or offer secondary jurisdiction to regional courts. The ICC should only be used as a last resort.

The ICC may become a dangerous entity as its understanding of universal jurisdiction, based on a loose application of complementarity, allows for untold reach into national sovereignty. Instead of going unchecked, the ICC should show restraint in accepting cases and opt for efforts meant to teach and enforce the rule of law within the national or regional context. The ICC should also reduce its acceptance of self-referrals and turn instead to the UN Security Council as its primary source of any cases it might accept.

The ICC's *Lubanga* case is a lesson. The ICC is becoming a danger to the world — it is reaching too far. The ICC's power must be scaled back.

## Appendix A: The Central African Republic

The situation regarding the Central African Republic has largely fallen to the wayside. As noted in the prosecutor's report of 15 December 2006, in September 2006, the Central African Republic filed a request 'that the prosecutor provide information on the alleged failure to decide, within a reasonable time, whether or not to initiate an investigation'.<sup>147</sup> A few months later, on 30 November 2006, the Central African Republic demanded an estimate on when the prosecutor's decision might be expected.<sup>148</sup>

In its response, the Prosecutor noted that 'no provision in the Statute or the Rules establishes a definitive time period for the purposes of the completion of the primary examination'.<sup>149</sup> However, given that no time line is required for the prosecutor to finish his preliminary examination nor to decide to prosecute,<sup>150</sup> the Central African Republic case presently sits *in limine*.

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<sup>147</sup> ICC Prosecutor, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 5, ICC-01/05-7 (15 December 2006).

<sup>148</sup> n 147 above, 6.

<sup>149</sup> n 147 above, 10.

<sup>150</sup> n 147 above, 20.

# Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence

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## Summary

*Nigeria has a significant number of people living with HIV/AIDS. Access to anti-retroviral drugs is important to enable such persons to live a healthy life. This paper examines access to anti-retroviral drugs as part of the right to health under international law. It locates the right of health, its scope and content in international human rights instruments and attempts to draw the connection between access to anti-retroviral drugs and the right to health. It examines the interpretation of the right to health in the broader context of socio-economic rights in Nigerian jurisprudence. It concludes that the jurisprudence leaves much to be desired with respect to the protection of the right to health and specifically to access to anti-retroviral drugs.*

## 1 Introduction

Nigeria is a low-income developing country whose economy is mainly dependent on its oil exports. It is the most populous country in Africa with a population of about 133 million people.<sup>1</sup> It is estimated that

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<sup>1</sup> See United Nations Development Programme *Human Development Report 2003* (2003) 85.

about three million of these people are living with HIV/AIDS.<sup>2</sup> In 2001, Nigeria, alongside India, China, and Ethiopia, was described by a Central Intelligence Agency (CIA) report as one of the 'next wave countries', that is, countries where the HIV/AIDS crisis may reach frightening levels in a very short time, whose governments have been slow to respond to the disease and 'have not yet given the issue the sustained high priority that has been key to stemming the tide of the disease in other countries'.<sup>3</sup> Under military governments in Nigeria, and prior to the coming into power of a civilian administration in 1999, HIV/AIDS was not actively engaged with.<sup>4</sup> Nigeria had no policy for dealing with HIV/AIDS until 1997.<sup>5</sup>

More recently, the federal government has undertaken a rigorous campaign to combat the disease, both from a prevention perspective and a treatment standpoint. Through the National Agency for the Control of AIDS, established in 2000, the government is currently co-ordinating efforts to provide anti-retroviral drugs (ARVs) at the national level.<sup>6</sup> ARVs do not provide an ultimate cure, but are very effective in managing the disease by suppressing the effects of the virus, thus deferring the onset of AIDS. ARVs have changed the disease to a chronic but manageable medical condition, enabling people living with HIV/AIDS (PLWHA) to live healthy lives.<sup>7</sup> Nigeria commenced the provision of ARVs in January 2002 at subsidised rates, becoming one of the first African countries to take this step.<sup>8</sup>

Nigeria has received support from international initiatives aimed at increasing the number of persons accessing treatment, including the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), the World Bank and the United States President's Emergency Plan for AIDS Relief (PEPFAR). Recently, the National Agency for the Control of AIDS Act<sup>9</sup> was passed, establishing the co-ordinating body as a statutory

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<sup>2</sup> UNAIDS, AIDS Epidemic Update 2006 (Geneva UNAIDS 2006) [http://data.unaids.org/pub/EpiReport/2006/2006\\_EpiUpdate\\_en.pdf](http://data.unaids.org/pub/EpiReport/2006/2006_EpiUpdate_en.pdf) (accessed 2 July 2007).

<sup>3</sup> National Intelligence Council *The next wave of HIV/AIDS: Nigeria, Ethiopia, Russia, India and China* (2002) 3 ICA 2002-04D (Next Wave Report) [http://img.thebody.com/whatis/pdfs/aids\\_wave.pdf](http://img.thebody.com/whatis/pdfs/aids_wave.pdf) (accessed 5 July 2007).

<sup>4</sup> G Kombe *et al* *Scaling up anti-retroviral treatment in the public sector in Nigeria: A comprehensive analysis of resource requirements* (2004) 3. 'Partners for health' [http://www.synergyaids.com/documents/PHRPlus\\_NigeriaARVFeb2004.pdf](http://www.synergyaids.com/documents/PHRPlus_NigeriaARVFeb2004.pdf) (accessed 22 June 2007).

<sup>5</sup> Next Wave Report (n 3 above).

<sup>6</sup> There is also co-ordination at the state and local governments. See *The National HIV/AIDS Strategic Framework 2005-2009* 3-4, online: [siteresources.worldbank.org/.../2693181-1155742859198/NigerianNationalStrategicFrameworkonHIVAIDS.pdf](http://siteresources.worldbank.org/.../2693181-1155742859198/NigerianNationalStrategicFrameworkonHIVAIDS.pdf) (accessed 11 October 2007).

<sup>7</sup> See World Health Organisation 'Anti-retroviral therapy' <http://www.who.int/hiv/topics/arv/en/print.html> (accessed 3 November 2003).

<sup>8</sup> Kombe *et al* (n 4 above) 4.

<sup>9</sup> National Agency for the Control of AIDS Act 2006 <http://www.naca.gov.ng/aboutus/naca-agency-act.pdf> (accessed 12 October 2007).

body, thus creating room for more effective and sustainable functioning. Currently, a significant number of people who require anti-retroviral treatment are still unable to access the drugs in Nigeria, even though the number of people on the drugs has increased substantially since the inception of the anti-retroviral programme.

From a human rights perspective, access to anti-retroviral drugs is most closely linked with the right to health, even though indirectly it may be linked to other rights, including the right to life. Human rights norms set broad standards for the obligations of countries with regard to realising the human rights to which their citizens are entitled.<sup>10</sup> Further, human rights are an instrument for compelling governments of countries to fulfil certain basic entitlements and expectations that people have, either through enforcement procedures where they exist, or through the exertion of public pressure on governments.<sup>11</sup> With specific regard to the health sector, Braveman and Gruskin point out that<sup>12</sup>

[t]he internationally recognised human rights mechanisms for legal accountability could be used by the health sector to provide processes and forums for engagement and to suggest concrete approaches to reducing poverty and health inequity. International human rights instruments thus provide not only a framework but also a legal obligation for policies towards achieving equal opportunity to be healthy, an obligation that necessarily requires consideration of poverty and social disadvantage.

Yamin also notes with specific regard to access to medicines that<sup>13</sup>

[h]uman rights law not only offers an alternative paradigm for understanding issues relating to the availability and distribution of medications, it also provides a workable framework for influencing the way in which adjudicative and legislative bodies, as well as other actors, make decisions that affect access to medications.

The aim of this article is to examine the legal foundations of access to anti-retroviral drugs within the context of the right to health in Nigeria. For this purpose, the meaning of the right to health is examined in international law, as well as its constitutional basis in Nigeria. The article consists of five sections. The first section of the paper is this introduc-

<sup>10</sup> Z Lazarinni 'Access to HIV drugs: Are we changing the two world paradigm?' (2002) 17 *Connecticut Journal of International Law* 281 288.

<sup>11</sup> R Macklin *Against relativism: cultural diversity and the search for ethical universals in medicine* (1999) 221 where she notes: 'When a moral claim is cast in terms of human rights, it commands the attention of governments and citizens throughout the world. It also compels the need for a response on the part of those accused of violating human rights.'

<sup>12</sup> P Braveman & S Gruskin 'Poverty, equity, human rights and health' (2003) 81 *Bulletin of the World Health Organisation* 539 539.

<sup>13</sup> AE Yamin 'Not just a tragedy: Access to medications as a right under international law' (2003) 21 *Boston University International Law Journal* 325 327. See also H Watchirs 'A human rights approach to HIV/AIDS: Transforming international obligations into national laws' (2002) 22 *Australian Yearbook of International Law* 77 79-80.

tion. The second section puts the issues relating to access to anti-retroviral drugs in context and discusses briefly Nigeria's policy on access to anti-retroviral drugs. The third section examines the right to health in international law within the context of the health and human rights debate, specifically looking at the provisions of some international instruments, including the International Covenant on Economic, Social and Cultural Rights (CESCR) and the African Charter on Human and Peoples' Rights (African Charter). It also attempts to draw the link between the right to health and access to anti-retroviral drugs, and briefly identifies the need to situate the application of the international right to health in domestic legal systems. The fourth section examines the right to health under the Nigerian Constitution. The fifth section concludes the article.

## 2 The need for access to anti-retroviral drugs in Nigeria and Nigeria's policy on access

As mentioned above, Nigeria has about three million people living with HIV/AIDS. Nigeria has shown a commitment in recent years to combat HIV/AIDS and, in particular, to increase access to anti-retroviral treatment. In 2001, the government announced a programme to provide anti-retroviral treatment at subsidised rates in 25 treatment centres to 10 000 adults and 5 000 children living with HIV/AIDS.<sup>14</sup>

The National HIV/AIDS Policy drawn up in 2003 contains the stated policy of the Nigerian government to provide access to anti-retroviral drugs for PLWHA. It states:<sup>15</sup>

The government will work towards ensuring that all persons in the country shall have access to the quality of health care that can adequately treat or manage their conditions, *including the provision of anti-retroviral medication.*

Nigeria has committed to provide universal access in line with regional commitments and plans to provide, by 2010, at no cost in the public sector, anti-retroviral treatment to 80% of adults and children who require it, and to HIV-positive pregnant women. The more recent National HIV/AIDS Strategic Framework 2005-2009 builds further on Nigeria's policy on, and plan for, access to anti-retroviral treatment. It states that one of the objectives of the government is to: increase equitable access to ART and ensure an uninterrupted supply of good quality ARV drugs; strengthen capacity of health sector institutions, systems and personnel to plan and manage a well co-ordinated and adequately resourced health sector response to HIV and AIDS at all levels and enhance an efficient and sustainable logistics system for

<sup>14</sup> National HIV/AIDS Strategic Framework 2005-2009 (n 6 above).

<sup>15</sup> National HIV/AIDS Policy 2003 20 <http://www.nigeria-aids.org/documents/National-HIVPolicy.pdf> (accessed 12 October 2007) (my emphasis).

improved access to health commodities for HIV and AIDS-related services.<sup>16</sup> Amongst other things, it also contains several key findings from conferences and studies on the issue of access to anti-retroviral drugs and other related issues. These findings include an inadequate human, technical and institutional capacity, including inadequate infrastructure, staff, equipment and supplies to provide anti-retroviral services; the predominance of treatment centres in urban centres within tertiary institutions, thus limiting access in rural areas and that anti-retroviral treatment for children had not commenced.<sup>17</sup>

Many of these limitations remain. In the past, the programme faced some problems, including inadequate and irregular funding, inefficient planning, allegations of corruption and disruptions in supplies.<sup>18</sup> Currently, although significant steps are being taken, only about 81 000 people, 15% of those requiring anti-retroviral treatment, currently have access to it.<sup>19</sup> Only about 3% of children requiring anti-retroviral drugs are able to access treatment.<sup>20</sup> The major shortcomings of the Nigerian programme for access to anti-retroviral drugs have been summarised by a recent World Health Organisation (WHO) report, which notes that treatment sites are mainly located in urban areas, leaving rural areas with inequitable access to treatment centres. Also, many health facilities lack trained personnel. Further, although treatment is provided at no

<sup>16</sup> See Objective 3 of the National HIV/AIDS Strategic Framework 2005-2009 (n 6 above).

<sup>17</sup> n 6 above, 11.

<sup>18</sup> Eg, from about June 2003 until about March 2004, many of the pilot sites established to supply the drugs did not have any supplies of drugs. Some of the sites also gave out expired ARVs to PLWHA, urging them to take the drugs since there were no other alternatives. See 'Nigeria: Over 14 000 on subsidised AIDS drugs run out of medication' *IRIN News* 3 February 2004 [http://www.plusnews.org/AIDSreport.asp?ReportID=2986&SelectRegion=West\\_Africa&SelectCountry=NIGERIA](http://www.plusnews.org/AIDSreport.asp?ReportID=2986&SelectRegion=West_Africa&SelectCountry=NIGERIA) (accessed 22 June 2007); O Akanni 'Saving the ARVs programme' (6 January 2004) Nigeria-AIDS <http://www.nigeria-aids.org/MsgRead.cfm?ID=2196> (accessed 23 June 2004); 'Nigeria: AIDS treatment resumes as depleted drug stocks replaced' *IRIN News* 12 March 2004 [http://www.irinnews.org/report.asp?ReportID=40035&SelectRegion=West\\_Africa&SelectCountry=NIGERIA](http://www.irinnews.org/report.asp?ReportID=40035&SelectRegion=West_Africa&SelectCountry=NIGERIA) (accessed 23 June 2007).

<sup>19</sup> WHO, UNAIDS & UNICEF 'Towards universal access: Scaling up priority HIV/AIDS interventions in the health sector: Progress report' (April 2007) 58 [http://www.who.int/hiv/mediacentre/universal\\_access\\_progress\\_report\\_en.pdf](http://www.who.int/hiv/mediacentre/universal_access_progress_report_en.pdf) (accessed 5 July 2007). Recently, in September 2007, however, NACA reported progress in the goal of creating increased access to anti-retroviral drugs. The treatment centres had been tripled, thereby helping to ensure access to anti-retroviral drugs for approximately 135 000 persons requiring the drugs. While this is laudable, Nigeria has been unable to meet the goal of providing treatment access for 250 000 people set by the government in 2006. See 'Nigeria triples number of HIV treatment centres, fails to meet target of providing anti-retrovirals to 250 000 HIV-positive people' *Kaiser Daily HIV/AIDS Report* September 20, 2007 [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=47628](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=47628) (accessed 11 October 2007).

<sup>20</sup> WHO, UNAIDS and UNICEF (n 19 above).



cost at public sector sites, the cost of diagnostic tests remains high and unaffordable for many patients.<sup>21</sup> The report concludes that<sup>22</sup>

[d]espite political commitment at the highest levels and efforts in recent years to scale up the national response, the coverage of basic health services for HIV prevention, care and treatment remains limited. A large country with a complex administrative structure, Nigeria faces the challenge of scaling up a co-ordinated response at the federal, state and local levels. The infrastructure and the skills for providing services are inadequate, especially in rural areas. Another problem is that the large private health sector is not linked to the state health system.

It is obvious that, while steps are being taken to expand access to anti-retroviral treatment in Nigeria, several impediments remain.

### 3 The right to health in international law

#### 3.1 Context and scope of the right

WHO defines 'health' as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.<sup>23</sup> The widely used definition of WHO has been criticised by many commentators as overly wide, too aspirational and somewhat devoid of actual meaning.<sup>24</sup> It has also been criticised as unrealistic and therefore an unsuitable foundation for determining the scope of the right to health.<sup>25</sup> Others are of the opinion that the definition of 'health' adds little or nothing to an understanding of the right.<sup>26</sup> While there may perhaps be problems with the WHO definition in relation to defining the scope of the right (such as the possible difficulty in explaining exactly what the right to health may contain and what specific steps may need to be taken in regard to protecting the right), it is a comprehensive definition which recognises that health is a concept that is dependent not only on therapeutic interventions and medical services, but also on psychological and social determinants. Such social determinants may include such factors as poverty and gender, which may

<sup>21</sup> As above.

<sup>22</sup> As above.

<sup>23</sup> Preamble to the Constitution of the World Health Organisation as adopted by the International Health Conference, New York, 19-22 June 1946; signed on 22 July 1946 by the representatives of 61 states (Official Records of the World Health Organisation 2, 100) and entered into force on 7 April 1948.

<sup>24</sup> See BCA Toebes *The right to health in international law* (1999) 22-24. It is now accepted that the right to health does not mean a right to be healthy, since no one can guarantee good health to anyone. See DP Fidler *International law and public health: Materials on and analysis of global health and jurisprudence* (2000) 302. See a criticism of a 'right to health' as opposed to a 'right to health care' in R Macklin *Against relativism: cultural diversity and the search for ethical universals in medicine* (1999) 235.

<sup>25</sup> As above.

<sup>26</sup> Toebes (n 24 above) 24. In Toebes's opinion, the right to health can be defined by its content without necessarily having recourse to a definition of 'health'.

increase vulnerability to illness as well as preclude access to health-improving facilities. The definition has a special significance in light of the vulnerability of certain categories of persons to HIV/AIDS, (for example, women) and the increased likelihood of inability to have access to essential medicines like ARVs. Further, the definition represents an ideal that ought to be aspired to by all countries which should aim to promote health in all possible ways, including attending to the underlying preconditions for health.

In recent years, HIV/AIDS has brought into focus the relationship between health and human rights.<sup>27</sup> In particular, the right to health has been invoked more frequently in the context of the HIV/AIDS epidemic and access to ARVs in developing countries than it has perhaps been in the past. The link between health and human rights has been articulated elsewhere.<sup>28</sup> As has been argued in detail elsewhere, these links include the fact that health policies and programmes, such as policies to provide anti-retroviral drugs (or not to do so) impact on the human rights of citizens and that human rights violations, such as the use of torture in interrogations, may have an impact on health. Thus, as has been argued in detail elsewhere, the 'promotion and protection of human rights and promotion and protection of health are fundamentally linked'.<sup>29</sup> Below, I consider the ways in which health has been provided for in human rights instruments.

The Universal Declaration of Human Rights (Universal Declaration)<sup>30</sup> provides for the right to health in article 25: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . .' The WHO definition is reflected in article 12 of CESC, which provides for the right to health, stating: 'The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' This socio-economic right (sometimes referred to as a second-generation right<sup>31</sup>), is couched in similar terms in the African Charter,<sup>32</sup> which

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<sup>27</sup> DP Fidler *International law and infectious diseases* (1998) 197.

<sup>28</sup> JM Mann *et al* 'Health and human rights' 1:1 *Health and Human Rights: An International Journal* <http://www.hsph.harvard.edu/fxbcenter/V1N1mannetal.htm> (accessed 11 October 2007).

<sup>29</sup> As above.

<sup>30</sup> Universal Declaration of Human Rights GA Res 217A (III), UN Doc A/810 71 (10 December 1948).

<sup>31</sup> C Archibold 'The incorporation of civic and social rights in domestic law' in J-M Copicud *et al* (eds) *The globalisation of human rights* (2003). See also M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 8.

<sup>32</sup> African Charter on Human and Peoples' Rights 21 June 1981 OAU Doc CAB/LEG/67/3Rev 5, (1982) 21 *International Legal Materials* 58 (entered into force 21 October 1986), reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 23.

provides that: '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health'.<sup>33</sup>

Having noted that these international instruments provide for the right to health, the question that arises is: What is the content and scope of the right to health? This can be determined by examining the provisions of some international instruments. In addition to providing for the right to health, article 12 of CESCRC contains steps to be taken by countries which are parties to CESCRC in order to fully achieve the right to health. It provides that in order to realise the right to health, countries should take steps necessary for the prevention, treatment and control of epidemic, endemic occupational and other diseases.<sup>34</sup> It provides also that countries have to take measures towards the creation of conditions which would assure medical service and medical attention to everyone in the event of sickness.<sup>35</sup> Similarly, article 16(2) of the African Charter also provides that

[s]tate parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

These measures, required by both instruments, would appear to cover the need for countries not only to engage in prevention measures in relation to the HIV/AIDS epidemic, but also to assure treatment to persons infected with the disease. Such treatment (which should include anti-retroviral treatment) is conceivably therefore a component of the right to health of such persons under CESCRC. In addition, it also covers the need for countries to ensure that there are adequate facilities to deliver the treatment in an appropriate manner which, as explained previously, is necessary to ensure increased access to ARVs.

The United Nations (UN) Economic, Social and Cultural Rights Committee (ESCR Committee), which is responsible for implementing, monitoring and enforcing CESCRC, has further clarified the normative content and scope of the right as provided in CESCRC in a General Comment.<sup>36</sup> The General Comment sheds light on the obligations of countries which have ratified CESCRC to respect, protect and fulfil the right to health.<sup>37</sup> The General Comment on the right to health is the

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<sup>33</sup> Art 16.

<sup>34</sup> Art 12(2)(c) CESCRC.

<sup>35</sup> Art 12(2)(d) CESCRC.

<sup>36</sup> ESCR Committee General Comment No 14: The right to the highest attainable standard of health (art 12 of the Covenant), 22nd session, 25 April to 12 May 2000 E/C.12/2000/4.

<sup>37</sup> Given the differences of opinion which may exist as a result of the different interpretations which countries could give to the provisions of CESCRC and their obligations under it, there is a need for an authoritative interpretation of the provisions and the obligations incurred thereunder. As Craven rightly states: '[I]n the absence of any authoritative procedure for settling the divergences of opinion over the interpretation of the Covenant, it is for states parties to construe the Covenant for

only UN document in which the content and the scope of the right to health are explained. Thus, although the General Comment is not binding, it is at least a primary point of reference which clarifies the scope of the right and provides countries with guidance as to the requirements of complying with the obligations they incur with respect to the right to health. The General Comment reiterates that<sup>38</sup>

[h]ealth is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.

In defining the normative content of the right, the General Comment states that the right takes into account the biological conditions of an individual, socio-economic conditions and the resources available to a country, and recognises that countries cannot guarantee good health or protect against all possible causes of ill-health.<sup>39</sup> As such, the right to health must be seen to connote a right to 'the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health'.<sup>40</sup> It also interprets the right to health to include not only early and proper health care, but also the underlying determinants of health, such as access to clean water and proper sanitation, a sufficient supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including information relating to sexual and reproductive health.<sup>41</sup>

Like all other human rights, the right to health imposes on countries the obligations to respect, protect and fulfil the right.<sup>42</sup> The precise application of the right according to the General Comment relates to

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themselves. Individual states may put forward their own interpretations of the Covenant's provisions but such interpretations are by no means authoritative and may be rejected by other states. In fact, states have rarely made direct statements regarding the meaning of Covenant provisions.' See A Rosas & M Scheinin 'Implementation mechanisms and remedies' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 379.

<sup>38</sup> Para 1 of the General Comment.

<sup>39</sup> Para 9. It also acknowledges that the right to health does not mean the right to be healthy.

<sup>40</sup> n 24 above.

<sup>41</sup> Para 11.

<sup>42</sup> Para 33. The General Comment, however, recognises also the application of the concept of progressive realisation as provided in CESCR and the resource constraints to which state parties may be subject, but states that some of the obligations under the right to health are of immediate effect, in particular the obligation to ensure non-discrimination in guaranteeing the right to health. It also states that the concept of progressive realisation should not be interpreted to mean a complete denial of the obligations which countries have under CESCR. See paras 30 & 31.

several elements namely, availability,<sup>43</sup> accessibility,<sup>44</sup> acceptability<sup>45</sup> and quality.<sup>46</sup> The General Comment also elucidates the obligations of countries with regard to implementing the right to health. It interprets the obligations as involving the obligation to respect, to protect and to fulfil. Countries are under a duty to respect the right to health, among other things, by refraining from denying or limiting the equal access for all persons to preventive, curative and palliative health services and abstaining from enforcing discriminatory practices as state policy.<sup>47</sup> The negative nature of this obligation requires governments, for example, not to deny health services to any specific group of people.

The obligation to protect involves, among other things, the duty to adopt legislation or take other steps in order to ensure equal access to health care and health-related services provided by third parties, including ensuring that medical practitioners have adequate training and that privatisation of the health sector does not jeopardise availability, accessibility, acceptability and quality of health facilities, goods and services

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<sup>43</sup> 'Availability' involves the presence of sufficient functioning public health and health-care facilities, goods and services, as well as programmes. These facilities must include the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs (para 12(a)).

<sup>44</sup> 'Accessibility' implies that health facilities, goods and services have to be accessible to everyone within a country's jurisdiction without discrimination. There are four dimensions to the requirement for 'accessibility', including non-discrimination, which means that health facilities, goods and services must be accessible to everyone, particularly to vulnerable and marginalised groups without discrimination. The second dimension is physical accessibility, which means that the health facilities, goods and services must be within easy reach for all sections of the population, particularly for vulnerable and marginalised groups, including ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. They must also be accessible to persons in rural areas. Economic accessibility or affordability is another dimension of 'accessibility' and requires that health facilities, services and goods must be affordable for all including socially disadvantaged groups. The General Comment further states that payment must be made on the principle of equity and poorer households should not be disproportionately burdened with health expenses as compared to richer households. The fourth dimension is information accessibility, which requires that persons shall be able to seek, receive and impart information (para 12(b)).

<sup>45</sup> 'Acceptability' requires that all medical services must be respectful of medical ethics as well as culture (para (c)).

<sup>46</sup> 'Quality' requires that health facilities, goods and services must be scientifically, medically and appropriate and of good quality. Among other things, this would necessitate the presence of skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation. As is discussed in the next subsection, these requirements have implications for access to ARVs (para (d)).

<sup>47</sup> Para 34.

and to control the marketing of medical equipment and medicines by third parties.<sup>48</sup>

The obligation to fulfil requires countries to take positive steps to promote the right to health. These steps include recognition through legislation of the right to health in the national legal system and establish a national policy with a detailed plan to ensure the right to health.<sup>49</sup> Countries must ensure the provision of health care, including immunisation against infectious diseases, public health services, including reproductive health services, particularly in rural areas, the underlying determinants of health. Countries are also required to ensure appropriate training of doctors, the provision of a sufficient number of hospitals, clinics and other health-related facilities, as well as the promotion of and support for the establishment of institutions providing counselling and mental health services. These must be provided with due regard to equitable distribution throughout the country. Further, countries are under an obligation to take positive measures to enable and assist individuals and communities to enjoy the right to health. In particular, countries are under an obligation to fulfil the right to health for individuals and groups who are unable for reasons beyond their control to realise the right to health for themselves by providing them with the requirements for realising the right.<sup>50</sup> The obligation to fulfil or promote the right to health requires countries to undertake actions that create, maintain and restore the health of the population.<sup>51</sup>

The General Comment further states that countries have a core obligation to satisfy '*at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care*'.<sup>52</sup> As such, it identifies the core obligations of countries with regard to the right to health as including, at least, ensuring the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups, minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone, access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water. The core obligations also include providing essential drugs, 'as from time to time defined under the WHO Action Programme on Essential Drugs and ensuring equitable distribution of all health facilities, goods and services'.<sup>53</sup> The minimum core obligations of countries are especially important because they are non-derogable and countries cannot

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<sup>48</sup> Para 35.

<sup>49</sup> Para 3.

<sup>50</sup> Para 36.

<sup>51</sup> Para 37.

<sup>52</sup> Para 43 (my emphasis).

<sup>53</sup> Para 43.

'under any circumstances' justify non-compliance with these obligations.<sup>54</sup>

### 3.2 Access to anti-retroviral drugs as a component of the right to health: Examining the links

The right to health, as contained in CESCER and the African Charter, is applicable to all human beings and imposes obligations on countries that are parties to these instruments. What would the right to health mean for people living with HIV/AIDS? For one thing, it could mean the availability of treatment for opportunistic infections to which they are subject because of the failure of their immune system as a result of HIV infection. It could also mean availability of health facilities which are necessary to receive care for HIV/AIDS-related illnesses. However, the need for ARVs may be more necessary, especially for those who can no longer benefit substantially from the sole treatment of opportunistic infections.

With respect particularly to children, the Convention on the Rights to the Child (CRC)<sup>55</sup> provides for the right of children to the highest attainable standard of health and to facilities for the treatment of children. The CRC Committee has in a recent General Comment on HIV/AIDS and the Right of the Child clarified that the right to health of children specifically requires countries to provide anti-retroviral treatment, amongst other things, stating that<sup>56</sup>

[t]he obligations of states parties under the Convention extend to ensuring that children have sustained and equal access to comprehensive treatment and care, including necessary HIV-related drugs . . . It is now widely recognised that comprehensive treatment and care includes anti-retroviral and other drugs, diagnostics and related technologies for the care of HIV/AIDS, related opportunistic infections and other conditions.

In recent resolutions, the Commission on Human Rights has also recognised that access to medications in the context of the pandemic such as HIV/AIDS is a fundamental element to realising the right to health and calls upon countries to pursue policies which ensure the availability, accessibility and affordability of pharmaceutical products and medical technologies necessary for the treatment of HIV/AIDS.<sup>57</sup> It further calls

<sup>54</sup> Para 47 (my emphasis).

<sup>55</sup> Art 28 of the Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (49) 167, UN Doc A/44/49 (1989) (entered into force 2 September 1990).

<sup>56</sup> General Comment No 3: HIV/AIDS and the Rights of the Child, Committee on the Rights of the Child, 32nd session, UN Doc CRC/GC/2003/1 (2003) para 25.

<sup>57</sup> See Commission on Human Rights 'Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria' 56th session of the Commission on Human Rights E/CN.4/2003/L.33. See also Commission on Human Rights Resolution 2001/33 'Access to medication in the context of pandemics such as HIV/AIDS' adopted 20 April 2001, (E/CN 4 RES.2001.33) and art 15 of the Declaration of Commitment on HIV/AIDS UNGA Res.A/Res/S-26/2.

upon countries to adopt and implement legislations and positive measures in accordance with international law and international agreements acceded to in order to safeguard access to pharmaceutical and medical technologies from any limitations by third parties.<sup>58</sup> With specific regard to the problems posed by pharmaceutical patents which have been discussed extensively elsewhere,<sup>59</sup> this would refer to the need for countries to take legislative steps to ensure that developing countries benefit from agreements in international trade organisations, such as the World Trade Organisation, which allow for public health exceptions to intellectual property rules, thus allowing for the manufacture, exportation and importation of cheaper generic versions of ARVs.<sup>60</sup> On the international level, the Commission on Human Rights calls upon developed countries to assist resource-poor developing countries in ensuring access to pharmaceutical and medical technologies and ensure that their actions as members of international organisations take into consideration the right to health.<sup>61</sup>

The Declaration of Commitment on HIV/AIDS, adopted by the General Assembly, also recognises that access to ARVs is fundamental to realising the right to health of PLWHA and is an essential part of the efforts by countries to combat the epidemic.<sup>62</sup> The Declaration shows that countries recognise, at least in principle, the danger that HIV/AIDS poses to societies in developing countries and the role that anti-retroviral treatment can play in mitigating such danger. Like most soft law instruments which are not intended to be legally binding, the Declaration reflects a good faith commitment and a desire to influence the actual practice of countries,<sup>63</sup> and as such can be used not only as reflecting the desire of countries to provide access to ARVs (amongst

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<sup>58</sup> Art 5.

<sup>59</sup> See, eg, P Cullett 'Patents and medicines: The relationship between patents and the human right to health' (2003) 79 *International Affairs* 139; B Loff & M Heywood 'Patents on drugs: Manufacturing capacity or advancing health?' (2002) 30 *Journal of Law, Medicine and Ethics* 621. See also M Berger 'Tripping over patents: AIDS, access to treatment and the manufacturing of scarcity' (2002) 17 *Connecticut Journal of International Law* 157.

<sup>60</sup> Decision on implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of 30 August 2003 WTO Doc WT/L/540 (2003) WTO [http://www.wto.org/english/tratop\\_e/trips\\_e/implement\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implement_para6_e.htm) (28 October 2003) which allows developing countries which lack the capacity for manufacturing to import generic drugs and amends the Agreement on Trade-Related Aspects of Intellectual Property, 15 April 1994 Agreement Establishing the World Trade Organisation Annex 1C, Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 6 ILM 119.

<sup>61</sup> Art 8. See also art 15 of the Declaration of Commitment on HIV/AIDS UNGA ResA/Res/S-26/2.

<sup>62</sup> See art 15 of the Declaration.

<sup>63</sup> See AE Boyle 'Some reflections on the relationship of treaties and soft law' (1999) 48 *International and Comparative Law Quarterly* 902, where the author describes here how soft instruments may become non-binding law.



other things), but as a tool to encourage governments to act in response to the need for wide access to ARVs in developing countries.<sup>64</sup>

In line with the General Comment's interpretation of the right to health, which includes access to essential drugs like ARVs, and the resolution of the Commission on Human Rights, the office of the UN High Commissioner for Human Rights and UNAIDS have formulated guidelines on human rights in the context of HIV/AIDS, the International Guidelines on HIV/AIDS and Human Rights (Guidelines).<sup>65</sup> The Guidelines, which are non-binding, are designed to help countries prepare adequate policies and to respect human rights.<sup>66</sup> The Guidelines have been argued to form a 'soft law' bridge between 'hard law' international obligations and the practice of countries.<sup>67</sup> The Guidelines were issued first in 1998. Guideline 6, which deals expressly with access to medicines, was, however, revised in 2002 to take into account the obligation of countries to provide ARVs as part of the right to health as interpreted by the ESCR Committee in the General Comment in 2000, as well as other developments in the area of access to HIV/AIDS treatment.<sup>68</sup> It states that<sup>69</sup>

[u]niversal access to HIV/AIDS prevention, treatment, care and support is necessary to respect, protect and fulfill human rights related to health, including the right to enjoy the highest attainable standard of health. Universal access will be achieved progressively over time.

Although the Guidelines recognise that the right to health must be achieved progressively over time, it nevertheless states that countries have an immediate obligation to take steps as quickly as possible to ensure, among other things, access to treatment.<sup>70</sup> Guideline 6, which is expressed in very similar terms as found in the General Comment but which refers specifically to HIV/AIDS treatment, recommends the enactment of legislation by countries to provide for HIV-related goods, services and information so as to ensure, among other things, safe and effective medication. Countries are required under the guideline to ensure access to essential medications at affordable prices, and on a non-discriminatory, sustainable basis. It further requires countries to

<sup>64</sup> D Patterson & L London 'International law, human rights and HIV/AIDS' (2002) 80 *Bulletin of the World Health Organisation* 964 966.

<sup>65</sup> UNAIDS & OHCHR *International guidelines on HIV/AIDS and human rights* (1997). See also UNAIDS & OHCHR *International guidelines on HIV/AIDS and human rights: Revised Guideline 6* (2002) <http://www.unhchr.ch/hiv/g6.pdf> (3 August 2004). The guidelines were developed by the Second International Consultation on HIV/AIDS and Human Rights. The Guidelines were drawn up after the Secretary-General of the UN recommended to Commission Human Rights that guidelines were needed to clearly outline the application of human rights in the context of HIV/AIDS.

<sup>66</sup> See Preface to the Revised Guideline 6.

<sup>67</sup> Watchirs (n 13 above) 98.

<sup>68</sup> n 65 above.

<sup>69</sup> Para (b) of Guideline 6.

<sup>70</sup> See n 66 above.

take measures to ensure for all persons, on a sustained and equal basis, the availability and accessibility of HIV-related goods, including anti-retroviral and other safe and effective medicines. Countries are also to pay particular attention to vulnerable individuals and populations.

Apart from the express link between access to ARVs and the right to health, eliminating the obstacles which may impede access to and the delivery of ARVs in developing countries is also necessary for the full enjoyment of the right to health. The interpretation of the right to health to include the underlying determinants of health would mean that countries have obligations under the right to health to deal with the political, economic and health structure obstacles which may prevent access to ARVs, including the inadequacy of a health infrastructure, the non-availability of trained medical professionals, particularly in rural areas, and inequitable resource distribution.<sup>71</sup> Dealing with these obstacles is very clearly a part of fulfilling the right to health as revealed by the General Comment with regard to the application of the right by countries under the criteria of availability, accessibility, acceptability and quality provided under the General Comment.<sup>72</sup> For instance, the availability criterion requires that the presence of sufficient functioning public health and health-care facilities, goods and services, trained medical professionals as well as programmes are necessary. Countries are therefore required as part of their obligations under the right to health to take steps within their available resources as required under article 2(1) of CESCR to deal with inadequacy of health structures as part of progressively fulfilling the right to health of PLWHA as well as the entire populace.

The accessibility principle involves affordability and thus requires countries to provide what may be necessary for the enjoyment of the right to health for people who cannot afford to provide it for themselves. It is thus obligatory for countries to put in place health insurance schemes to enable their citizens to pay for health services. This is particularly important in developing countries like Nigeria, where many people cannot afford to pay for health services or make out of pocket spending. It is necessary to take steps to the extent possible to provide free ARVs for those who cannot afford to pay for them and to subsidise other costs associated with anti-retroviral treatment. It also requires that health facilities should be accessible to all parts of the country. This would involve ensuring that rural areas have health facilities which

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<sup>71</sup> MC Hosseinipour *et al* *Challenges in delivering anti-retroviral treatment in resource-poor countries* (2002) 16 (Suppl. 4) *AIDS* S178; SS Abdool Karim *et al* *Implementing anti-retroviral therapy in resource-constrained settings: Opportunities and challenges in integrating HIV and tuberculosis care* (2004) 18 *AIDS* 975; UNAIDS 2004 *Report on the Global AIDS Epidemic* (Geneva: UNAIDS, 2004); C Webb 'AIDS: The real problem is getting the medicine out' *International Herald Tribune* 14 July 2004.

<sup>72</sup> Paras 12(a)-(d); T Barnett & A Whiteside *AIDS in the twenty-first century: Disease and globalisation* (2002).

PLWHA living in rural areas can easily access. The quality principle states amongst other things that the right to health includes the provision of unexpired drugs as well as trained health personnel. Countries would therefore have to monitor the proper administration and utilisation of ARVs provided to PLWHA. For instance, it must be ensured that the drugs provided are safe and that they are not expired. The provision of expired ARVs has already occurred in Nigeria.<sup>73</sup> Ensuring good quality ARVs would also involve a provision of monitoring equipment to ensure that the risks of drug resistance are reduced substantially. The Guidelines also expressly recognise the various obstacles which may impede access to ARVs and require countries to take measures to deal with these obstacles. Accordingly, it states that<sup>74</sup>

[a]ccess to HIV/AIDS-related information, goods and services is affected by a range of social, economic, cultural, political and legal factors. States should review and, where necessary, amend or adopt laws, policies, programmes and plans to realise universal and equal access to medicines, diagnostics and related technologies, taking these factors into account.

The Guidelines also recommend that countries increase their budgetary allocation in order to provide sustainable access to ARVs and other HIV/AIDS related goods.<sup>75</sup>

It seems fairly obvious that to respect, protect and fulfil the right to health of PLWHA, countries may be argued to have legal obligations not only to provide ARVs, but also to take steps to eliminate the obstacles which may impede access to ARVs for PLWHA.

### **3.3 The need to examine the application of the international right to health in domestic legal systems**

As shown above, the right to health is entrenched in international law, and gives rise to international legal obligations to ensure that PLWHA have access to ARVs. It is, however, important to examine the application of the right to health under the domestic laws of developing countries for various reasons. International human right obligations contained in international human rights instruments are primarily meant to apply domestically within countries and the obligations therein are required to be discharged in the domestic setting.<sup>76</sup> However, although many countries have ratified or signed international human rights treaties, including CESC (currently 145 states have

<sup>73</sup> See n 18 above.

<sup>74</sup> Para (d) of Guideline 6.

<sup>75</sup> Para (c) of Guideline 6.

<sup>76</sup> Countries are required to give effect to their obligations under international human rights treaties, including CESC, within their domestic legal systems. See ESCR Committee General Comment No 9: The domestic application of the Covenant (1998) UN Doc E/1999/22, Annex IV, (19th session, 1998), UN Doc E/C.12/1998/24 (1998).

ratified CESCER),<sup>77</sup> such ratification may simply be a ceremonial and empty gesture<sup>78</sup> unless brought into the domestic legal system. Thus, domestic legal systems may offer more effective protection of human rights to citizens because, where human rights norms are established in legislation or jurisprudence, they acquire a special status which is not easily changed.<sup>79</sup> Where they are recognised as justiciable in domestic law, (either in the constitution or other legislation), human rights norms can be enforced in domestic courts by interested parties. Further, the orders of domestic courts may have a stronger effect than the recommendations and concluding observations made by human rights monitoring committees, the execution of which frequently depends on good faith on the part of countries. Government accountability with respect to the protection and promotion of human rights may therefore be better guaranteed within domestic legal systems than in international law where adequate enforcement mechanisms may present difficulties.<sup>80</sup> Domestic jurisprudence may also influence the interpretation of rights and obligations in international law.<sup>81</sup> With particular regard to the right to health, the interpretation by domestic courts of the obligations of countries under the right to health may provide evidence of state practice, thus strengthening the effect of the right in international law, as well as provide further resources for legal analysis of the right in international law.<sup>82</sup>

There are, of course, debates about the justiciability of socio-economic rights such as the right to health.<sup>83</sup> Such debates frequently revolve around the legitimacy of socio-economic rights and how they are incorporated in the domestic legal system, whether as enforceable

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<sup>77</sup> Office of the United Nations High Commissioner for Human Rights Status of Ratifications of the International Human Rights Instrument Treaties (as of June 2004) <http://www.unhchr.ch/pdf/report.pdf> (accessed 6 July 2007).

<sup>78</sup> See C Heyns & F Viljoen 'The impact of the United Nations treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483.

<sup>79</sup> C Archibold 'The incorporation of civic and social rights in domestic law' in Copicud *et al* (n 31 above) 57; Heyns & Viljoen (n 78 above) 483.

<sup>80</sup> Heyns and Viljoen note that internalising treaty norms into the constitution as justiciable norms into the domestic legal system represents one of the most powerful ways in which treaty norms could be enforced on the domestic level. See Heyns & Viljoen (n 78 above) 500.

<sup>81</sup> See art 38(1)(d) of the Statute of the International Court of Justice, which states that the sources of international law provide that the decisions of national courts can be a subsidiary means for interpreting rules of international law. Statute of the International Court of Justice <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (accessed 24 August 2004). See Heyns & Viljoen (n 78 above).

<sup>82</sup> Fidler (n 24 above) 309. See Watchirs (n 13 above) 108. See also MA Torres 'The human right to health, national courts, and access to HIV/AIDS treatment: A case study from Venezuela' (2002) 3 *Chicago Journal of International Law* 107-108.

<sup>83</sup> See M Pieterse 'Coming to terms with judicial enforcement of social rights' (2004) Paper presented at the *South African Journal on Human Rights Conference*, 5-7 July 2004 [http://wwwserver.law.wits.ac.za/sajhr/conference\\_papers/pietersepaper.pdf](http://wwwserver.law.wits.ac.za/sajhr/conference_papers/pietersepaper.pdf) (accessed 6 July 2007).

rights or merely as directive principles of state policy.<sup>84</sup> These issues can be resolved more effectively within the domestic legal system of countries. It is therefore necessary to investigate the domestic legal systems of countries to determine how the right to health is incorporated and the limits of the obligations of governments, particularly as regards access to ARVs. For the purpose of the analysis carried out here, the next section of this article will examine the protection of the right to health in the Nigerian Constitution. It will look at the application of international law in Nigeria, with particular regard to the right to health, as well as judicial decisions which have implications for the right to health and for access to ARVs.

#### 4 The right to health in Nigeria

As discussed above, the right to health as provided for in international human rights law requires, among other things, that national legislation and policy be established with a detailed plan to ensure the right to health as well as the provision of health care and public health services, particularly in rural areas, the appropriate training of doctors, and the provision of a sufficient number of hospitals, clinics and other health-related facilities. Further, as discussed above, countries have obligations under the right to health to deal with the political, economic and health structure obstacles which may prevent access to ARVs, including the inadequacy of health infrastructure, the non-availability of trained medical professionals, particularly in rural areas, and inequitable resource distribution.<sup>85</sup>

Nigeria has developed a policy to provide access. However, as pointed out in section 2, several problems remain, particularly in relation to the adequacy of coverage, sufficiency of trained health personnel, inequitable access of the drugs and other facilities between urban and rural areas, with rural areas suffering a disadvantage. Below, I examine the effectiveness with which the right to health as described above is applied in Nigerian jurisprudence and the possibility of compelling government to take further steps to increase access in the courts. I consider the provision and application of the right by the courts under the constitution and international human rights instruments to which Nigeria is a party. I finally consider very briefly the application of the right in other developing world jurisdictions in comparison with Nigeria.

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<sup>84</sup> Pieterse (n 83 above) 8.

<sup>85</sup> See n 72 above.

#### 4.1 The Constitution

The Constitution of the Federal Republic of Nigeria, adopted in 1999,<sup>86</sup> provides for the protection of the rights of individuals and obligations of government. Like the Indian Constitution, the Nigerian Constitution contains fundamental rights,<sup>87</sup> consisting of civil and political rights and fundamental objectives and directive principles of state policy containing socio-economic rights.<sup>88</sup> Fundamental rights are enforceable by citizens against the government in Nigerian courts.<sup>89</sup> By contrast, fundamental objectives and directive principles of state policy do not entitle citizens to any actionable claims and are non-justiciable under the Nigerian Constitution.<sup>90</sup> In this regard, section 6 of the Constitution ousts the jurisdiction of the courts with regard to fundamental objectives, stating that<sup>91</sup>

[t]his section shall not, except as other wise provided by this Constitution, 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 judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

In cases such as *Archbishop Olubunmi Okogie and Others v Attorney-General of Lagos State* and *Adeyinka Badejo v Federal Minister of Education and Others*, Nigerian courts have held severally that the fundamental objectives and directive principles of state policy are non-justiciable and therefore the courts lack jurisdiction to deal with them.<sup>92</sup> They held that section 6(6)(c) of the Nigerian Constitution, which declares the fundamental objectives and directive principles of state to be non-justiciable, takes precedence over section 13, which provides that all the organs of government have the duty and responsibility to conform to, observe and apply the fundamental objectives and directive principles.<sup>93</sup> Nigerian courts have not read the fundamental objectives as part of the fundamental rights in order to ensure a greater level of accountability on the part of government with regard to the realisation of the

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<sup>86</sup> Constitution of the Federal Republic of Nigeria 1999 <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (accessed 6 July 2007).

<sup>87</sup> Ch IV of the Constitution of Nigeria.

<sup>88</sup> Ch II.

<sup>89</sup> Sec 46 of the Constitution.

<sup>90</sup> Sec 6(6)(c) of the Constitution.

<sup>91</sup> See n 76 above.

<sup>92</sup> See *Archbishop Olubunmi Okogie & Others v Attorney-General of Lagos State* (1981) 1 NCLR 218; *Adeyinka Badejo v Federal Minister of Education & Others* Suit No M/500/88 of High Court of Lagos State (ruling delivered on 4 November 1988).

<sup>93</sup> See n 92 above.

fundamental objectives and directive principles.<sup>94</sup> Nigerian courts seem to be shy of going beyond the literal letter of the law. Indeed, there has been little protection of human rights in Nigeria, particularly, under the military, when court orders constituting redress against human rights violations were routinely ignored by the executive.<sup>95</sup> It is therefore perhaps not very surprising (although not necessarily excusable) that Nigerian courts are reluctant to enforce socio-economic rights as contained in the directive principles, such as the right to health. It would therefore seem that the enforceability of the right to health and the accompanying obligations in Nigerian courts are in doubt.

In Nigeria, although fundamental objectives and directive principles are not enforceable in the courts, the executive, legislative and judicial arms of government are under a constitutional obligation to observe and apply them.<sup>96</sup> The fundamental objectives and directive principles, although not justiciable, were entrenched in the Constitution in order to promote the welfare and the advancement of society.<sup>97</sup> Thus, as some authors have argued, the fundamental objectives and directive principles are a serious mandate as well as a benchmark for measuring the performance of the government.<sup>98</sup>

Like other socio-economic rights, the right to health is contained in the Nigerian Constitution as a directive principle. The right as provided for in the Nigerian Constitution is very narrowly defined. Section 17 provides as follows:<sup>99</sup>

The State shall direct its policy towards ensuring that:

...

- (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
- (d) there are adequate medical and health facilities for all persons.

What may be construed as the right to health in Nigeria is therefore couched less broadly than in international human rights instruments,

<sup>94</sup> This is unlike the Indian courts and other courts such as the Ghanaian and Ugandan courts operating under similar constitutions. See C Obiagwu & CA Odinkalu 'Nigeria: Combating legacies of colonialism and militarism' in AA An-N'aim (ed) *Human rights under African constitutions: Realising the promise for ourselves* (2003) 226. See GW Kanyeihamba 'Constitutional obligation in developing countries' in ML Marasinghe & WE Conklin (eds) *Essays on third world perspectives in jurisprudence* (1984) 55; J Krishnan 'The rights of the new untouchables: A constitutional analysis of HIV jurisprudence in India' (2003) 25 *Human Rights Quarterly* 791.

<sup>95</sup> Obiagwu & Odinkalu (n 94 above) 227-228.

<sup>96</sup> Sec 13 of the Constitution. See BO Nwabueze *The Presidential Constitution of Nigeria* (1982) 456. See also BO Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1978-1988) 3 *Nigerian Juridical Review* 74.

<sup>97</sup> BO Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1983) 32 *International and Comparative Law Quarterly* 214-215.

<sup>98</sup> Okere (n 97 above) 228.

<sup>99</sup> Secs 17(c) & (d) of the Nigerian Constitution.

with obligations in regard only to ensuring occupational safety and the provision of adequate medical and health facilities. The right to health as contained in the Nigerian Constitution does not create obligations on the government in respect of the underlying determinants of health. However, establishing and implementing policies with regard to access to ARVs and the provision of adequate delivery systems undoubtedly comes within the scope of the government's obligation to provide adequate medical and health facilities for all persons as required by the Constitution. The government's policy of making ARVs available to a small number of PLWHA can therefore be seen as a step towards complying with the fundamental objectives and directive principles of state policy.

The non-justiciability of the right to health under the Nigerian Constitution, however, makes it difficult (if not impossible) to hold the government accountable for taking adequate steps to ensure access to ARVs and for Nigerian courts to question the reasonableness of the government's policy as courts in other jurisdictions have done.<sup>100</sup> The obligations of the government to ensure access to ARVs would therefore appear to be largely discretionary. Given that irregularities have previously occurred and may occur in the future in the current anti-retroviral programme run by the government, it may be difficult to compel the government to discharge its 'obligations' to ensure access to ARVs and to deal with any obstacles to access.

Despite these difficulties, however, it may be argued, as Okere has, that mere non-justiciability of the fundamental objectives does not completely divest them of any legal value. In his view, '[e]ven though disregard of these [p]rinciples cannot affect the validity of the legislation, a bold judiciary may yet vest them with legal significance'.<sup>101</sup> This view can, however, be extended to the interpretation of fundamental rights. In this regard, Nigerian courts can investigate whether or not fundamental rights have been violated by making reference to fundamental objectives and directive principles which may be connected to such fundamental rights.<sup>102</sup> However, as discussed above, Nigerian courts appear to stop at simply stating that fundamental objectives are not justiciable and do not seem to have interpreted the fundamental objectives and directive principles broadly and purposively to vest them with much legal significance. It may therefore be questioned

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<sup>100</sup> South Africa is one example. See *Minister of Health & Others v Treatment Action Campaign* 2002 10 BCLR 1033 (CC); *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>101</sup> Okere (n 97 above) 223.

<sup>102</sup> This has been the approach of the Indian courts towards similar provisions in the Indian Constitution which provides socio-economic rights as fundamental objectives and directive principles. See *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Another* [1996] ICHRL 31 (6 May 1996) (AIR) 1996 SCC 246 (Supreme Court of India), in which the Supreme Court linked the right to health to the right to life which is justiciable under the Indian Constitution.



whether relying on international law may not be a better option than placing reliance on the non-justiciable right to health in the Nigerian Constitution.

#### 4.2 International law: CESCER and the African Charter

Nigeria is a party to CESCER and therefore has obligations under it. However, Nigeria operates a dualist system. The Nigerian Constitution therefore stipulates that international treaties between Nigeria and other countries must be enacted as domestic laws in order to have effect as enforceable laws in Nigeria.<sup>103</sup> CESCER has not been domesticated in Nigeria and therefore will not be enforceable in the courts as law, although it may be of persuasive authority.<sup>104</sup> But, as is the case with state parties of any treaty, Nigeria is obliged to ensure that it takes no steps which would defeat the purpose of the treaty.<sup>105</sup> It can also be argued that Nigeria is obliged to take positive steps towards ensuring that it discharges its obligations under CESCER, having voluntarily ratified CESCER, thereby accepting the obligations imposed thereunder. Nigeria is also a party to the African Charter. The African Charter has been enacted as a domestic law in Nigeria.<sup>106</sup> It requires among other things that all organs of government give full recognition to the Act.<sup>107</sup>

As stated above, the right to health as provided for in the African Charter is couched in similar terms as the right to health in CESCER. The two instruments may therefore be subject to the same interpretation. In any event, it is apparent from the wording of the provision in the African Charter (which clearly requires parties to it to take measures towards providing medical treatment for people who need them)<sup>108</sup> that access to treatment is a basic component of the right to health. It follows that access to ARVs and the elimination of obstacles with respect thereto are components of the right to health for people living with HIV/AIDS in Nigeria. Nigeria, as a party to the African Charter, which is also domestic law in Nigeria, is thus under an obligation to ensure that people living with HIV/AIDS have access to treatment, including anti-retroviral treatment and treatment for opportunistic infections. It is also worth noting that, unlike CESCER, which requires the progressive realisation of the rights contained therein, the African Charter, which recog-

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<sup>103</sup> Sec 12(1) of the Nigerian Constitution provides that '[n]o treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly'.

<sup>104</sup> See *Ogugu v State* (1994) 6 NWLR 316 (Supreme Court of Nigeria).

<sup>105</sup> See *MS Shaw International law* (2003) 818.

<sup>106</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990.

<sup>107</sup> Sec 1.

<sup>108</sup> Art 16(2).

nises civil and political rights as well as socio-economic rights without any distinction, requires immediate implementation by parties.<sup>109</sup>

Since the African Charter is domestic law in Nigeria, people living with HIV/AIDS in Nigeria are entitled to access ARVs and can enforce their right to health with respect to such access in Nigerian courts. This argument may, however, present some difficulty when it is recalled that the obligation of the government to ensure that medical facilities are provided, is merely a part of the fundamental objectives and directive principles of state policy which are not enforceable.

A recent decision of the Supreme Court, which ruled on the position of the African Charter in Nigeria's legal system, strengthens this argument. In *General Sani Abacha and Others v Gani Fawehinmi*, the Supreme Court held that, while the African Charter is a municipal law enforceable in Nigerian courts and is on a higher pedestal than other municipal law because of its international origins, it is, however, inferior to and cannot override the provisions of the Constitution from which it takes its authority.<sup>110</sup> The Supreme Court held that '[t]he African Charter is not superior to and does not override the Constitution of the Federal Republic of Nigeria'.<sup>111</sup> It further emphasised that:<sup>112</sup>

The Constitution is the supreme law of the land; it is the *grundnorm*. Its supremacy has never been called to question in ordinary circumstances. Thus any treaty enacted into law in Nigeria by virtue of section 12(1) of the Constitution is circumscribed in its operational scope and extent as may be prescribed by the legislature.

The Supreme Court thus acknowledged a difference between the African Charter and other domestic laws on the basis of its origin in international law and its binding nature, but asserted the supremacy of the Constitution over the African Charter. It did not, however, interpret the African Charter as being useful in giving meaning to the fundamental rights and the directive principles and fundamental objectives in the Constitution. This is in sharp contrast with the position of legal systems of countries such as Venezuela which allows the courts to employ international human rights treaties over the Constitution where the treaties offer greater protection of human rights than constitutional provisions.<sup>113</sup> The stance of the Supreme Court in this case seems to suggest that international human rights treaties, even when domesticated, do not offer any more protection of human rights than the Constitution provides. The decision in this case has therefore been criticised as con-

<sup>109</sup> Art 1 of the African Charter. See CA Odinkalu 'Analysis of paralysis or paralysis of analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327-349.

<sup>110</sup> *General Sani Abacha & Others v Gani Fawehinmi* (2000) 6 *Nigerian Weekly Law Reports* 228 (Supreme Court of Nigeria).

<sup>111</sup> n 110 above, 255.

<sup>112</sup> n 110 above, 258.

<sup>113</sup> See art 19 of the Constitution of Venezuela.

servative and retrogressive with regard to the protection of human rights.<sup>114</sup>

While this was a case dealing with fundamental rights which are justiciable under the Nigerian Constitution,<sup>115</sup> it would seem that on the basis of this decision, economic and social rights provided for in the Constitution as fundamental objectives and directive principles cannot be enforced in Nigerian courts, since the Constitution specifically states that they are non-justiciable. Although the African Charter makes them justiciable, the African Charter, according to the Supreme Court's decision, is subject to the Constitution and as such cannot give rise to justiciable rights where the Constitution expressly denies the justiciability of such rights. This superficial interpretation is somewhat problematic in that it denies the African Charter, as incorporated in the Nigerian legal system, the full force which it should have as a domestic law as well as an international treaty which imposes obligations on Nigeria. Some have therefore contended that the rights in the African Charter (including socio-economic rights such as the right to health) can be enforced in Nigerian courts since the African Charter is a statute of its own and 'stands on its own legs'.<sup>116</sup> In this regard, it may be argued that the right to health as provided for in the African Charter being much broader in scope, as earlier discussed, cannot be taken to be the exact equivalent of the obligation of the government to provide adequate medical facilities under the Constitution, even though the right to health, as provided for in both the African Charter and the Constitution, has been argued to engender obligations to provide access to ARVs to persons living with HIV/AIDS in Nigeria. As such, the right to health under the African Charter, as distinguished from the duty of the government to provide medical services as required under the non-justiciable directive principles of state policy in the Constitution, can be enforced as a right in Nigerian courts.

Further, it can also be argued that any acceptance of the non-justiciability of economic and social rights as contained in the African Charter amounts to a contracting out of international obligations which Nigeria had voluntarily accepted by ratifying and domesticating the African Charter which is unacceptable in international law.<sup>117</sup> It is thus appro-

<sup>114</sup> See SC Agbakwa 'Retrieving the rejected stone: Rethinking the marginalisation of economic, social and cultural rights under the African Charter on Human and Peoples' Rights' unpublished LLM thesis, Dalhousie Law School, 2000 159.

<sup>115</sup> The respondent brought an action for unlawful detention by the military government in power at the time.

<sup>116</sup> See Obiagwu & Odinkalu (n 94 above) 227.

<sup>117</sup> It is well established in international law that countries cannot avoid their international obligations by internal legislative arrangements. See the *Norwegian Loans* case (1957) ICJ Reports 37. Indeed, Musdapher JCA had held in the Court of Appeal in the case of *Fawehinmi v Abacha* that the government cannot contract out of its obligations under the African Charter by means of local legislation. See *Gani Fawehinmi v Sani Abacha* (1996) 9 *Nigerian Weekly Law Reports* 747. The Supreme Court overturned the decision of the Court of Appeal.

priate and necessary for the Nigerian courts to take a bolder stance in interpreting the provisions of the African Charter to secure greater accountability from the government with respect to socio-economic rights. To approach the matter differently will be to deny the Nigerian people, including persons living with HIV/AIDS, the rights which are guaranteed to them by the African Charter and to make the African Charter, which is now domestic law, superfluous and unnecessary, which cannot have been the intention in domesticating it.

### 4.3 The right to health in other jurisdictions

The Nigerian model<sup>118</sup> differs from that of some developing countries, such as South Africa<sup>119</sup> and Venezuela,<sup>120</sup> in terms of the manner in which the right to health is incorporated into the legal system. In these two countries, the right to health is a justiciable constitutional right. But the Nigerian model is similar to the model in India,<sup>121</sup> Namibia,<sup>122</sup>

<sup>118</sup> It has been noted that the Nigerian model of incorporating socio-economic rights as fundamental objectives and directive principles is no longer the norm in Africa and that many African constitutions are beginning to recognise these rights as fundamental rights. See DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *African Journal of Law* 207.

<sup>119</sup> Sec 27(1) of the Constitution of the Republic of South Africa Act 108 of 1996 states that '[e]veryone has the right to have access to health care services, including reproductive health care'. However, the Constitution recognises that resources may not be sufficient and therefore provides in sec 27(2) that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. Sec 27(3) also provides that no one may be refused emergency medical treatment.

<sup>120</sup> Venezuela is a monist state. As such, the Constitution also provides that the government is bound to protect all the human rights in the human rights treaties it ratifies. More importantly, it provides that human rights treaties which have been ratified by Venezuela have a constitutional effect and are superior to other domestic legislation where such treaties provide for rights which are wider or more protective than the rights in domestic legislation. Such treaties can be applied directly by the courts. The import of this is that CDESCR and all the rights contained therein, including the right to health, apply with the same force as constitutional provisions in Venezuela. Where the right to health as provided by CDESCR is wider in scope than the right to health provided in the Constitution, the courts will apply CDESCR. See arts 19 and 23 of the Constitution of the Bolivarian Republic of Venezuela, 1999 (English translation online).

<sup>121</sup> Art 47 of the Constitution of India, 1950 <http://www.constitution.org/cons/india/const.html> (accessed 6 July 2007).

<sup>122</sup> JC Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006) 2 *African Journal of Legal Studies* 7-9.

Uganda,<sup>123</sup> Ghana<sup>124</sup> and Malawi,<sup>125</sup> where the right to health is part of the fundamental objectives and directive principles of state policy. Typically, the right to health is most secure and compels more binding obligations where incorporated as a constitutional and an enforceable right. The courts in Venezuela and in South Africa have therefore been better able to deal with issues relating to the obligations of government with respect to the right to health and in particular to access to ARVs.<sup>126</sup> The incorporation of the right as an enforceable right under the constitutions of countries depends frequently on several factors, the most important being perhaps their history and ideologies. Given the apartheid history of South Africa and the need to remedy the injustices of the past by addressing social and economic inequalities, the inclusion of the right to health as an enforceable right along with other socio-economic rights is hardly surprising.<sup>127</sup> Thus, the incorporation of the right to health in the South African Constitution has its basis in the history and accompanying ideology of the country. The same can be said of Venezuela in that there appears to be some form of socialist ideology in its Constitution which provides a wide range of welfare rights and requires the government to provide social security and a public health care system.<sup>128</sup>

India and Nigeria do not appear to recognise (at least not in the same clear manner as South Africa and Venezuela) strong welfare rights. Where incorporated as a fundamental objective and directive principle of state policy, the right to health is not justiciable. Courts therefore have to develop innovative ways and boldness to ensure that the right has some force and effectiveness. The courts in India appear to have been more successful at this than the courts in Nigeria, and have interpreted fundamental rights widely as including fundamental objectives and directive principles where necessary, thereby giving the fundamental objectives and directive principles some legal force.<sup>129</sup> The Indian

<sup>123</sup> Art XIV(b) of the Constitution of Uganda 1995 [http://www.parliament.go.ug/index.php?option=com\\_wrapper&Itemid=78](http://www.parliament.go.ug/index.php?option=com_wrapper&Itemid=78) (accessed 6 July 2007). See Mubangizi (n 122 above).

<sup>124</sup> Art 34(2) of the Constitution of Ghana [http://www.parliament.gh/const\\_constitution.php#Chapter%206](http://www.parliament.gh/const_constitution.php#Chapter%206) (accessed 6 July 2007); Mubangizi (n 122 above) 16-17.

<sup>125</sup> Sec 30(2) of the Constitution of Malawi. See Chirwa (n 118 above).

<sup>126</sup> See *NA et al v Ministerio de Sanida y Asistencia Social*, Sala Politico Administrativa, Corte Suprema de Justicia, Republica de Venezuela, Expediente numero 14.625 (1998). For Venezuela, see *Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social* Sala Politico Administrativa, Corte Suprema de Justicia, Republica de Venezuela, Expediente Numero 15.789 (1999), where the Venezuelan courts interpreted the right to health to include the right to access to anti-retroviral drugs. See also Torres (n 82 above) 105. For South Africa, see the *Treatment Action Campaign* case (n 100 above).

<sup>127</sup> See K Pillay 'Tracking South Africa's progress on health care rights: Are we any closer to achieving the goal?' (2003) 7 *Law, Democracy and Development* 1; Pieterse (n 83 above) 1. See also Archibold (n 81 above) 67-73.

<sup>128</sup> See arts 81-85 of the Constitution of Venezuela.

<sup>129</sup> See n 102 above.

Supreme Court, which is regarded as 'probably the only Third World court that continues to show boldness in upholding the Constitution against an over-zealous executive and a timid legislature'<sup>130</sup> and a champion of the poor and oppressed,<sup>131</sup> has taken a progressive stance regarding making orders regarding the obligations of governments and actions to be taken to improve the health care system. This stance is likely to have a positive impact on the right to health, including the right to essential medicines of people living with HIV/AIDS in that country. Nigerian courts, on the other hand, seem to be shy of going beyond the literal letter of the law. The Indian Supreme Court, operating within a similar legal system, has taken a different and more progressive approach to the interpretation of fundamental objectives and directive principles by linking them to fundamental rights, as well as employing international human rights standards in interpreting the fundamental objectives in the Indian Constitution, thereby making them largely justiciable. Nigerian courts seem to have taken a different direction. Indeed, there has been little protection of human rights in Nigeria, particularly under the military, when court orders constituting redress against human rights violations were routinely ignored by the executive.<sup>132</sup> It is therefore perhaps not very surprising that Nigerian courts are reluctant to enforce socio-economic rights as contained in the directive principles such as the right to health.

Given the enforceability of the right to health under the South African and Venezuelan Constitutions, the right to health, including the right to essential medicines such as ARVs, provides the courts with greater powers of enforcement. India, on the other hand, with similar provisions to those found in the Nigerian Constitution which provides socio-economic rights as fundamental objectives and directive principles, has adopted the approach of linking fundamental objectives to fundamental rights, thereby giving them more recognition than would otherwise be possible.<sup>133</sup>

## 5 Conclusion

Recently, Nigeria has taken steps to engage more effectively with the HIV/AIDS scourge, including efforts to provide anti-retroviral drugs to people living with HIV/AIDS in Nigeria. This article has sought to link access to treatment to the right to health. It is clear from the international instruments examined that access to effective medication, including anti-retroviral drugs, is a component of the right to health, a socio-

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<sup>130</sup> Kanyeihamba (n 94 above) 55.

<sup>131</sup> Krishnan (n 94 above) 791.

<sup>132</sup> Obiagwu & Odinkalu (n 94 above) 227-228.

<sup>133</sup> See n 102 above.

economic right. This article has also examined the jurisprudence surrounding the right to health in Nigeria. The specific issue of access to treatment for people living with HIV/AIDS or the broader issue of the right to health has not been adjudicated in Nigerian courts. It is therefore not clear what the decision of the courts would be in regard to such a case, given the complexities surrounding the enforceability of socio-economic rights and the effect of international human rights treaties in Nigerian jurisprudence discussed above.

However, the provisions of the Nigerian Constitution and the strict interpretation given to the issue of justiciability of fundamental objectives and directive principles of state under which the right to health falls in the Constitution indicate that any matter relating to access to anti-retroviral drugs in Nigeria is likely to present difficulties for the complainant. For instance, a complainant who brings an action to compel the government to deal with issues relating to his or her right to health, such as the inadequacy of health infrastructure or the lack of health facilities in rural areas for efficient and equitable delivery of the anti-retroviral drugs, faces seemingly insurmountable difficulties and may have little chance of success. The approach of courts in Nigeria to the enforceability of socio-economic rights has so far been less than positive, thus creating doubts about the applicability of the right to health and the protection of other socio-economic rights in Nigeria.

A reliance on international law and the domestic application of the right to health in international law present similar problems in light of the Supreme Court's decision in *Fawehinmi v Abacha*, discussed above. It is arguable that, in view of the fact that Nigeria is a party to CESC, and has domesticated the African Charter, one could reasonably contend that the government is under an obligation to discharge its obligations under these human rights treaties. However, the success of such an argument is debatable because, in effect, the Supreme Court has interpreted the usefulness of the African Charter rather narrowly and thus appears to leave little room for creative and purposive domestic application of the human rights treaties in Nigeria. The situation in Nigeria thus illustrates the difficulty in applying international human rights at the domestic level.

It would appear that the jurisprudence in Nigeria, as it currently stands, if applied to the right of access to anti-retroviral drugs specifically, and the right to health generally, would be trailing behind even government recognition for the need for, and efforts at, providing access to anti-retroviral drugs. At the very least, the courts should be able to inquire into the rationality of the policy which the government is currently implementing with regard to its anti-retroviral programme. A creative approach which takes into consideration the right to health of people living with HIV/AIDS, including the right of access to anti-retroviral drugs and other treatment, is required from the courts, particularly since such an approach will have positive implications, not only for

people living with HIV/AIDS, but also more broadly for government prioritising social services such as the improvement of the failing health sector,<sup>134</sup> thus benefiting many people who require other health services.

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<sup>134</sup> See S Agbakwa 'Reclaiming humanity: Economic, social, and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Journal* 190, noting that if socio-economic rights are enforceable in Nigeria, it would be possible to question the priorities of government.



# The promotion of basic employee rights in Tanzania

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## Summary

*This article examines the judicial protection of the right to work in Tanzania. First, it traces the historical basis of the struggle for the promotion and protection of workers' rights by looking at the early struggle in this regard, championed by early trade unions. It also discusses the implications of the partnership between trade unions leaders and politicians for the development of a vibrant trade union movement that would assist in the promotion of workers' rights. In the main, the article examines the effect of party supremacy by the ruling party on the legislation and the practice of labour rights in Tanzania. The article further examines the recent economic liberalisation and its impact on the promotion and protection of the right to work. In conclusion, it reviews a number of cases where the courts in Tanzania protected the right to work positively.*

## 1 Introduction

The article examines the judicial protection of the right to work in Tanzania. First, it traces the historical basis of the struggle for the promotion and protection of workers' rights by looking at the early struggle in this regard, championed by early trade unions. It discusses the implications of the partnership between trade union leaders and

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politicians for the development of a vibrant trade union movement that would assist in the promotion of the workers' rights. In the main, the article examines the effect of party supremacy by the ruling party, *Chama cha Mapinduzi* (CCM),<sup>1</sup> on legislation and the practice of labour rights in Tanzania. The article further examines the recent economic liberalisation and its impact on the promotion and protection of the right to work. Finally, it reviews some cases where the courts in Tanzania protected the right to work positively.

## 2 The right to work without a particular job

The right to work has two aspects. First, the right to work may entail a right against the state to maintain employment policies and promote vocational training, 'so that the unemployed can find suitable employment'.<sup>2</sup> According to Rudolph, seen in this sense, the right to work 'is a guarantee of employment but not to any particular job'. It is therefore a political goal or 'programme right'.<sup>3</sup> Secondly, there is the broad sense regarding the right to work that represents a right of a worker against a possible employer to be employed, and 'to job security'.<sup>4</sup>

So, from the foregoing, the right to work does not require a 'non-welfare state,' such as Tanzania, to provide jobs as a direct employer (ie the second sense).<sup>5</sup> In this situation, 'there is freedom to work or not to work. You may even have a right to work, as we have in our Constitution, but no one has an obligation to give you work'.<sup>6</sup> So, in countries such as Tanzania, the right to work is not taken as absolute in practice, even if there is a constitutional guarantee declaring it to be absolute. For instance, in *Timothi Kaare v Mara Co-operative Union*,<sup>7</sup> the Court of Appeal of Tanzania held that the right to work 'by its very nature cannot be absolute'.

However, for 'non-welfare states' it is easier to resort to the first sense of the right by merely declaring that it is the right of every citizen to have a job, but not to a *particular job*, as Rudolph points out. This kind of declaratory right does not demand the state to have positive

<sup>1</sup> In Kiswahili, *Chama cha Mapinduzi* means the revolutionary party.

<sup>2</sup> J Rudolph 'A right to work' in BG Ramcharan (ed) *Judicial protection of economic, social and cultural rights* (2005) 247.

<sup>3</sup> n 2 above, 248-249.

<sup>4</sup> As above.

<sup>5</sup> In a 'welfare state', such as Denmark and Britain, the first sense forms a part of security laws, where the 'right to work' may, in this sense, be defined as 'a right of a registered unemployed worker to be provided with work or otherwise to receive unemployment benefits in lieu thereof'. See P Luring *A history of Denmark* (2004); Ministry of Foreign Affairs of Denmark Factsheet Denmark, Copenhagen, January 2006.

<sup>6</sup> IG Shivji *Lawyers in neoliberalism: Authority's professional supplicants or society's amateurish conscience* (2006) 8.

<sup>7</sup> This case is discussed, without complete citation, in Shivji (n 6 above).

obligation to provide jobs to citizens, rather it just allows a person access to a job.

Going by the wording of the right to work and the right to earn just remuneration in articles 22 and 23 of the Constitution of the United Republic of Tanzania, it is apparent that the said provisions do not impose an express positive duty on the state to fulfil them. Articles 22 and 23 on the right to work and earn equal remuneration provide that:

- 22 (1) Every person has the right to work.<sup>8</sup>
- (2) Every citizen is entitled to equal opportunity and right on equal terms to hold any office or discharge any function under the state authority.
- 23 (1) Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measures and nature of the work done.
- (2) Every person who works is entitled to just remuneration.

In effect, article 22 of the Constitution of Tanzania 'is framed in [a way allowing it] to operate *vis-à-vis* the citizenry *inter se*. The executive faces little or no danger at all in its exercise.'<sup>9</sup> Similarly, article 23, which guarantees the right to fair remuneration, 'does not, in its exercise, impinge adversely on the privileged status of the executive in the hierarchy of governance'.<sup>10</sup>

In contrast, the International Covenant on Economic, Social and Cultural Rights (CESCR) imposes several positive obligations on the part of the state in relation to the right to work. They include the obligation by the state party thereto to 'take appropriate steps to safeguard' the right to work, which 'includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'.<sup>11</sup> The state party is also obliged to take steps in order to achieve the full realisation of this right, including providing 'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'.<sup>12</sup> Under article 7, CESCR obliges states to recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed con-

<sup>8</sup> Art 25 of the Constitution imposes a duty on every citizen to work and it also prohibits forced labour.

<sup>9</sup> FDAM Luoga 'The Tanzanian Bill of Rights' in CM Peter & IH Juma (eds) *Fundamental rights and freedoms in Tanzania* (1998) 40.

<sup>10</sup> As above.

<sup>11</sup> Art 6(1) CESCR.

<sup>12</sup> Art 6(2).

- ditions of work not inferior to those enjoyed by men, with equal pay for equal work;
- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
  - (b) Safe and healthy working conditions;<sup>13</sup>
  - (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
  - (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>14</sup>

So, the wording of articles 6 and 7 of CESC, which guarantees the right to work and all incidentals thereto, is more expansive than the wording of articles 22 and 23 of the Constitution. In progressive jurisdictions, such as Finland, the right to work and earn just remuneration is given wider constitutional and statutory protection than in Tanzania. In *Mr L v The Municipality of Hollola*,<sup>15</sup> for instance, it was apparent that the Finnish Constitution Act provided that: '[u]nless otherwise prescribed in an Act of Parliament, it is incumbent for the state to arrange a Finnish citizen a possibility to work'.<sup>16</sup> In order to implement this provision, the Finnish Employment Act of 1987 'included duties for municipalities and state authorities to arrange temporary jobs for two groups of persons: the long-term unemployed and the young unemployed'.<sup>17</sup>

### 3 The right to work as a basis for human survival

The right to work is very important to the very survival of the individual human being and society in general.<sup>18</sup> According to Justice Mwalusanya:<sup>19</sup>

The right to work is the most important . . . right in the labour law of . . . countries. Its ideological basis is the need and necessity of the working class. It aims at securing the possibility of continued employment. It is not an empty slogan but a survival for existence. For this right to exist in any real

<sup>13</sup> In *Mr L v the Municipality of Hollola*, Yearbook of Supreme Court of Finland, 1997 No 141 (also published in Ramcharan (n 2 above) 260-262), the Supreme Court of Finland held that the state and the municipality 'were under an obligation to strive for arranging to a person a job that corresponded to his ability to work and guaranteed his subsistence'.

<sup>14</sup> Also see *Mr L v the Municipality of Hollola* (n 13 above).

<sup>15</sup> As above.

<sup>16</sup> See sec 6(2) of the Finnish Constitution Act. This section is identical to sec 18 of the Finnish Constitution of 1999.

<sup>17</sup> Ramcharan (n 2 above) 262.

<sup>18</sup> See CM Peter *Human rights in Tanzania: Selected cases and materials* (1997) 169; H Kijo-Bisimba & CM Peter *Justice and rule of law in Tanzania: Selected judgments and writings of Justice James L Mwalusanya and commentaries* (2005) 105.

<sup>19</sup> *Augustine Masatu v Mwanza Textiles Ltd* High Court of Tanzania at Mwanza, Civil Case 3 of 1986 (unreported), reproduced in Peter (n 18 above) 174.

sense, it is necessary that economic, political and legal orders of the society assure everybody who is capable of working of the possibility of participating in building his society through work in accordance with his capacity and education and the right to earn an income proportional to the quantum of his work. And so job-security is the hall-mark of the whole system.

Indeed, the contemporary realisation of the right to work 'is a product of many years of concerted struggle against capital and exploitation of labour in general'.<sup>20</sup> In this respect, the right to work entails 'among other things, the right to demand better and fair wages, the right to withhold labour by strikes and other means, etc'.<sup>21</sup> Therefore, in recognition of this reality, the Tanzanian Constitution has guaranteed the right to work in article 22. The right to earn fair remuneration is guaranteed under article 23. Although the Constitution of Tanzania provides *separately* for the right to work and the right to earn fair and just remuneration, these are essentially two sides of the same coin. In practice, the right to work goes hand in hand with the right to fair remuneration. Therefore, this work examines the said rights as two sides of the same coin.

Under the Constitution of Tanzania, the right to work entails a guarantee to every person to be afforded an equal opportunity in employment.<sup>22</sup> It also involves one's guarantee to equal conditions in occupying any position of employment in Tanzania.<sup>23</sup> In fact, the provisions of article 22 of the Constitution of Tanzania strive to give legal effect to the provisions of article 7 of CESCRR at the municipal level. However, this guarantee is a mere constitutional declaration. In practice, the right to work and workers' rights are 'hardly protected in [the] real sense'.<sup>24</sup>

#### 4 The struggle for protection of the right to work in Tanzania

The contemporary state of the right to work in Tanzania is linked to the struggles for the protection of workers' rights, dating back to the 1930s and 1940s. During this period, workers in colonial Tanganyika — then under the British colonial rule — started to organise themselves in small trade unions. This was the colonial epoch where trade unions were not encouraged to operate by the colonial rulers. As such, under such stringent conditions, the existing small trade unions did not organise as a formidable force that would steer the struggle for protection of workers'

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<sup>20</sup> Peter (n 18 above).

<sup>21</sup> As above.

<sup>22</sup> n 19 above.

<sup>23</sup> Art 22(2) Constitution of Tanzania.

<sup>24</sup> Peter (n 18 above) 170.

rights in Tanzania. Nonetheless, they attempted to organise some serious activities, including strikes.<sup>25</sup>

During the struggle for independence in the 1950s, workers joined peasants and politicians<sup>26</sup> to pressurise the British colonial government to grant the independence to Tanganyika that would ensure freedom and liberty.<sup>27</sup> In time, though, trade union leaders became active politicians; and after independence, the politicians swallowed trade union leaders.<sup>28</sup> This was done 'either voluntarily through co-opting trade union leaders into the political process or by force through detention or internal deportation of the leadership'.<sup>29</sup> In fact, this was facilitated by the enactment of repulsive laws, such as the Preventive Detention Act, 1962, which went hand in hand with the outlawing of strikes through the Trade Disputes (Settlement) Act, 1962.<sup>30</sup> According to Peter, these laws were given impetus by the enactment of a 'disciplinary code to control the workers', in the name of the Security of Employment Act which was enacted in 1964.<sup>31</sup> In effect:<sup>32</sup>

This legislation also took all labour matters from the purview of the normal courts of law and placed them in some administrative bodies. These were the Labour Conciliation Board under a labour officer<sup>33</sup> which holds its sessions *in camera* and advocates have no *locus standi* in them and appeals from these Boards go direct to the Minister for Labour whose decision is final and conclusive.

<sup>25</sup> Peter (n 18 above). Also see IG Shivji *Law, state and the working class in Tanzania* (1985).

<sup>26</sup> During this time, peasants were well organised and had a strong leadership through co-operative unions, like the Victoria Nyanza Co-operative Union and the Kilimanjaro Native Co-operative Union. This was also the case with the politicians who were strongly organised through the TANU leadership. Consequently, the weaker trade unions had to seek refuge in this partnership.

<sup>27</sup> See IG Shivji *Class struggle in Tanzania* (1976) 48-60.

<sup>28</sup> See MA Bienefeld 'Socialist development and the workers in Tanzania' in R Sandbrook & R Cohen (eds) *The development of an African working class: Studies in class formation and action* (1975) 242.

<sup>29</sup> Peter (n 18 above) 171.

<sup>30</sup> See IG Shivji 'The post-Mwongozo proletarian struggles in Tanzania' in H Goulbourne (ed) *Politics and state in the Third World* (1979) 142.

<sup>31</sup> Peter (n 18 above).

<sup>32</sup> As above.

<sup>33</sup> Indeed, the labour officers abused the powers vested in them by the law. In *Augustine Masatu v Mwanza Textiles Ltd* (n 19 above), eg, the labour officer unlawfully gave a fiat for termination of the employee's employment to a JUWATA executive committee member under sec 8(b) of the Security of Employment Act 'because he did not consult the affected employee first and the Labour Conciliation Board'.

## 5 Trade unions and the right to work in Tanzania: Reconciling law with practice

The foregoing problem was further compounded when in 1964 an army mutiny took place in the country. As a result of this mutiny, several trade union leaders were detained and their umbrella union — the Tanzania Federation of Labour (TFL) — was dissolved,<sup>34</sup> and a single trade union, more susceptible to political manoeuvring, was formed. This was the National Union of Tanganyika Workers (NUTA), formed under the National Union of Tanganyika Workers (Establishment) Act 1964.<sup>35</sup> This Act brought forth a *de facto* principle that saw the Secretary-General of NUTA being the Minister responsible for labour, which dwarfed serious struggles for the protection of workers' rights. This was intensified in February 1977, when TANU merged with its Zanzibar counterpart, Afro-Shirazi Party (ASP), to form *Chama cha Mapinduzi* (CCM). The coming into scene of CCM, as the sole and supreme political party, brought about a new political dispensation of 'party supremacy'. With CCM being supreme over and above all other branches of the state — ie the judiciary and the legislature — trade unions were reduced to one of the five mass organisations of the ruling party and changed their name from NUTA to *Jumuiya ya Wafanyakazi wa Tanzania* (JUWATA).<sup>36</sup> JUWATA was established under the *Jumuiya ya Wafanyakazi wa Tanzania Act, 1979*,<sup>37</sup> as the sole trade union affiliated to CCM.<sup>38</sup>

In effect, JUWATA turned out to be a tool of the state in its bid to infringe on workers' rights in the country. In fact, JUWATA was used by the state, which was the major employer in those days, to discourage workers to claim for their rights. For instance, in 1982, when 300 workers employed by the Tanzania Zambia Railway Authority (TAZARA) were declared redundant, JUWATA was instrumental in furthering the redundancy.<sup>39</sup> Indeed, JUWATA endorsed the management's decision to declare the workers redundant. In this matter, after being declared redundant, the workers, using the services of the Legal Aid Committee of the Faculty of Law at the University of Dar es Salaam, filed a trade dispute inquiry in the Permanent Labour Tribunal.<sup>40</sup> They challenged the redundancy, alleging that it was done in bad faith because the

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<sup>34</sup> As above.

<sup>35</sup> Act 18 of 1964.

<sup>36</sup> The Kiswahili version for Tanzania Workers' Association.

<sup>37</sup> Peter (n 18 above) 172.

<sup>38</sup> SLC Chachage 'Globalisation, politics and good governance in Tanzania' in *Globalisation: Who benefits?* Annual Human Rights Conference Report, 2003, Dar es Salaam Legal and Human Rights Centre (2004) 111.

<sup>39</sup> Shivji (n 6 above) 18.

<sup>40</sup> This matter is discussed at length in Shivji (n 6 above).

workers were not consulted before they were declared redundant. It should be noted that in the 1980s there was no specific law on redundancy in Tanzania. Therefore, the workers' lawyers creatively used certain provisions of the Security of Employment Act (SEA) and managed to obtain an award of the Permanent Labour Tribunal, which ordered, *inter alia*, for the reinstatement of the workers.

This award prompted the management of TAZARA to appeal to the Minister responsible for labour, who endorsed the Tribunal's decision. The management, consequently, decided to institute a judicial review of the Minister's decision in the High Court, seeking an order of *certiorari* to quash the award.<sup>41</sup> In a sense:<sup>42</sup>

TAZARA's counsel argued that the Minister who had made the decision based on the report of the Tribunal exceeded his jurisdiction because he embarked on settling a trade dispute that did not exist. *Quoting the letter from JUWATA's Secretary General, TAZARA's lawyer forcefully submitted that the sole representative of all employees in Tanzania (section 4(1) of the JUWATA Act, 1979) had amicably settled the trade dispute. The judge agreed.*

Consequently, the workers appealed to the Court of Appeal, which held that 'the statutory provision on consultation requires "meaningful consultation" with the trade union branches at the place of work and before the decision on redundancy has been made'.<sup>43</sup> The Court of Appeal restored the order of reinstatement.<sup>44</sup>

Even with the reformation of JUWATA to become the Organisation of Tanzania Trade Unions (OTTU)<sup>45</sup> and then the Trade Union Confederation of Tanzania (TUCTA),<sup>46</sup> things did not improve in respect of workers' realisation of the constitutional guarantees relating to the right to work. In practice:<sup>47</sup>

OTTU, like the other state-established and controlled 'trade unions', still retained strong allegiance to the party and government. In addition, the law establishing it, apart from being contradictory and a bad piece of legal draftsmanship, gave the Registrar of Societies power to de-register OTTU at any time.

<sup>41</sup> *Tanzania Zambia Railway Authority v Hamisi Ally Ruhondo & 115 Others*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause 7 of 1985 (unreported).

<sup>42</sup> Shivji (n 6 above) 18 (my emphasis).

<sup>43</sup> As above.

<sup>44</sup> *Tanzania Railway Workers Union v Tanzania Railways Corporation and PSRC*, High Court of Tanzania at Dar es Salaam, Civil Case No 190 of 2002 (unreported); *COTWU (T) — OTTU Union and Another v Hon Iddi Simba, Minister of Industries and Trade & 7 Others*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause 100 of 1999 (unreported).

<sup>45</sup> OTTU was established under the Organisation of Tanzania Trade Unions Act, 1991 (Act 20 of 1991).

<sup>46</sup> TUCTA was established under the Trade Unions Act, Cap 244 RE 2002.

<sup>47</sup> Peter (n 18 above) 172.



The Presidential Commission on Single Party or Multiparty System in Tanzania (popularly known as the Nyalali Commission) was of the view that OTTU did not qualify to be a trade union, because '[t]he principles governing trade unions insist that people should be left to organise freely'.<sup>48</sup> So, the Nyalali Commission recommended the reform of labour laws with a view to aligning them with human rights standards.

The foregoing discussion, in general, shows that the right to work has not been given practical implementation by the laws, although it is well entrenched in the Constitution of Tanzania. In practice:<sup>49</sup>

The laws that have been enacted either before or after flag independence are all out to remove [the] right [to work]. The so-called Security of Employment Act gives a right to the employer to dismiss the employee without notice.

However, in *Augustine Masatu v Mwanza Textiles Ltd*, Mwalusanya J (as he then was) held that the provisions entitling the employer to dismiss the employee without notice were repugnant to the Bill of Rights contained in the Constitution. His Lordship was of the view that:<sup>50</sup>

A right to work is now a fundamental human right which is over and above ordinary legislation. And so if the right to work had been taken away by ordinary legislation, then the same stood a good chance of being declared void and unconstitutional by 16/3/1988 when the Bill of Rights became justiciable.

Justice Mwalusanya further held as follows:<sup>51</sup>

The law regards with care the right of individuals and unless a statute restricts those rights by language *beyond reasonable doubt*, they should be left untouched by the Court. In the case at hand, the Security of Employment Act has not in a clear language conferred upon an employer the rights to terminate the services of an employee in the face of reinstatement. There is section 27 of the Act which is a cog in the wheel held by the employer.

## 6 The ramifications of trade liberalisation for the right to work in Tanzania

### 6.1 Reform in economic policies and laws in favour of economic liberalisation

The late 1980s and early 1990s witnessed the emergence of trade liberalisation which was carried out through a radical restructuring of

<sup>48</sup> See Government of the United Republic of Tanzania *The Report and Recommendations of the Presidential Commission on Single Party or Multiparty System in Tanzania, 1991 on the Democratic System in Tanzania* (1992) (Vol 3) 82.

<sup>49</sup> PB Mihyo 'Labour unrest and the quest for workers' control in Tanzania' (1974) 7 *Eastern Africa Law Review* 14-15.

<sup>50</sup> *Augustine Masatu v Mwanza Textiles Ltd* (n 19 above) 176.

<sup>51</sup> n 19 above, 177-178.

the country's economy.<sup>52</sup> This was one of the Tanzanian government's efforts to restructure the economy after the failure of the hitherto state-controlled economy, 'which placed heavy reliance on the state as owner and entrepreneur of the national economy'.<sup>53</sup> The economic restructuring policy was officially pursued from 1992,<sup>54</sup> although measures to adopt the same started in the late 1970s, 'particularly by the adoption of the policy of privatisation by the ruling party,<sup>55</sup> *Chama cha Mapinduzi* (CCM), following the serious economic crises of the late 1970s'.<sup>56</sup> Between 1981 and 1982, the government 'adopted the National Economic Survival Programme (NESP) followed by the Economic Recovery Programme (1986-89), following on improving physical infrastructure in direct support of the productive sector'.<sup>57</sup> Thereafter, the Economic Recovery Programme (ERP II) was formulated, as the second phase of economic recovery programmes that aimed at intensifying areas of adjustments identified in the ERP I. It also aimed at eliminating subsidies on parastatals and the privatisation of the failed corporations.<sup>58</sup> Mashamba adds the following:<sup>59</sup>

Among the policy [objectives] of privatisation was to improve performance of the public enterprises with a view to [enabling them] to contribute considerably in the growth of the national economy. It was the objective of privatisation to encourage a wider share of ownership among the public in general and the employees in particular, apart from increasing employment among Tanzanians.

It was also the policy objective of privatisation to create a more market-oriented economy that would fashion conditions necessary for assessing foreign market, capital and technology with a view to promoting development of capital market.<sup>60</sup> Therefore,<sup>61</sup>

[t]he enforcement of the policy pre-supposed serious reforms in the laws guiding the operations and establishment of a powerful Presidential Parastatal Sector Reform Commission (PSRC) which would provide a focal point for the implementation and monitoring of the parastatal sector.

<sup>52</sup> CJ Mashamba *et al* *Privatisation — Workers' eclipse? Legal and human rights implications of privatisation on industrial relations: The case of the divestiture of the Tanzania Electrical Supply Company Limited (TANESCO)* (2002) 9.

<sup>53</sup> n 52 above, 10.

<sup>54</sup> See B Shaaban 'An appraisal of the legal position of trade unions in the operation of the law on retrenchment in public sector reform process' LLM coursework paper, University of Dar es Salaam, 1997 27.

<sup>55</sup> See S Njama 'Restructuring of the parastatal sector in Tanzania' LLM coursework paper, University of Dar es Salaam, 1994 11.

<sup>56</sup> Mashamba *et al* (n 52 above) 10.

<sup>57</sup> As above.

<sup>58</sup> IJ Maige 'Viability of the privatisation legal mechanism in Tanzania' LLM coursework paper, University of Dar es Salaam, 2000 9.

<sup>59</sup> Mashamba *et al* (n 52 above) 11. Also see Presidential Parastatal Sector Reform Commission, *Privatisation Master Plan*, 1992.

<sup>60</sup> As above.

<sup>61</sup> Mashamba *et al* (n 52 above) 11.

However, more emphasis was put on the reform of economic laws that would create a conducive environment within which the private sector economy would operate. In 1990, for instance, the National Investment (Promotion and Protection) Act<sup>62</sup> was enacted to, particularly, enforce the National Investment (Promotion and Protection) Policy, 1990. This Act provided for the regulation of investment businesses in Tanzania conducted by both local and foreign investors with the exception of investment in petroleum and minerals.<sup>63</sup> Nonetheless, in 1997 this Act was repealed and replaced by the Tanzania Investment Act, 1997, which established the Tanzania Investment Centre (TIC)<sup>64</sup> 'to supplement the National Investment Promotion Centre'.<sup>65</sup> In fact, the Tanzania Investment Act<sup>66</sup> strives to give legal and practical effect to the National Investment Policy of 1996.

## 6.2 The implications of economic reforms on the right to work in Tanzania

The foregoing reforms in the laws relating to investment in Tanzania had negative ramifications for the right to work. Although there were some reforms in the laws relating to employment between 1990 and 2000,<sup>67</sup> none of these reforms sought to create an environment for the protection of the right to work during the era of private sector economy. Even worse, the Industrial Court of Tanzania (Amendment) Act, of which the objectives are, *inter alia*, to discourage strikes, has reintroduced the essential service provisions.<sup>68</sup> The focus here falls on retrenchment, as the most tangible consequence of these economic reforms (in particular, privatisation). Retrenchment is the issue that has most affected employees and has been addressed by the legislature and the judiciary.

### 6.2.1 Retrenchment *vis-à-vis* the right to work in Tanzania

Massive privatisation of public corporations in the 1990s witnessed equally massive retrenchment of workers<sup>69</sup> as the Public Corporations

<sup>62</sup> Act 10 of 1990.

<sup>63</sup> n 62 above, sec 3.

<sup>64</sup> The mandate, functions and role of TIC on business investment and economic growth in Tanzania is discussed at length in CM Peter & SJ Mwakaje *Investment in Tanzania: Some comments — Some issues* (2004) 13-39.

<sup>65</sup> Mashamba *et al* (n 52 above) 12.

<sup>66</sup> Other laws enacted in order to promote private sector economy in Tanzania after 1990 include the Foreign Exchange Act (Act 1 of 1992), Cap 271 RE 2002 and the Public Corporations Act (Act 2 of 1992), Cap 257 RE 2002.

<sup>67</sup> See, eg, the Trade Unions Act, 1998; and the Industrial Court of Tanzania (Amendment) Act, 1993.

<sup>68</sup> Mashamba *et al* (n 52 above) 16.

<sup>69</sup> As of 1997, as many as 80 000 workers hitherto employed by the parastatals were retrenched in pursuit of the privatisation process. See *The Daily News* (Tanzania) 13 January 1997 7.

(Amendment) Act, 1993,<sup>70</sup> which provides for the procedure for privatisation of public corporations, does not contain any protection mechanism for employees of privatised corporations to retain their jobs upon divestiture of their erstwhile employers. 'Besides, the Amending Act is silent on what compensation packages employees retrenched in the privatisation process are entitled to.'<sup>71</sup>

It can, therefore, be said that the implementation of the privatisation policy, far from being intended, *inter alia*, at sustaining employment among the people, ironically it does not guarantee the individual's right to work. The exercise, thus, in one way or another, is repugnant to the basic right provided for in the Constitution of the United Republic of Tanzania.<sup>72</sup>

Interestingly, the Public Corporations (Amendment) Act does not provide for the mechanism which the employees, 'the main victims of the exercise, may be consulted or involved in the process, especially where the option is sale' of their employing corporation.<sup>73</sup> As a result, 'the fate of the employees becomes a subject matter of negotiations between PSRC and the prospective buyers only'.<sup>74</sup>

It is worth noting that under section 39(2) of the Amending Act, the Commission may, before restructuring a public corporation, hold discussion with the employees or their representatives regarding the intended restructuring. *However, the provisions vest discretionary powers in the Commission either or not to consult the employees to be affected.*<sup>75</sup>

In addition, section 39(2) of the Public Corporations (Amendment) Act empowers the Commission, in consultation with the responsible Ministry, to determine fair and reasonable severance pension and other payment arrangements. Paradoxically, neither the workers nor their representatives are involved in determining the said benefits, notwithstanding the fact that they are the sole beneficiaries thereto. However,<sup>76</sup>

It should be emphasised that in (the) modern human rights discourse the right to be consulted to a person whose rights stand to be affected by a particular decision, is of paramount significance.

Further to the foregoing anomaly, the law has failed to define the term 'retrenchment', although it has been rampant in the privatisation process. Only the term 'redundancy'<sup>77</sup> has been defined under section

<sup>70</sup> Act 16 of 1993.

<sup>71</sup> Mashamba *et al* (n 52 above) 18.

<sup>72</sup> n 52 above, 18-19.

<sup>73</sup> n 52 above, 20.

<sup>74</sup> As above.

<sup>75</sup> As above (my emphasis).

<sup>76</sup> As above.

<sup>77</sup> Nonetheless, in some sense, the term redundancy may be used as synonymous with retrenchment.

6(10)(g) of the Security of Employment Act, 1964. This section, nonetheless, does not set out elaborate procedures for effecting redundancies, nor does it provide for the extent of redundancy packages. As a result, 'retrenchment packages have, in some cases, been treated in the same manner as terminal benefits'.<sup>78</sup> Indeed, experience has revealed that the packages paid as terminal benefits are too meagre to support the employee during the period of unemployment.

### 6.2.2 Lack of retrenchment mechanism

The above problem is exacerbated by the fact the law does not expressly set out the mechanism to determine what categories of employees should remain and which should be retrenched in the process. This has also been aggravated by the recent challenge to the first-in-last-out (FILO) principle.<sup>79</sup> That is to say, courts in the era of economic liberalisation have been taking a more expansive approach to the FILO principle, by particularly invoking such other factors as age, efficiency, commitment, health, and expertise in prioritising who should be retrenched or declared redundant by the employer.<sup>80</sup> For instance, in *John Chimanga and 29 Others v Ravji Construction Ltd*,<sup>81</sup> Mwipopo J held that a total adherence to the FILO principle may lead to the curtailment of employment opportunities of energetic and skilled young persons.

### 6.2.3 Reinstatement *vis-à-vis* payment of statutory compensation

Another notable restriction on the right to work that was inherent in the labour laws before 2004<sup>82</sup> is contained in section 40A(5) of the Security of Employment Act (SEA).<sup>83</sup> This section provides that when 'the employer refuses or fails to comply with the order (of the Board or the Minister)' for reinstatement, the employer shall be liable to pay the employee statutory compensation in an aggregate amount to be stated. In effect,<sup>84</sup>

[This provision clearly suggests] that the employer has the option of, *inter alia*, not re-instating or re-engaging the employee even after being so ordered by the Board or the Minister. These amendments were a big blow

<sup>78</sup> As above.

<sup>79</sup> See *Kihanira Kulunge Kibaya v United Africa Construction of Tanzania Ltd*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal 36 of 1987 (unreported).

<sup>80</sup> See, eg, *OTTU v Morogoro Co-operative Union*, Industrial Court of Tanzania, Employment Inquiry No 6 of 1992.

<sup>81</sup> Industrial Court of Tanzania, Employment Inquiry No 6 of 1992.

<sup>82</sup> In 2004, new labour laws were enacted: that is, the Employment and Labour Relations Act, 2004 and the Labour Institutions Act, 2004.

<sup>83</sup> This provision was incorporated in the SEA. See Act 1 of 1975.

<sup>84</sup> Mashamba *et al* (n 52 above) 30-31.

to the workers and human rights advocates who were in support of the right to work. . .

In the beginning, this provision brought about two conflicting schools of thought in the High Court of Tanzania. The first school, the progressive one, held the view that this provision, if not interpreted in a liberal sense, would pre-empt the right to work and security of employment. So, in *Juma A Kaziabure v Tanzania Post and Telecommunication Corporation*,<sup>85</sup> Msumi J (as he then was), having read this provision together with section 27 of SEA, which equates the decision of the Board of Minister as a decree of the court, holds categorically that '[a]n employer cannot at his own instance choose to pay his aggrieved employee . . . as alternative to complying with the decision of reinstatement'.

This position was reiterated by Justice Mwalusanya in *Augustine Masatu v Mwanza Textiles Ltd*,<sup>86</sup> where His Lordship interpreted section 40A(5) of SEA liberally and held that:

In the case at hand, it will be recalled, the intention of the Security of Employment Act was to create job security for employees and therefore it is very unlikely that the same legislature decided to take away that tenet of job security by section 40A(5) of the Act.

Therefore, His Lordship concludes that:<sup>87</sup>

In the case at hand the Security of Employment Act has not in a clear language conferred upon an employer the right to terminate the services of an employee in the face of an order of reinstatement. There is section 27 of the Act which is a cog in the wheel held by the employer.

However, the second school, the conservative one, supported the provision of section 40A(5) of SEA. In *Mahona v University of Dar es Salaam*,<sup>88</sup> supporting this provision, Kisanga J (as he then was) held that an employer has a right to refuse to reinstate an employee and instead terminate his services with full terminal benefits. His Lordship interpreted the section thus:<sup>89</sup>

Essentially, this subsection is saying this: If an employer refuses to reinstate or re-engage an employee as ordered by a Board or the Minister . . . such employer shall pay the employee statutory compensation plus twelve months' wages.

<sup>85</sup> High Court of Tanzania at Dar es Salaam, Civil Case 4 of 1985 (unreported).

<sup>86</sup> High Court of Tanzania at Mwanza, Civil Case 3 of 1986 (unreported).

<sup>87</sup> Also see *Obadiah Salehe v Dodoma Wine Company Ltd*, High Court of Tanzania at Dodoma, Civil Case 53 of 1990 (unreported); *General Marketing Co Ltd v AA Shariff* [1980] TLR 61.

<sup>88</sup> [1981] TLR 55.

<sup>89</sup> Also see *Mathew Kato v National Poultry Corporation*, High Court of Tanzania at Dar es Salaam, Civil Case 122 of 1990 (unreported); *Peter Ndonde v Tanzania Shoe Company Ltd*, High Court of Tanzania at Dar es Salaam, Civil Case 90 of 1986 (unreported).

The foregoing conservative school of thought of the High Court was confirmed by the Court of Appeal of Tanzania in *Dan Kavishe v Arusha International Conference Centre*,<sup>90</sup> where it was held that:

So, according to this section, the employer is not bound to receive the applicant back even if the Permanent Labour Tribunal (now the Industrial Court of Tanzania) or the Minister orders his reinstatement.

This authority entails that an employer who does not wish to reinstate his employee, who has referred his or her dispute to the Board or Minister, can do away with him with or without any reason for so doing. This position of law, indeed, puts the security of the employee's job at risk; hence, using Justice Mwalusanya's diction,<sup>91</sup>

In giving the employer the option to reinstate an employee, the provision negates the constitutional right of an employee of the right to work as provided for in article 22(1) of the Constitution. There is no valid reason why an employee should be discontinued from working, when a court of law found that he committed no offence or irregularity.

In other words, what Justice Mwalusanya was saying is that: by refusing to reinstate an employee who has been found to have committed no offence by the Board or Minister, the section renders the whole process of challenging improper dismissal meaningless.<sup>92</sup> As the Globalisation and Workers' Rights in Tanzania Report notes:<sup>93</sup>

[The law] empowers the employer to discharge his obligation following an order of reinstatement or reengagement of an employee whom [s/he] has dismissed without right only by paying the employee compensation. This means that however unsupported, illegal, oppressive, prejudicial, harsh, unrealistic, or malicious a decision to remove an employee from work, there is no means by which an employee can find a way back if the employer does not want him anymore. Therefore, whenever the employer feels like removing any employee from work, he will readily succeed under the authority [of the foregoing statutory provisions] provided that [s/he] is ready to pay the stated compensation.

## 7 Some positive examples of judicial protection of the right to work in Tanzania

Notwithstanding the foregoing limitations to judicial protection of the right to work in Tanzania, there are several cases in which the courts

<sup>90</sup> Court of Appeal of Tanzania at Arusha, Civil Appeal 1 of 1987 (unreported).

<sup>91</sup> *Augustine Masatu v Mwanza Textiles Ltd* (n 19 above). Also see Legal and Human Rights Centre *Globalisation and workers' rights in Tanzania* (2005) 23; Legal and Human Rights Centre *Tanzania human rights report 2005* (2006) 41.

<sup>92</sup> *Globalisation and Workers' Rights in Tanzania* (n 91 above).

<sup>93</sup> As above.

positively protected the right to work. In *AG v. WK Butambala*,<sup>94</sup> the Court of Appeal agreed with Justice Mwalusanya, in the High Court, that the provisions of section 4 of the Legal Aid (Criminal Proceedings) Act 1969,<sup>95</sup> infringed article 23 of the Constitution because the sum paid to advocates who appeared in criminal legal aid briefs was 'outrageous and needed to be looked into'.<sup>96</sup> However, the Court of Appeal faulted the procedure used by Justice Mwalusanya in determining this matter. The reason for the Court of Appeal faulting the procedure used by Justice Mwalusanya was that His Lordship acted on a matter that was not before him.

In fact, Butambala, an advocate based in Mwanza, had handled three legal aid briefs. After the sessions were closed, he wrote a letter to the trial judge, who happened to be Justice Mwalusanya, to have his fees assessed in terms of the Legal Aid (Criminal Proceedings) Act. After receiving the letter, Justice Mwalusanya was of the view that the advocates' remuneration — that is, between TShs 120/= and 500/= <sup>97</sup> in each case — was inadequate and contravened the provisions of article 23 of the Constitution. Thus, Justice Mwalusanya instructed the District Registrar of the High Court, first, to open a Miscellaneous Criminal Cause, second, to set the hearing date of the application, and, third, to serve the parties — Butambala and the AG — respective summonses for hearing of the application.

When the parties attended the hearing, the state attorney who appeared for the Attorney-General unsuccessfully raised a point of preliminary objection, urging that there should have been a petition in terms of article 30(3) of the Constitution. Having overruled this preliminary objection, Justice Mwalusanya went on to hear the matter on the same day and later on ruled in favour of Butambala, holding that:

In the upshot, under s 5(1) of Act No 16/1984 I hereby construe s 4 of the Act No 21/1969 to be modified so as to bring it into conformity with the provisions of our Bill of Rights. Therefore, I will take it that the paltry sums mentioned in s 4 of Act No 21/1969 are void, and modified to read that an advocate in legal aid cases shall be entitled to be remunerated according to the quantity and quality of the work done as assessed by the certifying authority.

The learned judge proceeded to assess the fees to be paid to Mr Butambala for the three legal aid cases he had handled. His Lordship ordered that the learned advocate should be paid TShs 5 000/= for one of the cases, and TShs 2 500/= for each of the other two cases, totalling TShs 10 000/=.

<sup>94</sup> [1993] TLR 46.

<sup>95</sup> Act 21 of 1969.

<sup>96</sup> See *AG v WK Butambala* (n 94 above).

<sup>97</sup> At the time of writing this paper, 1 US dollar was equivalent to TShs 1,250/=.



Although the Court of Appeal faulted Justice Mwalusanya's way of proceeding to 'initiate' this case, in the end, the Court agreed with him that the fees payable under section 4 of Act 21 of 1969 were 'grossly inadequate and out of date'. Therefore, the Court of Appeal concluded that: 'We think something positive must be done, unless the public philosophy is that the service advocates render under the law are intended to be akin to the classical dock briefs of some jurisdictions.'<sup>98</sup>

However, the authorities concerned did not look into the fees until another case was filed in the High Court at Arusha. In *The Judge i/c High Court, Arusha and Another v NIN Munuo Ng'uni*,<sup>99</sup> the Court of Appeal, with the same Justices of Appeal as those who presided in the appeal before it in *Butambala*,<sup>100</sup> took a more positive approach to protecting the right to work and earn just remuneration as guaranteed under articles 22 and 23 of the Constitution. In this case, the Court of Appeal held, *inter alia*, that, whilst TShs 500/= was a substantial amount at the time Act 21 was enacted in 1969, it is peanuts in the 2000s and, clearly, infringed article 23(2) of the Constitution. It was the Court's opinion that a remuneration of TShs 500/=, for defending a serious criminal case such as murder, could not be described as just or equitable to be brought within the purview of article 23(2) of the Constitution.

Given the lack of evidence to the effect that the Attorney-General had taken any positive steps to bring section 4 of Act 21 of 1969 into conformity with the provisions of the Bill of Rights in the Constitution, as per the Court's instruction in *AG v WK Butambala*, the Court of Appeal, in *Munuo*, reasonably inferred that the Attorney-General had been negligent in this regard. This was further emphasised by the Attorney-General's inaction during the last 30 months after the High Court had ruled that the fees payable under section 4 of Act 21 of 1969 were grossly inadequate and out of date. Therefore, the Court of Appeal struck out the amount stipulated in section 4 of Act 21/1969 and replaced it with a fee of TShs 100 000/= per brief, based on an advocate receiving a judicial *per diem* of two and a half days. The new court-set fees were to come into effect on 1 July 2002.

## 8 The new labour law regime and the future of the right to work in Tanzania

In 2004, two important pieces of legislation relating to the right to work were enacted by parliament. These are the Employment and Labour

<sup>98</sup> n 94 above, 54.

<sup>99</sup> Civil Appeal 5 of 1998 (unreported) 5 March 2002.

<sup>100</sup> Justices Lewis Makame and Augustino Ramadhani presided over in both the *Butambala* and *Munuo* cases.

Relations Act, 2004<sup>101</sup> and the Labour Institutions Act, 2004. While the latter sets out labour institutions to ensure that the right to work is adequately realised, the former provides for the promotion and protection of core labour rights,<sup>102</sup> by establishing basic employment standards, providing a framework for collective bargaining and providing for the prevention and settlement of disputes.<sup>103</sup> However, these laws have not yet become operational. Consequently, the discussion that follows does not address the practical effect of the new legislation.

It is the Employment and Labour Relations Act which is the most relevant to the right to work. Section 7(1) of the Employment and Labour Relations Act prohibits discrimination in matters related to work. It provides lucidly that '7(1) Every employer shall ensure that he promotes an equal opportunity in employment and strives to eliminate discrimination in any employment policy or practice'.<sup>104</sup>

Subsection (2) of section 7 of the Employment and Labour Relations Act obliges an employer to register, with the Labour Commissioner, 'a plan to promote equal opportunity and to eliminate discrimination in the work place'. The grounds for discrimination are set out in subsection (4) of section 7, and include colour, nationality, tribe or place of origin, race, national extraction, social origin and political opinion or religion. Others are sex, gender, pregnancy, marital status or family responsibility, disability, HIV/AIDS, age, and station in life. The Act is progressive on acts of discrimination, as it criminalises such acts under subsection (7) section 7.

Another progressive aspect of the Employment and Labour Relations Act is found in section 5, which prohibits child labour. Under this section, it is provided that '[n]o person shall employ a child under the age of fourteen years'.<sup>105</sup> However:<sup>106</sup>

A child of fourteen years of age may only be employed to do light work, which is not likely to be harmful to the child's health and development; and does not prejudice the child's attendance at school, participation in vocational orientation or training programmes approved by the competent authority or the child's capacity to benefit from the instruction received.

The Act also prohibits a child under 18 years of age from being employed 'in a mine, factory or as crew on a ship'<sup>107</sup> or any other worksite including non-formal settings and agriculture, where work

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<sup>101</sup> Act 6 of 2004.

<sup>102</sup> Eg, Part II of the Act contains fundamental labour rights and their respective protection.

<sup>103</sup> n 101 above, sec 3.

<sup>104</sup> Under sec 8(1), trade unions or employers' associations are prohibited to exercise discrimination against any grounds prescribed in subsec (4) of sec 7.

<sup>105</sup> Sec 5(1).

<sup>106</sup> Sec 5(2).

<sup>107</sup> Under sec 5(3), the term 'ship' is defined to include a vessel of any description used for navigation.

conditions may be considered hazardous by the Minister'.<sup>108</sup> However, under subsection (5) of section 5 of the Act, a child under 18 may be permitted to work:

- (a) on board a training ship as part of the child's training;
- (b) in a factory or a mine of that work if part of the child's training;
- (c) in any other worksite on condition that the health, safety and morals of the child are fully protected and that the child has received or is receiving adequate specific instruction or vocational training in the relevant work or activity.

In terms of subsection (7) of section 5 of the Act, it is an offence for any person (a) to employ a child in contravention of this section; or (b) to procure a child for employment in contravention of this section.

The Employment and Labour Relations Act, on the other hand, prohibits forced labour. In terms of section 6(1) of the Act, '[a]ny person who procures, demands or imposes forced labour, commits an offence'. As such,<sup>109</sup>

- (2) For the purposes of this section, forced labour includes bonded labour or any work exacted from a person under the threat of a penalty and to which that person has not consented . . .

However, forced labour does not include<sup>110</sup>

- (a) any work exacted under the National Defence Act, 1966 for work of a purely military character;
- (b) any work that forms part of the normal civic obligations of a citizen of the United Republic of Tanzania;
- (c) any work exacted from any person as a consequence of a conviction in a court of law, provided that the work is carried out under the supervision and control of a public authority and that the person is not hired, or placed at, the disposal of private persons;
- (d) any work exacted in cases of an emergency or a circumstance that would endanger the existence or the well-being of the whole or part of the population;
- (e) minor communal services committed by the members of a community in the direct interest of that community after consultation with them or their direct representatives on the need for the services.

The Employment and Labour Relations Act also guarantees the right of every employee to (a) form and join a trade union, or (b) participate in the lawful activities of the trade union. Employers also have the right to form and join an employers' association or to participate in the lawful activities of an employers' association.<sup>111</sup>

So, the Employment and Labour Relations Act is one of the most progressive labour laws adopted in Tanzania since the colonial period. This is because the process of enacting the said law involved a tripartite

<sup>108</sup> Sec 5(3).

<sup>109</sup> Sec 6 (2).

<sup>110</sup> Sec 6(3).

<sup>111</sup> Sec 10(1).

spectrum of stakeholders. During the preparation of the bill for this law, the government, employers and civil society organisations were all involved and satisfactorily consulted. This kind of participation was facilitated by ILO through the Project on Strengthening Labour Relations in East Africa (SLAREA).<sup>112</sup> The SLAREA Project aimed at creating the space for and facilitation of CSOs and Social Partners with a view to putting in place labour laws that aim at encouraging economic growth and the reduction of poverty 'in the context of enhancing social dialogue for productivity as well as labour reforms and employment issues'.<sup>113</sup> It was believed, in essence, that 'poverty eradication is about protecting and creating decent and well remunerated jobs for all'.<sup>114</sup>

In actual fact, the Employment and Labour Relations Act was enacted along the eight fundamental principles underlying the ILO Declaration, which include freedom of association and the effective recognition of the right to collective bargaining,<sup>115</sup> the elimination of all forms of forced or compulsory labour,<sup>116</sup> effective abolition of child labour,<sup>117</sup> and the elimination of discrimination in respect of employment and occupation.<sup>118</sup> Viewed in this context,<sup>119</sup>

[t]he new labour legislation is an important tool for fostering harmonious industrial relations . . . [In effect], the new labour laws have made it possible to have good governance in our workplaces. Indeed, this is a precondition for development and the attainment of higher labour productivity which can lead to steady business profitability and competitiveness and sustainable socio-economic progress.

Therefore, the Act reflects the underlying principles set out in the ILO Declaration, Constitution and national programmes, notably the

<sup>112</sup> M Mfunguo 'Statement made at the Opening Ceremony of the ILO/SLAREA National Workshop on the ILO Declaration, Employment Creation and Poverty Reduction Strategies: Enhancing the Roles of Social Partners and Civil Society Organisations' held at Oasis Hotel, Morogoro, 10-12 November 2005.

<sup>113</sup> M Mwingira 'Vote of Thanks at the Opening Ceremony of the ILO/SLAREA National Workshop on the ILO Declaration, Employment Creation and Poverty Reduction Strategies: Enhancing the Roles of Social Partners and Civil Society Organisations' held at Oasis Hotel, Morogoro, 10-12 November 2005.

<sup>114</sup> As above.

<sup>115</sup> See ILO Convention No 87 of 1948 and No 98 of 1949.

<sup>116</sup> See ILO Convention on Forced Labour No 29 of 1930 and ILO Convention on Abolition of Forced Labour No 105 of 1957.

<sup>117</sup> See ILO Convention on Minimum Age No 138 of 1973 and ILO Convention on Worst Forms of Child Labour No 182 of 1999.

<sup>118</sup> See ILO Convention on Equal Remuneration No 100 of 1951 and ILO Convention on Discrimination, Employment and Occupation No 111 of 1958.

<sup>119</sup> J Lyela 'Human rights and the ILO Declaration: The role of the social partners in its promotion and implementation — The role of employers' organisations (the case of ATE)' paper presented at the ILO/SLAREA National Workshop on the ILO Declaration, Employment Creation and Poverty Reduction Strategies: Enhancing the Roles of Social Partners and Civil Society Organisations held at Oasis Hotel, Morogoro, 10-12 November 2005.

National Strategy for Growth and Reduction of Poverty (NSGRP).<sup>120</sup> As such, it is expected that once the jurisprudence on the new labour laws evolves, the right to work will be protected more effectively by courts of law.

## 9 Conclusion

The article examines the judicial protection of the right to work in Tanzania by first tracing the historical basis of the struggle for the promotion and protection of workers' rights. The article also examines the early struggles for the promotion and protection of workers' rights, which were championed by early trade unions. It concludes that the partnership between trade union leaders and politicians weakened the development of a vibrant trade union movement that could have assisted in the promotion of the workers' rights because most of the strong trade union leaders, voluntarily or by coercion, became politicians. The article further examined the effect that party supremacy of the ruling party had on the legislation and practice of labour rights in Tanzania and concluded that party supremacy reduced trade unions into party affiliates and foiled their strength to wage effective struggles for the promotion and protection workers' rights in the country.

Finally, the article reviewed the recent economic liberalisation and its impact on the promotion and protection of the right to work, concluding that the process of economic liberalisation has jeopardised workers' rights in Tanzania because there is a lack of adequate legal protection of the said rights. Nonetheless, the review of some cases instituted in courts of law reveals that the courts of law in Tanzania positively protect the right to work.

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<sup>120</sup> The NSGRP is popularly known as MKUKUTA (that is, *Mkakati wa Kukuza Uchumi na Kuondoa Umasikini Tanzania*).

# The realisation of the right to bail in the Special Court for Sierra Leone: Problems and prospects

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## Summary

*The right to bail, as provided for under some United Nations and regional human rights instruments, has in recent times been applied by international tribunals. This article reviews the implementation of this right by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, before focusing in more detail on the incorporation of this right into the Statute of the Special Court for Sierra Leone and its implementation by the Special Court. In conclusion, some suggestions are offered to ensure the more effective realisation of the right to bail at the Special Court for Sierra Leone.*

## 1 Introduction

The right to bail is the right for an accused or indicted person in a criminal case to remain free and stay out of lawful custody while awaiting his or her trial. It is narrowly linked to other fundamental rights, such as the right to liberty, the right to a fair trial, the presumption of innocence and the right to have adequate time and facility to prepare one's defence.

Since the establishment of the United Nations (UN) in 1945,<sup>1</sup> a number of declarations and treaties have been passed by the General Assem-

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<sup>1</sup> Charter of the United Nations, signed on 26 June 1945, San Francisco, entry into force 24 October 1945.

bly which deal with human rights in general and the right to bail in particular.

The Universal Declaration of Human Rights (Universal Declaration),<sup>2</sup> although a non-binding legal document, provides that '[e]veryone has the right to life, liberty and security of person'.<sup>3</sup> Though the Universal Declaration is still thought to be at the forefront of human rights, it has been somehow overshadowed by later binding treaties.

The International Covenant on Civil and Political Rights (CCPR)<sup>4</sup> provides:<sup>5</sup>

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgments.

This provision makes it abundantly clear that bail is a right that arrested, detained and accused persons are entitled to, and gives such persons a right to compensation for unlawful arrest or detention. CCPR is clear in its provisions that detention for defendants awaiting trial shall be an exception rather than the general rule.

CCPR constituted the first and one of the most important articulations on the right to bail in international law. The Covenant established a Human Rights Committee, recently superseded by a successor body, the Human Rights Council (HRC), with an array of responsibilities, including receiving complaints and reports on state parties.<sup>6</sup> Though not a body of judges, the HRC is empowered to interpret disputed provisions of CCPR by examining evidence received from complaining individuals and states allegedly in violation. The HRC then issues rulings on law and fact which serve as a body of precedent on what CCPR means and its implications for specific state practices. In a landmark case, it was held that, under CCPR, the general rule is for bail to be granted and that provisional release should not be the exception.<sup>7</sup>

<sup>2</sup> Adopted by the General Assembly of the United Nations, Resolution 217 A(III) of 10 December 1948.

<sup>3</sup> n 2 above, art 3.

<sup>4</sup> Adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, Resolution 2200 A(XXI) of 16 December 1966.

<sup>5</sup> n 4 above, art 9(3).

<sup>6</sup> n 4 above, art 28.

<sup>7</sup> *Hill v Spain* (526/93) UN Covenant on Civil and Political Rights: CCPR Commentary (2nd Ed) M Nowak 234-235. This case was brought by two British citizens who had been arrested and charged in Spain on allegations of having firebombed a vehicle. The HRC found 'that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witness or flee . . . The mere conjecture of a state party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9 paragraph 3 of the Covenant.'

The UN Standard Minimum Rules for the Administration of Juvenile Justice<sup>8</sup> provide that '[d]etention pending trial shall be used only as a measure of last resort and for the shortest possible period of time'<sup>9</sup>.

The UN body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>10</sup> provides that '[a] person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial'.<sup>11</sup>

Regional systems for the protection of human rights have also enacted provisions dealing with the right to bail. The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>12</sup> provides that:<sup>13</sup>

Everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial . . .

Similar to the European regional system, the American Convention on Human Rights (Pact of San José)<sup>14</sup> provides that '[a]ny person detained shall be brought promptly before a judge . . . and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings'.<sup>15</sup>

Within the African regional system, the African Charter on Human and Peoples' Rights (African Charter)<sup>16</sup> does not contain any specific provision on the right to bail. This Charter does not effectively protect human and peoples' rights in Africa in this regard.

Thus, the right to bail is clearly provided for in international law, as reflected in the provisions of universal and regional human rights instruments. This article undertakes a study of the implementation of the right to bail through the different international and internationalised criminal tribunals, and specifically the Special Court for Sierra Leone (SCSL).

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<sup>8</sup> Adopted by the General Assembly of the UN, Resolution 40/33 of 29 November 1985 upon the recommendation of the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Nulan, 1985.

<sup>9</sup> n 8 above, art 13(1).

<sup>10</sup> UN General Assembly Resolution A/RES/43/173 of 9 December 1988.

<sup>11</sup> n 10 above, Principle 38.

<sup>12</sup> Adopted by the Council of Europe on 4 November 1950, Rome.

<sup>13</sup> n 12 above, art 5(3).

<sup>14</sup> Adopted by the Organisation of American States on 22 November 1969, San José, Costa Rica.

<sup>15</sup> n 14 above, art 7(5).

<sup>16</sup> Adopted by the OAU at the 18th Assembly of Heads of State and Government on 27 June 1981, Nairobi, Kenya.



## 2 The right to bail in international criminal tribunals

### 2.1 Review of the different international criminal tribunals' practices

#### 2.1.1 International human rights treaties and *jus cogens*

The extent to which international human rights treaties bind international criminal bodies is as yet unsettled.<sup>17</sup> The Universal Declaration and CCPR bind those nation-states that have ratified them. Since an international criminal tribunal is neither a state nor an organ of any government, it is not a party to the treaties. It may be argued that they are thus not bound by the constraints of the Universal Declaration or CCPR. There is, however, no consensus on this. At the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>18</sup> for example, the UN Secretary-General took a contrary position, implying that the procedural protections of CCPR should indeed bind international criminal courts as internationally accepted standards protecting the accused.<sup>19</sup> He further stated: 'It is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of the proceedings.'<sup>20</sup>

Additionally, one can maintain that both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) were created by acts of the Security Council. As such, 'those courts are bound not only by their statutes but also by the United Nations Charter and the applicable internal law of the United Nations'. This rationale would appear to extend to the SCSL, which was also created by an Act of the Security Council.

Additionally, regardless of whether they are explicitly bound by treaty, there is a body of customary international law that protects the presumption of innocence and right to bail. Scholars have noted that 'Equally with the other subjects of international law, international organisations are bound by customary law'.<sup>21</sup> The phrase *jus cogens* is generally applied to describe a 'mandatory norm of general international law from which no two or more nations may exempt themselves

<sup>17</sup> For further discussion on this, see K Gallant 'Individual human rights in a new international organisation: The Rome Statute of the International Criminal Court' in MC Bassiouni (ed) *International criminal law* (1999) 695.

<sup>18</sup> This was established by the UN Security Council by Resolution 827 of 25 May 1993, UN Doc S/RES/827 (1993).

<sup>19</sup> See notes 39-43 on Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808, UN Doc S/25704 and Add 1 (1993) para 1.6. However, this argument loses force by virtue of the fact that not all internationally recognised human rights relevant to criminal cases are protected in the ICTY statute or the statute of the ICTR.

<sup>20</sup> n 19 above, para 106.

<sup>21</sup> HG Schermers & NM Blokker *International institutional law: Unity within diversity* (1995) 824 988.

or release one another'.<sup>22</sup> *Jus cogens* is thought to reflect a 'consensus concerning fundamental values'.<sup>23</sup> The concept of *jus cogens* was adopted by the International Law Commission and incorporated into article 50 of its Law of Treaties in 1966.<sup>24</sup> The Law of Treaties states:

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

One can argue that states cannot 'contract out' or get around rules of general international law. However, the existence of human rights treaties with so many signatories reflects an international consensus regarding fundamental values.

### 2.1.2 The right to bail/provisional release at the ICTY

One cannot properly understand the right to bail at the ICTY without looking at the background to the establishment of the ICTY. Security Council Resolution 827, adopted on 25 May 1993, sanctioned the UN to create the ICTY. When this happened, hostilities in the former Federal Republic of Yugoslavia (FRY) had been underway for almost two years. First, acting under chapter VII, the Security Council declared that the situation in the FRY posed a threat to international peace and security and it condemned the atrocities being committed there. Secondly, it publicised the atrocities and called for an investigation. Finally, after seeing other remedies fail, and armed with enough information, it determined that those who gravely violated international humanitarian law would be prosecuted and punished.<sup>25</sup> Recalling the two years of war, the Security Council's progressive procedure could easily be labelled a waste of time. However, when compared to the cumbersome and consensus-demanding nature of a treaty-based international criminal court, this proved to be the fastest and most appropriate method for the UN.

The earlier stages of the conflict in the FRY<sup>26</sup> included the declaration of independence by two FRY member states, Croatia and Slovenia, in

<sup>22</sup> *Blacks law dictionary*, 7th ed 864.

<sup>23</sup> *Blacks law dictionary*, quoting JA Frowein in *Encyclopaedia of public international law* (1997) 66.

<sup>24</sup> See *Yearbook ILC* (1966) ii 247-249. See also 261 (art 61), 266 (art 67).

<sup>25</sup> JC O'Brien 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *American Journal of International Law* 639-659.

<sup>26</sup> For a more detailed discussion, see S Boelaert-Souminen 'The International Criminal Tribunal for the Former Yugoslavia and the Kosovo conflict' (2000) 837 *International Review of the Red Cross* 217-252, available at the website of the International Committee of the Red Cross (ICRC) at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQD2> (accessed 30 June 2007).

June 1991.<sup>27</sup> In April 1992, Serbia and Montenegro proclaimed that they had assumed the international, legal and political personality of the former Yugoslavia. However, the overwhelming majority of the members of the international community, including the UN, rejected this declaration, claiming that the former Yugoslavia's dissolution was one of state secession. This hostile attitude began to shift because of the advantageous political changes in the FRY in late 2000, after a decade of sanctions and isolation. Later, it would be seen that this process played a vital role in relation to the ICTY, although its prosecutor complained about the lack of co-operation with it.

Meanwhile, in early 1993, already shocked by the scale of the raging conflict, the UN Security Council was even more horrified by the mass crime witnessed in Bosnia-Herzegovina. It therefore requested the Secretary-General to report on the prospect of a new international criminal tribunal to try and punish persons responsible for those atrocities.<sup>28</sup> It was then that the Security Council decided to create the ICTY, to be based in The Hague. However, this move did not have the intended deterrent effect, and the atrocities continued until the 1995 Dayton Peace Agreement.

Although the Agreement embodied a provision on co-operation with the ICTY,<sup>29</sup> despite continuous warnings from the international community and the Tribunal itself, there were no significant outcomes in practice. However, Zagreb did improve its tendency to co-operate, whilst Belgrade believed that the major criminals should come before a domestic court. Since the states were hesitant to accept the Tribunal, generally speaking, the ICTY had to resort to its own means to assure that any person indicted would be arrested and tried. As a result, UN Special Forces arrested two indicted criminals, Dokmanovic and Kovačević, in the summer of 1997.<sup>30</sup>

Rule 65 of the Rules of Procedure and Evidence (RPE) of the ICTY deals with provisional release. It stipulates:

- (a) Once detained, an accused may not be released except upon an order of a Chamber.

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<sup>27</sup> This date was very important in respect of the future tribunal's jurisdiction. After this date, the conflict in the former Yugoslavia qualified as an international armed conflict, although in nature it was non-international as such. Further, the parties to the conflict concluded several agreements under the auspices of the ICRC that bound them to the law of international armed conflicts.

<sup>28</sup> See Security Council Resolution 808, 3175th meeting, 22 February 1993, UN Doc S/RES/808 (1993); Report of the Secretary-General under para 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704.

<sup>29</sup> Art IX of the General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995.

<sup>30</sup> Compare P Tavernier 'The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (1997) 321 *International Review of the Red Cross* <http://www.icrc.org> (accessed 30 April 2007).

- (b) Release may be ordered by a Trial Chamber only after giving the host country and the state of which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

Provisional release has been granted — always subject to a number of stringent conditions — in the case of eight accused: Dorde Dukic; Milan Simic; Drago Josipovic; Miroslav Tadic; Simo Zaric; Enver Hadzhihadsonovic; Mehmed Alagic and Amir Kubura.<sup>31</sup>

Before rule 65 was amended,<sup>32</sup> there was a requirement of ‘exceptional circumstances’ for the granting of provisional release. The Court often relied on the ‘exceptional circumstances provision’ when it denied applications for bail. For example, in *Prosecutor v Landzo*,<sup>33</sup> the Court articulated its position on the exceptional circumstances requirement. The Court further articulated the standard it would follow in bail applications in *Prosecutor v Delalic*,<sup>34</sup> in which it found that an accused petitioning for bail carries a burden of establishing four conjunctive criteria before a Trial Chamber will grant provisional release, as follows:

[t]he presence of exceptional circumstances; that the accused will appear for trial; that the accused will not pose a danger to any witness or victim; and that the host country must be heard.

The exceptional circumstances requirement was removed upon amendment of rule 65. Nonetheless, the change in ICTY rule 65 did not result in immediate or even the widespread success by the accused in bringing motions for provisional release.<sup>35</sup> One of the major concerns of the ICTY judges in refusing to grant bail in other cases has been the Tribunal’s inability to execute some warrants of arrest.

The ICTY currently imposes a two-pronged test before a defendant is released on bail. First, the Trial Chamber must be satisfied that the accused will appear for trial if provisionally released. The judges con-

<sup>31</sup> JRWD Jones & S Powles *International criminal practice* (2003) 601–602.

<sup>32</sup> Amended at the 21st Plenary Session of the Judges of the Tribunal on 30 November 1999.

<sup>33</sup> IT-96-21-T.

<sup>34</sup> IT-96-21-T.

<sup>35</sup> Provisional release has not been granted in any case before the ICTR. Motions for provisional release have been denied at the ICTY in numerous cases since the rule was changed. See eg *Prosecutor v Mile Mrksic*, IT-95-13/1-AR65, Decision on Appeal against Refusal to grant Provisional Release, 8 October 2002; *Prosecutor v Dragon Obrenovic* IT-02-60-PT, Decision on Dragon Obrenovic Application for Provisional Release, 19 November 2002, upheld on appeal in IT-02-60-AR65.3 & AR.65.4, Decision on Applications by Blagojevic and Obrenovic for Leave of Appeal, 16 January 2003; *Prosecutor v Naser Oric* IT-03-68-PT, Decision on Application for Provisional Release, 25 July 2003; *Prosecutor v Milan Milutinovic et al* IT-99-37-PT, Decision on Provisional Release (Milan Milutinovic), 3 June 2003 and Decision on General Ojdanic Third Application for Provisional Release, 16 December 2003; and *Prosecutor v Pasko Ljubicic* IT-00-4-PT, Decision on the Defence Motion for Provisional Release of the Accused, 2 August 2002.

sider many factors and have articulated several that carry weight in their decision making. In *Prosecutor v Blaskic*,<sup>36</sup> the Tribunal found that a very high bail surety, in this instance 1 million Deutsch marks, was insufficient to satisfy the judges that the accused would appear for trial. When ruling on the bail application, they bore in mind the 'gravity of the criminal acts of which he stands accused; [and] of the severity of penalties to which he is liable ...'

In *Prosecutor v Jokic*,<sup>37</sup> the prior voluntary surrender of the accused was found to be significant in assessing the risk that he would not appear for trial after his provisional release. The Tribunal found that it is correct to give some 'credit' for voluntary surrender.

In *Prosecutor v Sainovic*,<sup>38</sup> the Tribunal found that the imposition of conditions on an accused enabled them to grant him provisional release. In that case, the Tribunal imposed restrictions on his travel, including the obligation to remain in his municipality and to surrender his passport.

If the first prong of the test can be met, the accused must then also satisfy the Tribunal that he will not pose a danger to victims of his alleged crime, to witnesses or others.

In *Prosecutor v Jokic*,<sup>39</sup> the Court found that the completion of the prosecution's investigation did reduce the risk that the accused would destroy documentary evidence or threaten witnesses.

The ICTY has applied several tests in order to grant bail or provisional release to indictees, thus complying with international human rights standards — unlike its sister tribunal, the ICTR.

### 2.1.3 The right to bail or provisional release at the ICTR

On 6 April 1994, an aircraft was downed with the Presidents of Rwanda and Burundi — Juvenal Habyarimana and Cyprien Ntaryamira — on board. After this event, a genocidal campaign against the Rwandan Tutsis by the more numerous Hutus began, spanning four months and resulting in more than 800 000 casualties. Although there was a tragic 'tradition' of massacres of the Tutsi minority by the Hutu majority, a conflict on this scale had never been experienced. The magnitude of the mass killings was clearly illustrated shortly after the atrocities began, when the UN was forced to withdraw most of its peacekeeping contingent, UNAMIR or 'blue helmets', from the troubled state.

A month later, although the UN had decided to create a bigger peacekeeping contingent, the international community failed to deploy these troops before the end of the crisis. Instead of international action, French forces entered Rwanda to end the violence within the frame-

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<sup>36</sup> IT-95-14.

<sup>37</sup> IT-01-44-PT.

<sup>38</sup> IT-99-37-AR65.

<sup>39</sup> n 37 above.

work of the controversial Operation Turquoise. In this respect, the international community should shoulder moral responsibility for staying idle in the face of the Rwandan genocide. Since this gross negligence, with fatal consequences, can hardly be atoned for *ex post facto*, social reconciliation can only be promoted by judicial means.

The Security Council followed the very same 'step-by-step' approach adopted previously in relation to the Yugoslav conflict. However, this process, which was very rapid when compared to that ensuing from the Balkan conflict, became extremely time-consuming in light of the extent of the genocide that had swept across Rwanda. As such, and in contrast to the ICTY, the ICTR was created only after the armed conflict concluded and pursuant to the explicit request of the new Rwandan government.<sup>40</sup>

Even though the Security Council enjoyed the political support of the Rwandan government, views clashed when the ICTR's statute was drafted. For example, Rwanda wanted the following: (a) to be a broad influence on the Tribunal's functioning; (b) the statute to observe its specificities to the utmost extent; and (c) to give voice to concerns regarding certain provisions of the statute.<sup>41</sup>

In contrast, the Security Council was determined to follow the ICTY's example. As a result, it was no wonder that the differences in opinions and expectations led Ambassador Bakuramutsa of Rwanda to vote against the issue<sup>42</sup> in the Security Council.

The ICTR's creation, as it happened, gave rise to antipathy, not only in Rwanda, but also in certain neighbouring states, except Tanzania where the ICTR has its seat. The ice did not break until after the Harare Summit of the Organisation of African Unity (OAU), held in July 1997.<sup>43</sup> Shortly afterwards, the Tribunal recorded its first significant success

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<sup>40</sup> Letter of 28 September 1994, sent by Rwanda's Permanent Representative to the UN to the President of the Security Council, UN Doc S/1994/1115.

<sup>41</sup> Rwanda's objections focused mainly on the following points (the comments within parentheses reflect the government's objections): *ratione temporis* (this was determined arbitrarily); common organs with the ICTY (this undermined the specific nature of the Tribunal); the relation of the Tribunal to domestic courts and the appointment of judges (such states could also appoint judges who supported the genocide); enforcement of sentences (this would be taken out of Rwanda's hands); absence of death penalty; seat of the Tribunal (Arusha, Tanzania was chosen for several reasons, while the ICTR had only a Prosecutor's Office in Kigali, Rwanda). For more details, see CM Peter 'The International Criminal Tribunal for Rwanda: Bringing the killers to book' (1997) 321 *International Review of the Red Cross* <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNZ8> (accessed 30 April 2007); O Dubois 'Rwanda's national criminal courts and the International Tribunal' (1997) 321 *International Review of the Red Cross* [/web/eng/siteeng0.nsf/html/57JNZ8](http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNZ8) (accessed 30 April 2007).

<sup>42</sup> Security Council Resolution 955, 3453rd meeting, 8 November 1994, UN Doc S/RES/955 (1994).

<sup>43</sup> 33rd ordinary session of the Assembly of Heads of State and Government and the 66th ordinary session of the Council of Ministers, Harare, Zimbabwe, 26 May to 4 June 1997.

within the framework of Operation Naki, which led to the arrest in Kenya of several major figures who had been members of the one-time provisional government of Rwanda.<sup>44</sup>

Rule 65 of the RPE of the ICTR deals with provisional release. It stipulates:

- (a) Once detained, an accused may not be released except upon an order of a Trial Chamber.
- (b) Provisional release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

This provision is similar to that of the ICTY. However, article 65 of the ICTR contains an exceptional circumstances requirement, which has been removed in the case of the ICTY.<sup>45</sup> No defendant has been able to meet the exceptional circumstances requirement and none has been granted provisional release, in spite of several applications.<sup>46</sup>

#### 2.1.4 The Rome Statute of the International Criminal Court<sup>47</sup>

The Rome Statute of the International Criminal Court (ICC) deals with the issue of interim release pending trial. The statute builds upon the human rights protection for indictees that are contained in the RPE of the ICTY and ICTR.

Article 62 of the statute states that:

A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

- (a) Conditions under article 58(1):
  - (i) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of this Court; and
  - (ii) The arrest of the person appears necessary:
    - To ensure the person's appearance at trial; to ensure that the person does not obstruct or endanger the investigation or court proceedings, or; where applicable, to prevent the person from continuing with the commission of the related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

<sup>44</sup> Compare D Wembou 'The International Criminal Tribunal for Rwanda: Its role in the African context' (1997) 321 *International Review of the Red Cross* <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNZ6> (accessed 30 April 2007); Dubois (n 41 above).

<sup>45</sup> n 35 above.

<sup>46</sup> See *Prosecutor v Kanbayashi*: The accused requested the application of rule 65(B) under the ICTY formulation without the 'exceptional circumstances' requirement. The judge rejected this as the ICTR was a 'separate and sovereign body'. Accordingly, following *Prosecutor v Kayashema*, it held that an accused must show 'exceptional circumstances' to be granted provisional release.

<sup>47</sup> As corrected by *proces-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

One could sum up by saying that various standards have been adopted for provisional release in the international criminal tribunals. While the ICTR has not granted provisional release to any defendant, the ICTY has made use of its statutory bail provisions with more regularity. Each of these bodies recognises the right to provisional release in limited circumstances, and that right is often tied to the presumption of innocence.

### 3 The right to bail and the specific case of the Special Court for Sierra Leone

#### 3.1 Background to the establishment of the Special Court

Similar to the conflict in the Balkans and Rwanda, widespread and horrendous violations of human rights<sup>48</sup> and humanitarian law have characterised the brutal ten-year civil war in Sierra Leone. Even though the Revolutionary United Front (RUF) in Sierra Leone was mainly responsible for the systematic and widespread abuses throughout this period, other parties were not blameless.<sup>49</sup> The Armed Forces Revolutionary Council (AFRC),<sup>50</sup> former soldiers of the Sierra Leone Army (ex-SLA),<sup>51</sup> members of the Civil Defences Forces (CDF)<sup>52</sup> and soldiers from

<sup>48</sup> For more information, see generally Human Rights Watch 'Sierra Leone: Sowing terror — Atrocities against civilians in Sierra Leone' July 1998, 10:3(A) <http://www.hrw.org/reports98/sierra/>, especially Part III 'Human rights abuses in a war against civilians' (13 September 1995); 'Sierra Leone: A disastrous setback for human rights' <http://web.amnesty.org/library/Index/engAFR510051997> (20 October 1997); 'Sierra Leone: Recommendations to the International Contact Group on Sierra Leone' New York, 19 April 1999 [http://web.amnesty.org/library/Index/ENG.AFR510051999?open\\$ef=ENG-SLE](http://web.amnesty.org/library/Index/ENG.AFR510051999?open$ef=ENG-SLE) (accessed 30 November 2007); Amnesty International Report 2000 <http://web.amnesty.org/report2000/ar2000>. For the key UN documents, refer to UN Security Council 'Sierra Leone and Liberia' <http://www.globalpolicy.org/security/issues/slindy/ex.htm> (accessed 20 November 2007).

<sup>49</sup> On 23 March 1991, Foday Saybana Sankoh (an ex-army corporal who had served time for treason) led RUF forces into Sierra Leone from neighbouring Liberia and tried to overthrow the one-party rule there by the All Peoples Congress Party (APC). Rt Major-General Joseph Saidu Momoh had led the APC then. However, the RUF's motives were questionable, though it acted on the pretext of ridding corruption, misrule and one-party statism in Sierra Leone. Later, 26 year-old Captain Valentine Esegrobo Melvin Strasser and others overthrew President Momoh's government in April 1992: Federation of American Scientists, 27 May 2000 'Sierra Leone' <http://www.fas.org/irp/world/para/docs/footpaths.htm> (accessed 20 November 2007).

<sup>50</sup> This was the military junta formed in May 1991 after President Ahmad Tejan Kabbah's democratically elected government was removed from power: UN Security Council 'Sierra Leone and Liberia' (n 48 above).

<sup>51</sup> When President Kabbah returned to power in March 1998, he disbanded the army. Some former soldiers retreated into the jungle and began a brutal campaign against innocent and unarmed civilians. In January 1999, this group (together with AFRC and RUF elements) invaded the capital, Freetown, and committed unspeakable atrocities: MM Khobe 'The evolution'n and conduct of ECOMOG operations in West Africa'



the Economic Community of West African State Monitoring Group (ECOMOG)<sup>53</sup> were also alleged to have committed gross human rights abuses, mainly against innocent and unarmed civilians.

In March 1996, Sierra Leone returned to civilian rule after its first democratic elections in almost three decades. President Ahmad Tejan-Kabbah's government negotiated a peace agreement, commonly known as the Abidjan Peace Agreement, with the RUF on 30 November 1996 in Côte d'Ivoire.<sup>54</sup> The aim was an immediate ceasefire, demobilisation and acceptance of the RUF as a political party. However, the Agreement failed soon after its inception. In May 1997, a military *coup* ousted the Kabbah government and the AFRC invited the RUF to join it in governing the country. This step did not, however, bring about the intended peace.<sup>55</sup> Several months of chaos, barbarism, murder and civil disobedience ensued.<sup>56</sup> In February 1998, ECOMOG (assisted by British-based Sandline mercenaries and the CDF) forced the AFRC from power.<sup>57</sup> The following month, President Kabbah returned to Sierra Leone from Guinea (where he had sought refuge) for a ceremonial reinstatement.<sup>58</sup>

In January 1999, elements of the AFRC, ex-SLA members and the RUF attacked the capital, Freetown, and occupied the central and eastern

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<http://www.iss.co.za/Pubs/Monographs/No44/ECOMOG.html> (accessed 20 November 2007). See also generally Human Rights Watch (n 48 above) 10:3 (A) 'Atrocities against civilians in Sierra Leone' <http://www.hrw.org/reports98/sierra/> (accessed 20 November 2007).

<sup>52</sup> The government formed and supported civil militia groups to fight RUF. They were from different tribes, such as the Kamajors from the Mende tribe, the Tamaboros from the Koranko tribe and the Kapras from the Temne tribe: SJ Kemokai 'The security issue' Sulima Internet <http://www.sulima.com/pubs/kamajors.html> (accessed 20 November 2007).

<sup>53</sup> This was the peacekeeping force of the Economic Community of West African States (ECOWAS), consisting mainly of Nigerian soldiers. Originally deployed to Liberia to monitor a ceasefire agreement, it was later sent to Sierra Leone after the RUF invaded Sierra Leone in March 1991. It fought the RUF and the AFRC alongside the army. See generally ET Dowyaro 'ECOMOG operations in West Africa: Principles and praxis' <http://www.iss.co.za/Pubs/Monographs/No44/ECOMOGPraxis.htm1> (accessed 21 November 2007).

<sup>54</sup> See 'Peace agreement between the government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL)' [http://www.usip.org/library/pa/sl/sierra\\_leone\\_0707/999\\_toc.html](http://www.usip.org/library/pa/sl/sierra_leone_0707/999_toc.html) (accessed 21 November 2007).

<sup>55</sup> US Committee for Refugees 'Coup in Sierra Leone culminates in months of insecurity' *News and Resources* 27 May 1997 [http://www.refugees.org/new/press\\_releases/1997/o52797.htm](http://www.refugees.org/new/press_releases/1997/o52797.htm) (accessed 21 November 2007).

<sup>56</sup> As above.

<sup>57</sup> See M Nicol-Wilson 'Accountability for human rights abuses: The United Nations Special Court for Sierra Leone' (2001) *Australian International Law Journal* 161, citing Amnesty 'Killing for gain — The Sierra Leone affair' *Amnesty News* <http://www.amnesty.org.uk/news/mag/jul98/killinghtm> (accessed 21 November 2007).

<sup>58</sup> CNN Interactive 'Jubilant crowds greet returning Sierra Leone leader' *World News* 10 March 1998 <http://www.cnn.com/WORLD/9803/10/sierra.leone/> (accessed 21 December 2001).

parts for almost three weeks until ECOMOG troops removed them. The egregious abuses of human rights during this period<sup>59</sup> shocked the international community's conscience and the UN finally focused its attention on this state.<sup>60</sup> Persuaded by military weakness and by the blandishments of Western governments, the government of Sierra Leone concluded the Lomé Peace Agreement with the RUF.<sup>61</sup> *Inter alia*, article IX of the Agreement granted amnesty to all collaborators and combatants for activities undertaken in pursuit of their objectives throughout the conflict. Further, the Agreement granted amnesty to all collaborators and combatants for activities undertaken in pursuit of their objectives throughout the conflict. The Agreement also granted Foday Sankoh the protocol rank of Vice-President and the leadership of a government commission that controlled the state's mineral wealth (including diamonds). A UN peacekeeping force, part of the UN Mission in Sierra Leone (UNAMSIL), was formed and mandated with peacekeeping duties in a transfer of responsibilities from ECOMOG.

The Lomé Peace Agreement's amnesty and pardon provisions in article IX were widely condemned by human rights groups and other non-governmental organisations (NGOs).<sup>62</sup> Ambassador Francis G Okelo, Special Representative of the Secretary-General of the UN, signed the Agreement on behalf of the UN, but attached a disclaimer regarding these pardon provisions. This disclaimer provided that international crimes (such as genocide, crimes against humanity and war crimes) and other serious violations of international humanitarian law were to be excluded from the interpretation of article IX. This was in keeping

<sup>59</sup> During the fighting, there were innumerable killings, amputations, rapes of women and girls, child abductions and the burning of houses and vehicles. For more information, see generally Human Rights Watch 'Getting away with murder, mutilation and rape — New testimony from Sierra Leone' <http://www.hrw.org/reports/1999/sierra> (accessed 20 November 2007).

<sup>60</sup> Eg, the UN High Commissioner for Human Rights, Mary Robinson, described the human rights situation as worse than in Kosovo: BBC News 'Sierra Leone abuses worse than Kosovo' *BBC News Online* 25 June 1999 <http://news.bbc.co.uk/1/hi/africa/377541.stm>; BBC News 'Sierra Leone and Britain: Key dates' *BBC News Online* 9 February 1999 [http://news6.thdo.bbc.co.uk/1/hi/english/special\\_report/1999/sierra\\_leone/newsid\\_](http://news6.thdo.bbc.co.uk/1/hi/english/special_report/1999/sierra_leone/newsid_) (accessed 21 November 2007).

<sup>61</sup> Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Lomé, Togo on 7 July 1999 <http://www.sierraleone.org/lome.accord> (accessed 21 December 2001).

<sup>62</sup> In a letter to the UN Secretary-General, Human Rights Watch condemned the amnesty and pardon provisions and called for the punishment of the perpetrators of human rights violations: Amnesty International Press Release 'A peace agreement but no justice' 9 July 1999 [http://web.amnesty.org/library/Index/ENGAFR510071999?open\\$ef=ENG-SLE](http://web.amnesty.org/library/Index/ENGAFR510071999?open$ef=ENG-SLE) (accessed 21 November 2007). The Sierra Leone Bar Association condemned the provisions and called for an independent inquiry into the gross human rights abuses committed in Sierra Leone since 1991. Furthermore, it urged the government to ratify the 1998 Rome Statute of the International Criminal Court, referring to the urgent need to bring the perpetrators to justice: News Archives, 31 May 2000 <http://www.sierra-leone.org/slnews0500.htm1> (accessed 21 November 2007).

with international law, which does not allow amnesty for crimes of this nature.<sup>63</sup>

Although the amnesty and pardon provisions amounted to impunity and injustice and were perceived to have a negative effect on the prospects for peace in Sierra Leone, the Agreement was subsequently ratified by the Sierra Leonean Parliament and enacted into law as the Lomé Peace Act 2000. This was despite the amnesty and pardon provisions being inconsistent with section 28(1) of the 1991 Sierra Leone Constitution,<sup>64</sup> which is deemed to be the supreme law of the land.

Notwithstanding the Lomé Peace Agreement, hostilities continued. In November 2000, a ceasefire paved the way for further peace talks to consolidate and observe the Agreement during the first half of 2001, finally ending the hostilities.<sup>65</sup>

These events forced the government of Sierra Leone to reconsider the Lomé Peace Agreement and to request assistance from the UN Security Council to establish an appropriate judicial forum to try and punish those responsible for the gravest atrocities. As a result, the Security Council passed Resolution 1315 (2000), requesting the Secretary-General to pursue negotiations with the government of Sierra Leone to create an independent 'Special Court'. Following successful negotiations, the Secretary-General submitted to the Security Council a report dated 4 October 2000, which incorporated an agreement between the UN and the government of Sierra Leone.<sup>66</sup> The Court's statute was annexed to the Agreement and the latter incorporated into Sierra Leonean law by the 2001 Special Court (Ratification) Act.<sup>67</sup>

### 3.2 SCSL Statute and its Rules of Procedure and Evidence

The Special Court for Sierra Leone is one of the 'mixed' courts guided by both international and domestic law, such as the Extraordinary

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<sup>63</sup> Amnesty International Report 'Sierra Leone: Ending impunity — An opportunity not to be missed' 31 July 2000 3 [http://web.amnesty.org/library/Index/ENG.A-FR510642000?open\\$ef=ENG-332](http://web.amnesty.org/library/Index/ENG.A-FR510642000?open$ef=ENG-332) (accessed 21 November 2007).

<sup>64</sup> If individuals allege that their constitutional rights are infringed, sec 28(1) of the Constitution gives them the right to apply by motion to the Sierra Leone Supreme Court for redress. However, the amnesty and pardon provisions of the Lomé Peace Agreement, in law inferior to the Constitution, bar them from enjoying this right. See art IX.

<sup>65</sup> 'UNAMSIL chairs peace talks between Sierra Leone government and the RUF' at <http://www.un.org.av/radio/news/2001/may/01051500.htm> (accessed 21 December 2001).

<sup>66</sup> See UN Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915 [http://sss.afrol.com/countries/Sierra\\_Leone/documents/un\\_sil\\_court\\_041000.htm](http://sss.afrol.com/countries/Sierra_Leone/documents/un_sil_court_041000.htm) (accessed 20 November 2007).

<sup>67</sup> See M Nicol-Wilson 'International Criminal Tribunals — A comparative study of the Tribunal in former Yugoslavia, Rwanda and Sierra Leone' (2002) *Australian International Law Journal* 134.

Chambers in the Court of Cambodia, the State Court of Bosnia-Herzegovina or the more recently established Special Tribunal for Lebanon.

There are several sources of law that guide the Rules of Procedure and Evidence of the Special Court. First among them are the Rules of the ICTR. Article 14(1) articulates that

[t]he Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

Thus, under article 14(1), the Rules of the ICTR apply. Article 14(2) provides for their amendment by the judges of the Special Court:<sup>68</sup>

The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable rules do not or do not adequately provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act 1965 of Sierra Leone.

The mixed nature of the Special Court is apparent in this provision. The Special Court is not a part of the judiciary of Sierra Leone, just as the other tribunals do not form part of the judiciaries of their own host countries. The laws of Sierra Leone, however, specifically its Criminal Procedure, do factor into its jurisprudence. The Special Court is distinct from the other tribunals in this regard.

Again, multiple sources of law are apparent in article 20(3), which states,

The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

### 3.3 The presumption of innocence and the right to bail at the SCSL

Article 17 of the Statute of the SCSL deals with the rights of the accused. Article 17(3) provides that '[t]he accused shall be presumed innocent until proven guilty according to the provisions of the present statute'.

Rule 65 of the RPE deals with the right to bail. At the inception of the Court, rule 65 contained an 'exceptional circumstances' requirement, just as rule 65 of the ICTR does. However, this rule was later amended

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<sup>68</sup> The Special Court itself wrestled with this issue in *Prosecutor v Norman*, Decision on the Applications for a Stay of Proceedings, holding that the Criminal Procedure Act of 1965 is a source of guidance and that SCSL judges have a 'broadly permissive power' to amend the SCSL rules.

and the 'exceptional circumstances' requirement removed.<sup>69</sup> As such, the text of the statute currently reads:

- (a) Once detained, an accused shall not be granted bail except upon an order of a judge or Trial Chamber.
- (b) Bail may be ordered by a judge or Trial Chamber after hearing the state to which the accused seeks to be released and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

What was the significance of the amendment? Its exact significance is unclear, since as yet no accused has been released on bail from the Special Court, neither before nor after the removal of the 'exceptional circumstances' requirement. This will be explored in greater detail in subsequent sections.

### 3.4 The Constitution of Sierra Leone and the SCSL Statute

The Special Court does not form part of the judiciary of Sierra Leone. Nonetheless, it was created by means of an agreement with the government of Sierra Leone. The Court also sits in Sierra Leone. Within this context, the Constitution of Sierra Leone<sup>70</sup> provides for the right to bail.<sup>71</sup>

The Criminal Procedure Act<sup>72</sup> also deals with the issue of bail.<sup>73</sup> It provides for the granting of bail to persons charged with any offence, including murder and treason.

In his application for a writ of *habeas corpus*, Special Court indictee Alex Tamba Brima contended that any divergence by the SCSL from Sierra Leone's constitutional bail provisions must be deemed void as the Constitution is the supreme law of the land. Under the Constitution, the Supreme Court has a supervisory jurisdiction over all courts in Sierra Leone and over any adjudicating authority.<sup>74</sup> It was thus contended that any questions about the interpretation of the Constitution could only be resolved by the Supreme Court and not by the SCSL.

The Trial Chamber noted that it was an international agreement and not the Constitution of Sierra Leone that created the SCSL. Justice Itoe maintained:

... the natural interpretation of section 125 and other provisions of the Sierra Leonean Constitution is that these provisions are only meant to apply to the courts of Sierra Leone and the courts which come within the judicial hierarchy of the Constitution of the Republic of Sierra Leone. I therefore hold that application of section 125 and other sections of the Constitution ... is only

<sup>69</sup> Amended on 7 March 2003.

<sup>70</sup> Act 6 of 1991.

<sup>71</sup> n 70 above, art 17.

<sup>72</sup> Act 32 of 1965.

<sup>73</sup> n 72 above, sec 79.

<sup>74</sup> Sec 28(3) 1991 Constitution of Sierra Leone.

limited to the courts created by the 1991 Constitution of Sierra Leone and not to a post-1991 international creation that owes its existence to an international instrument of the Security Council and an equally international instrument of the Security Council and an equally international agreement between the United Nations and the government of Sierra Leone.

I therefore hold, from the foregoing analysis, that the Special Court, even though created by a special international agreement between the United Nations and the government of Sierra Leone . . . is not, should not and cannot be considered as forming an integral part of courts of the Republic of Sierra Leone . . . it therefore has no connection with the Supreme Court of Sierra Leone nor is it subjected to its jurisdiction, supervisory or otherwise.

## 4 The implementation of the right to bail in the SCSL

### 4.1 Evaluation of bail applications at the SCSL

Since the inception of the SCSL, it has received four applications for bail<sup>75</sup> and one application for a writ of *habeas corpus*.<sup>76</sup> None of the applications were successful based on the decisions and the standards by which the judges evaluated the bail applications.

#### 4.1.1 Is the SCSL bound by decisions of the ICTY and the ICTR?

The SCSL was created after the establishment of both the ICTY and ICTR. Its enabling statute reflects that its appeals chamber is to be guided by those of the other tribunals.<sup>77</sup> When considering bail applications, however, the judges of the SCSL have asserted that they will not be bound by the precedent of the ICTY and ICTR. For example, in the application of Issa Sesay, the judge held that the SCSL is 'not generally bound by the jurisprudence of other international tribunals'.<sup>78</sup> The judge echoed this in the bail application of Monina Fofana, noting that granting bail is a matter that is 'entirely within either the discretion of the judge or that of the trial chamber so seized of the application'.<sup>79</sup> It is therefore difficult to assess how and how much decisions of the other tribunals have influenced the SCSL. At times, the judges have relied on those decisions, sometimes quoting them as authority, yet they have also at other times conspicuously ignored relevant decisions.

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<sup>75</sup> *Prosecutor v Alex Tamba Brima* (SCSL 03-06-PT); *Prosecutor v Monina Fofana*; *Prosecutor v Morris Kallon*; *Prosecutor v Issa Hassan Sesay*.

<sup>76</sup> *Prosecutor v Sam Hinga Norman*.

<sup>77</sup> See, in particular, Special Court Statute art 20(3), which states: 'The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.'

<sup>78</sup> *Sesay* bail application (n 75 above).

<sup>79</sup> *Fofana* bail application (n 75 above).

#### 4.1.2 The application of rule 65

Rule 65 has been applied by the judges as a two-part test. The Trial Chamber must be satisfied that if released, '[t]he accused will appear for trial; and [t]he accused will not pose a danger to any victim, witness or other person'.

##### *Will the accused appear for trial?*

In the determination of bail applications, the SCSL has relied on the case of *Neumeister v Austria* before the European Court of Human Rights, in which it was held that, in granting bail, it is relevant to consider the character of the person, his morals, his home, his occupation and his assets.<sup>80</sup> Additionally, the Court argued that the issue of community ties does not constitute sufficient foundation to meet the prescribed requirement for bail and that release of an accused person within the local community of Sierra Leone would undermine their own safety and indeed the likelihood of their appearance for trial.<sup>81</sup>

##### *The opinion of the government of Sierra Leone in granting or denying bail*

Pursuant to rule 65(B) of the RPE, the SCSL has given a lot of weight to submission (9) of the government of Sierra Leone, which expressed an objection to the granting of bail. The government of Sierra Leone has argued that it is unable to guarantee to the Court that accused persons granted bail will not move outside of the jurisdiction. Even though the SCSL has argued that it cannot be bound by the opinion expressed by the government of Sierra Leone as to whether an accused should be provisionally released or not, one can conclude that such objections have influenced the court in denying bail.

##### *The presumption against release*

In several bail applications, the prosecution and the accused have each claimed a presumption weighing in their favour. Counsel for the various accused have argued that the fundamental nature of the right to liberty in international law mandates that there must be a presumption in favour of granting bail. This presumption would, on its face, only be defeated through a sufficient demonstration of good cause by the prosecution. Prosecutors have countered that the plain text of rule 65, which requires the satisfaction of the Trial Chamber, imposes a burden that naturally falls to the accused. Without satisfying that burden, they argue, no accused ought to be granted bail under rule 65. The implications of this dispute are significant, as it is determinative of the argu-

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<sup>80</sup> Decision on the Motion by Morris Kallon for bail, 25 February 2004.

<sup>81</sup> n 80 above, 13.

ment required to be made on behalf of an accused who seeks release on bail.

*The 'exceptional circumstances' requirement*

Lawyers for the accused have also inferred that the removal of the 'exceptional circumstances' requirement from rule 65 suggests a presumption in favour of bail. However, the judges have not agreed. In fact, in his decision on the bail application of Morris Kallon, which barely addresses the relevant human rights norms, Judge Pierre Boutet rejected this very argument.<sup>82</sup> He held that '... it is for the defence to show that further detention of the accused is neither justified nor justifiable in the circumstances at hand'.<sup>83</sup> Judge Benjamin Mutanga Itoe treated the issue in greater depth in his analysis of the application of Monina Fofana. He recognised the applicable standard in international human rights law, noting that

as far as the contention that detention is the rule and liberty the exception is concerned, I am of the opinion that it is contrary to internationally entrenched principles of the presumption of innocence.

He conceded that a presumption against release is not in conformity with human rights norms. In spite of this, Judge Itoe found that since the accused 'is the person seeking to benefit from the Court's discretion', the burden is on the accused to 'furnish legal, moral, or material guarantees to assure the judge or the Chamber' that he will not escape if released on bail or otherwise pose a danger to any victim, witness or other person.<sup>84</sup> In effect, he agreed that the prosecution is not required to show cause to have a detainee imprisoned indefinitely, and that the onus falls instead on the accused to win his release from the judges.

In spite of his application of a presumption against provisional release, Judge Itoe finds that the right to liberty should 'under either customary international law or municipal law, continue to be and remain the rule and detention the exception'.<sup>85</sup>

For their purposes, it appears that the judges of the SCSL seem to have resolved among themselves that there is a presumption weighing against release, as in the *Fofana* bail application, as a result of which no indicted has been released on bail by the SCSL judges. What are the implications of this decision for international criminal practice? Does this presumption comport with human rights norms? These questions will be addressed in subsequent paragraphs.

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<sup>82</sup> *Kallon* bail application (n 75 above).

<sup>83</sup> n 75 above, 7.

<sup>84</sup> *Fofana* bail application (n 75 above).

<sup>85</sup> n 75 above.



*Burden shifting: A new standard?*

In his analysis of Fofana's bail application, Judge Itoe provided an expanded framework for the analysis of rule 65 applications.<sup>86</sup> He concurred with his colleagues that there is an initial burden on the accused to satisfy the Trial Chamber as to both prongs of rule 65(B). What he added, however, is that if the accused succeeds in this, the application for bail can then be defeated by a sufficient demonstration by the prosecution of '... good reasons for continuing to deprive the detainee of his fundamental right to liberty'.<sup>87</sup> He described this as a burden-shifting standard by way of which the Special Court judges could analyse specific bail applications.

**4.1.3 Factors used in evaluating each prong of the rule 65 two-part test**

The court has weighed up a number of issues in evaluating rule 65 applications. For the purposes of analysis, the factors used in evaluating each prong of the test will be considered separately.

*First prong: Will the accused appear for trial?**Amount of security posted by the accused*

The amount of the security posted by the accused has been significant in several of the applications.<sup>88</sup> In his decision on the application of Monina Fofana, Judge Itoe found that the surety offered by the accused 'does not rise up to the expectation that would convince me to exercise discretion in his favour'. There is no articulation of what level of surety would convince the judge to so exercise his discretion.

*Severity of the sentences*

The amount of the surety required by the Court is linked to the severity of the potential sentences to be imposed. Special Court judges have cited and agreed with ICTY decisions in which a very high amount of surety was required because of the severity of the sentence. In the *Kallon* bail application, Judge Itoe maintained that the allegations against the accused are of such gravity and seriousness that if released the safety of the accused himself would be undermined.

*Risk of flight*

The risk of flight posed by indictees has also been a primary consideration. Judges have given particular weight to the fact that the SCSL does

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<sup>86</sup> *Fofana* bail application (n 75 above).

<sup>87</sup> As above.

<sup>88</sup> See *Fofana* bail application (n 75 above), quoting the ICTY.

not have an enforcement arm able to execute a warrant of arrest issued by the Court's Trial Chambers. They have also factored the lack of resources available to the Sierra Leonean police force against the granting of bail.

*Awareness of indictment and seriousness of alleged crimes*

In his application for bail, the accused Issa Sesay argued that as interim leader of the RUF, he had been aware that he was the subject of an impending investigation by the SCSL. As such, his lack of flight prior to his eventual arrest should be taken into consideration in favour of granting his bail application. However, Judge Boutet noted that on his review of certain 'evidence', which was totally unspecified in his decision, he was not satisfied that the accused had been aware of the indictment or that he would have surrendered to the tribunal given a more comprehensive understanding. Judge Boutet was also not satisfied that the accused had been aware of the seriousness of the crimes being investigated by the SCSL. Since Judge Boutet did not articulate the evidence relied upon, there is no basis on which to determine how much any of this made an impact on his decision. The judge did, however, conclude that the current awareness of the accused of the seriousness of the crimes alleged against him does now weigh against his release on bail.

*Family ties within Sierra Leone*

In evaluating Sesay's application, Judge Boutet noted that the accused presented unspecified 'evidence in support of this factor'. However, he found that 'these allegations do not suffice . . . to meet the prescribed requirements for bail'. Since Judge Boutet neither addressed the submissions by the accused, nor gave any indication of what type of submissions would meet the standard, there is nothing to go on here.

*Participation in the peace process*

In Sesay's application, Judge Boutet acknowledged that the accused played a role in the peace process. However, Judge Boutet concluded that, whilst this factor may weigh in mitigation should the accused be convicted, it was not relevant to application for bail.

*Second prong: Will the accused pose any danger to victims, witnesses or others?*

Due to the protections accorded to witnesses testifying before the Special Court, much of the information regarding witnesses and their safety is contained in confidential documents submitted between counsel and the bench, and not made available for outside analysis.

However, in the *Fofana* application, the judge appears to indicate that the fact that some witnesses had been threatened (without speci-

fyng by whom or when) and that this weighed heavily against the application for bail. The question considered here is whether provisional release after the disclosure of sensitive information in court would heighten the risk to witnesses.

#### *Public order concerns*

Though not made explicit in the text of rule 65, the judges of the SCSL have weighed up the potential impact of release of the accused on the public. The nine accused are polarising figures for much of Sierra Leone. The judges have accordingly relied upon a government submission in which they note the 'potential for an extremist reaction to the SCSL'. Additionally, the UN Secretary-General referred to the trials at the Special Court as a 'potential source of instability'.

If an accused is released, it follows from such argument that this may provoke 'unrest in his supporters or detractors in the general population'.<sup>89</sup>

#### *Can bail ever be granted before the Special Court?*

It has been argued by the judges of the SCSL that the particular situation of the SCSL and its physical presence in the territory of Sierra Leone, and more specifically in Freetown, the capital of the country, 'make[s] it even more important, difficult, critical and sensitive situation than that of the ICTR which sits in Tanzania, a neighbouring country to Rwanda'.<sup>90</sup>

## **5 Recommendations and suggestions**

The importance of the right to bail for indictees at the SCSL cannot be over-emphasised. Among other considerations, enjoyment of this right strengthens the presumption of innocence to which all indictees are entitled irrespective of the allegations against them.

The international community is expected to uphold the rule of law and to promote human rights in the course of helping to rebuild the country.

The question now is, what needs to be done to ensure the effective realisation of the right to bail at the SCSL? This question can be answered by way of recommendations and suggestions under various heads.

### **5.1 The standards used by judges/requirements for bail**

The judges at the SCSL have used various standards to refuse the appli-

<sup>89</sup> *Fofana* bail application (n 75 above).

<sup>90</sup> *Sesay* decision (n 75 above) on bail application.

cation for bail by indictees. For instance, they have maintained in some rulings that the amount of security posted by accused persons is not sufficient to convince them that the accused persons will not jump bail. Below are some recommendations:

### **5.1.1 The opinion of the government of Sierra Leone**

The SCSL was established by means of an agreement between the government of Sierra Leone and the UN. Rule 65 stipulates that a judge or Trial Chamber may only order bail after hearing the states to which the accused seeks to be released. In every bail application, the government of Sierra Leone has argued against the granting of bail. It would therefore be unfair to the accused persons for the SCSL to rely exclusively on the opinion of the government of Sierra Leone in determining whether or not bail should be granted. In the alternative, rule 65(B) should be amended by removing the requirement to hear the state to which the accused seeks to be released.

### **5.1.2 The amount of security posted by accused**

Sierra Leone is a poor country by international standards and all the indictees are considered to be indigent. As a matter of fact, none of the accused persons can afford to pay for the services of lawyers and investigators, so this responsibility has been taken on by the SCSL. Financial strength should not be a requirement for the enjoyment of a fundamental right, and so the judges should not lay undue emphasis on the financial strength of an accused as a requirement for the granting of bail. What the Court should consider, which is indeed the practice in most jurisdictions, is whether an accused has a credible and reliable surety that would ensure he attends trial.

### **5.1.3 The severity of the sentences**

The amount of surety required by the Court, I propose, is linked to the severity of the potential sentences to be imposed. It should, however, be borne in mind that the charges against the indictees have, prior to sentencing, the status of mere allegations. It is quite possible, after all, for an accused person to be acquitted and discharged at the end of the trial. The granting of bail would ensure the presumption of innocence until the final determination of the case, and would in no way interfere with the severity of the sentences or the serving of terms of imprisonment.

### **5.1.4 The risk of flight**

The SCSL has given a lot of weight to the fact that it does not have an enforcement arm able to execute a warrant of arrest, as well as to the declaration of the government of Sierra Leone that the police forces do

not have enough resources to ensure that an accused person does not jump bail. The indicted should not be deprived of their right to bail only because of the inefficiency of the police force.

#### **5.1.5 Family ties within Sierra Leone**

The judges of the SCSL have never given any indication of what types of submissions would satisfy the requirement of showing family ties within Sierra Leone. It is beyond question that all the indictees before the Court have very strong family ties in Sierra Leone, including members of their immediate and extended families. It would be important for the development of the jurisprudence of the SCSL if the judges were to give an indication as to what would be required to fulfil this condition.

#### **5.1.6 Will the accused pose any danger to victims, witnesses or others?**

The SCSL has not been objective in its evaluation of this requirement. For example, in the Fofana bail application, the judge mentioned that some witnesses had been threatened without giving precise circumstances. The accused persons do not pose any danger to victims or witnesses. This requirement must therefore be subjected to a more even-handed analysis, taking into consideration their present and past behaviour and also the stage of the inquiry.

#### **5.1.7 The public order concerns**

The issue of whether the accused would be put at risk if released on bail is not an objective consideration. There are many Sierra Leoneans who have committed more atrocities than some of the indictees, yet they walk along the streets of Sierra Leone without any risk to their personal wellbeing. The release on bail of the indictees would not in any way undermine their safety or invoke the anger of members of the public.

### **5.2 The consistency in the interpretation of rule 65**

Rule 65, dealing with release on bail, is provided for in the ICTY, ICTR and the SCSL. With the exception of the provision of exceptional circumstances present in the equivalent ICTR rule 65, the content of this rule is the same in all the three tribunals. Whilst the ICTY has been flexible in its interpretation of the requirements for release on bail under rule 65 and has released a number of indictees on bail, the ICTR and the SCSL have been very rigid in their interpretation of the fulfilment of the requirements by indictees and have not released any on bail. This has created an impression that there is no right to bail at the SCSL in spite of the evident provisions of rule 65.

There must be some consistency in the interpretation of the requirements by all the Tribunals, which ought, after all, to be applying the same standard.

### 5.3 Bail is the rule, detention is the exception

According to international law as reflected in treaties, *jus cogens* and the reports of the HRC, bail is the rule and detention the exception. However, the requirements imposed by the SCSL in order for an indictee to be released on bail makes detention the rule and bail the exception.

The jurisprudence of the ICTY has established that provisional release, rather than detention, is the general rule,<sup>91</sup> and that provisional release is a basic right that emanates from the fundamental presumption of innocence.<sup>92</sup> The SCSL should respect this rule of precedent as it is noted in the case law.

It is important that international and internationalised judicial bodies comply with international human rights norms. The lessons of the SCSL will be followed by the ICC and other internationalised criminal tribunals.

The right to liberty is fundamental and cannot be ignored. In any criminal proceeding, the presumption should be in favour of bail. By placing the burden on the accused, the SCSL has sidestepped human rights norms.

### 5.4 The explicit incorporation of the writ of *habeas corpus* into the SCSL Statute

The writ of *habeas corpus* is a critical protection of the liberty of detainees wherever they are held. Though the SCSL did consent to hear a *habeas* application, it did so, noting that the writ of *habeas corpus* is not incorporated into or recognised by the SCSL Statute.

In *Prosecutor v Brdanin*, the ICTY found that, although the writ of *habeas corpus* is not explicitly recognised by the Court, the Court can nonetheless adjudicate on the lawfulness of a detention.

The writ of *habeas corpus* is not explicitly recognised by the enabling Statute of the Rwandan Tribunal either. That Court has found, however, that, though not explicitly recognised, the concept is universal, thus the writ of *habeas corpus* should apply to ICTR decisions<sup>93</sup> as well as the SCSL decisions.

## 6 Conclusion

International and internationalised criminal trials have historically taken a long time and there is no reason to believe that the SCSL is any different. Because of the seriousness of the crimes, and the correspond-

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<sup>91</sup> *Prosecutor v Hadzihasanovic*, Decision on Motion for Provisional Release, 19 December 2001, pointing out that mandatory detention on remand contravenes art 5(3) of the European Convention on Human Rights, and is incompatible with CCPR.

<sup>92</sup> *Prosecutor v Aleksovski*, Decision of 23 January 1998.

<sup>93</sup> Brima application, quoting *Jean Bosco Barayagwiza v Prosecutor*.

ingly severe penalties that may be imposed, special care must be taken to ensure that these indictees are not given the opportunity to escape or to interfere with their eventual trials. Yet, the presumption of innocence that adheres to a defendant until the moment of his conviction is fundamental to many criminal justice regimes. Tied to that presumption is a conditional right to be provisionally released, upon production of sufficient surety.

Each of the tribunals thus far has been justifiably cautious in granting bail to indictees who present a particularly grave risk to flight or interference. The ICTR has categorically refused to grant bail to any defendant. Yet, how does that position relate to the presumption of innocence? A tribunal that refuses bail in all circumstances has in some ways vested the prosecution with the authority to imprison indictees throughout the pre-trial and trial phases, which have in some cases taken up to five years. Does this practice serve to erode the presumption of innocence built into the international legal system?

Releasing indictees on bail would enable them to participate in the preparation of the case for the defence through direct involvement in investigations. This would ensure equality of arms and reinforce the right to a fair trial.

As the Special Court continues its trials, it is hoped that the above-mentioned recommendations and suggestions might guide its work in the determination of bail applications.

## A court not found?

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### 1 Introduction

It is no secret that the African regional human rights system has severely underperformed its mandate and has not met the expectations of the people of the continent. The time of hushed criticisms of the weaknesses of the institutions, mechanisms and structures is long gone. Moreover, the African Charter system has routinely been subjected to stringent criticism due to its apparent inability to improve the situation.<sup>1</sup> However, Africans need and deserve well-functioning institutions. It is within this context that the African Union (AU) is heralded as offering some hope, since it has as its distinct purpose the integration of 'political, economic and *human rights* priorities'.<sup>2</sup>

Virtually simultaneously with the induction of the AU, the treaty establishing an African Court on Human and Peoples' Rights (African Court) was adopted and subsequently entered into force. The 11 judges were elected in January 2006 and accordingly assumed their positions. To date, the African Court has not commenced functioning in the material sense, yet four of the judges' terms come to an end in January 2008. Moreover, for practical and logistical reasons, it was

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<sup>1</sup> C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 156.

<sup>2</sup> CA Odinkalu 'African states make human rights a priority in new treaty for African Union' (2001) 13 *Interights Bulletin* 90.



decided to merge the AU Court of Justice and the African Court on Human and Peoples' Rights. The merger has not been without its controversies. Many of the pertinent issues which will dictate the future functioning of the merged court remain unresolved. In July 2006, the AU Summit decided that Ministers of Justice and Attorneys-General should meet to resolve the outstanding issues of *locus standi* and jurisdiction of the Court. The meeting, scheduled to take place in April 2007, has not yet taken place, leaving an unfortunate void in the ongoing debate on the prospective role and success of the Court.

The Organisation of African Unity (OAU) was conceived in Addis Ababa, Ethiopia, in 1963, as Africa's first inter-governmental organisation responsible primarily for economic development and integration. The OAU was designed as a regional intergovernmental organisation with the aim of promoting unity and solidarity among African states.<sup>3</sup> The provisions of the OAU Charter reflect the overriding concerns of Africa in the late 1950s and 1960s, namely, to ensure the rapid decolonisation of Africa and resultant self-determination for those African peoples that were still being ruled by colonial masters,<sup>4</sup> and to protect newly acquired statehood by stressing the sovereign equality of states<sup>5</sup> and the principle of non-interference in internal affairs.<sup>6</sup> The Charter's focus was thus on the protection of the state, rather than the individual.<sup>7</sup> To the extent that the OAU had concern for the question of human rights, such concern was largely concentrated on the right of self-determination of peoples in the context of decolonisation and apartheid.<sup>8</sup>

In the early 1980s the OAU took a step beyond self-determination as its primary human rights focus, to support the adoption of the African Charter on Human and Peoples' Rights of 1981 (African Charter), also known as the Banjul Charter.<sup>9</sup> The principal means of ensuring compliance with the African Charter was left to the African Commission on Human and Peoples' Rights (African Commission), which is a quasi-judicial enforcement mechanism established under article 30 of the African Charter, with the specific mandate to 'promote and protect human and peoples' rights in Africa'.

In 2000 the OAU underwent a transformation to become the African

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<sup>3</sup> On the OAU generally, see K Mathews 'The Organisation of African Unity' in D Mazzeo (ed) *African regional organisations* (1984) 49.

<sup>4</sup> Preamble of the OAU Charter; art 3(3).

<sup>5</sup> Art 3(1).

<sup>6</sup> Arts 3(1) & 3(2).

<sup>7</sup> See R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 7.

<sup>8</sup> Murray (n 7 above) 7 8.

<sup>9</sup> The African Charter echoes, to some extent, the theme of the OAU, since art 19 provides that 'nothing shall justify the domination of a people by another'.

Union.<sup>10</sup> The AU was established by the Constitutive Act of the AU, adopted at the 36th ordinary session of the Assembly of Heads of State and Government of the OAU on 11 July 2000 in Lomé, Togo.<sup>11</sup> The AU was formally inaugurated in Durban, South Africa, on 9 July 2002, and the Secretariat of the AU is based in Addis Ababa, Ethiopia.<sup>12</sup> By the time the AU was inaugurated, all 53 former OAU member states, except the Democratic Republic of Congo and Madagascar, had ratified the Constitutive Act and deposited instruments of ratification with the Secretary-General of the OAU.<sup>13</sup> The Democratic Republic of Congo deposited its instrument of ratification on the day of the inauguration itself, while Madagascar only did so almost a year later, on 10 June 2003. To date Morocco is not a member.

A number of reasons led to the transition from the OAU to the AU.<sup>14</sup> By the end of the 1980s, there was a widespread perception that the OAU was in serious need of reform. Most obviously, the original motivations for the OAU's creation — the pan-Africanist ideals of securing independence for African peoples and uniting against colonial subjugation — no longer sustained the organisation following the period of decolonisation that Africa witnessed in the 1960s, 1970s and into the 1980s.<sup>15</sup> A new *raison d'être* was needed to unite the organisation. One goal, consistent with the OAU's nature as a pan-African body constituted to improve the lives of Africa's people, would have been to focus on securing peace amongst Africa's newly independent states. However, the OAU came increasingly to be criticised for its failure to respond to serious conflicts between member states.<sup>16</sup> In addition, several of Africa's leaders, in the fight for independence, led their newly liberated nations into totalitarianism, with an ineffectual OAU doing little to put a stop to this African malaise.<sup>17</sup> It did not help that the OAU found itself caught between superpower rivalries during the Cold War; these ideological clashes led to debilitation of the OAU as it failed to meaningfully respond to civil wars that were fueled by East/West interests (such as in Angola and Mozambique), and development and reform programmes

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<sup>10</sup> For a critical discussion of the AU, see H Richardson 'The danger of oligarchy within the Pan-Africanist authority of the African Union' (2003) 13 *Transnational Law and Contemporary Problems* 255.

<sup>11</sup> See Decision on the Establishment of the African Union, OAU Doc AHG/Dec 143 (XXXVI).

<sup>12</sup> The Secretariat is described as the 'Commission of the AU' — see Statutes of the Commission ASS/AU/2(I)-d — and is composed of a Chairperson, Deputy Chairperson and eight other commissioners.

<sup>13</sup> South Africa ratified on 3 March 2001.

<sup>14</sup> See generally CA Packer & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365-369.

<sup>15</sup> n 14 above, 366.

<sup>16</sup> See Y El-Ayouty 'An OAU for the future: An assessment' in Y El-Ayouty (ed) *The Organisation of African Unity after thirty years* (1994) 180.

<sup>17</sup> See Packer & Rukare (n 14 above) 367.

initiated by the OAU became symbolised by lofty words and promises at OAU conferences, but were rarely translated into meaningful action.<sup>18</sup> Matters did not improve after the end of the Cold War, as the OAU suffered from under-funding by member states and an unwieldy Assembly structure in which the 53 members more often than not leaned towards preserving national interests and sovereignty at the expense of a true commitment to regional co-operation and finding 'African solutions for African problems'.<sup>19</sup>

Given these and other failures by the OAU, at the end of the twentieth century, African leaders chose to start afresh with the AU. The core objectives of the AU evidence a commitment by African leaders not only to tackle the key economic and social issues facing the continent, but also to improve the AU relative to the weakness that had come to cripple the OAU. These objectives include the promotion of sustainable development,<sup>20</sup> good governance, social justice, gender equality, and good health.<sup>21</sup>

Some criticise the AU for the fact that although it was intended to remedy the failures and inadequacies of the OAU structures regarding human rights, it is ironically becoming a symbol of those failures. In this paper we focus on the AU's talk of an African Court dedicated to human rights and on the recent decision by the AU to merge the proposed African Court on Human and Peoples' Rights with the African Court of Justice. Our goal is not merely to criticise, however, or to stand as disinterested cynics carping from the outside. Rather, we are concerned with the strategic importance and imperative necessity of greater clarity and direction from the AU regarding the proposed merger between the two courts. To achieve its purpose, this paper is composed of three interrelated parts. The first details the historical development of the OAU and now the AU and introduces the concept of the OAU's guarantees of respect for human rights on the continent. Part two highlights the provisions of the African Court Protocol, as read in conjunction with the latest developments, such as the introduction of a new Draft

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<sup>18</sup> As above.

<sup>19</sup> See El-Ayouty (n 16 above) 179.

<sup>20</sup> This objective builds on earlier initiatives begun under the OAU for the development, mobilisation and utilisation of African human and material resources in an effort to achieve self-sufficiency for the continent. The framework was set in place by the OAU's adoption of the Lagos Plan of Action and Final Act in which the intention was expressed to create an African Economic Community. This intention came to be realised with the Abuja Treaty Establishing the African Economic Community, which entered into force in 1994. On the African Economic Community see K Danso 'The African Economic Community: Problems and prospects' (1995) 4th Quarter *Africa Today* 31.

<sup>21</sup> See arts 3 & 4 of the Constitutive Act of the AU.

Protocol and Statute on the African Court of Justice and Human Rights.<sup>22</sup> The third part examines the future prospects of the Court in light of the decision to merge the AU Court of Justice and the African Court on Human and Peoples' Rights. This aspect of the discussion emanates from the recent meeting of the Permanent Representatives' Committee, in terms of which consideration was (once again) given to the Draft Protocol on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.<sup>23</sup>

## 2 From OAU to AU — The historical problems concerning the protection of human rights in Africa

The OAU was conceived as Africa's first inter-governmental organisation responsible primarily for economic development and integration. The Pan-African ideals that gave rise to the creation of the OAU emanated from the assumption that African states were strong and united against colonial subjugation and racism, having the common objective of working together to improve the lives of African *people*. As we pointed out in the introductory section of this article, the OAU's focus was on the protection of the state as the representative of the *people*, rather than the state as the protector of the *individual*.<sup>24</sup> Accordingly, to the extent that the OAU had concern for the question of human rights, such concern was largely related to the right of self-determination of peoples in the context of decolonisation and apartheid.<sup>25</sup>

Viewed from the perspective of the OAU's theoretical commitments towards a respect for human rights, and its less than satisfactory performance, grievances were expressed concerning the OAU's (in)effectiveness. Consequently, the OAU, with its policy of 'non-interference' in the internal affairs of other African states, has been transformed into the much stronger AU which has a strategy of 'non-indifference' to the suffering of the citizens of the African continent when countries do not respect democracy, human rights and the need for peace. The AU officially assumed its role upon the entry into force of the Constitutive Act of the AU.<sup>26</sup>

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<sup>22</sup> Executive Council Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union — EX CL/211 (VIII).

<sup>23</sup> This item was first placed on the agenda of the Permanent Representatives' Committee (PRC) and Legal Experts for purposes of their meeting held in January 2006 in Khartoum, Sudan, and thereafter, again for the meeting to be held from 16 to 19 May 2006 in Addis Ababa, Ethiopia.

<sup>24</sup> Murray (n 7 above) 7.

<sup>25</sup> Murray (n 7 above) 7 8.

<sup>26</sup> Constitutive Act of the African Union CAB/LEG/23 15, adopted in Lomé, Togo on 11 July 2000; entered into force on 26 May 2001.

The transition of the OAU to the AU must be understood against the backdrop of another African development: the New Partnership for Africa's Development (NEPAD). In January 2001, President Thabo Mbeki of South Africa unveiled a programme (then known as the Millennium African Recovery Programme, or MAP) for Africa's 'recovery' at the World Economic Forum meeting in Davos, Switzerland. During the 5th extraordinary OAU/Africa Economic Community (AEC) summit held in Sirte, Libya in March 2001, the MAP was integrated with the New Africa initiative presented by President Abdoulaye Wade of Senegal. The combined programme was subsequently renamed NEPAD.<sup>27</sup> NEPAD has been described as a 'holistic, comprehensive and integrated strategic framework for the socio-economic development of Africa, with a programme of action that embraces initiatives on peace and security, democracy and political governance, as well as economic and corporate governance'.<sup>28</sup> The importance of NEPAD is that it is 'an African-led, African-owned and African-managed initiative underpinned by an agreed set of principles to which the participating countries commit themselves'.<sup>29</sup> NEPAD was formally adopted as a programme of the OAU at a summit on 11 July 2001, and is a 'pledge by African leaders' to achieve certain goals.<sup>30</sup> In terms of NEPAD's founding document, African leaders 'recognise that failures of political and economic leadership in many African countries impede the coherent mobilisation of resources into productive areas of activity in order to attract and facilitate domestic and foreign investment'.<sup>31</sup> To that end, various strategies are adopted in the document to which the leaders commit themselves, with the ultimate goal to 'consolidate democracy and sound economic management on the continent' and a 'pledge to promote peace and stability, democracy and sound economic management and people-centred development and to hold each other accountable in terms of the agreements outlined in the programme'.<sup>32</sup> Implementation of NEPAD's commitments is undertaken through a Heads of State and

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<sup>27</sup> See the NEPAD website at <http://www.nepad.org>

<sup>28</sup> See T Maluwa 'South Africa and Organisation of African Unity/African Union treaties: Assessing South Africa's participation in international law making in Africa, 1994—2004', revised version of a paper presented on 8 July 2004 in Pretoria, South Africa, at the 'Symposium on a Decade of Developments in International Law' organised by the Department of Foreign Affairs of South Africa (on file with author) 4 fn 10.

<sup>29</sup> As above.

<sup>30</sup> 'A new African initiative: Merger of the Millennium Partnership for the African Recovery Programme (MAP) and Omega Plan' July 2001 para 1.

<sup>31</sup> n 30 above, para 34.

<sup>32</sup> Para 73. NEPAD's monitoring mechanism has come to be known as the African Peer Review Mechanism. For details, see 'Objectives, standards, criteria and indicators for the African Peer Review Mechanism (APRM), NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 9 March 2003. See also C Stals 'The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 130.

Government Implementation Committee, chaired by Nigeria and with Senegal and Algeria as Vice-Chairs. Seventeen other states, representing different geographical areas of Africa, make up the remainder of the 20-strong Committee.

A question worth asking is what the relationship is between NEPAD and the AU. It seems as though there had been early confusion about the position of NEPAD under the AU and concerns over duplication and competition.<sup>33</sup> The mainstay of NEPAD's plan for the promotion of democracy and human rights is its African Peer Review Mechanism (APRM), in terms of which African states hold each other accountable to agreed principles of good governance, based on best practice. With the creation of the AU, peer review is now placed under the direct control of the AU.<sup>34</sup>

These developments are important, and on paper look impressive. What remains to be seen, however, is whether African states have the political will to mobilise the AU Peer Review Mechanism to act against errant member states who abuse human rights.<sup>35</sup> The advent of the AU has brought with it hope for better protection of human rights in Africa and has been heralded as the start of a new economic, political and judicial organisation for the African continent, which places human rights squarely on its agenda.

For human rights to be placed on the agenda is one thing. To have a principal judicial body dedicated to the protection of basic freedoms is quite another. In this paper we are particularly concerned with the creation of an African Court on Human and Peoples' Rights. The Court has been hailed as an important display by the AU of its commitment to human rights; the creation by it of a true enforcement arm of the African Charter. Before coming to a discussion of the African Court, it is necessary to sketch the background to the protection of human rights in Africa and to consider the work (and failings) of the African Commission under the continent's regional human rights instrument, the African Charter.

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<sup>33</sup> See J Cilliers 'NEPAD's Peer Review Mechanism' (Pretoria: Institute for Security Studies Paper 64, November 2004) 3 <http://www.iss.co.za> (accessed 31 October 2007).

<sup>34</sup> As above. As a further sign of NEPAD's subsidiary role to that of the AU, the NEPAD secretariat, currently based in Pretoria, South Africa, will in future relocate to Addis Ababa, Ethiopia or will constitute a satellite office of the AU Commission. There is, however, ongoing confusion and flux between the various institutions within the NEPAD and CSSDCA processes. For critical comment, see A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 180-186.

<sup>35</sup> See further on the CSSDCA African Commission — The argument and recommendations, 11 May 2005 <http://www.commissionforafrica.org/english/report/introduction.html> (accessed 30 September 2007).

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

The African Commission is an organ of the (O)AU and has for two decades been the quasi-judicial body of the African Charter, responsible for implementing and enforcing the rights provisions in the African Charter. The African Commission began functioning on 2 November 1987 and is based in Banjul, The Gambia, West Africa. Over the past 20 years the attitude towards the African Commission have varied, albeit without significant praise. To some, with respect to the performance of the African Commission in general, the Commission is a disappointment. One of the most pronounced criticisms is that it lacks an effective tool to ensure compliance with the norms enshrined in the African Charter.<sup>36</sup>

The African Commission is tasked with implementing and enforcing the Charter through its three primary mandates, namely, the protective mandate; the promotional mandate and the interpretive function.<sup>37</sup> Under the protective mandate, the African Charter permits the African Commission to consider complaints (communications) brought against state parties by individuals, non-governmental organisations (NGOs) or other states alleging violations of human rights. The African Commission seeks an amicable resolution and, should that fail, makes non-binding recommendations which the Assembly of Heads of State and Government should adopt.<sup>38</sup> It becomes apparent that those states which have perpetrated human rights violations have the power to lobby like-minded states to potentially veto the adoption of these recommendations, hence our particular criticism that human rights in Africa are at the behest of states. The effect of the omnipotence of states within the regional system is one of the common themes throughout this paper and serves to illustrate that fundamentally, within the African regional human rights system, political good-will and diplomacy between states have often placed a dampener on the protection of human rights.

Pursuant to the promotional mandate, the main purpose of the African Commission's promotional activities is the sensitisation of the public on human rights issues in an effort to enhance respect and recognition of the rights stipulated in the African Charter. One of the African Commission's successes, achieved through its interpretive mandate, has been the Commission's interpretation of the African Charter.

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<sup>36</sup> VOO Nmehielle *The African human rights system, its laws, practices and institutions* (2001) 246.

<sup>37</sup> Arts 45(1), (2) & (3) of the African Charter prescribe the mandates of the African Commission.

<sup>38</sup> See F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1 9-10.

These interpretations have become an important source of understanding and learning about the human rights obligations of African states that are party to the African Charter.<sup>39</sup>

The AU has on numerous occasions endorsed the African Commission's role in attaining a culture of human rights on the continent. By way of illustration, during the 41st African Commission session, Julia Joiner declared (not for the first time) that the effective functioning of the African Commission is critical for the actualisation of the AU's human rights agenda.<sup>40</sup> However, the irony is that it is the AU itself which is responsible for ensuring that the Commission receives sufficient financial support in order to achieve its objectives, and yet, a lack of resources is routinely cited as the reason why the African Commission is failing to reach its true potential.

### 3.1 Impediments to the effective functioning of the African Commission

Serious impediments to the effective functioning of the African Commission are highlighted in this paper for the purpose of drawing a parallel between the commitment of the AU towards the African Commission and the African Court. The intention is to demonstrate that the novelty of establishing organs and mechanisms should not be allowed to wear off (as it seems to have done with respect to the African Commission). In this regard, the AU should be compelled to ensure that adequate resources are provided to render the African regional human rights system a meaningful and effective component of the overall regional framework.

Starting from the perspective of the African Commission's infrastructural impediments, and considering that the Commission is based in a country where electricity outages are the norm rather than the exception, it is clear that the capacity of the African Commission is severely impaired. Invariably, the internet does not function for days on end, or the telephone systems are out of order. This renders communication between the commissioners and the Commission as well as between NGOs and interested individuals highly problematic and frustrating, leading to delays in the sending and receipt of vital information concerning communications submitted to the Commission or about specific problems which may have arisen in a particular country. This seems incongruent with the very reason for the Commission's existence,

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<sup>39</sup> As noted below, the African Commission was at first hesitant to commit itself to definitive interpretations of the rights in the African Charter, but over the years, a body of jurisprudence has developed which sustains the need for the Commission to prioritise its interpretive function.

<sup>40</sup> Her Excellency Mrs Julia Joiner, Commissioner for Political Affairs of the Commission of the African Union, during her keynote address at the opening of the 41st ordinary session of the African Commission, Accra, Ghana, 16 May 2007.



namely, to protect and promote human rights on the continent, without restraint or limitation.<sup>41</sup>

Although the excuse of 'insufficient funds' gives the African Commission a scapegoat for its mediocre performance, it is a very real concern. Consistently, members of the Commission lament the inadequacy of funds made available to the African Commission. According to the 18th Activity Report of the African Commission, 'the work of the African Commission was compromised due to lack of funding'.<sup>42</sup> This does not reflect well on the importance which the AU attaches to the work of the African Commission and sends mixed signals to member states that ultimately, human rights are not a priority to the AU (and by unfair inference, neither to the African Commission).

It is noted that the headquarters of the African Commission are to be provided by the host country, but that for the last seven years, the African Commission has included the issue of the construction of the headquarters of the African Commission on its agenda for discussion at every session. On 24 October 2001, the Foundation Stone was laid, but it is presently hidden by overgrown grass and no further concrete progress has been made as far as the construction of the headquarters is concerned.<sup>43</sup>

Of more dire concern is the fact that African Commission seminars and missions often do not take place as scheduled due to lack of funding.<sup>44</sup> In terms of article 41 of the African Charter, the AU Commission bears the operating costs of the African Commission, including provision of necessary staff, means and services. It appears that the AU has recently taken this provision to heart because in the aftermath of repeated complaints voiced by, amongst others, Chairperson Salimata

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<sup>41</sup> Even though not directly attributable to any fault on the part of the AU, the AU is indisputably aware of the frequent electricity outages in The Gambia and the consequent problems that this has caused for the proper functioning of the African Commission. To overcome the adverse effects of this problem, the AU purchased a generator for the African Commission, but fuel shortages have at times undermined the 'back-up' efficiency of the generator. See in this regard 'Solution to Guinea, Senegal, Gambia energy crisis in sight' [http://www.gambianow.com/news/Open-Forum/Analysis/Solution\\_to\\_Guinea\\_Senegal\\_Gambia\\_energy\\_crisis\\_in\\_sight.html](http://www.gambianow.com/news/Open-Forum/Analysis/Solution_to_Guinea_Senegal_Gambia_energy_crisis_in_sight.html) (accessed 13 October 2007).

<sup>42</sup> 18th Activity Report of the African Commission on Human and Peoples' Rights, adopted during the 7th ordinary session of the African Union Executive Council, held from 28 June to 2 July 2005 in Sirte, Libya, EX.CL/199 (VII) para 58.

<sup>43</sup> Resolution of the Construction of the Headquarters of the African Commission on Human and Peoples' Rights (2001) ACHPR/Res 58 (XXX) 01. See, further, the 22nd Activity Report of the African Commission on Human and Peoples' Rights adopted during the 11th ordinary session of the Executive Council of the African Union Commission, held from 25 to 29 June 2007 in Accra, Ghana, EX CL/364(XI), in terms of which the construction of the headquarters is reflected under item 13(b) 27.

<sup>44</sup> See in this regard the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights, para 46, where it is stated that 'the Seminar on Economic, Social and Cultural Rights scheduled to take place from 20 to 24 September 2003 in Cairo, Egypt, did not take place due to lack of funding'.

Sawodogo, about the lack of adequate funds, compounded by the fact that the Commission was not given a voice as far as its budget was concerned, a significant development transpired during the 41st ordinary session of the Commission where it was resolved that as from January 2008, the Commission will present its budget directly to the Permanent Representatives Committee and the Executive Council of the AU. Time will tell whether this development will enable the Commission to resolve its recurring financial problems.<sup>45</sup>

### 3.2 Security of (employment) tenure

During the first six months of 2005, approximately 85%<sup>46</sup> of the members of staff of the African Commission left the Commission and sought alternate employment, primarily due to insecurity of tenure. On a practical level or in terms of productivity, the effect of any rapid turnover in staff is that years of accumulated experience are suddenly lost. In the context of the new staff members of the African Commission, many had to begin with virtually no guidance or direction. These adverse consequences are compounded by the fact that, within a period of two years, the African Commission has had no less than three Secretaries to the Commission.<sup>47</sup> The seriousness of this fact becomes exacerbated when one considers that the Secretary to the Commission is tasked with the overall obligation of ensuring the efficient operation of the African Commission.

Closely related to the issue of tenure, is the aspect of the appointment of the Secretary to the Commission and its staff. Accordingly, article 41 of the African Charter dictates that the Secretary-General of the (O)AU appoints the Secretary and staff of the Commission and that the (O)AU shall bear the costs of such staff and services. This raises the issue of the independence of staff. Despite the undertaking in article 41 that costs shall be borne by the (O)AU, it is noted hereunder that, in fact, this has not proved to be the case and assistance has routinely been rendered by Western donors.

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<sup>45</sup> As per Henok Teferra, Legal Affairs General-Directorate, Ministry of Foreign Affairs, Ethiopia, who attended the 41st ordinary session of the African Commission on Human and Peoples' Rights in Accra, Ghana from 16 to 30 May 2007 and advised the authors of this development.

<sup>46</sup> The Secretary, the Senior Legal Officer for the Protection of Human and Peoples' Rights, as well as three legal officers, the Financial and Administrative Officer, the Documentalist/Librarian, and the Public Relations Officer all left within a very short space of time and were replaced by relatively inexperienced staff who were not well-acquainted with the procedures of the African Commission.

<sup>47</sup> Mr Germain Baricako held the position of Secretary for 12 years and after his transfer to the AU office in Sudan in December 2005, he was replaced by Ms Adwoa Coleman. As of May 2007, Dr Mary Maboreke has taken over as Secretary to the Commission.

### 3.3 Status of decisions and the problem of state non-compliance

Possibly the most significant distinction that can be made between the African Commission and the proposed African Court is the status of the decisions handed down. Essentially, the decisions handed down by the African Commission are not binding on state parties. They are merely 'recommendations' that have to be transmitted to the AU Assembly for endorsement.<sup>48</sup> It is only once these recommendations are published in the African Commission's Annual Activity Report and approved by the Assembly that they become final.<sup>49</sup> While the African Commission has stated on more than one occasion that it considers its decisions as an authoritative interpretation of the African Charter and thus binding on states,<sup>50</sup> it was only in November 2006 that the African Commission took a determined stance and adopted a Resolution on the Importance of Implementation of the Recommendations of the African Commission on Human and Peoples' Rights, during its 40th ordinary session. This resolution supplements the pressure that had formerly been placed on states to report on the measures that they had taken towards implementing decisions of the African Commission when they submit their state reports pursuant to article 62 of the African Charter.

### 3.4 Heavy reliance on foreign donors and (Western) institutions for financial and personnel support

It is a significant feature of the African Commission that there are numerous reputable international organisations, usually based in the United Kingdom, Canada or Scandinavian countries, which provide sizeable funds to the Commission for the payment of, *inter alia*, salaries for Commission staff, which second highly competent and qualified lawyers to assist the Commission in achieving its mandate, and which undertake intensive research into how the functioning of the Commission as a whole might be improved. Likewise, the African Commission has become synonymous with young European, American and Canadian interns who undertake a perfunctory six-month stint in The Gambia, to 'help Africa'. As altruistic and as valuable this is, it serves to confirm how deprived the Commission is of African graduates who

<sup>48</sup> See, however, Viljoen & Louw (n 38 above) 48, who argue that there is a movement towards decisions being viewed as legally binding, one reason being that under the new AU structures, when the Assembly adopts after consideration the Commission's Annual Activity Report, '[t]he Assembly, as "parent" institution, takes legal responsibility for the findings of the Commission by way of its act of "adoption"' (10).

<sup>49</sup> Notwithstanding the nomenclature ('final'), upon pronouncement alone the African Commission's findings are not considered final. They are merely 'recommendations' to the political body that had given life to the African Commission, the OAU/AU Assembly. These findings become 'final' only when they are contained in the African Commission's Annual Activity Report and approved by the Assembly.

<sup>50</sup> R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 54-55.

might similarly enhance their professional careers through an internship at the Commission and whose own home-grown experience might benefit the Commission's work on African soil. Viewed from the perspective of the African Court, it is conceivable that in order to attain its objectives, reliance will once again be placed on foreign donors, who are more than willing to provide financial, technical and human resources. Upon closer analysis, the extensive reliance on donors can be construed as the antithesis to the initial establishment of the OAU, namely independence and a strong emphasis on sovereignty.<sup>51</sup>

### 3.5 Communications and the decision-making process

By its very nature, the African Court is intended to interpret and apply the provisions of the African Charter and any other relevant human rights instrument in order to make a determination as to whether or not a violation has occurred. The expeditious consideration of complaints of allegations of human rights is always a priority. However, with respect to the African Commission, a very real concern is its tendency to defer consideration of matters from one session to the next for further consideration, 'to enable the commissioners to have time to prepare adequately so as to make a decision'. By way of illustration, during the 37th ordinary session of the African Commission, the Commission considered 47 communications. It took decisions on seizure on six communications and decisions on admissibility on 26 communications, with only *one* decision on the merits. It further considered 14 other communications and decided to defer them to the 38th ordinary session pending the submission of supplementary information<sup>52</sup> or at the request of the parties. Likewise, during the 41st ordinary session of the African Commission, the Commission considered 73 communications, in terms of which it was seized with 10 new communications, declared eight admissible, finalised only one and considered requests for review on three, while it deferred *sine die* consideration of one, and deferred 50 to the 42nd ordinary session for further consideration.<sup>53</sup> It is unclear how the Commission proposes to consider the existing 50 as

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<sup>51</sup> Of course, given its current cash-strapped reality, it is hardly surprising that the African Commission has looked to (and thus become reliant on) Western donors. That is hardly the Commission's fault. If it is to be released from such reliance, its own regional parent, the AU, should perform a better job of caring for it by providing the requisite financial assistance.

<sup>52</sup> The request for supplementary information by the African Commission can be construed as a convenient mechanism for deferring consideration of the communication while at the same time deflecting 'responsibility' from the Commission for being unable to manage its time effectively so as to consider all the communications that require consideration.

<sup>53</sup> 22nd Activity Report of the African Commission on Human and Peoples' Rights adopted during the 11th ordinary session of the Executive Council of the African Union Commission, held from 25 to 29 June 2007 in Accra, Ghana, EX CL/364(XI) May 2007.

well as any additional communications during the 42nd ordinary session.

### 3.6 The African Commission's continued relevance within the African Union

The extent to which the African Commission will play an integral role in the AU's overall strategy on human rights remains to be seen. The transition to the AU has not been accompanied by a review of the African Charter or the Commission's Rules of Procedure, which are now out of date with regard to the institutions that have been set up under the AU structures.<sup>54</sup>

Already under the OAU, the African Commission suffered from a severe shortage of funds, with the Commission pointing out to the OAU in 1998 that it 'could not carry out quite a number of activities, despite their importance, owing to the paucity of the human, financial and material resources needed to ensure its smooth-running'.<sup>55</sup> As pointed out earlier, the Commission's financial situation does not appear to have been improved under the AU. A further difficulty was that the OAU organs, while being obliged under the African Charter to enforce the decisions of the Commission, did little to proactively ensure that member states comply with their state reporting obligations or with adverse decisions of the Commission following communications received by non-state parties.<sup>56</sup> There is accordingly an urgent need for the AU to consider how the Commission's position might be strengthened within the new structures of the AU, and for the Commission to urge the political organs of the AU to take its supervisory role under the African Charter seriously.<sup>57</sup> The debate is all the more necessary in order to clarify the relationship between the African Commission and the numerous other bodies that exist now in the AU with their own remit for human rights. There is furthermore a need to clarify the role of the Commission *vis-à-vis* the proposed African Court of Justice and Human Rights, a topic to which we return below.

<sup>54</sup> Murray (n 7 above) 52.

<sup>55</sup> Interim Report on the Activities of the African Commission on Human and Peoples' Rights, CM 2056 (LXVII) para 22, cited in Murray (n 7 above) 55.

<sup>56</sup> For a full discussion of the relationship between the OAU/AU and the African Commission, see Murray (n 7 above) 49-72.

<sup>57</sup> A promising step is the adoption by the Commission of the Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights (done at the 37th session of the African Commission, held from 27 April to 11 May 2005 in Banjul, The Gambia). For text of the resolution, see [http://www.achpr.org/english/resolutions/resolution82\\_en.html](http://www.achpr.org/english/resolutions/resolution82_en.html) (accessed 30 September 2007); ACHPR /Res.77(XXXVII)05.

## 4 The call for an African Court on Human and Peoples' Rights

Given the difficulties referred to above regarding the work and institutional effectiveness of the African Commission, within the first decade of the African Commission's existence, commentators perceived that the viability of the African Charter (and by inference, the African regional human rights system) was placed in a particularly precarious position as a direct result of the absence of an effective African Court dedicated to the question of human rights.<sup>58</sup> This view had become so pronounced in Africa that during the summit of Heads of State and Government of the OAU, held in Tunis, Tunisia in June 1994,<sup>59</sup> the decision was taken to establish a Court on Human and Peoples' Rights, which would complement and reinforce the African Charter.<sup>60</sup> The Court would serve the purpose of attaining the objectives of the African Charter, which is to ensure the protection of human rights on the continent.<sup>61</sup> The Court would come into being to 'complement the protective mandate' of the Commission.<sup>62</sup>

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was eventually adopted on 10 June 1998 at the Summit of Heads of State and Government in Ouagadougou, Burkina Faso.<sup>63</sup> In December 2003, the Court's Protocol achieved the required 15th ratification for

<sup>58</sup> FN Adjetej 'Religious and cultural rights: Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture' (1995) 44 *American University Law Review* 1375.

<sup>59</sup> B Kioko 'The road to the African Court on Human and Peoples' Rights' in African Society of International and Comparative Law, Tenth Annual Conference (1998) 70. During the summit, the Assembly adopted a resolution in which the Secretary-General of the organisation was called upon to summon experts to meet in order to deliberate on the establishment of an African Court on Human Rights.

<sup>60</sup> See generally J Harrington 'The African Court 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) 305; G J Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431; JC Mubangizi & A O'Shea 'An African Court of Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 257; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342.

<sup>61</sup> Preamble, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of a Court on Human and Peoples' Rights, OAU/CAB/LEG/66.5.

<sup>62</sup> Art 2 of the Court's Protocol.

<sup>63</sup> OAU/LEG/MIN/AFCHRP/PROT (III).

the Protocol to become operative.<sup>64</sup> South Africa ratified the Protocol on 3 July 2002.<sup>65</sup>

The adoption of the African Court Protocol was an acknowledgment of the general ineffectiveness of the African human rights mechanism as being composed of only a Commission, particularly when regard was had to the institutional mechanisms that exist in other regions.<sup>66</sup> The expectation was that the Court would strengthen the regional system and aid it in realising its human rights promises.

Immediately apparent from a reading of the Protocol that established the Court is that the African Court on Human and Peoples' Rights was intended to have the authority to hand down binding court judgments against states found guilty of violating human rights. In addition, the Court was empowered to order that compensation be paid to victims of human rights abuses. This was one of the most remarkable aspects of the Court, because it sent a strong statement that impunity would no longer be tolerated while, at the same time, affording victims of violations the opportunity to have their dignity restored by way of payment of damages. Moreover, article 28(2) of the Protocol confirmed that the decisions of the African Court would be final and neither subject to appeal nor to political confirmation.<sup>67</sup> In terms of article 30 of the Protocol, the consequence would have been that the Court's decisions would be unequivocally binding on state parties. State parties would not only 'undertake to comply with the judgments in any case to which they are parties', but would also be responsible to 'guarantee its execution'. Institutional or systematic control over enforcement was provided in that the Executive Council had to be notified of judgments and was obliged to monitor their execution on behalf of the Assembly (article 29(2)). Non-compliance may have resulted in an AU decision, which in turn may have lead to the imposition of sanctions as envisaged under the AU Constitutive Act.

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<sup>64</sup> Countries that have ratified the Protocol include Algeria, Burkino Faso, Burundi, Comores, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritania, Rwanda, Senegal, South Africa, Togo and Uganda. In terms of art 34(3) of the Protocol, the Protocol came into force on 25 January 2004, 30 days after Comoros became the 15th state to deposit its instrument of ratification with the Secretary-General of the African Union.

<sup>65</sup> See further NB Pityana 'Hurdles and pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' (2003) 28 *South African Yearbook of International Law* 110.

<sup>66</sup> Nmehielle (n 36 above) 259.

<sup>67</sup> However, the Draft Protocol on the Establishment of an African Court of Justice and Human Rights introduces the right to appeal a decision, incorporating the principles of a fair trial. The right to appeal is subject to certain strict criteria.

## 5 Yet another change: From the African Court on Human and Peoples' Rights to the African Court of Justice and Human Rights

Commentators unanimously agree that the time has come to accede to the demands of Africans who feel it indispensable that the victims of human rights violations, or their representatives, be afforded recourse to judicial process on demand.<sup>68</sup> The African Court on Human and Peoples' Rights was heralded as an important — if not the most important — development to ensure that these demands would be met. Yet much of the fanfare that accompanied news of the Court's creation has now been diminished by news that the Court will not have a continued independent existence, but will rather be conjoined with the proposed African Court of Justice so that the two stand together as a composite Court — the African Court of Justice and Human Rights.

At its conception, the AU intended to establish two separate judicial institutions, being the African Court on Human and Peoples' Rights (African Court) and the African Union Court of Justice (ACJ). The ACJ was intended to be the principal judicial organ of the AU with its primary role being the authoritative interpretation, application and implementation of the Constitutive Act of the AU and the various Protocols. Its mandate also included the adjudication of contentious matters between state parties to the Constitutive Act on any issues referred to it by mutual agreement between states. The ACJ was not originally conceived to have competency to interpret the African Charter, although cognisance could be taken of the Charter. The African Court, by contrast, would focus on violations of the African Charter and would be the principal judicial arm by which the Charter would be enforced.

However, during the 3rd ordinary session of the Assembly of Heads of State and Government of the AU, a decision was taken to integrate the African Court on Human and Peoples' Rights and the African Court of Justice.<sup>69</sup> The effect is that the African Court on Human and Peoples' Rights will be subsumed into the African Union Court of Justice, hence the name 'African Court of Justice and Human Rights'.<sup>70</sup>

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<sup>68</sup> Nmehielle (n 36 above) 250.

<sup>69</sup> Decision on the seats of the organs of the AU, Assembly/AU/Dec 45(III) as read with Decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec 83(V), (Assembly/AU/6 (V)), taken during the 5th ordinary session of the Assembly of the AU held in Sirte, Libya, from 4 to 5 July 2005.

<sup>70</sup> The merger decision contrasts with an earlier decision taken, after much debate, by a meeting of African Ministers of Justice which had been convened to finalise the Protocol on the Court of Justice of the African Union (see AU Doc Assembly/AU/Dec 45 (III)).



The decision taken by the Assembly of Heads of State and Government raises important legal and practical issues. Difficulties with the merger of the two courts thus abound. At the level of vision and rhetoric, the obvious criticism is that human rights violations in Africa and the abysmal failure of the regional organisation to respond thereto are reason enough to motivate the AU to establish a self-standing judicial organ dedicated to the protection and enforcement of the provisions of the African Charter. From a practical perspective, the most obvious is that the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights has already entered into force, whereas the Protocol on the African Union Court of Justice has not yet done so. The decision to merge the courts brings into focus the legality of amendments to the two instruments establishing the Courts. Regard is to be had to article 40(2) of the Vienna Convention on the Law of Treaties, which provides that any amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement. The result would be the anomalous situation whereby state parties are party to differing treaties on the same subject, giving rise to legal uncertainty and insurmountable problems with respect to enforcement.

Moreover, amendments would necessarily entail that article 5 of the Constitutive Act of the AU — which states in paragraph 1(d) that 'the Court of Justice is an organ of the Union' — be amended accordingly in order to reflect the fact that the composite court will replace the Court of Justice of the AU as an organ of the AU.

In the circumstances, a new legal instrument — the Draft Protocol and Statute of the African Court of Justice and Human Rights — has been drafted relating to the establishment of the merged court comprising the African Human Rights Court and the African Court of Justice.<sup>71</sup> The instrument was considered by the Executive Council of the AU during its 9th session held in Banjul, The Gambia from 25 to 29 June 2006.<sup>72</sup>

## 6 The merged court: A preliminary appraisal<sup>73</sup>

Those advocates hoping for a dedicated human rights court to act as the principal judicial organ in respect of the African Charter have thus

<sup>71</sup> The Draft Protocol appears to have been proposed at a meeting of the PRC and Legal Experts on Legal Matters at a meeting on 16-19 May 2006 in Addis Ababa, Ethiopia. See EX CL/211 (VIII) Rev 1, Annex 11.

<sup>72</sup> In this regard, see art 1 of the Draft Protocol on the Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex II Rev.

<sup>73</sup> The appraisal is limited to being a preliminary one for two reasons: First, the information publicly available in respect of the merged court is so scant and difficult to access that any discussion of the Protocol must *per force* be undertaken with caution, and second, it is difficult to assess what the legal status is of the proposed Protocol and thus whether the existing information is not liable to further change.

far been disappointed.<sup>74</sup> Their disappointment is not without good reason. Before considering critically the difficulties inherent in the merger, it is important to highlight the apparent advantages of combining into one judicial body the African Court on Human and Peoples' Rights and the African Court of Justice.

From a human rights perspective, possibly the most important development is that *locus standi* before the merged Court has been broadened to include individuals and relevant human rights organisations accredited to the AU or any of its organs. The instrument merging the Courts provides in article 30, read with article 31, that state parties to the Protocol, the African Commission, African national human rights institutions, individuals and relevant non-governmental organisations accredited to the AU or to its organs shall be eligible to submit cases to the Court.

This is an important improvement on the Protocol that established the African Court on Human and Peoples' Rights, which included the prohibitive and much maligned article 34(6), which reads as follows:

At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.

The requirement of the article 34(6) declaration can be seen as a major obstacle to the essential rationale for the establishment of an African Human Rights Court — to ensure access to justice for *all* victims of human rights violations on the continent. However, it must be noted that the requirement of the article 34(6) declaration is not fatal, due to the fact that article 5(1)(a) of the Protocol permits the African Commission to submit cases alleging violations of individuals' rights to the Court. Nevertheless, the provision remains rightly criticised for undermining the aspirations expressed in the Preamble to the Protocol, which sought to place the Protocol in the wider context of a natural progression in the achievement of the legitimate aspirations of the African people and drew a causal link between the objectives of the (O)AU, including freedom, equality and justice, and the establishment of the Court.<sup>75</sup> From a cursory reading, article 34(6) had the effect of reinforcing the contention that human rights are at the behest of states,

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<sup>74</sup> As an example of such disappointment well articulated, see the African Commission on Human and Peoples' Rights Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights adopted at the 37th session of the African Commission, held from 27 April to 11 May 2005 in Banjul, The Gambia (for text see [http://www.achpr.org/english/resolutions/resolution81\\_en.html](http://www.achpr.org/english/resolutions/resolution81_en.html)) and Amnesty International 'Open letter to the Chairman of the African Union (AU) seeking clarifications and assurances that the establishment of an effective African Court on Human and Peoples' Rights will not be delayed or undermined' IOR 63/008/2004, 5 August 2004.

<sup>75</sup> Naldi & Magliveras (n 60 above) 433.

because the ultimate prerogative lay with the state as to whether or not they would issue an article 34(6) declaration. By the time of the decision to merge the two courts, only one state had made the requisite declaration. That is a sad reflection on the commitment on the part of African states to respect and protect human rights. The worrying thing was that article 34(6) gave protective cover to recalcitrant governments — its message was clear: You need not take this Protocol or the Court seriously.

Aside from the improvement in *locus standi*, it is also important to note that there has been no undermining of the ability of the African Court of Justice and Human Rights to issue final and binding decisions which, importantly, may be backed by political sanction by the AU. It is trite that human rights protection is routinely viewed as being at the behest of states on the African continent. This is more than obvious from the failure of states responsible for human rights violations to implement the recommendations of the African Commission. What may be viewed then as a step in the right direction and a move away from vesting power in hypocritical states is the fact that the African Court of Justice and Human Rights (like the African Court) has the authority to issue final and binding decisions.<sup>76</sup> Moreover, the Executive Council of the AU will be tasked with the responsibility of monitoring the execution of the Court's decisions, on behalf of the AU Assembly.<sup>77</sup> In addition, the African Court of Justice and Human Rights may refer cases of non-compliance with its judgments to the AU Assembly, which shall decide upon measures to be taken to give effect to that judgment, and which may thereby impose sanctions by virtue of paragraph 2 of article 23(2) of the Constitutive Act.<sup>78</sup>

Putting these positive aspects aside, there remain significant concerns about the merged Court and its ability, from an African Charter perspective, properly to do justice to the human rights of Africans. For one thing, the merger has been confused and confusing. For example, article 2 of the (original) Protocol to the African Court provided for a system of complementarity between the African Commission and the African Court, which has generally been interpreted to mean that the Court would complement and reinforce the Commission. That close symbiosis is not replicated in the Draft Protocol<sup>79</sup> that merges the African Court with the African Court of Justice, although the Commission is one of the eligible parties that are provided power to bring a case before the Court. However, in order for this referral power to work effectively, the Rules of Procedure of the African Commission have to

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<sup>76</sup> Art 47(1) of the Draft Statute of the African Court of Justice and Human Rights, EX CL/211 (VIII), Annex II Rev 1. This is a replication of the provisions of arts 28(2) & 30 of the Protocol, which accorded the African Court the same powers.

<sup>77</sup> Art 44(6) Draft Statute (n 76 above).

<sup>78</sup> Arts 47(4) & (5).

<sup>79</sup> EX CL/211 (VIII).

be amended and brought into conformity with the Rules of Procedure of the African Court. At present, the Rules of Procedure of the merged Court are in the process of being written. Once these have been finalised, it is anticipated that a meeting will take place between the African Commission and the African Court in order to align the two sets of Rules of Procedure. However, the delays that have characterised the establishment of the African Court are indicative of a general malaise that has beset the idea of an African Human Rights Court — the lack of deliberate speed to implement the system and to ensure an up-and-running court as the judicial arm responsible for the enforcement of the African Charter. A significant amount of valuable time is being wasted while the system remains in limbo. The merger decision and its implications have simply prolonged the wait for an African Court dedicated to human rights.

Moreover, while 11 judges were originally selected to sit on the African Court on Human and Peoples' Rights, confusion sets in when one considers that article 3 (Composition) of the Draft Protocol of the merged Court requires that '[t]he Court shall consist of fifteen (15) judges who are nationals of states parties'. The Draft Protocol thus provides that '[t]he term of office of the judges of the African Court on Human and Peoples' Rights shall end following the election of the judges of the African Court of Justice and Human Rights', but that 'the judges shall remain in office until the newly elected judges of the African Court of Justice and Human Rights are sworn in'.<sup>80</sup> The judges of the African Court on Human and Peoples' Rights have been selected to an institution that is at best moribund, and, at worst (depending on the speed with which the Draft Protocol merging the Court comes into force) stillborn. This is not simply a waste of time and money; it is emblematic of a shambolic approach to the AU's human rights commitments.

The muddle and mess created by the merger could hardly be more apparent than from the transitional provisions in the Draft Protocol which reflect a noble but ultimately confusing effort on the part of the drafters to make sense of the merger of the two Courts, let alone ensure the workability of the final product. Aside from the attempt mentioned already to keep some transitional role open for the incumbent judges of the African Court on Human and Peoples' Rights, the Draft Protocol speaks about a transitional role for such a Court (as though it were already firmly in place with a well-established docket of cases that it were ploughing through). It provides in article 5:

Cases pending before the African Court on Human and Peoples' Rights, including those which have not been concluded before the entry into force of the present Protocol, shall be transferred to the Human Rights Section of the African Court of Justice and Human Rights.

<sup>80</sup> Art 4 Draft Protocol.

The only way to make sense of this provision is to read into it an acknowledgment (or worse, a prediction) on the part of the drafters, that the merged Court is unlikely to become a legal reality for some time. Presumably when the merger becomes at some future point a reality, then the provisions of article 7 of the Draft Protocol will become relevant. Article 7 provides as follows:

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights shall remain in force for a transitional period not exceeding one (1) year or any other period determined by the Assembly, after entry into force of the present Protocol, to enable the African Court on Human and Peoples' Rights to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human Rights.

The situation is far from satisfactory and it must be open to question how long it will take for the merged African Court of Justice and Human Rights to come into existence. In the interim, a heavily denuded African Court on Human and Peoples' Rights is expected to carry the hopes of human rights victims. This is obviously unsatisfactory, and not only because of the lack of clarity about the merger and the African Court on Human and Peoples' Rights' continued mandate. It is a court staffed by judges who know that they are presiding over a tribunal that, if it comes to hear any cases at all, is moribund from the start, and which is beset by inherent problems such as article 34(6) of the Protocol establishing an African Court on Human and Peoples' Rights. To be a judge of the African Court on Human and Peoples' Rights is to sit in an uneasy twilight zone. The real victims of this confused state of affairs, it hardly needs mention, are the African victims of human rights violations.

## **7 Conclusion — A court not found?**

In attempting to complete this article, we were confronted with the almost impossible task of accessing relevant and official documentation regarding the merged Court. What should be a simple task of discerning what developments have in fact taken place in respect of the merger is made complicated by the lack of ready information available within the AU or its affiliated bodies. An example of this is the fact that the websites of both the AU and the African Commission are usually not updated regularly and there is very little continuity with regard to the information that is published. It has been over three years since the decision was taken to merge the AU Court of Justice and the African Court on Human and Peoples' Rights and yet, at the time of writing in November 2007, there is still no conclusive information on the single instrument which is to govern the proposed Court. As mentioned earlier, a document entitled 'Draft Protocol and Statute of the African Court of Justice and Human Rights' was tabled before the African Commission during its 39th ordinary session in May 2006, but

over one year later, there has been no further information forthcoming on the status of this Protocol, nor are we much closer to having an established and fully-functioning African Court on Human and Peoples' Rights as an interim measure. The AU website is even less helpful when it comes to sourcing up-to-date information concerning the African Court on Justice and Human Rights. The 'archives' only go back a few months and invariably, when one clicks on an icon to read further on the decisions of the AU Assembly of Heads of State and Government in respect of the proposed merged African Court, one is informed that 'the page cannot be found'.

It is imperative that the AU asserts itself firmly in respect of the merged Court. The confusion that abounds regarding the merger, the future work of the Court, the election of its judges, the relationship between the Court and the African Commission, to mention only the most obvious concerns, is prevalent and concerning. Without clarity, direction and meaningful public information, there is a real danger that the website's message becomes a precursor for something far more damning — that the Court itself 'cannot be found'.

# The 9th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child: Looking back to look ahead

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## 1 Introduction

The African Children's Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) monitors the implementation of the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>1</sup> The 11-member African Children's Committee held its 9th meeting at the African Union (AU) Conference Centre in Addis Ababa, Ethiopia, from 29 to 31 May 2007.<sup>2</sup> The Committee meets in bi-annual ordinary sessions, in spring and fall respectively.

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<sup>1</sup> African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990). For a detailed discussion of the Charter see, for instance, 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 of Children's Rights* 157; A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Children's 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).

<sup>2</sup> For a report on the 5th, 6th and 7th meeting of the African Children's Committee, see B Mezmur (A) 'The African Children's Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 549-571. For a report on the 8th meeting of the African Children's Committee, see B Mezmur (B) 'Still an infant or now a toddler? The work of the African Children's Committee of Experts

Below, the article highlights the proceedings of the 9th ordinary session of the African Children's Committee. The discussions covered in this article include the issue of the independence of the members of the Committee; the frequency of meeting of the Committee; the Second Pan-African Forum on the Declaration and Plan of Action on Children — Mid-Term Review; lobbying and investigation missions; and the Day of the African Child. In addition, the issue of state reporting and the role of non-governmental organisations (NGOs) in submitting complementary reports to the African Children's Committee are devoted a substantial amount of space. The experience of the Committee on the Rights of the Child (CRC Committee) in this regard is highlighted. The need to look back at the experience of the African Commission on Human and Peoples' Rights (African Commission) is also mentioned.

The writer relies mostly on notes personally taken while participating during the 9th meeting. Reports of the Committee, documents of the AU and academic writings are also used as a source of information.

This piece does not discuss in full detail all the procedures involved and the issues deliberated upon during the 9th meeting. Finally, this is not the official report of the AU Commission or the African Children's Committee.<sup>3</sup> 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.

## 2 Procedural matters

During the initial stages of the 9th meeting, a closed session was held among the Committee members after the opening ceremony of the meeting. The agenda and programme of work were considered and adopted by the Committee. The attention of the Committee was drawn to the fact that two Committee members had joined other positions and there was a need, therefore, to see how this would affect their membership of the Committee.

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on the Rights and Welfare of the Child and its 8th ordinary session' (2007) 7 *African Human Rights Law Journal* 258-275. See Annexure A, 'Criteria for granting observer status in the African Committee of Experts on the Rights and Welfare of the Child to non-governmental organisations (NGOs) and associations'; Annexure B, 'Guidelines on the conduct of investigations by the African Committee of Experts on the Rights and Welfare of the Child under article 45 of the African Charter and article 74 of the Rules of Procedure'; and Annexure C, 'Guidelines for the consideration of communications provided for in article 44 of the African Charter on the Rights and Welfare of the Child'. The 'Guidelines for initial reports of state parties to the African Charter on the Rights and Welfare of the Child were published previously (see (2003) 3 *African Human Rights Law Journal* 347).

<sup>3</sup> For official reports and documents, see <http://www.africa-union.org> (accessed 30 September 2007).



There is no gainsaid in reiterating that the issue of the independence of the Committee members is important.<sup>4</sup> Murray notes that, unlike the African Commission, the issue of independence and incompatibility of members of the Committee appears to have been taken seriously by the AU.<sup>5</sup>

Mrs Seynabou Diakhate was said to have been nominated as judge to the West African Monetary and Economic Union, while Mrs Dawlat Hassan has been appointed as Advisor to the Minister of Agriculture and International Relations. The Committee considered the matter in light of its Rules of Procedure.<sup>6</sup> The view of the representative of the AU Legal Counsel was also sought, who indicated that if the Committee found that the posts taken were not incompatible with the functions of the Committee, then the Committee should take the decision as called in rule 11(3).

The Committee discussed the issue in detail and highlighted the ramifications that could be involved by the taking of the position by the two Committee members. After this, the Committee decided that the posts taken by the two Committee members were not incompatible with their functions within the Committee and they should continue to be members of the Committee.<sup>7</sup> The fact that the two Committee members disclosed their change of posts of their own volition and the level of attention the Committee gave the issue are indeed very commendable.

Another procedural matter which the Committee had to handle related to the frequency of its meetings. In her opening address, the AU Commissioner for Social Affairs reckoned that the Committee is working under very difficult circumstances and that the establishment of the Secretariat is taking much longer than expected. A set-back was also highlighted in regard to the AU-UNICEF project with the recruitment of the project staff.<sup>8</sup> In view of this predicament, the AU Commission did put forward a proposal that the Committee meets only once a year until such time when a fully-fledged Secretariat is put in place.

After some debate, the Committee outrightly resisted this proposal. The Committee highlighted that it had a lot of work and was already working behind schedule. The need to consider the state party reports

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<sup>4</sup> Art 33(1) of the African Children's Charter provides that '[t]he Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child'.

<sup>5</sup> R Murray 'Children's rights in the OAU' in R Murray (ed) *Human rights in Africa* (2004) 168.

<sup>6</sup> Rules 11.2 & 3 Rules of Procedure.

<sup>7</sup> However, it was highlighted that the two Committee members should affirm their availability to participate in the meetings and activities of the Committee. It was agreed that a letter would be drafted and sent to the Committee member who was not present during the meeting.

<sup>8</sup> After the recruitment of the two personnel, one of them desisted and the other left after six months because of health and personal reasons.

at its disposal was highlighted as one of the priority tasks the Committee should undertake. The attention of the meeting was also drawn to the Rules of Procedure of the Committee addressing the frequency of meetings of the Committee. Rule 2(1) of the Rules of Procedure requires that '[t]he Committee shall normally hold two ordinary sessions annually not exceeding two weeks'.

Rather, in a move to boost the capacity of the Committee, it was highlighted that the AU Commission should endeavour to find out urgent ways of establishing the Secretariat to enable the Committee to accomplish its work effectively. A proposal was made to the members of the Committee to at least meet with the Director of Administration and Human Resources Development who could follow up the appointment of the Secretary to the Committee with the office of the Deputy Chairperson of the AU Commission.<sup>9</sup> The Committee highlighted that it would lose its credibility and momentum if it cannot convene its meetings as mandated in its Rules of Procedure and achieve its mandate.

In connection with the issue of the frequency of meetings, a point worthy of mention is the length of each ordinary session. Clearly, the Rules of Procedure provide for the maximum period an ordinary session should last — which is not more than two weeks.<sup>10</sup> The minimum length of an ordinary session is for the AU Commission and the Committee to decide by taking into account a number of factors. However, in a situation whereby the Committee reckons on record that it has a lot of work to attend to and a number of issues to address, the writer feels that the length of the 9th meeting was very short. It lasted for only three days — the morning of the third day with no activity and the afternoon committed to the reading out and adoption of the report of the meeting. Therefore, not only the frequency of meetings in a given year, but also the length of each meeting should be reasonable, taking into account the amount of work that needs to be covered. Otherwise, very short sessions could also have the potential to cause the Committee to lose its credibility and momentum.

### **3 Second Pan-African Forum on the Declaration and Plan of Action on Children — Mid-term review**

The African Children's Committee was briefed about the preparations for the Second Pan-African Forum on the Declaration and Plan of Action for Children. The outcome of the First Pan-African Forum on Children, held in Cairo, Egypt, in 2001, was the adoption of the African Common

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<sup>9</sup> This proposal was made after the urgent need to meet with the AU Chairperson or his deputy was emphasised. The meeting was informed that both the AU Chairperson and the Deputy Chairperson were out of the country at that moment.

<sup>10</sup> Rule 2(1) Rules of Procedure.

Position for Children — Africa Fit for Children. The African Common Position, which comprises a Declaration and Plan of Action, was also Africa's contribution to the United Nations (UN) General Assembly Special Session on Children held in May 2002. The Plan of Action was also meant to be implemented by all member states.

Five years after the adoption of the African Common Position, and as called for in the Plan of Action, the AU Commission is organising the Second Pan-African Forum on the Future of Children to assess progress made in implementing commitments made to Africa's children.

It was highlighted that the Second Pan-African Forum on Children is to be held in Cairo, Egypt, in October.<sup>11</sup> The Forum will assess achievements made in implementing the Plan of Action on Children based on a questionnaire which was sent to member states. It will also consider in-depth issues related to child survival, protection, development and participation. The outcome of the Forum will be the adoption of a Call for Accelerated Action for Child Survival, Protection, Development and Participation which will also be Africa's contribution to the UN Special Session on Children to be held in December 2007.

The attention of the Committee was drawn to a questionnaire prepared and sent to member states. The meeting was informed that the questionnaire had been sent to member states after receiving an input from Committee members. It was also stressed that regional consultations were envisaged and that the AU Commission was working out the modalities.

As the regional children's rights monitoring body, the role of the African Children's Committee is significant in the preparations towards the Forum. The role of Committee members in ensuring that the questionnaire is filled out by member states and sent back to the AU Commission was highlighted. In addition, the Committee was informed of its role in identifying organisations that may participate in the regional consultations.

#### 4 Lobbying missions and investigation

During the 8th meeting, after considering the countries that have not ratified the African Children's Charter and taking into consideration the regional balance, it was recommended that Gabon, Tunisia, São Tomé and Príncipe, Democratic Republic of Congo, Liberia and Zambia be visited by Committee members for lobbying. The 'Status of Implementation of Recommendations of the 8th meeting' report, submitted during the 9th meeting, indicated that *notes verbales* were sent to the six

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<sup>11</sup> At the time of writing, the meeting is to be held from 29 October to 2 November 2007 under the patronage of HE Mrs Suzan Mubarak, the First Lady of the Arab Republic of Egypt. The meeting will be held at two levels as follows: Experts Meeting: 29–30 October 2007; Ministerial Meeting: 1–2 November 2007.

countries to be visited by the Committee members. Copies of *notes verbales* were also sent to the Committee members.

Accordingly, it was indicated that the Republic of Tunisia replied that there was no need for the mission, since the government of Tunisia was finalising the process of ratification of the African Children's Charter. The Republic of Zambia was also said to have replied by indicating that the request had been forwarded to the relevant ministry in Zambia. However, the attention of the meeting was drawn to the fact that there had been no response from the Democratic Republic of Congo, Gabon,<sup>12</sup> Liberia and São Tomé and Príncipe.

The African Children's Committee's own experience from the past indicates that these lobbying missions are very important and effective. For instance, in 2004, members of the Committee concluded lobbying missions in four countries: Burundi, Madagascar, Namibia and Sudan. Positive results were recorded after these visits, namely, the ratification of the African Children's Charter by the first three countries. Although the Committee was informed that ratification by Sudan would take place before the end of 2004, there is no official record<sup>13</sup> of that to date. By the same token, although there is a positive promise made by the Republic of Tunisia of the finalisation of ratification, the African Children's Committee should not be reluctant to do a follow-up and request progress made in this regard. This follow-up should continue until the final document of ratification is deposited with the AU Commission.

During the 8th meeting, the Committee had also recommended that a special mission of the Committee be sent to Darfur to report on the situation of children in the area.<sup>14</sup> The members of the mission that will undertake the meeting was also indicated. As a follow-up, during the 9th meeting, it was highlighted that the Department of Social Affairs was in consultation with the AU Department of Peace and Security to facilitate the visit of the Committee members to Darfur.

Regarding the planned mission to Darfur, the previous experience of the Committee in its mission to Northern Uganda should be revisited. After the visit, a report containing the background of the mission, the objectives, the activities undertaken and, importantly, clear recommendations, were submitted to the AU Commission.<sup>15</sup> Any lessons from the Northern Uganda mission should be a guide for the forthcoming visit to Darfur. For instance, to mention but one, to the knowledge of the

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<sup>12</sup> Subsequent to the 9th meeting, Gabon ratified the African Children's Charter on 12 June 2007.

<sup>13</sup> There is an unconfirmed report that the Children's Charter was ratified by a Presidential Decree in 2006, although the AU record cannot confirm this.

<sup>14</sup> Such a visit finds legal support from art 45(1) of the African Children's Charter.

<sup>15</sup> See, for further details of the mission, Mezmur (A) (n 2 above) 564-565.

writer, there has not been any concrete follow-up on the recommendations of the Committee to the AU Commission.<sup>16</sup> If any visit is to be undertaken, a proper follow-up should be made in connection with the recommendations made in the mission report submitted by the Committee to the AU Commission.

## 5 Consultation with partners

The main highlight of the 9th meeting of the African Children's Committee was the discussion held under agenda item 12, 'Consultations with partners'. Although other cross-cutting issues were also mentioned in the process of the discussion, two of the main issues were

- state reporting; and
- observer status.

### 5.1 State reporting

At the start of the discussion under this item, it was highlighted by the Chairperson of the Committee that the Committee would soon have to consider state party reports which it had already received. Reports already received hail from Egypt, Mauritius, Nigeria and Rwanda. As provided in an earlier publication, the report from Egypt has been allocated to Mrs Sielthamo and Mrs Diakhate; the report from Mauritius to Mrs Pholo and Prof Ebigbo; the report from Nigeria to Mrs Koome and Dr Bequele; and the report from Rwanda to Dr Sissoko, Mrs Polo and Mrs Hassan.<sup>17</sup> The respective Committee members are allocated the reports to act as Rapporteurs.

The Chairperson of the Committee underscored the procedures for the consideration of state party reports which outline the requirements prior to the consideration of the reports. Here, the need for complementary reports to enable the Committee to examine the state party reports in a meaningful manner was highlighted. After noting that some of the NGOs and other organisations present during its meeting already have experience in dealing with the UN CRC Committee and in the preparation of complementary reports, the Chairperson called upon partner organisations to share their experiences with the African Children's Committee and to provide it with appropriate guidance to facilitate the process of examining state party reports.

In the process, the representative from the ILO gave an overview on the process of considering reports under the two core conventions of the ILO on child labour. Similarly, the representative of CONAFE shared his experiences on the report of Senegal which was presented to the

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<sup>16</sup> As above.

<sup>17</sup> Mezmur (B) (n 2 above ) 270.

CRC Committee. He rightly emphasised that it was important for the Committee to have a set of guidelines for NGOs to prepare their reports. This view was shared by many in the room, including the representative from ANPPCAN-Ethiopia. The need to establish an advisory group of NGOs to gather complimentary reports was also echoed by a number of representatives.<sup>18</sup>

The fact that the Chairperson alluded to the need to share experience from the CRC Committee is important and indicative of the fact that the African Children's Committee is cautious not to re-invent the wheel. Under the CRC Committee procedure, reports are considered in three steps: the pre-session working group, the constructive dialogue and concluding observations.

The pre-session working group, which at this point is very relevant for the African Children's Committee, is the first stage which reviews reports. The Working Group usually meets a week after a plenary session of the Committee, in a closed meeting, to prepare for the next session.<sup>19</sup> The pre-session working group of the CRC Committee is convened with UN agencies and bodies, NGOs and other competent bodies, such as national human rights institutions and youth organisations, which have submitted additional information to the Committee.<sup>20</sup> The main purpose of this meeting is to identify in advance the main questions that should be discussed with the representatives of the reporting states. Therefore the list of issues is intended to give the government a preliminary indication of the issues which the Committee considers to be priorities for discussion.<sup>21</sup>

Here it is apposite to highlight the role that is played by the Secretariat of the CRC Committee towards preparation for the Working Group. Thus, it is the staff members of the Secretariat of the CRC Committee

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<sup>18</sup> The representative from the Community Law Centre (University of the Western Cape) and the representative from the World Association of Girl Guides and Girl Scouts, in particular, pushed for this idea.

<sup>19</sup> The pre-session working group consists of the Committee members. Government representatives are not allowed to attend these sessions. The pre-session working group is a meeting closed to the public, so no observers are allowed.

<sup>20</sup> See Working methods of the CRC Committee <http://www.ohchr.org/english/bodies/crc/workingmethods.htm#a1> (accessed 23 June 2007).

<sup>21</sup> The 'working methods' section of the CRC Committee's website further explains the role of the pre-session working group. It indicates that the pre-session working group 'also gives the Committee the opportunity to request additional or updated information in writing from the government prior to the session. This approach gives governments the opportunity better to prepare themselves for the discussion with the Committee, which usually takes place between three and four months after the working group. In order to facilitate the efficiency of the dialogue, the Committee requests the state party to provide the answers to its list of issues in writing and in advance of the session, in time for them to be translated into the working languages of the Committee. It also provides an opportunity to consider questions relating to technical assistance and international cooperation.' See Working methods of the CRC Committee (n 20 above).

that initially go through state party reports and do a preliminary analysis. The Secretariat prepares substantive background papers and draws up a draft list of issues which is afterwards submitted to the Working Group for their adoption.<sup>22</sup> In this regard, the establishment of the Secretariat for the African Children's Committee becomes an even greater necessity than before as the Committee gears towards the consideration of state party reports.

The role of NGOs and individual experts at the level of the pre-session working group is very relevant. In recognition of this, the CRC Committee has adopted guidelines to facilitate and encourage the process of the written submission of NGO reports as well as the participation of NGOs and individual experts in its pre-session working group meetings. This was done at the 22nd session of the CRC Committee. The adopted guidelines are entitled 'Guidelines for the participation of partners (NGOs and individual experts) in the pre-session working group of the Committee on the Rights of the Child'.<sup>23</sup>

According to these guidelines, written submissions by NGOs (or national coalitions) and individual experts and requests of NGOs to participate in the pre-session working group are to be submitted to the CRC Committee through its Secretariat at least two months before the pre-session starts.<sup>24</sup> It is on the basis of these written submissions that the CRC Committee, in a written form, invites a selected number of NGOs to take part in the pre-session working group.<sup>25</sup> This provides a unique opportunity for dialogue with partners regarding the implementation of the CRC by the state parties.<sup>26</sup>

Speaking of alternative reports to the CRC Committee by NGOs, credit should also go to the NGO Group for CRC which is a coalition of international NGOs, which work together to facilitate the implementation of CRC. Originally formed in 1983 when members of the NGO Group were actively involved in the drafting of the Convention, the NGO Group has a Liaison Unit that supports the participation of NGOs, particularly national coalitions, in the reporting process to the CRC Committee as well as other activities to ensure the implementation

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<sup>22</sup> The 'list of issues', once adopted, is sent to the state in order to enable the representative to prepare himself or herself for the constructive dialogue session that follows the pre-session working group.

<sup>23</sup> CRC/C/90, Annex VIII.

<sup>24</sup> See 'Guidelines for the participation of partners (NGOs and individual experts) in the pre-session working group of the Committee on the Rights of the Child' (UN Doc CRC/C/90, 1999) paras 2 & 3.

<sup>25</sup> Guidelines (n 24 above) para 4.

<sup>26</sup> The Committee strongly recommends that its partners limit their introductory remarks to a maximum of 15 minutes for NGOs coming from in-country and five minutes for others so that members of the Committee can engage in constructive dialogue with all participants.

of the Convention. An important area is the management of alternative reports that have been submitted to the CRC Committee.<sup>27</sup>

By the same token, the establishment of an NGO Group for the African Children's Charter, similar to the NGO group for the CRC, as a coalition of international, regional and national NGOs which work together to facilitate the implementation of the African Children's Charter, could be given some thought. The NGO Group can support participation of the NGOs, particularly national coalitions, in the reporting process to the African Children's Committee as well as other supplementary activities to ensure the implementation of the African Children's Charter. It could assist in the preparation of alternative reports, by bringing communications to the African Children's Committee, facilitate and even finance fact finding missions or other activities that fall within the mandate of the African Children's Committee. The NGO Group for the African Children's Charter could also have a focal point programme on different priority areas that affect the life of the African child to facilitate co-ordination of continent-wide action. The granting of observer status, to strengthen the work of the African Children's Committee, could be an avenue worthy of exploration. In recognition of the value added by such an NGO Group on the work of the African Children's Committee, the 9th meeting stressed that there is a need to revive the NGO Group that was initiated in May 2005 in Addis Ababa, Ethiopia.

The African Children's Committee has also not overlooked the fact that experience in considering state party reports (and other areas too) should be drawn from its sister organisation, the African Commission. The discussions during the meeting and the final report of the meeting reflect this reality. In this regard, perhaps it is time to follow up on the formal relationship that was started with the two organisations in December 2005 (when the Chairperson of the African Commission attended and addressed the African Children's Committee meeting) and capitalise on that for the purpose of capacity building.

In the end, since the African Children's Committee has not established an NGO Group yet, it was agreed that it should merely call on

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<sup>27</sup> In accordance with art 45(a) of CRC. See NGO Group for the Convention on the Rights of the Child <http://www.crin.org/NGOGroupforCRC/> (accessed 28 May 2007). According to its brochure, the NGO Group 'has a membership of over 50 international non-governmental organisations. Each of these has a constituency and/or activities in at least three countries. Some members are directly involved in the implementation of the CRC through their aims and activities. Others have child welfare as their primary focus. There are also members, such as special interest groups, religious-based charities, women's organisations, professional associations and trade unions, for whom the rights of the child form one aspect of a wider mandate. Full members' meetings are held twice yearly in Geneva to co-ordinate NGO Group action and develop joint strategies. Other intergovernmental organisations, such as UNICEF, participate at this and other levels as observers.' See Child Rights Information Network <http://www.crin.org/NGOGroupforCRC/about.asp> (accessed 3 June 2007).



any NGO or organisation to provide it with complementary reports in its endeavour to consider the state party reports at its disposal. In order to avoid contradictions, thematic reports as complementary reports were not encouraged to be submitted to the Committee. Rather, the idea that garnered support was a partnership between civil society organisations (CSOs) and NGOs in the submission of joint complementary reports on the four countries who have submitted their initial reports. Such a partnership was called upon to be as inclusive as possible and to involve concerned NGOs in the preparation of the complementary reports. Subsequently, the African Children's Committee requested UN agencies, NGOs and other partners to provide the Committee with any complementary reports on those state parties that have submitted their initial reports to the Committee.

## 5.2 Observer status

As alluded to previously,<sup>28</sup> the African Children's Committee has drafted a Criteria for Granting Observer Status, 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 CSOs. There is no gainsaid in reiterating the role of granting observer status to formally involve NGOs in the work of the African Children's Committee, be it in the preparation of complementary reports, the submission of communications or undertaking of lobbying and/or investigation missions.

During the 9th meeting, the Chairperson of the Committee called on partners to submit their requests for observer status by the latest in May 2008. The final version of Criteria for Granting Observer Status with the African Children's Committee was distributed to all partners.

## 6 The Day of the African Child

The Day of the African Child (DAC)<sup>29</sup> has been recognised by the OAU since 1991. It is celebrated every year on 16 June, and has been used as the main advocacy tool by the African Children's Committee. The role of the Day of the African Child is not only to popularise the African Charter, but to also keep member states updated about the work of the African Children's Committee. It also helps to draw attention to priority issues affecting children in Africa. Member states are obliged to submit reports on how the DAC was celebrated at the national and local levels.

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<sup>28</sup> See Mezmur (B) (n 2 above) 267-270; Annexure A to this article.

<sup>29</sup> The Day marks the 1976 march in Soweto, South Africa, when thousands of black school children took to the streets to protest the inferior quality of their education and to demand their right to be taught in their own language. CM/Res 1659 (LXIV) Rev 1 1996.

These reports should be scrutinised by the African Children's Committee.

In 2006, the theme selected was 'The right to protection: Stop violence against children'. This theme was selected, among others, in view of the UN Secretary-General's Global Study on Violence against Children.<sup>30</sup> In order to keep the 'Stop violence against children' momentum, 'Combat child trafficking' was the theme adopted for the day of the African Child in 2007. The 9th meeting was informed that the theme has been communicated to all member states and partners. The joint AU-EU Plan of Action on Trafficking against Human Beings Especially Women and Children, which was adopted by the AU Summit in January 2007, was also said to have been forwarded to member states and partners.

The role of the Committee members in the celebration of the Day of the African Child needs no reiteration. Suffice to say that they should organise events and continue to participate actively in the celebrations. They should not only lobby their own states but also other states as much as possible. The representative of the AU Commission drew the attention of the meeting to the fact that, although at the AU level no specific programme was envisaged, a message would be delivered by the AU Chairperson on the theme.

Here, experience from the past shows that member states are often reluctant to celebrate the DAC in a meaningful manner. To date, there have been very few reports submitted about the celebration of the Day of the African Child by member states, and the African Children's Committee has often stated that these were insufficient to constitute a basis for comprehensive assessment. An aggressive lobbying strategy, both on the part of the African Children's Committee, the AU and partners, is called for to elevate the role of the Day of the African Child. The communication of the theme for the year to member states in good time is crucial. In addition, it might help that, while communicating the theme to member states, the African Children's Committee attaches a brief explanation about the relevance of the theme, the reason for its selection as well as providing pointers on how the DAC could possibly be celebrated.

The theme selected for 2008 in celebrating the Day of the African Child, as recommended by the 8th meeting of the Committee, is 'Right to participation: Let children be seen and heard'. The right to participation is one of the cardinal principles of both CRC and the African Children's Charter and it is very relevant to the promotion and protection of the African child.

However, child participation is also a right which is relatively less understood in practice. This has been demonstrated by the representative of UNICEF who made the thematic presentation on participation

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<sup>30</sup> See Mezmur (A) (n 2 above) 567 for further details.

rights of children during the 9th meeting.<sup>31</sup> Accordingly, child participation is not manipulation, decoration and/or tokenism. In order to have a meaningful and informed celebration of the Day of the African Child with this theme, it is even more apposite this time around that the African Children's Committee, the AU and all partners give clear guidance and assistance to member states in the celebration of the DAC.

## 7 Other matters

As requested during the 8th meeting, participation rights of children have been included in the agenda of the 9th meeting under item 4. Accordingly, a presentation was made on the subject matter by a representative of UNICEF. The presentation revolved around article 12 of CRC. It highlighted that child participation was an important issue which had been neglected for too long. Areas covered by the presentation included degrees of child participation, spaces for child participation, principles of meaningful presentation, and child participation in the African context. The need to develop guidelines on child participation in order to educate governments, NGOs and other role players dealing with children on how to involve them to ensure their participation, was underscored. Although the presentation was appreciated, it drew criticism for being focused on CRC and not on the African Children's Charter.

After the presentation by UNICEF, Committee members highlighted some areas of the African Children's Charter where they might need guidance for a better understanding of provisions. Accordingly two thematic items were debated and agreed to be included in the agenda of the 10th meeting of the Committee. These items were a discussion paper on the unique provision of article 31 of the African Children's Charter on 'the responsibilities of the child' and article 4 of the African Children's Charter on the 'best interests of the child' principle. The Community Law Centre, based at the University of the Western Cape, was called upon and agreed to prepare the paper on the 'responsibilities of the child' and present it to the Committee during its 10th meeting.

On a different note, Committee members reported on the various activities they undertook within the framework of the Committee.<sup>32</sup> The issue of resource mobilisation was also touched upon. A core group which was established during the 8th meeting was called to continue its work and develop a plan for resource mobilisation.

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<sup>31</sup> See sec 7 below for further details.

<sup>32</sup> These activities included attendance of meetings, workshops and conferences.

## 8 Conclusions

The African Children's Charter is currently ratified by 41 countries on the continent. The last two countries to come on board are Gabon<sup>33</sup> and Côte d'Ivoire.<sup>34</sup> Indeed, ratification by all member states of the AU does not seem to be out of reach. The African Children's Committee is exercising its mandate in this regard to make ratification of the Children's Charter by all AU member states a reality.

The issue of individual communications seems to be drawing less attention from the Committee, despite the fact that there is at least one communication submitted to the Committee on the situation of children in Northern Uganda. Perhaps it is already high time that a way forward is planned for this and other communications that the Committee might already have received.

The African Children's Committee has many challenges ahead of it that it needs to tackle in its endeavour to advance the rights of children in Africa. To name but one challenge, the Committee operates with a very tight budget line. This of course is despite the fact that there are NGOs and UN agencies that continue to support the work of the Committee.

In its endeavour to advance the rights of children in Africa, the African Children's Committee should at least try to avoid two things — a room for repetition of 'shortcomings' and an exercise that could be dubbed as 'reinvention of the wheel'. Especially now, as the Committee gears towards the consideration of the state party reports at its disposal, the granting of observer status and undertaking of lobbying and investigation missions, the need to look back at its own previous work and their lessons, as well as the work of its sister institution, the African Commission, and the work of the CRC Committee, have become pertinent. The African Children's Committee clearly recognises that it needs to look back (and look around) at these and other lessons in order to look ahead.

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<sup>33</sup> Ratified on 12 June 2007.

<sup>34</sup> Ratified on 18 June 2007.

## **Annexure A**

### **Criteria for granting observer status in the African Committee of Experts on the Rights and Welfare of the Child to non-governmental organisations (NGOs) and associations**

#### **Introduction**

The AU African Committee of Experts on the Rights and Welfare of the Child, in conformity with article 42 of the Charter and articles 34, 37, 81 and 82 of the Rules of Procedure on representation and co-operation with civil society organisations grant observer status to civil society organisations according to the following criteria and principles.

#### **Section I**

##### **Principles to be applied in granting observer status in the AU African Committee of Experts on the Rights and Welfare of the Child**

- 1 The aim 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 African Union and of the African Committee of Experts on the Rights and Welfare of the Child and those enshrined in the Charter.
- 2 The NGOs/associations shall undertake to support the work of the African Union and the Committee, and promote the dissemination of information on its principles and activities, in accordance with the aims and objectives, the nature and areas of competence and activities.
- 3 The NGOs and human rights associations in general for the promotion and protection of the child in particular should have a recognised reputation in their particular areas. 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.
- 4 The NGOs/associations should:
  - a) be registered in a state party, at least three (3) years after the submission of the request, to undertake without restriction regional and continental activities as African civil society organisations or of the diaspora working in the area of defending, protecting and promoting the rights of children; and
  - b) provide proof of their official recognition as well as their activities during that period.
- 5 The NGOs/associations should have:
  - a) a recognised headquarters and an executive organ;
  - b) democratically adopted statutes, a copy of which shall be deposited with the Chairperson of the Committee of Experts;
  - c) a representative structure and appropriate mechanisms to enable them to report to their members who should exercise effective con-

- ontrol over their policies, through an appropriate democratic and transparent decision-making process;
- d) an administration comprising a majority of African citizens or Africans from the diaspora as defined by the executive council and an elected children's representative. These conditions shall be applicable to international non governmental organisations.
- 6 The NGOs/associations shall be required to provide all the details concerning their different sources of financing. In case of voluntary contributions from external sources, the amounts and names of donors should be accurately indicated in the application for observer status. Any support, financial or other contributions, granted directly or indirectly by a government to the NGO/association, should be duly declared and recorded in its financial statements.
  - 7 Any NGO/association that practises discrimination on the basis of specific criteria such as gender, colour, religion, ethnic group, tribe or race, or practises any other activity involving children that could be described as the worst forms of work and other abuses cannot enjoy observer status.

## **Section II**

### **Application procedure for non-governmental organisations**

- 1 Any NGO/association wishing to obtain observer status should submit:
  - 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.
- 2 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.
- 3 The submission of documents shall be in two (English and French) of the official languages of the African Union and in sufficient number of copies to allow their distribution to Committee members.
- 4 If it is a non-governmental organisation of the diaspora, it should also submit all the information and the names of at least two (2) AU member states or civil society organisations recognised by the Union that are well acquainted with the organisation and are willing to certify its authenticity.

## **Section III**

### **Procedure for consideration of applications by the Committee**

- 1 The Committee shall, during its ordinary sessions, in conformity with the agenda prepared, consider the applications received within the set deadline.
- 2 The Committee shall, on the basis of defined criteria and principles, 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.

#### **Section IV**

##### **Participation of observers in the deliberations of the Committee**

The representatives of NGOs/associations enjoying observer status may:

- 1 be invited to be present at all the opening and closing ceremonies;
- 2 participate in meetings of the Committee in conformity with the conditions provided for in this section.
- 3 have access to documents of the Committee provided these documents:
  - a) are not confidential;
  - b) deal with issues concerning the observers.
- 4 The documents of the Committee shall be distributed in accordance with the documents classification system adopted by the Committee;
- 5 be invited to attend closed sessions to consider issues which concern them;
- 6 participate, without voting rights, in the deliberations of meetings to which they are invited, with the authorisation of the Chairperson.
- 7 Observers may be authorised by the Chairperson to make a statement on issues concerning them, provided that the text of the statement is communicated in advance to the Chairperson.
- 8 The Chairperson of the meeting may give the floor to observers to enable them to reply to questions they may be asked by members.
- 9 Observers may request the inclusion of issues of particular interest to them on the agenda of the meeting.

#### **Section V**

##### **Relations between the Committee and observers**

- 1 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.
- 2 All NGOs/associations enjoying observer status with the Committee should submit analytic reports on their activities every two years (2) years. 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.
- 3 The Chairperson of the Committee may authorise any NGO/association enjoying observer status, which has legally changed its name or legally succeeded an organisation which enjoyed observer status, to continue to enjoy the said status under its new name.
- 4 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.
- 5 Granting, suspension or withdrawal of observer status of an NGO/association is the prerogative of the Committee and may not be the subject of a judgement of a court or tribunal.

## Section VI

### Final provisions

- 1 Granting of observer status to an NGO/association does not incur any obligation on the part of the Committee to allocate a subsidy or any material assistance whatsoever to this NGO/association.
- 2 Observers shall bear the expenses for their transport and stay at the venue of the conference.

## Annexure B

### **Guidelines on the conduct of investigations by the African Committee of Experts on the Rights and Welfare of the Child under article 45 of the African Charter and article 74 of the Rules of Procedure**

#### Introduction

The African Committee of Experts on the Rights and Welfare of the Child is established under article 32 of the African Charter on the Rights and Welfare of the Child. Its mandate is to, *inter-alia*, promote and protect the rights of children as enshrined in the Charter; collect and document information; commission interdisciplinary assessment of situations on African problems in the area of the rights and welfare of the child; formulate and lay down principles and rules aimed at protecting the rights of the child; and above all monitor the implementation and ensure protection of the rights enshrined in the Charter and to supervise their observance.

Article 44(1) provides that '[t]he Committee may receive communication from any person group or non-governmental organisation recognised by the Organisation of African Unity, by a member state or the United Nations relating to any matter covered by this Charter'.

Further, article 45(i) of the African Charter provides that '[t]he Committee may resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the state parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures a state party has adopted to implement the Charter'.

It would thus appear that, on the basis of the ratification of the African Charter on the Child and without the need for a complementary acceptance of competence, the Committee of Experts is empowered to investigate any issue arising from the Charter, including alleged or observed violations of the rights and welfare of the child that could or could not have been submitted to it.

The Charter on the Child does not clearly or adequately stipulate the procedures for communication and investigation. Therefore, these guidelines have been drafted to provide regulations that will enable the Committee of Experts to conduct investigations within the framework of the Charter.



## **I General presentation of investigation missions of the African Committee of Experts on the Rights and Welfare of the Child**

### **A Definition, aim and types of investigation missions**

#### **Article 1: Definition**

An investigation mission shall be a mission of a team of the Committee of Experts on the Rights and Welfare of the Child to a state party to the Charter to gather information on the situation of the rights of the child in the state party.

#### **Article 2: Aim of investigation missions**

The aim of the investigation missions shall be to seek and collect accurate and reliable information on any issue arising from the Charter in order to:

- a) assess the general situation of the rights of the child in a country;
- b) clarify the facts and establish responsibility of individuals and the state towards children who are victims of violations and their families, and/or
- c) promote and support the implementation of the rights and welfare of the child by the various administrative, legal and legislative institutions of the country, in conformity with the Charter.

#### **Article 3: Types of investigation missions**

- 1 The African Committee of Experts on the Rights and Welfare of the Child (hereinafter known as the Committee) may undertake two types of investigative missions:
  - a) investigations on any matter referred to the Committee;
  - b) investigations initiated by the Committee.

### **B Initiative and composition of investigation missions**

#### **Article 4: Initiative of investigation missions**

- 1 Investigative missions shall be undertaken on the initiative of the Committee, under the relevant provisions of the African Charter and its Rules of Procedure, on the basis of a communication admitted by the Committee indicating serious and systematic violations of the rights of the child in a state party.
- 2 The Committee may also undertake an investigative mission at the invitation of the state party concerned. Any invitation from a state party to undertake an investigative mission shall be considered by the Committee without delay.
- 3 In the event of refusal by a state party of an investigative mission on its territory, the state concerned should indicate the reasons for this refusal in a reasonable time. The Committee shall take note and report to the Assembly of the Union which shall then decide on further action to be taken. State parties shall strive to adopt a policy of admitting investigative missions to their territories.

#### **Article 5: Composition of investigation missions**

- 1 On the basis of article 62 of its Rules of Procedure, the Committee could, depending on the case:

set up sub-committees and/or *ad hoc* working groups in order to prepare for the investigations as per the provisions of article 45 of the Charter and these directives;

designate a head of mission to lead a mission;

designate a Special Rapporteur from among its members to investigate in accordance with the above-mentioned provisions;

designate independent experts to back the sub-committees, *ad hoc* working groups and Special Rapporteurs in their missions.

- 2 The number and designation of the sub-committee and/or working group members thus established shall be determined by the Committee, taking into consideration the aim and scope of the mission. In the event of emergency, these decisions shall be taken by the Chairman and submitted to the Committee for approval.

#### **Article 6: Inability of a member to take part in an investigation mission**

- 1 A Committee member may not take part in an investigation mission if:
  - a) he/she is a national of a state in which the mission takes place;
  - b) he/she resides on the territory of the state party in which the mission takes place; or
  - c) the mission is undertaken in the state party on behalf of which he/she has been elected to the Committee.
- 2 Any issue raised within the context of this article shall be resolved by the Committee without the participation of the member concerned.

#### **Article 7: Organisation/functioning of investigation missions**

*Ad hoc* sub-committees and working groups set up under article 5(1) above shall organise their proceedings. In this respect, they shall in consultation with the Chairperson of the Committee assign duties to each of their members and notify the secretariat staff on the composition of the team(s).

### **II Preparation of investigation missions of the African Committee of Experts on the Rights and Welfare of the Child.**

#### **A Preliminary mission report**

A preliminary mission report is a report that will be prepared prior to proceeding on a mission.

#### **Article 8: Aim of the preliminary report**

- 1 A preliminary mission report shall be prepared before each investigation mission.
- 2 The aim of the preliminary report shall be to collect all available information on the country concerned in order to give an overview of the situation of the rights of the child in the country.

#### **Article 9: Substantial points of the preliminary report**

- 1 The preliminary mission report should contain relevant information such as:

- a) the general situation of the country : political, economic, social, cultural and security issues;
  - b) the country's legal system;
  - c) the status of ratification of the major international instruments on human rights, particularly the United Nations Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child concerning the Sale of children, Prostitution of Children and Pornography that displays children, the Additional Protocol to the Convention on the Rights of the Child concerning the involvement of children in armed conflicts and the African Charter on the Rights and Welfare of the Child and the status of the submission of the reports to the UN Committee on the Rights of the Child and the African Committee;
  - d) the status of ratification of the regional and sub-regional instruments of co-operation and development and also information on the accession of the country to the African Peer Review Mechanism of NEPAD;
  - e) the major constitutional and legislative provisions on the rights and welfare of the child;
  - f) analysis of the major policies for children and information on budgets allocated to issues on education and maternal, child and youth health.
- 2 The preliminary mission report shall also mention the possible difficulties of the mission and include a list of potential interlocutors.

#### **Article 10: Sources of information**

Information contained in the preliminary mission report shall be collected from the African Union, the United Nations and other international organisations with expertise on the country or the situation of the rights of the child in question, from the government of the state party concerned and from non-governmental organisations with observer status on the Committee, as well as official opposition political parties, local representatives of international or regional organisations and civil society organisations.

### **B Logistics**

#### **Article 11: Mission dates**

- 1 The Committee should, through its Chairperson and the Chairperson of the AU, send through the official channel, three (3) months before the dates scheduled for the mission, a letter to the government of the state party to inform it of the objective, timetable and venues of the investigation mission. The state party shall be obliged to send its reply within one (1) month after reception of the letter.
- 2 In agreement with the state party, the Committee shall finally fix the dates of its investigation missions six (6) weeks before the beginning of the mission. In the event of emergency, the Committee shall decide on its investigation missions within a shorter period.

#### **Article 12: Need for independent arrangements**

- 1 In order to ensure the independence and impartiality of the mission, the

- Committee shall undertake to organise the collection of information necessary for the preparation of the mission.
- 2 The Committee shall also make the necessary arrangements for the journey through its Secretariat. These arrangements shall include, *inter- alia*, air and hotel reservations, travel insurances and necessary visas, transport in the country, organisation of meetings with the various interlocutors as well as arrangements necessary for communication on and during the mission.
  - 3 All expenses incurred by the mission shall be borne by the Committee.

### **Article 13: Mission programme**

- 1 The mission programme shall be prepared by the Committee Secretariat, in collaboration with the Committee Chairperson and mission members.
- 2 In order to ensure the smooth functioning of the mission, the Secretariat of the Committee shall transmit to the state party a draft mission programme. The Secretariat shall draw the government's attention on the mission's terms of reference, its mandate as well as its privileges and immunities. The agreement of the government on these terms of reference should be obtained in writing before the onset of the mission.
- 3 The mission programme shall include meetings with national and local authorities, including members of government, the judicial authority and parliament, representatives of national institutions of human rights and rights of the child, civil society organisations, representatives of United Nations agencies and other inter-governmental organisations and if need be, children who are victims of violations and their families or representatives, and presenters of petitions submitted under article 44 of the Charter.
- 4 The mission programme shall be flexible and measures should be envisaged in the event of complementary meetings.

## **III Functioning of investigation missions**

### **A Contents and procedure of investigation missions**

#### **Article 14: Public Information**

- 1 A general notice shall also be published on the mission, inviting the public and all individuals likely to contribute to the mission's success to cooperate with the Committee's representatives.

#### **Article 15: Investigations on any matter referred to the Committee**

- 1 The mission shall conduct in-depth and impartial investigations on alleged violations of the rights of the child.
- 2 In order to protect the identity of the victimised children and ensure their protection as well as that of the witnesses, these meetings shall be open and confidential, in the absence of government representatives and in a venue that is not supervised by government authorities.
- 3 The mission shall also meet authorities of public or private institutions responsible for victimised children and their families.

**Article 16: Investigations initiated by the Committee itself**

- 1 The mission shall focus on sensitisation on the African Charter and the African system of human rights in general by encouraging and indicating good practices in the effective implementation of the Charter.
- 2 Mission members shall meet government authorities, representatives of non-governmental organisations as well as any other person likely to provide information on the rights of the child in the country.
- 3 They shall also visit detention or rehabilitation centres for children, schools, hospitals, refugee camps, if need be, and any other centre that will enable a fair assessment of the situation of children in the country.

**Article 17: Common procedures**

- 1 Whenever possible, investigation missions shall visit the rural areas of the country and shall hold discussions with local government authorities, local authorities of institutions responsible for children, community organisations and local populations including children.
- 2 Mission members shall take notes at each meeting or visit, including the date, time, names and posts of persons met and subjects discussed. Notes of the meetings should be as complete and as detailed as possible.
- 3 Mission members shall meet, if possible, at the end of each day in order to report on activities carried out and the problems faced with a view to facilitating the preparation of the mission report. They shall also consider possible difficulties of the current programme that they could face and ways to resolve them.

**B Guiding principles of investigation missions****Article 18: Principles relating to mission members**

- 1 The investigation mission shall be conducted in total impartiality and independence.
- 2 Mission members shall strive to obtain any and all information necessary for their investigation.
- 3 The mission shall moreover have the obligation to act in conformity with its mandate. All mission members shall have the duty to participate actively in all activities envisaged by the mandate, including individual participation.
- 4 Mission members shall be obliged, prior to, during and after the mission, to respect the general principles for the implementation of the rights of the child, *inter-alia* the principles relating to non-discrimination, participation of children and respect of the supreme interest of children.

**Article 19: Principles relating to investigation methods**

- 1 In carrying out their mandate, mission members shall have the obligation to respect the laws and regulations of the state party visited without, however, being hindered by these laws and regulations in the conduct of the mission.
- 2 State parties shall be obliged to take all necessary measures to protect the alleged victims of violations of the rights of the child, their parents or legal representatives as well as witnesses met in the course of the mission

against threats, harassments or any other form of intimidation that could be related to the investigation.

- 3 The state party shall have the opportunity, at every stage of the investigation, to comment on the information collected by the mission.

#### **IV Report, publication and follow-up of investigation missions**

##### **A Preparation of mission report**

###### **Article 20: Preliminary results**

- 1 At the end of the mission and before leaving the country visited, the delegation shall prepare a document presenting the preliminary results of its investigation that shall be communicated to the government and media.
- 2 The above-mentioned preliminary results shall be presented at a press conference and confidential information related to the consideration of certain violations of the rights of the child shall not be published.

###### **Article 21: Mission notes**

All notes taken during the mission shall be compiled and handed over to the Head of Mission. He shall transmit them to a member of the Committee's Secretariat who shall be responsible for drafting the mission's final report.

###### **Article 22: Contents of the final report**

- 1 The mission report shall be prepared within a period of one (1) or two (2) months after the mission. It shall include a description of the investigation, as well as procedures and methods used in the investigation.
- 2 The mission report shall also recapitulate all the substantial points included in the preliminary report, for example, information on:
  - a) the general situation in the country and the major political, economic, social and cultural issues on the protection of the rights and welfare of the child;
  - b) the legal system of the country and particularly the legal provisions and mechanisms established to guarantee the rights of the child proclaimed in the Charter;
  - c) analysis of the major national policies on children.
- 3 In addition, the mission report shall include:
  - a) a historical background, if need be, of actions taken by the Committee on rights and welfare of the child in the country;
  - b) a recapitulation of the correspondence exchanged by the Committee and the state party concerned;
  - c) the mission's terms of reference;
  - d) a copy of the form for the collection of information on the field;
  - e) An *aide-mémoire* of the mission, recapitulating its composition, mission programme, places visited and persons met, including government officials, representatives of institutions responsible for children and civil society organisations. The report shall also mention meetings with victimised children, their families or representatives, except those whose identity was not revealed for their protection;
  - f) press releases published;
  - g) a summary of communications submitted, if need be, under article

- 44 of the Charter and information collected by the mission on every communication;
- h) information on the process to be followed with regard to these communications as well as on possible replies given by the government in response to the communications; and lastly
  - i) an analysis of mission results in relation to all the issues for the investigation.

#### **Article 23: Recommendations**

- 1 On the basis of all the information collected, the mission report shall make recommendations on the implementation of the Charter in the state party visited, or relating to allegations of violation of the rights of the child, including by presenters of petitions submitted under article 44 of the Charter.
- 2 Recommendations of the Committee shall mainly be addressed to the state party concerned, indicating the measures that should be taken. They shall also be sent to other public and private institutions responsible for the monitoring and implementation of the rights of the child recognised in the Charter.

#### **B Publication of mission report**

##### **Article 24: Transmission of report**

- 1 Once drafted, the mission report shall be sent to members of the delegation who shall have one (1) month to propose amendments. The amended report shall then be transmitted to the government of the state party concerned which shall within thirty (30) days following transmission, be allowed to make its observations and indicate measures to be taken for a follow up.
- 2 In the case of investigation missions on allegations of violations of the rights of the child recognised in the Charter and communicated to the Committee on the basis of article 44, the report shall also be transmitted to presenters of petitions. The Committee shall take into account comments made by the presenters of petitions particularly in the possibility of an amicable settlement of the dispute.

##### **Article 25: Adoption and circulation of report**

- 1 After revision in conformity with the comments made by the state parties mentioned above by the Committee Secretariat, under the supervision of the Head of Mission, the report shall be submitted to the Committee at its next meeting for approval.
- 2 The mission report shall be attached to the progress report submitted by the Committee to the Assembly of Heads of State and Government of the African Union. It shall be published after consideration by the Assembly of Heads of State and Government and the state parties concerned shall ensure its circulation in their countries.

#### **C Follow-up of missions**

##### **Article 26: Monitoring of investigation missions on any matter referred to the Committee**

- 1 Investigation missions of the Committee on petitions submitted under

article 44 shall be monitored by contacts inviting the state party visited to present, within six (6) months after the mission or the adoption of a decision by the Committee, a written reply comprising information on any measure taken in the light of recommendations made by the Committee after the mission.

- 2 The Committee could also establish other contacts that will enable it to obtain additional information on measures taken by the state party in reaction to its recommendations.
- 3 Lastly, the Committee could request the state party to include in its subsequent reports presented under article 43 of the Charter, information on any measure taken in reaction to recommendations made by the Committee after the mission.

#### **Article 27: Monitoring of investigation missions initiated by the Committee**

- 1 Investigation missions of the Committee shall be monitored by a periodic evaluation of the situation of the rights of the child in the country. The Committee could, for example, request the state party to include in its subsequent reports presented under article 43 of the Charter, information on any measure in reaction to the recommendations made by the Committee after the mission.
- 2 The Committee could moreover invite specialised institutions and civil society organisations working for the protection of the rights and welfare of the child to provide it with information on the monitoring and implementation of the Charter in the countries concerned in the areas that shall be covered by their activities.

## **Annexure C**

### **Guidelines for the consideration of communications provided for in article 44 of the African Charter on the Rights and Welfare of the Child**

#### **I Introduction**

- 1 Article 44 of the African Charter on the Rights and Welfare of the Child stipulates '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 Organisation of African Unity, by a member state or by the United Nations'.
- 2 Any communication to the Committee shall indicate the names and address of the author and shall be treated as 'confidential'.
- 3 The Committee considers that the directives should be elaborated for effective application of these provisions in accordance with article 74 of the Rules of Procedure of the Committee.



**Chapter I: General provisions****Article 1: Definition of communications**

- 1 Under article 44 of the African Charter on the Rights and Welfare of the Child, any correspondence or any complaint from a State, individual or NGO denouncing acts that are prejudicial to a right or rights of the child shall be considered as communication.

**Article 2: Recording of communications**

- 1 Communications shall be recorded by the Committee's Secretariat.
- 2 For that purpose, the Committee shall keep a register.

**Article 3: Summary and circulation of communications**

- 1 The Committee Secretary shall make a summary of all the communications, depending on their subject. At each session, he/she shall circulate these summaries to Committee members.
- 2 An original file shall be kept for each communication summary. The complete text of any communication brought to the attention of the Committee shall be made available to all members.

**Chapter 2: Consideration of communications****Article 1: Conditions of admissibility of communications****I Authors of communications**

- 1 Communications may be presented by individuals, including the victimised child and/or his parents or legal representatives, witnesses, a group of individuals or non-governmental organisations recognised by the African Union, by a member state or by any other institution of the United Nations system.
- 2 The author of the communication shall specify either to have been a victim of violations of the rights spelt out in the Charter, or to act on behalf of a victim or of other eligible parties.
- 3 A communication may be presented on behalf of a victim without his/her agreement on condition that the author is able to prove that his/her action is taken in the supreme interest of the child. The victimised child who is able to express his/her opinions shall be informed of the communications presented on his/her behalf.
- 4 The Committee shall decide by simple majority of members present and in conformity with the following regulations, on the admissibility or not of a communication in conformity with the provisions of article 44 of the Charter.

**II Conditions of form**

- 1 No communication shall be considered by the Committee if:
  - it is anonymous;
  - it is not written;
  - it concerns a state non-signatory to the Charter.
- 2 Notwithstanding, 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.

### **III Conditions of content**

- 1 In order to take a decision on the admissibility of a communication, the Committee shall ensure that:
  - a) 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;
  - b) the communication is not exclusively based on information circulated by the media;
  - c) the same issue has not been considered according to another investigation, procedure or international regulation;
  - d) 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;
  - e) the communication is presented within a reasonable period after appeal channels at the national level have been exhausted.
  - f) the wording of the communication shall not be offensive,

## **Article 2: Procedure for consideration of communications**

### **I Transmission of communications**

- 1 Communications shall be forwarded to Committee members three (3) months before each ordinary session.

### **II Setting up of a working group**

- 1 The Committee may set up one or more working groups made up of three of its members who shall meet before its sessions or at any time decided by the Committee in order to consider the admissibility or not of a communication. The working group shall designate a Rapporteur.
- 2 When the Committee decides that a communication is admissible according to the terms of the Charter and these directives, it shall communicate, as soon as possible, through the Secretariat, its decision to the author of the communication.
- 3 The author of the communication may request the Committee to reconsider its decision by providing additional documents or facts.
- 4 After having decided on the admissibility of a communication according to the terms of the article 1, chapter 2 of these directives, the Committee, working group or Rapporteur shall confidentially bring the communication to the attention of the state concerned and shall request it to present an explanation in a written statement containing his observations within three (3) months.
- 5 When the Committee or working group has decided that a communication is admissible according to the terms of the Charter and directives, this decision and all the other relevant documents shall, as soon as possible, be presented to the state party concerned through the Committee Secretary. The author or authors of the communication shall also be informed of the decision.

- 6 The Committee shall decide by simple majority of members.

### **III Order in which communications are considered**

- 1 Except in cases that require promptness on a decision taken by the Committee or a working group, communications shall be dealt with in the order in which they are received by the Secretariat.
- 2 Two or several communications may be dealt with together if the Committee or working group so decides.
- 3 The author of the communication shall also be informed.
- 4 If at the end of the deadline the state party concerned does not give an explanation, the Committee or working group may decide to proceed to consider the communication.

### **IV Provisional measures**

- 1 When the Committee decides to consider a communication, it may forward to the state party concerned, a request to take provisional measures that the Committee shall consider necessary in order to prevent any other harm to the child or children who would be victims of violations.

### **V Additional information, clarifications and observations**

- 1 The Committee or working group may request the state concerned, the author or authors of the communication for additional information.
- 2 Within the period fixed by the Committee, the state party concerned shall present to the Committee explanations by way of written statements indicating, if need be, the measures that it has been able to take in conformity with the Committee's directives. If necessary, the Committee may indicate the information requested from the state party concerned.
- 3 The Committee may request the presence of the author or authors of the communications or their representatives as well as the presence of the representatives of the state concerned in order to give additional clarifications or answer questions on the validity of the communication. Each time that one of the parties is thus invited, the other party shall be informed and invited to be present and make its observations if it so wishes. The absence of a party shall not hinder consideration of the case.
- 4 The Committee may send one of its members to conduct on the spot investigations.

### **VI Incompatibilities**

- 1 A Committee member may not take part in the consideration of a communication:  
if the state party on whose behalf he has been elected to the Committee is party to the case;  
if the member has any personal interest in the case; or  
if he has participated in any decision-making process concerning the case relating to the communication.

## VII Removal or withdrawal of a member

- 1 Any person who has reasons to doubt the impartiality of a member could request his removal.
- 2 The Committee shall request the person to explain the reasons for doubting a member's impartiality before taking a decision.
- 3 If, for whatever reason, a member considers that he should not take part or continue to take part in the consideration of a communication, he shall inform the Committee Chairperson.
- 4 After consultation with members, the Chairperson shall formally acknowledge the withdrawal and inform the member accordingly.

## Chapter 3: Committee deliberations

### Article 1: *In camera* session

- 1 Committee meetings at which communications shall be considered according to the terms of article 44 of the Charter shall be held *in camera*.
- 2 The Committee, working group or Rapporteur shall not make public any communication, document or information relating to a communication.
- 3 The Committee or working group responsible for considering a communication may gather and validate information.

### Article 2: Open session

- 1 Meetings at which the Committee shall have to consider general issues such as procedures for the implementation of article 44 may be held in open session if the Committee so decides.
- 2 After considering the validity of a communication, the Committee may reconsider a decision according to which a communication is admissible in the light of the explanations or decisions presented by the state party. However, before the Committee shall decide to reconsider this decision, the explanations or statements concerned should be forwarded through the Secretary, to the author or authors of the communication, who may present additional written information or observations within a period to be fixed by the Committee.
- 3 The Committee may request the presence of the author or authors or their representatives as well as the presence of representatives of the state party concerned in order to give additional clarifications or answer questions on the communication's validity.

### Article 3: Children's participation

- 1 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.
- 2 When the child is capable of expressing his opinions, he should be heard by a Committee member.

**Article 4: Monitoring of decisions**

- 1 The Committee shall designate one of its members to be responsible for monitoring its decisions.
- 2 He/she shall regularly report to the Committee,
- 3 The Committee Chairperson shall inform the Chairperson of the African Union Commission.
- 4 The decisions of the Committee shall be submitted to the Assembly of Heads of State and Government of the African Union. The decisions shall be published after consideration by the Assembly and the state parties concerned which shall ensure their dissemination in their countries, in conformity with article 45, paragraphs 3 and 4 of the Charter.

# Europe and the return to 'proper statehood' in Africa — A reply to Strydom

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## 1 Introduction

In his article 'From mandates to economic partnerships: The return to proper statehood in Africa',<sup>1</sup> Professor Hennie Strydom sets out to show how the Economic Partnership Agreements (EPAs) currently being negotiated between the European Union (EU) and groups of countries belonging to the African, Caribbean and Pacific (ACP) group of states would help establish stronger states in Africa. In this reply to Strydom's article, I set out why the EPAs are unlikely to play the role he foresees.<sup>2</sup>

In this note, I first briefly discuss the idea, seemingly supported by Strydom, that a new form of trusteeship should be an option in dealing with failed states in Africa. Thereafter I consider the development of the relationship between Europe and Africa, before turning to the present Europe-Africa partnership and the EPA negotiations.

## 2 The consequences of failure

In his article Professor Strydom states that<sup>3</sup>

[t]here 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 . . . or by unequivocally arguing for rehabilitated forms of trusteeship over African states that face increasing

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<sup>1</sup> H Strydom 'From mandates to economic partnerships: The return to proper statehood in Africa' (2007) 7 *African Human Rights Law Journal* 68.

<sup>2</sup> At the time of writing, the EPAs were still being negotiated with the prospect of comprehensive EPAs being signed before the deadline of the end of 2007 looking increasingly unlikely.

<sup>3</sup> Strydom (n 1 above) 69-70.

difficulties in performing basic governmental functions and in delivering essential services to their citizens . . . 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 is a 'dysfunctional' state? Strydom gives no answer, but gives a definition of a 'functional' state. He cites the stringent criteria set out by the Permanent Mandates Commission in 1931 for granting independence to the territories under the mandates system of the League of Nations.<sup>4</sup> As Strydom notes, the effectiveness criterion gave way to the notion of juridical statehood, as many of the new states emerging from decolonisation displayed a lack of effectiveness.<sup>5</sup> Unfortunately, Strydom does not mention which states he considers dysfunctional in Africa today. He only mentions, without any reference, that Africa 'has the largest concentration of states considered weak or dysfunctional'.<sup>6</sup> His use of South Africa as his only example, when he discusses 'main areas of concern' with regard to government ineffectiveness, indicates an overly broad definition of what should be seen as a dysfunctional state.<sup>7</sup>

A weak or dysfunctional state should be distinguished from a failed state. In his book *State failure, sovereignty and effectiveness — Legal lessons from the decolonisation of sub-Saharan Africa*, Kreijen notes that '[t]he solutions to state failure must . . . be premised on the idea of reintroducing effectiveness. They must aim at filling the empty juridical hull of the failed State with empirical substance'.<sup>8</sup> The examples of failed states that Kreijen considers in his study are Somalia, 'the *locus classicus* of state failure', the Democratic Republic of the Congo, Liberia and Sierra Leone.<sup>9</sup> Kreijen argues for a new trusteeship system for failed states which he refers to as 'benign re-colonisation'.<sup>10</sup> Seemingly Strydom supports the idea of a revival of the trusteeship system.<sup>11</sup>

Trusteeships with an 'effective' state as trustee, as provided for in chapter XII of the United Nations (UN) Charter, have been abolished.

<sup>4</sup> '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 secure the financial resources needed for the regular functioning of the state, and possess a legislative and judicial organisation that could mete out justice to all on a continuous basis.' Strydom (n 1 above) 72.

<sup>5</sup> For a discussion on statehood, see J Crawford *The creation of states in international law* (2006). See also G Kreijen *State failure, sovereignty and effectiveness — Legal lessons from the decolonisation of sub-Saharan Africa* (2004).

<sup>6</sup> Strydom (n 1 above) 69.

<sup>7</sup> It is worth noting that South Africa scores better than the two new members of the European Union, Romania and Bulgaria, in the *Failed states index 2007*, published by the Fund for Peace, [http://www.fundforpeace.org/web/index.php?option=com\\_content&task=view&id=229&Itemid=366](http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=229&Itemid=366) (accessed 4 October 2007).

<sup>8</sup> Kreijen (n 5 above), 376.

<sup>9</sup> Kreijen (n 5 above) 64-86.

<sup>10</sup> As above.

<sup>11</sup> Strydom (n 1 above) 69-70.

Instead, the UN has established its own protectorates, for example in Kosovo. Apart from principled objections to 'benign re-colonisation', the experiences so far do not bode well for such an experiment. The most elaborate recent human trial of 'benevolent autocracy' is the United Nations Mission in Kosovo (UNMIK), which has been fraught with a lack of accountability, corruption and mismanagement.<sup>12</sup>

### 3 Europe and Africa — A brief historical overview

Europe's relationship with Africa has for centuries been one of domination. For a long time, this European domination was limited to the coast through either formal or informal empire.<sup>13</sup> European traders on the coast used African intermediaries to trade with the interior. In the late 1800s, the tales of explorers such as Livingstone led to calls for opening up the interior for the three Cs: commerce, Christianity and civilisation.<sup>14</sup> The result was the scramble for Africa. The European powers concluded treaties with local chiefs to expand their empires and when the treaty route did not work, used force to get what they wanted, adding a fourth C, conquest.<sup>15</sup> The aim of the scramble was not philanthropy: 'Europe is in Africa for the mutual benefit of her own industrial classes, and of the native races in their progress to a higher plane.'<sup>16</sup> Today Africa is governed by 3Gs: globalisation and good governance. Globalisation is the new word for commerce and the language of good governance is similar to the discourse of civilisation of the past.<sup>17</sup>

Strydom's description of the problematic structure of the African state is probably accurate for many states.<sup>18</sup> However, many of the problems are hardly unique to Africa, and the use of South Africa as his only specific example is not very convincing. African leaders have recognised the problem of bad governance for as long as it has been on the international agenda.<sup>19</sup> There is, of course, a big difference between

<sup>12</sup> S Chesterman *You, the people — The United Nations, transitional administration and state-building* (2004) 126-127. See also M Zaremba 'Report from Unmikistan, land of the future' <http://www.dn.se/DNet/jsp/polopoly.jsp?d=2502&a=664639> (accessed 2 October 2007).

<sup>13</sup> T Pakenham *The scramble for Africa, 1876-1912* (1991) xxiii.

<sup>14</sup> Pakenham (n 13 above) xxiii.

<sup>15</sup> Pakenham (n 13 above) xxv.

<sup>16</sup> FD Lugard *The dual mandate in British Tropical Africa* (1926) 617, quoted in Chesterman (n 12 above) 11.

<sup>17</sup> DP Fidler 'International human rights law in practice: The return of the standard of civilisation' (2001) 2 *Chicago Journal of International Law* 137.

<sup>18</sup> Strydom (n 1 above) 80-87.

<sup>19</sup> *Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World* adopted by the OAU Assembly of Heads of State and Government in July 1990.



rhetoric and reality, but a distinction must be drawn between regimes which lack the political will to work for the realisation of the human rights of their citizens and states which simply lack adequate resources. It must also be recognised that it is the lack of fulfilment of promises of both African and Western governments that contributes to the desperate situation that many Africans are facing.

#### 4 The Cotonou Agreement and the Economic Partnership Agreements

Strydom sets out the history of the relationship between the EU and the ACP group of states, and it need not be repeated here.<sup>20</sup> The Cotonou Agreement between the EU and ACP, adopted in 2000 and amended in 2005, will remain in force until 2020. As is the case with previous agreements between the EU and ACP, the Cotonou Agreement gives the ACP countries preferential access to EU markets. Other states have argued that this system discriminates against them and should therefore not be allowed. A waiver given by the World Trade Organization (WTO) expires at the end of 2007. Under WTO rules, preferential access should be reciprocal. The negotiations for EPAs are thus aimed at establishing free trade areas.<sup>21</sup> This means that the ACP countries under the EPAs must gradually open up their markets to EU products and not apply tariffs or other trade barriers. Admittedly these states can expect to have many years to gradually introduce free access to EU products, but the loss of revenue and increased competition that such a move entails must be addressed if it should not mean falling deeper into the economical abyss.<sup>22</sup> An interim EPA concluded between the EU and the members of the East African Community (EAC) in November 2007 gave the EAC member states 15 years to remove 80% of its tariffs on goods from the EU.<sup>23</sup> Negotiations on issues not required for WTO compatibility, such as trade in services, intellectual property, services and government procurement, will continue. Many ACP countries oppose the inclusion of these issues in EPAs and argue that they should rather be discussed in WTO negotiations.

Strydom sees the future EPAs as 'instruments of sustainable development', which will 'have a clear disposition towards state-institutional

<sup>20</sup> Strydom (n 1 above) 90-98.

<sup>21</sup> On the EPA negotiations, see eg the EPA project of the Trade Law Centre for Southern Africa <http://epa.tralac.org/> (accessed 4 October 2007).

<sup>22</sup> Trade Justice Movement 'Economic Partnership Agreements (EPAs): Sustainable development in jeopardy' Policy Briefing (August 2007 update), <http://www.tjm.org.uk/briefings/epasbriefing.pdf> (accessed 4 October 2007).

<sup>23</sup> 'Oxfam warns EU-East Africa trade deal may cause revenue loss' AFP, 28 November 2007 [http://afp.google.com/article/ALeqM5j\\_IGMkEI3S0OtjVXVmlBquoH5xBw](http://afp.google.com/article/ALeqM5j_IGMkEI3S0OtjVXVmlBquoH5xBw) (accessed 1 December 2007).

capacity building'.<sup>24</sup> However, assistance for institution building is regulated in the Cotonou Agreement and implemented through the European Development Fund (EDF). The ninth EDF (2002-2007) had a budget of €13,5 billion for support to the ACP countries and the tenth EDF (2008-2013) will have a budget of €22,6 billion.<sup>25</sup> The aid component of the EPA negotiations instead focuses on adjustment costs, such as loss of tariff revenues.

Strydom notes, with regard to regional integration, that '[s]trong 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'.<sup>26</sup> This lack of capacity also weakens the African side in the EPA negotiations, allowing the EU to press for concessions, in particular, as the deadline for the conclusion of the negotiations draws closer.<sup>27</sup> There are also indications that the EPAs themselves could weaken regional integration.<sup>28</sup>

Strydom quotes the European Security Strategy as aiming at 'better governance through assistance programmes, conditionality and targeted trade measures'.<sup>29</sup> Conditionality is another word for sanctions in the form of a denial of market access or denial of disbursement of already agreed aid if a state does not conform. Economic sanctions, as has been proven over and over again, only make the situation worse for the ordinary citizen, while rarely affecting the regime elite.<sup>30</sup>

## 5 Conclusion

The heading of Strydom's article is 'The *return to proper statehood in Africa*' (my emphasis). This implies that most African states have exercised what he would define as proper statehood at some point in their existence. Otherwise, there would be no 'proper statehood' to return to. To take the examples of failed states given by Kreijen, Somalia, DRC, Liberia and Sierra Leone, of these at least Liberia and Sierra Leone seem at the present moment to be on the path to 'proper statehood'. Perhaps the DRC is also heading in the same direction. Even one part of Somalia, Somaliland, has ostensibly exercised 'proper statehood' for

<sup>24</sup> Strydom (n 1 above) 98.

<sup>25</sup> European Development Fund (EDF) <http://europa.eu/scadplus/leg/en/lvb/r12102.htm> (accessed 4 October 2007).

<sup>26</sup> Strydom (n 1 above) 89.

<sup>27</sup> Trade Justice Movement (n 22 above) African Trade Policy Centre 'EPA negotiations: African countries continental review' Review Report 19 February 2007 6.

<sup>28</sup> C Stevens 'The EU, Africa and Economic Partnership Agreements: Unintended consequences of political leverage' (2006) 44 *Journal of Modern African Studies* 441.

<sup>29</sup> Strydom (n 1 above) 99.

<sup>30</sup> S Chesterman & B Pouligny 'Are sanctions meant to work? The politics of creating and implementing sanctions through the United Nations' (2003) 9 *Global Governance* 503.

many years. A state with 'proper statehood' can collapse, but this is nothing unique to Africa and has occurred also among states that were once seen as epitomising effectiveness and stability.<sup>31</sup>

There is universal agreement about the goal: the realisation of the Millennium Development Goals.<sup>32</sup> That many African states would have problems reaching many of these goals, even if they displayed 'proper statehood', is clear. However, there is no denying that the existence of an effective state would contribute to their realisation. To make states more effective will not be easy. A national leadership that takes an interest in building the state, rather than their personal empire, will be required. Unfortunately, all experience indicates that such a leadership cannot be imposed from abroad. There are indications that some countries are on the right track and they should be encouraged, through economic assistance and by other means.<sup>33</sup> For those leaders who neglect their citizens, sanctions that could effect the general population should be avoided. Regime-targeted sanctions should be considered, though such sanctions are likely to be effective only if implemented by all other states.

Europe's relationship with Africa has always been a mix of exploitation and philanthropy. There is a clear risk that the EPAs, with their focus on increased EU access to the markets of the ACP countries, will further weaken rather than strengthen African states. Perhaps the EPAs will be accompanied with a bit more charity in the form of aid to cushion the adjustment. However, an effective state is more likely to materialise as a result of less exploitation rather than more philanthropy.

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<sup>31</sup> Eg, China and Spain in the 1930s and Yugoslavia in the 1990s.

<sup>32</sup> New Partnership for Africa's Development (NEPAD) October 2001 para 68; EU Strategy for Africa, cited by Strydom (n 1 above) 89.

<sup>33</sup> On aid effectiveness, see D Ehrenpreis (ed) 'Does aid work? — For the MDGs' *Poverty in Focus*, International Poverty Centre, October 2007 [http://www.undp-povertycentre.org/pub/1\\_PCPovertyInFocus12.pdf](http://www.undp-povertycentre.org/pub/1_PCPovertyInFocus12.pdf) (accessed 4 October 2007).

## Recent publications

**E Decaux, A Dieng & M Sow (eds) *From human rights to international criminal law: Studies in honour of an African jurist, the late Judge Laïty Kama***

Martinus Nijhoff Publishers (2007) 774 pages

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*From human rights to international criminal law: Studies in honour of an African jurist, the late Judge Laïty Kama* is in honour of Judge Laïty Kama who served as President of the International Criminal Tribunal for Rwanda from 1995 to 1999. On the whole, the compilation contains articles on various aspects of international criminal law, using the International Criminal Tribunal for Rwanda (ICTR) as the starting point for most of the articles. The discussion of the cases from various perspectives adds to the relevance of the compilation at a time when international criminal law is starting to come into its own. Regrettably, this author lacks a knowledge of French, the language in which a number of articles in the compilation are written. Therefore, commentary is given on some of the articles written in English in order to provide an overview of the work.

The first article sets the tone of the compilation, entitled 'Judge Laïty Kama: Five cases to develop international criminal law' by Helen Klann and Phillipa McKenzie. It focuses on five ICTR judgments that the learned judge participated in and discusses in detail the substantive law issues that arise from the cases. These include genocide, rape, war crimes and crimes against humanity. A subsequent article, '*The Prosecutor v Laurent Semanza, Case No ICTR-97-20, judgment, Trial Chamber (15 May 2003): A commentary*' by Coline Rapneau, links up with this first article and expands on the discussion on the law. The author examines one of the judgments given by a Trial Chamber differently composed and rendered after Judge Lamy's death. The main question looked at is that of cumulative convictions and the Trial Chamber in this case added the requirement that a double conviction, in

order to be accepted, must be necessary to reveal and represent a complete picture of the criminal conduct of the accused.

The second article, by Charmaine de los Reyes, examines state co-operation and its challenges for the ICTR. The articles that follow look at the accused and his rights. Firstly, there is 'The protection of human rights of the accused before the International Criminal Tribunal for Rwanda' by Wolfgang Schomburg and Jan Christoph Nemitz; secondly, 'Vagueness of indictment: Rules to safeguard the rights of the accused' by Helen Klann; and thirdly, 'The right to legal assistance at the International Criminal Tribunal for Rwanda: A review of its jurisprudence' by Simon M Meisenberg. The use, analysis and discussion of case law make these essays particularly valuable.

Alhagi Morang, Chernor Jalloh and David Kinnecome's 'Concurrent jurisdiction at the ICTR: Should the tribunal refer cases to Rwanda?' discusses the implications of Resolution 1503 of the United Nations Security Council, which urges the ICTR to formulate a detailed strategy '... to transfer cases involving immediate and lower-rank accused to competent national jurisdictions, as appropriate, including that of Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010'. What is particularly appreciated about this work is the authors' practical approach when looking at the realities of concurrent jurisdiction.

'The Rwanda Tribunal and genocide' by Lennart Aspegen and Jamie A Williamson gives a detailed and sometimes harrowing exposition of the Rwandan situation and explains the genocide in relation to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, and discusses the judicial findings of genocide. The importance of the ICTR's work is emphasised on page 221:

The ICTR provided the first ever judicial definition of the crime of genocide and succeeded in explaining in a judicial context why and how the atrocities occurred in Rwanda. The evidence presented during those early trials resolved one of the first crucial questions, whether genocide had been committed in Rwanda in 1994. Answered in the affirmative in the *Akayesu* case, all subsequent ICTR judgments have reached the same undeniable conclusion.

'Countdown to 2010: A critical overview of the completion strategy of the international criminal tribunal for Rwanda (ICTR)' by Jean-Pelé Fomété is a detailed and highly critical analysis of the proposed completion strategy and concludes in part '... that the completion strategy was largely imposed on the ICTR by the Security Council in order to expedite the closure of costly and somewhat unwieldy bureaucracy ...'. In a compilation that focuses in detail on the legal issues raised in international criminal law, it is important to realise the implications of establishing and running a tribunal for the communities involved. These include the economic impact of the tribunals on the cities that host

them and the possible economic problems that may occur once the work is completed. The article raises questions of cost, efficiency and effectiveness and questions the proposed completion strategy.

'Gender and sexual violence under the Rome Statute' by Fatou Bensouda investigates the development of gender crimes under the Nuremberg and Tokyo military tribunals, which largely ignored gender crimes, the ICTR and at how the International Criminal Tribunal for the former Yugoslavia (ICTY) in its case law influences and analyses sexual crimes in the Rome Statute.

Hassan B Jallow's contribution is 'Challenges of investigating and prosecuting international crimes'. The office of the Prosecutor comes under the spotlight and the practical problems faced by the prosecuting team in the Rwandan context are examined.

'Prohibition against subsequent prosecution: Periscoping the *non bis in idem* principle' by Segun Jegede looks at the principle of double jeopardy in English, Canadian, United States of America and, especially detailed, South African law before moving on to international law. International law is dealt with in much less detail, which is unfortunate as this issue could have been covered in more detail from that perspective.

'Revisiting the Abu Graibh prosecutions from the perspective of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)' by Geert-Jan Alexander Knoops analyses individual criminal responsibility for the treatment of prisoners and links this to the doctrine of superior responsibility. It is interesting to see here how lessons learnt in the ICTY and ICTR may be applied and carried through in the international criminal law system.

In 'International law, mercenary activities and conflict prevention in Africa' by Adama Dieng and Chile Eboe-Osuji, the OAU Convention for the Elimination of Mercenarism in Africa and the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries are discussed and the author argues cogently that the mercenary activities outlawed in the OAU and UN Conventions should be made crimes over which the International Criminal Court exercises jurisdiction.

Bahame Tom Nyanduga contributes an article entitled 'Addressing impunity: A challenge to the international criminal justice system with specific reference to Africa and the African human rights system'. The author argues that impunity in Africa has manifested itself politically and is recognised through its deeds and consequences, although there is no legal definition of the term. It consists of acts prohibited under international human rights instruments or violations of international humanitarian law. The author links impunity to an analysis of the Rome Statute and finds that criminal legislation, procedures and mechanisms for the administration of justice in African states require updating in order to implement the obligations assumed under the Rome Statute. However,

bilateral impunity agreements, although not discussed in any detail, are found to be a problem area in the conclusion. This article could have benefited from an in-depth discussion of these agreements, as well as concrete examples.

This book is factual and in the various essays sets out the present status of international criminal law. With most of the attention focused, rightly, on Africa and the Rwanda Tribunal, this compilation is a welcome contribution to the body of international criminal law and will further its development and debate in time to come.

### **J Quigley *The Genocide Convention: An international law analysis***

Ashgate (2006) 301 pages

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Generally, the term 'genocide' conjures up images of Adolf Hitler and the Nazi's, the Yugoslavia and Rwanda atrocities and the recent events in Darfur, Sudan. However, can the new methods of warfare, such as aerial bombings and nuclear weapons, constitute genocide? Is it possible to commit genocide by mistake? These are some of the questions that are tackled by John Quigley in his book, *The Genocide Convention: An international law analysis*. The work consists of 45 chapters, divided into nine parts. The chapters are concise and easy to understand. The first three parts are introductory, explaining how genocide came to be accepted as a legal norm, while the next four parts analyse the intent-element required for genocide. These deal with prosecutions at the domestic as well as at the international level, as well as with lawsuits in the World Court. Part eight examines lawsuits against states for genocide and asks whether states are able to commit a crime, while the final part deals with the question of the utility of genocide as a legal concept.

Part one, titled 'Outlawing genocide', consisting of three chapters, focuses on the origin of the crime of genocide, the drafting history of the Genocide Convention and the Genocide Convention in the criminal codes of various states. The author discusses how Raphael Lemkin's conception of genocide became that which is now known as the Genocide Convention. The author draws a distinction between genocide and crimes against humanity, such as persecution and extermination. In his analysis he notes that the Yugoslav and Rwandan Tribunals con-

victed perpetrators of both crimes against humanity and for genocide on a single act. In this way, he maintains, 'the tribunals have treated genocide and crimes against humanity as separate offences' (p 14).

The author notes that not all states that have codified the crime of genocide have used the same method of adoption as stipulated in article V of the Genocide Convention. On the one hand, he points out that some states have enacted a penalty for the crime and that they refer to article II as the definition of genocide. These are, for example, the United Kingdom and Ireland. On the other hand, he notes that some states have expanded the qualifying acts in their statutes. For example, Spain's statutory definition includes two acts not specified in article II: sexual assault on a member of the group, and forced removals of the group or of members.

The author further notes that a few states have added to the protected groups in their statutes. For example, Ethiopia added 'political' groups, providing 'whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group' (p 17), while France refers to 'the total or partial destruction of a national, ethnic, racial or religious group or of a group based on any other arbitrary criterion'. The French courts have yet to construe the term 'arbitrary criterion' (p 17). The author also analyses the definition of genocide for non-penal purposes, such as immigration and extradition.

Part two, titled 'Calling to account' and consisting of five chapters, examines the prosecutions of alleged genocide perpetrators under a quasi-genocide statute; without the aid of a genocide statute; under a true genocide statute; prosecution in international courts; and suing in the World Court. The author analyses the domestic laws of the states that have ratified the Convention and incorporated the genocide provision in their criminal codes and its application by domestic courts. The author also analyses state liability; whether a state may be sued in the World Court for its involvement in genocide.

Part three, consisting of four chapters and titled 'Genocide's legal environment', discusses the difficulties faced when it comes to the interpretation of the Genocide Convention. In chapter 9, 'Ex post facto genocide', the author looks at the difficulties of article V of the Genocide Convention, which requires states to enact necessary legislation and to provide for penalties. He notes that article V 'recognises that the Genocide Convention does not provide penalties, but this task falls to the states' (p 64). The expectation was that states would insert provisions on genocide into their penal codes, legislate a penalty and use these provisions to prosecute offenders. However, the author notes that '[n]ot all ratifying states have done so' (p 64). For example, Australia, after ratifying the Convention, did not enact a penal provision, and as a result the courts have decided that there can be no prosecution in Australia for genocide. New Zealand took the view that it did not need to enact a genocide crime as prosecution could be brought under



existing statutes on crimes against the person. The Philippines indicated that it did not intend future penal provisions on genocide to apply to acts committed prior to their enactment.

An important question raised by the author is whether it is possible for the UN Security Council to commit genocide. This is any interesting question, as the Security Council is mandated to deal with threats to, or breaches of, the international peace. How can it be involved in the commission of genocide? In addressing the issue, the author argues that, in its role of protecting international peace, the Security Council may undertake its own military actions. He argues that the role of the Security Council puts it in the position of being responsible for troops in the field and thus makes it, potentially, a perpetrator of a variety of war crimes, and even of genocide. Moreover, the Security Council has the power to take coercive action, short of the use of force, involving economic or diplomatic sanctions. He notes that this power also puts the Security Council in a position to affect the livelihood of a civilian population. The author gives the example of Iraq accusing the Security Council of genocide against its population for the economic sanctions the Security Council imposed on Iraq after the Persian Gulf War. Iraq viewed these sanctions to have caused thousands of foreseeable civilian deaths. It will be interesting to find out how the Security Council responds to this analysis.

Part four examines the requirement of intent for acts directed against particular members of a group. The author argues that, although the mass murders perpetrated in World War II inspired the Genocide Convention, article II does not require killings of large numbers. He contends that article II requires the killing of 'members' without specifying a minimum number. Therefore, in principle, the act could be directed at a single member. The author also inquires about the meaning of intent to destroy a group. He points out that article II does not define the term 'destroy' and suggests two possible ways of intending to destroy: an intent to injure, but short of killing; and an intent to destroy the group's social identity. The author concludes that the physical destruction of a group does not necessarily require the death of its members.

Part five, titled 'The victims of genocide', discusses which groups are protected by the Convention, and how the existence of such groups is determined. The author analyses the meaning of 'the whole or in part' in terms of article II.

Part six, titled 'The scale of genocide', examines the question whether genocide is present when acts are directed against a defined stratum of people within a victim group, where the actor identifies the stratum as critical to the group's existence. The author inquires whether genocide may be committed by an isolated actor whose acts against a victim are modest in scope, and who has little realistic possibility of destroying the relevant victim group. The author concludes that the article II definition is satisfied even if the individual in question does not realistically have

the capacity to carry out the mass killings. The author discusses political groups as a subgroup protected by the Genocide Convention, although article II does not include political groups as a group in its definition. He argues that the logic of finding genocidal intent in the targeting of such subgroups is stronger when a group holds a particular importance to a society, so that its elimination harms the group as a whole. In the case of political opponents, this logic holds.

Part seven, titled 'Techniques of genocide', examines genocidal intent in four situations: ethnic cleansing; destruction of human habitat; aerial bombardments and nuclear attack. Part eight, titled 'Genocide by a state', consists of eight chapters. This is a very interesting part of the book, because the author examines the question of genocide committed by a state. Is it possible for a state to commit a crime? The author argues that, as of 1948, 'there had been no analysis in international law of the acts of a state under the rubric "crime"' (p 232). He goes on to say that, whether a concept of 'state crime' is found in international law, article IX of the Genocide Convention of 1948 does not provide for penal responsibility. Analysing the plain meaning of article IX, the author contends that 'by referring to a state's responsibility "for genocide or for any of the other acts enumerated in article III"', the Convention makes it plain that a state may perpetrate genocide, including conspiracy, incitement, attempt, and complicity' (p 236). Therefore, the author's position is that 'one would not say that a state is "punishable" under article III. Rather, from the wording of article IX, one would say that a state is liable . . . for genocide' (p 236).

The final part, titled 'Why genocide', examines other routes to jurisdiction and notes that the Genocide Convention is not the only international instrument aimed at stopping atrocities. The author inquires whether other mechanisms are available in order to determine how critical a role the Genocide Convention plays. The author investigates whether genocide claims and prosecutions reduce the frequency of atrocities. He begins by examining the significance of action by the International Court of Justice (ICJ). The author points out that, if the ICJ orders a state to stop genocide, there is no guarantee that it will comply. He notes that the UN Security Council, as the enforcement mechanism for the judgments of the ICJ, may force a non-compliant defendant state to honour the ICJ's judgment, adding that the Security Council has hardly been effective in this task. The author does not make any suggestion as to the way in which the Security Council may be effective in this task. Despite its lack of effectiveness, the author notes that a favourable ICJ order is often viewed as significant by a plaintiff state.

This last section discusses the deterrent value of the crime of genocide as well. The author notes that the crime of genocide functions as a supplement to other internationally defined offences, those offences falling into the category of crimes against humanity. He concludes

that genocide holds the prospect, to a greater degree than crimes against humanity, of providing a legal avenue to stopping atrocities before they occur. However, the author believes that no one is able to prove the deterrent effect of genocide. He therefore concludes that '[d]espite its status as the oldest of the major human rights treaties, the Genocide Convention remains a work in progress' (p 284).

This book is practical and topical, as popular opinion is building a case for genocide taking place in Darfur, Sudan. It is definitely recommended for all those interested in the international law of genocide. This book may even be the leading text on the Genocide Convention. The author analyses every angle of the Genocide Convention, going beyond the Convention itself, and discusses genocide in customary international law.

It is difficult to criticise a well-written international law analysis of the Genocide Convention such as this. However, it may be criticised for failing to give background on the Yugoslavia and Rwanda atrocities before discussing the work of the Tribunals, in order to guide those who might not be familiar with such a background. Further, although Africa has a treaty criminalising sexual violence as genocide, namely, the Protocol to the African Charter on the Rights of Women in Africa, adopted in Maputo in July 2003, and which entered into force on 25 November 2005, the author fails to acknowledge this Protocol in his analysis. However, on the whole I believe that this book deserves to be on the shelves of every international lawyer. It deals with contemporary issues in the area of genocide law and is recommended reading for anyone who is keen to learn more about or to reflect on the law of genocide. The author uses authority extensively and hence the book is also a good resource for further research.

**R Murray *The role of national human rights institutions at the international and regional levels. The African experience***

Hart Publishing (2007) 137 pages

*Michelo Hansungule*

Professor of Human Rights Law, Centre for Human Rights, University of Pretoria, South Africa

Rachel Murray's book is probably the first of its kind solely to focus on national human rights institutions (NHRIs) in Africa. Previous works on the subject have generally looked at the NHRIs worldwide. In any case, there is a famine in Africa on works such as this on subjects that are practical to the African project. Murray's book comes in handy for the

'book-starved' African libraries, academic institutions, policy makers, civil society, victims of human rights abuses and perhaps also perpetrators of violations of human rights when they change positions and become victims seeking to vindicate their rights. Also, it is a handmaiden for 'Africanists' beyond the continent.

With 91 pages and, including annexures, bibliography and index, 137 pages, the book is not only handy but user-friendly. It is a small but rich book, easy to carry around and to use as reference material. People do not have much time to read lengthy material. Students, in particular, with a mountain of materials to scan through, easily find that they do not have much time for lengthy, technically intimidating material. This book is an excellent piece for the busy practitioner, students and bureaucrats who want to find what they want in an instant without having to scan through voluminous material.

The book is easy to read. This is a distinct advantage and also one of its main competitive characteristics. Murray's book is simple, friendly, practical and relevant. It is relevant because the subject it deals with is one that is relevant to ordinary men and women. Often, human rights, though *human*, have the tendency to sound pedantic and beyond the ordinary. This book is different. It is written in such a way that both the lay person and the most sophisticated professional will be able to follow. As indicated before, there is a list of important documents in the annexures. Some of the documents listed, such as the Paris Principles, are often hard to come by. Therefore, the book is also an invaluable source of key information on the subject and on human rights law in general.

In addition, Murray is an 'insider' in most of the issues about which she writes. For example, she regularly attends African Commission sessions, about which she has published academic works. Therefore, she writes with the advantage of an 'insider', even though she is an 'outsider'. At a judges' workshop in Kenya, this author was approached by a judge who was literally reproaching Murray for writing on African issues, particularly the African Charter on Human and Peoples' Rights, instead of Africans. She wondered whether Murray had the necessary sensitivity to write on African rights. The short answer of course is that when there is a gap, anyone who can must try to fill it. With this and her other works, Murray is fulfilling an important need.

However, just like every book, it has several flaws and inadequacies. The first of these is the title itself. 'The role of national human rights institutions at the international and regional levels' immediately suggests a very limited focus, which in fact treats the subject unfairly. The impression from this is that the book does not even deal with a quarter of the work NHRIs generally do, which is at national level. It is probably correct to say that NHRIs have no role at all either at international or regional levels, that is assuming that the two terms 'international' and 'regional' represent two distinct levels as is being suggested. Most of

the work of NHRIs is in fact national and this would appear to be in line with its original concept in the Paris Principles. Clearly, NHRIs have no business at international and regional forums. With obviously limited resources at their disposal, most of them would do well to spend these resources implementing local obligations by spreading the word of human rights locally and protecting victims. Fortunately, some of them, such as the South African Human Rights Commission, whose Chief Executive Officer (CEO) was reportedly among those Murray interviewed as part of the research, have already complained about the high cost of sending delegations to such meetings as the Human Rights Commission sessions. (This was stated by the CEO of the South African Human Rights Commission in a meeting at a workshop jointly organised between the Commission and the Human Rights Institute of South Africa (HURISA), held at the offices of the Commission on 26 November 2007.)

The title also boasts to provide 'the experience of Africa'. This is not entirely correct. It is most definitely not possible to come up with 'the experience of Africa' from an examination only of the international and regional roles of the NHRIs. Besides, the methodology used makes this claim impossible. Interviews with one or two Europeans and four or so mostly officers of NHRIs, though in different African countries, can hardly enable one to form a perspective from an 'African experience'. It is too much of an exaggeration to say 'an experience of Africa' with only a handful of respondents, however useful these may have been. The point is that Africa is a large continent. Often, experiences from one or two countries would be dangerous to replicate to others, let alone to call them 'the African experience'. The method was probably not wrong, but definitely not adequate. There is no indication that researchers tried to reach beneficiaries or communities to understand from them their views in relation to the subject being investigated. Besides officials, the author should have made an effort to at least reach beneficiaries.

Also, there are technical errors in parts of the book, some of which are not attributable to the author. For example, Appendix 11 on the Resolution on Granting of Observer Status to the National Human Rights Institutions in Africa, which appears on page 97, evokes one of the African Commission on Human and Peoples' Rights' typical flaws. On the African Commission website, there is an attempt to provide for 'observer status' for non-governmental organisations (NGOs) differently from 'affiliate status' (on the website wrongly spelt as 'afflate status'), which is reserved for the NHRIs. Therefore, while Murray is right in quoting this as 'Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa', the African Commission on the website provides it as 'Resolution on the Granting of Affiliate Status to National Human Rights Institutions in Africa' ([http://www.achpr.org/english/\\_infor/news\\_en.html](http://www.achpr.org/english/_infor/news_en.html)), which is technically dif-

ferent and could easily be confusing to practitioners, researchers and students. On page 126 of the bibliography, she cites the 'Kigali Declaration', without details, as such as the African Commission session at which the Declaration was adopted.

However, in spite of these and other flaws and errors, technical and substantive, the book remains an important contribution to the dissemination of critical knowledge in the field. Consisting of seven chapters, including a four-page introduction and a short background in which it deals with the independence era, the book goes on to provide the scope of the study. Chapter two deals with the difficult but critical issue of legitimacy of NHRI participation. In this chapter the author, basing her views on reasons advanced both by the United Nations and 'African regional bodies', claims that the common reason for the involvement of NHRIs at international and regional levels is basically two-fold. Its first role is to provide another way of ensuring states' compliance with their international obligations. Indeed, both the UN National Institutions Unit and the Office of the UN High Commissioner for Human Rights see these bodies as playing a leading role in this respect. The second role, as captured by the author, is for the bodies, through their involvement at these levels, to act as 'filters' for the international mechanisms by educating and providing information to individuals and groups who wish to use them. Reality, however, shows these to be nothing more than tall orders. Most of the NHRIs in Africa simply do not have the competence to play these roles, let alone to do so effectively. At the time of preparing the review, this author has been told by officials from two African NHRIs how, although they regularly attend the African Commission public sessions, they do not understand the principles and application of the African Charter or those of international human rights. Even though they may attend these sessions, most African NHRIs practically have no competence as suggested to assist states' compliance with their international obligations or to advise victims on how to use these systems to access the mechanisms. They cannot possibly play these roles when they themselves lack a basic understanding which is necessary for any kind of role-playing. Therefore, it is being 'too patronising' of the NHRIs to suggest that, just like NGOs, these bodies can be seen as 'experts' or bodies that provide legal expertise on human rights. The African Commission, for example, has been on record to complain about affiliated NHRIs' failure, just like state parties, to comply with their obligation to submit reports every two years to the Commission on their activities upon being granted the affiliate status.

Other important chapters include chapter 3 on 'the role of NHRIs in the United Nations' and inevitably their role at regional level which is dealt with in chapter 4. Chapter 5 deals with the important subject of state and non-state actors as well as their status in international law, where they can be viewed both as subjects and objects of international

law and, finally, as participants. The last substantive chapter — chapter 6 — tackles perhaps the most intractable question regarding the accountability of the NHRIs, which is dealt with in the most comprehensive way. However, the sources cited in trying to define accountability, particularly the elusive notions of good and bad governance, still leave the terminology unclear. Therefore, instead of dwelling only on this, Murray makes an effort to discuss some of the potential roles and responsibilities of NHRIs. As indicated, this is followed by appendices, bibliography and an index.

This is a book one must have on one's desk or bookshelf. It is a useful tool for activists and lobbyists of human rights, including NGOs, academics, NHRIs, government officials, international organisations, students and others.





AFRICAN HUMAN RIGHTS LAW JOURNAL  
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Position as at 31 July 2007

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 October 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/<br>Acceded                         | Ratified/<br>Acceded   | Ratified/<br>Acceded                                   | Ratified/<br>Acceded  | Ratified/<br>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*   | <b>09/06/06</b>  |
| 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   | 01/03/02   |   | 07/01/03   |
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\* Additional declaration under article 34(6)

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| Lesotho                       | 10/02/92                                     | 18/11/88   | 27/09/99   | 28/10/03  | 26/10/04   |
| Liberia                       | 04/08/82                                     | 01/10/71   |  |   |  |
| Libya                         | 19/07/86                                     | 25/04/81   | 23/09/00   | 19/11/03  | 23/05/04   |
| Madagascar                    | 09/03/92                                     |  | 30/03/05   |   |  |
| Malawi                        | 17/11/89                                     | 04/11/87   | 16/09/99   |   | 20/05/05   |
| Mali                          | 21/12/81                                     | 10/10/81   | 03/06/98   | 10/05/00  | 13/01/05   |
| Mauritania                    | 14/06/86                                     | 22/07/72   | 21/09/05   | 19/05/05  | 21/09/05   |
| Mauritius                     | 19/06/92                                     |  | 14/02/92   | 03/03/03  |  |
| Mozambique                    | 22/02/89                                     | 22/02/89   | 15/07/98   | 17/07/04  | 09/12/05   |
| Namibia                       | 30/07/92                                     |  | 23/07/04   |   | 11/08/04   |
| Niger                         | 15/07/86                                     | 16/09/71   | 11/12/99   | 17/05/04  |  |
| Nigeria                       | 22/06/83                                     | 23/05/86   | 23/07/01   | 20/05/04  | 16/12/04   |
| Rwanda                        | 15/07/83                                     | 19/11/79   | 11/05/01   | 05/05/03  | 25/96/04   |
| Sahrawi Arab Democratic Rep.  | 02/05/86                                     |  |  |   |  |
| São Tomé and Príncipe         | 23/05/86                                     |  |  |   |  |
| Senegal                       | 13/08/82                                     | 01/04/71   | 29/09/98   | 29/09/98  | 27/12/04   |
| Seychelles                    | 13/04/92                                     | 11/09/80   | 13/02/92   |   | 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  | <b>03/03/07</b>  |
| Togo                          | 05/11/82                                     | 10/04/70   | 05/05/98   | 23/06/03  | 12/10/05   |
| Tunisia                       | 16/03/83                                     | 17/11/89   |  |   |  |
| Uganda                        | 10/05/86                                     | 24/07/87   | 17/08/94   | 16/02/01  |  |
| Zambia                        | 10/01/84                                     | 30/07/73   |  |   | 02/05/06   |
| Zimbabwe                      | 30/05/86                                     | 28/09/85   | 19/01/95   |   |  |
| <b>TOTAL NUMBER OF STATES</b> | <b>53</b>                                    | <b>45</b>  | <b>41</b>  | <b>23</b>   | <b>21</b>  |

Ratifications after 31 July 2006 are indicated in bold