AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 8 No 1 2008

The financial assistance of the European Union
is gratefully acknowledged.

First published 2001

Mercury Crescent
Hillstar, Wetton 7780

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

CONTENTS

Recent publications

Editorial

This issue of the *Journal* appears against the background of xenophobic violence in South Africa. Previously a symbol of transcending race and racism, South Africa's reputation has now become seriously tainted. The recent wave of violent xenophobia is a contradiction of the ideals of pan-Africanism. It illustrates that African integration has been dominated by politicians and bureaucrats, with meaningful involvement and inclusion of ordinary Africans seriously lacking. These recent events demonstrate how far-fetched and premature discussions about a federal 'United States of Africa' are. Increasingly, it is acknowledged that the project of African integration needs to focus on more modest goals, such as the consolidation of existing regional economic communities and the full functionality of all AU institutions.

One of these institutions, vested with great expectations, is the African Court on Human and Peoples' Rights. However, following the entry into force of the Protocol establishing the Court, on 25 January 2004, these expectations have remained unfulfilled. After some delay, the AU Assembly elected the 11 judges constituting the Court. Inaugurated on 2 July 2006, the judges serve for six, four or two-year terms, as determined by the drawing of lots. The two-year terms of four judges (Judges Somba, from Burkina Faso; Akuffo, from Ghana; Ngoepe, from South Africa; and Kanyiehamba, from Uganda) are therefore coming to an end in July 2008.

In those two years, the accomplishment of the Court has been limited. While progress has been made towards establishing the seat of the Court in Arusha, Tanzania, the Court's Rules of Procedure remain a work in progress. No doubt, the lack of such a regulatory framework accounts for the fact that no cases have so far been submitted to the Court. Perhaps it is now time for lawyers, civil society organisations and affected individuals to submit appropriate cases to the Court, so as to force the Court out of its lethargy.

The terms of four members of the African Committee of Experts on the Rights of the Child also came to an end in July 2008. Still, this Committee has not examined any state report and has not dealt with communications pending before it.

Contributions in this issue of the *Journal* cover a wide range of themes, including topical issues such as South Africa's vote in the UN Security Council on Myanmar and the recent and upcoming decisions on life imprisonment in Uganda. While some articles focus on specific

countries (Nigeria, Eritrea, Rwanda), others have a broader continental focus.

Contributions for 'articles' and 'recent developments' are subjected to peer-review. The editors convey their thanks to the following independent reviewers, who so generously assisted in ensuring the quality of the *Journal*: Abiola Ayinla, Solomon Benatar, Danwood Chirwa, Solomon Dersso, Unity Dow, John Dugard, Ockert Dupper, Solomon Ebobrah, Zerisenay Habtezion, Kithure Kindiki, George Mukundi, Godfrey Musila, Tarisai Mutangi, Michelle Olivier, Oladejo Olowu, Albie Sachs, Ann Skelton, Julia Sloth-Nielsen, Karen Stefiszyn, Samuel Tindifa, Johan van der Vyver, Dirk van Zyl Smit and Stella Vettori.

THIS JOURNAL SHOULD BE CITED AS (2008) 8 *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.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Building on a global movement: Violence against women in the African context

*Fareda Banda**
Reader in the Laws of Africa, School of Oriental and African Studies, London, United Kingdom

Summary

This article celebrates the gains that have been made by women in the field of human rights as they pertain to issues of violence. It provides an overview of international and regional initiatives illustrated with reference to case law. The focus of the article is on provisions in the African Protocol on Women's Rights tackling violence. While acknowledging that normative recognition of rights is not by itself the panacea for the pervasive discrimination that affects women, the article argues that the almost universal recognition of violence against women as constituting a violation of their fundamental rights is cause for celebration, not least because it provides the framework for dealing with the problem and provides states with concrete goals.

1 Introduction

The international community has travelled a long way towards recognising violence against women as a violation of their human and fundamental rights. Although the issue had received sporadic attention over the years, it is true to say that many of the substantial legal gains came in the last decade of the twentieth century. The most recent instrument pertaining to the rights of women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[1] (African Women's Protocol), contains comprehensive provisions

* BL LLB (Zimbabwe), DPhil (Oxon); fb9@soas.ac.uk

1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, 2003 http://www.africa-union.org (accessed 31 January 2008).

on violence against women. Indeed, the African Women's Protocol came into force on 25 November 2005, which is also International Day for the Elimination of Violence against Women. This marks the start of the annual 16 days of activism against gender violence campaigns, observed in many countries.[2] This article focuses on the issue of violence against women through the prism of human rights.

While the international focus on violence against women has been welcomed in many circles, Kapur identifies some difficulties with the attention paid to this topic, including the fact that it reinforces the notion that women, especially those from the south, are 'weak and vulnerable and in need of rescue and protection'.[3] She further notes that the international community's coalescing around the issue of violence has led to a distortion of the 'women's rights project', with violence against women now being seen as the principal human rights violation experienced by women.[4] She notes that the difficulty with this approach is that[5]

> it deflects attention from the ways in which states are not implementing their obligations under a range of human rights documents, including CEDAW which, if implemented, could remove both structural and formal impediments that may contribute to women's experience of violence. The focus on violence against women has thus encouraged a focus on wrongs, rather than on rights and the facilitation of the promotion of these rights.

It is of course also worth acknowledging from the outset that the formal normative-based approach that I have chosen to take is not without its problems.[6] The adoption of human rights instruments is clearly not an end in itself, but the beginning. It goes without saying that rights without implementation and enforcement mechanisms are meaningless.[7] It is also important to acknowledge that one cannot look at a woman's right to be free from violence in isolation. The right to life, to bodily integrity and indeed to equality and to be free from discrimination on the grounds of sex must be seen as part of a mosaic of rights which include access to food, to adequate health

---

2 Sixteen Days of Violence Against Women is an international campaign lasting from 25 November to 10 December (International Human Rights Day). http://www.cwgl.rutgers.edu/16days/ about.html (accessed 31 January 2008).

3 R Kapur 'Feminist critiques of human rights' in R Smith & C van den Anker (eds) *The essentials of human rights* (2005) 132 133. See also R Kapur 'The tragedy of victimisation rhetoric: Resurrecting the 'native' subject in international post-colonial feminist legal rhetoric' (2002) 15 *Harvard Human Rights Journal* 1; S Engle Merry *Human rights and gender violence* (2006) 101-2.

4 Engle Merry (n 3 above) 81.

5 Kapur 'Feminist critiques of human rights' (n 3 above) 133.

6 D Kennedy 'The international human rights movement: Part of the problem?' (2002) 15 *Harvard Human Rights Journal* 101.

7 M Robinson 'Foreword' in D Buss & A Manji (eds) *International law: Modern feminist approaches* (2005); C Chinkin *et al* 'Feminist approaches to international law: Reflections from another century' in Buss & Manji 17 26 28.

care, to education and equal opportunities to access resources and to participate in decision-making processes. It is not by accident that the Millennium Development Goals list gender equality as a goal to be achieved along with seven others.[8] Nevertheless, it remains important to examine, and indeed to celebrate, normative gains made by women at the international level.[9]

Divided into three parts, the article starts with an examination of existing human rights norms which pertain to issues of violence against women which are reflected in, and indeed informed, the drafting process of the African Women's Protocol. This includes an examination of the provisions of the international bill of rights[10] and the general recommendations of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) focusing on CEDAW General Recommendation No 19 on violence against women.[11] Thereafter, the paper focuses on the United Nations (UN) General Assembly Declaration on the Elimination of Violence Against Women, 1993 (DEVAW).[12] Initiatives taken at international conferences, including Vienna,[13] Cairo[14] and Beijing,[15] are also considered in brief. In part two, I look at the regional, the African Charter on Human and Peoples' Rights (African Charter),[16] and sub-regional initiatives, including the Addendum to the Southern African Development Community (SADC)

8 Millennium Development Goals http://www.un.org/millenniumgoals/ (accessed 31 January 2008); CESCR General Comment No 16, art 3: The equal rights of men and women to the enjoyment of all economic, social and cultural rights (34th session, 2005) UN Doc E/C.12/2005/3 (2005). P Valley 'From dawn to dusk, the daily struggle of Africa's women' *The Independent*, London, 21 September 2006.

9 Chinkin *et al* (n 7 above) 44.

10 Universal Declaration on Human Rights, 1948 GA Res 217A (III) of 10 December 1948; International Covenant on Civil and Political Rights, 1966 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 1966 999 UNTS 3.

11 See CEDAW General Recommendation No 12 on Violence Against Women, UN Doc A/44/38; CEDAW General Recommendation No 19 on Violence Against Women, UN Doc A/47/38.

12 Declaration on the Elimination of Violence Against Women, GA Res 48/104, 20 December 1993.

13 World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, UN Doc A/CONF. 157/23.

14 International Conference on Population and Development, Cairo, UN Doc A/CONF 171/13, 18 October 1994.

15 Beijing Declaration and Platform for Action, 1995 reproduced in United Nations Beijing Declaration and Platform for Action with the Beijing + 5 Political Declaration and Outcome Document (2001).

16 African Charter on Human and Peoples' Rights (1981) 21 *International Legal Materials* 59; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 29.

Declaration on Gender and Development, 1998.[17] The examination of the provisions of the African Women's Protocol that was finally adopted includes an assessment of the feasibility of enforcement on a continent where gender discrimination continues to be one of the greatest challenges; this is part three. The conclusion follows.

2 Violence against women within the international human rights framework

The prohibition of discrimination contained in the international bill of rights ensures that all the rights contained therein are to be enjoyed without discrimination on the basis of sex.[18] This means that women are to be protected from torture and cruel, inhuman and degrading treatment.[19] Similarly, they have a right to life,[20] which in the context of the International Covenant on Economic, Social and Cultural Rights (CESCR) includes the right to food and an adequate standard of living, thus touching on issues of physical and economic violence against women.[21] Both the UN Convention on the Rights of the Child[22] (CRC) and the African Charter on the Rights and Welfare of the Child[23] (African Children's Charter) contain provisions prohibiting abuse,[24] and also

17 The Prevention and Eradication of Violence Against Women and Children, an Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State and Government. reproduced in (1999) 1 *SADC Gender Monitor* 37. SADC is in the process of finalising a draft Protocol on Gender and Development as amended by senior officials responsible for gender and women affairs, in Livingstone, Zambia, 13 December 2007. See in particular part 6 (arts 23-28) (on file with author).

18 Arts 2 & 7 Universal Declaration; arts 2(1), 3 & 26 CCPR; arts 2(2) & 3 CESCR.

19 Art 5 Universal Declaration; art 7 CCPR. See also Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85 and the Special Rapporteur on Violence Against Women who has noted that VAW can constitute torture. Report of the Special Rapporteur on Violence against Women, Ms R Coomeraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, E/CN 4/1996/53, 6 February 1996. See also C Mackinnon 'On torture: A feminist perspective on human rights' in K Mahoney & P Mahoney (eds) *Human rights in the 21st century: A global perspective* (1993) 21.

20 Art 3 Universal Declaration; art 6(1) CCPR.

21 Art 11(1) CESCR. See also CESCR General Comment No 12 on the Right to Adequate Food E/C12/1999/5; C Chinkin & S Wright 'The hunger trap: Women, food and self-determination' (1993) 4 *Michigan Journal of International Law* 262; D Brand 'The right to food' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 153.

22 Convention on the Rights of the Child, 1989 GA Res 44/25 of 20 November 1989.

23 African Charter on the Rights and Welfare of the Child, 1990 OAU Doc CAB/LEG/24.9/49.

24 Art 19 CRC; art 16 African Children's Charter.

guarantee the child's right to life[25] and to be free from discrimination on grounds including sex.[26]

Although violence against women was mentioned at the Mexico, Copenhagen and Nairobi women's conferences,[27] it was not included in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[28] The only provision that could be said to address violence against women directly is article 6 on trafficking and forced prostitution.[29] The CEDAW Committee has, through its general recommendations, done much to remedy the silences in CEDAW on the issue of violence against women.[30] General Recommendation No 19 seeks to provide a comprehensive understanding of issues pertaining to violence against women within CEDAW, providing:[31]

> The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

General Recommendation No 19 makes the link between violence against women and existing human rights norms. The rights covered include protection from torture, the right to life, the right to equal protection under the law, the right to equality in the family, the right to health and also just and favourable conditions of work.[32] Building on the case of *Velasquez*,[33] the responsibility of the state to prevent, investigate, punish acts of violence and to compensate those affected

---

25 Art 6 CRC; art 5(1) African Children's Charter.

26 Art 2 CRC, art 3 African Children's Charter.

27 H Charlesworth & C Chinkin 'Violence against women: A global issue' in J Stubbs (ed) *Women, male violence and the law* Institute of Criminology Monograph (1994) 13. It is worth noting that Nairobi did consider the issue in more detail than at previous conferences which had only touched on domestic violence.

28 Convention on the Elimination of All Forms of Discrimination Against Women, 1979 1249 UNTS 13.

29 However, see art 2(g) on states' obligation to 'repeal all national penal provisions which constitute discrimination against women', which arguably would include rape laws requiring the complainant to corroborate her testimony.

30 Starting with General Recommendation No 12 on violence against women UN Doc A/44/38 (1990).

31 General Recommendation No 19 para 6.

32 n 31 above, para 7.

33 *Velasquez Rodriguez v Honduras* 4 Inter Am Ct HR Ser C No 4 1988, reproduced in R Emerton *et al* (eds) *International women's rights cases* (2005) 91. See also the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994 (1994) 33 *International Legal Materials* 960 (Convention of Belem do Para).

is included.[34] In addition to giving examples of some of the types of violence that are proscribed under various provisions in CEDAW, General Recommendation No 19 also considers the reasons (legal, cultural, socio-economic) behind the perpetuation of violence against women.[35] The recommendations offered reflect a holistic understanding of the causes and consequences of violence against women, providing as they do for states to undertake to strengthen institutions, provide training for judicial, law enforcement and other public officials, run education campaigns in the media, challenge attitudes and stereotypes that lead to the perpetuation of violence against women, provide counselling to the victims of violence and provide compensation to them.[36] States are also enjoined to report[37] on what they have done to meet the obligations envisaged by General Recommendation No 19,[38] and indeed they are examined on the issue by the Committee.[39]

It was at the 1993 human rights conference in Vienna that the issue of violence received detailed international scrutiny. This was because women from all over the world identified violence within their own societies as one of the key impediments to the enjoyment by women of their rights.[40] It was at Vienna that states agreed to the formulation of the document that became the United Nations Assembly Declaration on the Elimination of Violence Against Women, 1993[41] (DEVAW). In addition to highlighting the impact of intersectional discrimination on certain groups,[42] DEVAW closely mirrors CEDAW General Recommendation No 19 in recognising that women experience violence in the family, the community and at the hands of the state.[43] DEVAW envisages the adoption of a multi-agency approach to tackling violence against women. States are to provide resources for staff training

34 CEDAW General Recommendation No 19 para 9.

35 n 34 above, paras 10-23.

36 n 34 above, para 24.

37 States are obliged to send the first post-ratification report a year after depositing instruments of ratification and thereafter every four years. See arts 18(1)(a) & (b) CEDAW.

38 Although general recommendations are non-binding, it is worth noting that the Indian Supreme Court has adopted the provisions of CEDAW General Recommendation No 19 in its decision in the case of *Vishaka v State of Rajasthan* 1997 (6) SCC 241, in which it noted that sexual harassment was a manifestation of violence against women and urged the government of Rajasthan to adopt CEDAW General Recommendation No 19 in drawing up guidelines to deal with violence against women; V Chaudhuri 'Sexual harassment' (1998) (5) *Indian Journal of Gender Studies* 115.

39 Engle Merry (n 3 above) 76.

40 H Charlesworth & C Chinkin *The boundaries of international law* (2000) 12-14.

41 Declaration on the Elimination of Violence against Women GA Res 48/104 of 20 December 1993.

42 n 41 above, Preamble para 7.

43 n 41 above, art 2. This is anticipated in CEDAW General Recommendation No 19 para 3.

as well as the provision of counselling services.[44] Moreover, there is recognition of the contributions that the non-government sector can make.[45] The UN is also enjoined to actively participate in the promotion and co-ordination of anti-violence strategies; as well as financing and facilitating international co-operation to tackle the issue.[46]

Once the international community had grasped the nettle, it pressed on, and in 1994, the UN appointed its first Special Rapporteur on Violence against Women, Radhika Coomeraswamy.[47] Reasons given for making the appointment included states' 'deep concern at the continuing endemic violence against women'.[48] Her findings on the causes and consequences of violence resonate with African women's experiences of violence. The UN Special Rapporteur on Violence against Women has produced a multitude of reports highlighting the fact that the issue affects women in the family,[49] in war situations,[50] and also that violence against women manifests itself in different ways the world over, hence her reports on cultural dimensions of violence[51] amongst many others. She has also made country visits and produced more than 20 reports.[52]

The appointment of the Special Rapporteur coincided with the International Conference on Population and Development (ICPD) held in Cairo in 1994. Cairo dealt with gendered dimensions of reproductive rights violations, including harmful traditional practices and the effects on women's health of violence and lack of access to adequate health care.[53] Focusing on issues of reproductive health, the Programme of Action made clear that violence against women hindered their right to health.[54] Specifically, issues such as forced abortion, sterilisation and

44 Art 4 DEVAW.

45 Arts 4(e) & 5(h) DEVAW.

46 Art 5 DEVAW.

47 United Nations Commission on Human Rights Resolution 1994/45 on the question of integrating the rights of women into human rights mechanisms of the UN and the elimination of violence against women, adopted on 4 March 1994.

48 As above.

49 Special Rapporteur on Violence Against Women in the Family E/CN 4/1996/53 and E/CN 4/1999/68.

50 Special Rapporteur on Violence Against Women Violence against women perpetrated or condoned by the state during times of armed conflict (1997-2000) E/CN 4/2001/73.

51 Special Rapporteur on Violence Against Women Cultural practices in the family that are violence towards women E/CN 4/2002/83.

52 See http://www2.ohchr.org/english/issues/women/rapporteur/visits.htm (accessed 31 January 2008).

53 See also World Health Organisation (WHO) *World Report on Violence and Health* (2002).

54 ICPD 1994 Principle 4.

harmful practices were identified as constituting a violation of women and children's rights.[55]

The gains made at Vienna and Cairo were reinforced in the Beijing Declaration and Platform for Action of 1995.[56] Violence against women was identified as one of the 12 critical areas of concern.[57] At Beijing it was recognised that women's lives were continuing to be blighted by violence. States were enjoined to act to prevent violence against women within their societies.[58] Again the different manifestations of violence were identified and it was reiterated that violence against women constituted a violation of their fundamental rights.[59] Interestingly, the Beijing+5 Outcome Document shows that much progress has been made in the global recognition of violence against women as violating their human rights.[60]

The coming into force of the Optional Protocol to CEDAW, 1999,[61] provided an avenue for individuals to bring individual complaints alleging a breach of CEDAW provisions to the Committee. For those states not opting out, it also provided for the Committee to invoke article 8, the inquiry procedure, to investigate reports of grave or systematic violations of rights. It is worth noting that one of the first cases dealt with by the Committee under the complaints provisions of the Optional Protocol to CEDAW relates to violence against women in the family.

In *AT v Hungary*,[62] a woman had been severely assaulted by her partner on many occasions. She had complained to the police and the courts. However, little concrete assistance had come of her many complaints. A complaint was made to the CEDAW Committee. The Committee decided that Hungary had violated articles 2(a), (b) and (e) as well as articles 5(a) and 16 of CEDAW. The Committee censured Hungary for not having provision in its law for restraining or protection orders. Moreover, it was censured for the absence of shelters to house Ms AT and her children. The existing shelters had failed to offer refuge to Ms AT because one of her children was disabled and the refuges could not cope with children with disabilities. The prioritisation by the civil courts of the abuser's

---

55 A Carbert *et al A handbook for advocacy in the African human rights system Advancing reproductive and sexual health* (2002).

56 Beijing Declaration and Platform for Action para 112.

57 n 56 above, para 44.

58 n 56 above, Strategic Objective D1.

59 n 56 above, Strategic Objective D2.

60 Beijing + 5 Outcome Document Reproduced in United Nations *Beijing to Beijing + 5: Review and appraisal of the implementation of the Beijing Platform for Action* (2001) 195. See section D para 13. However, para 14 identifies some of the obstacles that remain to be overcome.

61 Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, 1999 GA Res 54/4, 6 October 1999. B Sokhi-Bulley 'The Optional Protocol to CEDAW: First steps' (2006) 6 *Human Rights Law Review* 143.

62 *AT v Hungary* Communication 2/2003, views adopted on 26 January 2005, 32nd session.

property rights over the victim's right to be protected from violence came under criticism.[63] Echoing the recommendations found in its General Recommendation No 19 on Violence Against Women and DEVAW, the Committee made clear that to address the failings identified in the *AT* case would require the state to undertake a range of measures which included providing legal aid, giving Ms AT and her children a safe and secure home, ensuring that she received the requisite child support, as well as compensation for the harm that she had suffered. In addition to implementing a national policy on the prevention of violence within the family, officials, including judges and the police, should be given training on CEDAW and its Optional Protocol. Moreover, the state was to ensure the introduction of a specific law outlawing violence against women and to 'investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards'.[64]

The first inquiry undertaken by the CEDAW Committee was to Mexico to investigate reports of abduction, rape and murder of women, made by two non-governmental organisations (NGOs).[65] The NGOs alleged that more than 230 women had been killed near Ciudad Juarez and that little had been done to investigate their deaths and disappearances or indeed to bring the perpetrators to justice. Families of the victims had been kept in the dark. The Committee sent two of its members to investigate. In a long and comprehensive report, the Committee detailed the widespread violence against women and the fact that a culture of impunity appeared to have developed. The Committee produced a comprehensive list of recommendations for Mexico to implement. These included the timely investigation of crimes committed against women, the training of police and judges, ensuring that families were kept appraised of progress in investigations and that the law was enforced with punishments being meted out to the guilty and adequate remedies, including compensation for those who had experienced violations of their rights. The state was asked to report on progress in its next report under article 18 of CEDAW.

More recently, the UN has (re)turned its attention to specific forms of violence.[66] This can be seen by the adoption of the Palermo

---

63 Compare the South African case of *S v Baloyi* 2000 2 SA 425 which dealt, amongst other things, with the tension between an accused person's right under criminal law to be presumed innocent until conviction (proof beyond all reasonable doubt) and the right of a woman alleging violence to have an interdict preventing the continuation of violence granted to her under civil law (proof on a balance of probabilities).

64 *AT v Hungary* (n 62 above) paras II(v) & 11(vi).

65 CEDAW Committee 'Report on Mexico Produced by the Committee on the Elimination of all Forms of Discrimination Against Women under article 8 of the Optional Protocol to the Convention and Reply from the Government of Mexico' UN Doc CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.

66 Beijing Declaration and Platform for Action Strategic Objective D3 (on trafficking and prostitution).

Protocol,[67] prohibiting the trafficking of women and also providing for inter-state co-operation and the punishment of traffickers.[68]

Not to be outdone, regional and sub-regional bodies have also paid attention to the effects of violence on the ability of women to enjoy their rights. The next section looks at some of these initiatives.

3 Regional initiatives on violence against women

In line with the international bill of rights, the African Charter has provisions proscribing torture[69] and guaranteeing the right to life,[70] to health[71] and outlawing discrimination including that based on sex.[72] Article 18(3) of the African Charter provides, in part, that women are to be protected from 'every discrimination'. More recently the African Union (AU) has adopted the Solemn Declaration on Gender Equality in Africa which makes it clear that violence and abuse of girls and women, particularly in times of armed conflict, is proscribed.[73]

Sub-regionally, the SADC has an instrument specifically on violence against women.[74] This, the Addendum to the 1997 Declaration on Gender and Development, forms the basis of the provisions on violence against women found in the African Women's Protocol and thus deserves close attention.

4 The Southern African Development Community

Coming as it did after the Beijing Conference of 1995, the SADC Addendum on violence reflects many of the international initiatives on violence against women discussed above. The Preamble to the SADC Addendum notes that there has been an increase in violence against

---

67 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000 UN Doc GA Res 55/383, 15 November 2000.

68 UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002 UN Doc E/2002/68/Add 1.

69 Art 5 African Charter.

70 Art 4 African Charter.

71 Art 16 African Charter.

72 Art 2 African Charter.

73 Solemn Declaration on Gender Equality in Africa, Assembly/AU/Decl 12 & 13 (III), Assembly of Heads of State and Government 3rd ordinary session 6-8 July 2004, Addis Ababa.

74 Addendum (n 17 above). The Economic Community of West African States (ECOWAS) has a Declaration on the Fight against Trafficking in Persons, A/DC/12/12/01 25th ordinary session of the Authority of Heads of State and Government, Dakar, 20-21 December 2001. See also *Annexe a la Recommendation* 03/99/CM/UEMOA. *Plan d'action communitaire pour le renforcement du role de la femme dans l'UEMOA, 1.1 Santé,* http:/www.uemoa.int/actes/dec99/anex1_REC_03_99.htm (accessed 30 April 2008).

women,[75] and article 3 notes that the occurrence of violence against women and children is a reflection of 'unequal power relations between women and men', resulting in women experiencing domination and discrimination.[76] Having identified the main cause of the problem, the definition given of what constitutes violence is very broad and covers 'physical and sexual violence, as well as economic, psychological and emotional abuse'.[77] The addition of economic violence constitutes an advance on previous documents which have focused on physical, sexual and psychological violence. However, in keeping with DEVAW and, indeed, the Convention of Belem do Para, the Addendum locates violence in the family, community and also violence committed or condoned by agents of the state.[78] The examples of types of violence given are also varied and include femicide, sexual harassment and trafficking.[79]

Noting that existing measures have failed to protect women and children from violence, the Addendum divides its recommendations for remedying that situation into categories covering not only legal change, but also cultural change. It places on states the duty of providing the resources necessary to tackle the problem.[80]

Under the legal section it is anticipated that states will enact laws proscribing violence against women and will amend those that contain discriminatory provisions which either excuse or minimise violence against them. In keeping with these injunctions, some of the SADC states have introduced legislation proscribing violence against women.[81] Judicial intervention has also brought about changes not least in the area of sexual violence against women. The Zimbabwean case of *H v H*[82] made it clear that the concept of marital rape was recognised in Zimbabwean law, challenging the long-held legal and socio-cultural assumption that upon her marriage a woman is presumed to give consent to intercourse with her husband for the duration of the marriage.[83]

The section on social, economic, cultural and political changes enjoins states to 'introduce and support gender sensitisation and

---

75 See also 'Gender and development: A declaration of the Southern African Development Community, 1997' reproduced in (1999) 1 *SADC Gender Monitor* 34, art H(ix).

76 See also Engle Merry (n 3 above) 77.

77 Addendum to the SADC Declaration art 5.

78 n 77 above, arts 5(a)-(c).

79 As above.

80 CEDAW General Recommendation No 12.

81 Namibia Combating of Rape Act 8 of 2000, Combating of Domestic Violence Act 4 of 2003. However, little seems to have been done by the government by way of educating the population about the existence of the 2003 statute. See *Namibia Economist* 'Combating of Domestic Violence Act enforced' http://www.economist.com.na/2004/6aug/08-06-18.htm; South Africa Domestic Violence Act 116 of 1998.

82 *H v H* 1999 (2) ZLR 358.

83 See also Namibia Combating of Rape Act 2000 (n 81 above), sec 2(3).

public awareness programmes'[84] as well as encouraging the media to avoid stereotyping women.[85] Related to this is that states undertake to eradicate those elements of traditional practice and norms that lead to the perpetuation of violence against women.[86] It is important that the Addendum recognises that not all aspects of tradition and religious practice are harmful or prejudicial to women. This opens up the possibility of working with or through religion and 'culture' or tradition to tackle discriminatory practices which are used to justify or which exacerbate violence against women.

The SADC Addendum echoes article 5 of DEVAW in that it anticipates the adoption of policies, programmes and mechanisms within the region to monitor violence against women and to ensure that the Addendum's recommendations are followed.[87] Although it has yet to come to pass, the Addendum urges states to give 'urgent consideration ... to the adoption of legally binding SADC Instruments on Preventing Violence against Women and Children'.[88] Perhaps it is because of this as yet unfulfilled promise that the SADC states were so influential in the drafting of the violence provisions in the African Women's Protocol. It is to this that the article now turns.

5 The African Women's Protocol

5.1 Provisions on violence in the final version of the African Women's Protocol

The significance of violence against women is highlighted in the Preamble which expresses concern that, despite the ratification by states of the African Charter and other human rights instruments, 'women in Africa still continue to be victims of discrimination and harmful practices'. Article 1 of the Women's Protocol defines violence against women as including:

> [a]ll acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or of war.

The definition builds on those found in existing instruments, not least DEVAW and the SADC Addendum. In common with CEDAW General Recommendation No 19, the Women's Protocol reflects an understanding of gender (social and cultural construction of the roles of men and

---

84 n 77 above, art 14. See also art 20 on the training of officials and service providers.

85 n 77 above, art 15.

86 n 77 above, art 13.

87 n 77 above, art 25.

88 n 77 above, art 26.

women in society) and how it impacts upon justifications often given for violence against women, and also the reasons why it is sometimes difficult to change behaviour.[89] This is clearly seen in article 2 which, like CEDAW, lists some of the state's obligations in seeking to eliminate discrimination against women and includes the duty to modify[90]

> social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

It is significant that violence against women is recognised as an affront to their dignity, hence the injunction in article 3 that states have a duty to 'ensure the protection of every woman's right to respect for her dignity',[91] which includes the 'protection of women from all forms of violence, particularly sexual and verbal violence'.[92]

Although provisions on violence against women are found throughout the African Women's Protocol, they are concentrated in article 4 entitled 'right to life, integrity and security of the person'. Article 4(1) starts by reiterating the core human rights to life and to be free from degrading, inhuman punishment and treatment, while article 4(2) contains an exhaustive list of state obligations. These reflect those found in the instruments discussed in part one of this article and include the state's duty both to enact and also to enforce laws prohibiting all forms of violence against women.[93] Crucially, it is provided that violence is proscribed 'whether the violence takes place in private or public'. This suggests that forced sex, including that occurring between spouses, is proscribed, thus by implication requiring ratifying states that have not already done so to introduce the crime of marital rape into their national laws. Although those against recognising marital rape often argue that it is difficult for law to regulate the privacy of the marital unit,[94] it is hoped that states will ensure that those women who approach law enforcement agencies for assistance will receive help and support, not derision and condemnation.

Moreover, it needs to be emphasised that all forced sex is prohibited. The 'moral character' of the victim or indeed what she was wearing or where she was when she was raped or sexually abused should not

---

89 CEDAW General Recommendation No 19 para 11.

90 Art 2(2) African Women's Protocol. See also arts 4(2)(d), (f) & 5(a). See also CEDAW General Recommendation No 19 para 11.

91 Art 3(4) African Women's Protocol.

92 As above.

93 Art 4(2)(a) African Women's Protocol.

94 See discussion in F Banda *Women, law and human rights: An African perspective* (2005) 172-176.

be a consideration in deciding whether to prosecute an accused.[95] Procedural laws may need to be changed and states should consider the introduction of evidence from professionals acting as expert witnesses and testifying on the different effects of rape on women. Furthermore, it is worth noting that the understanding of rape should not be limited to stranger rape, thus ignoring what is sometimes termed 'date rape'. States should ensure that their definitions of rape do not discriminate against a victim who has not 'actively resisted' the rape or on stereotypical views of what constitutes an adequate or 'proper' response to rape, for as noted in the European case of *MC v Bulgaria:* [96]

> Any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member states' positive obligations under articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

The African Women's Protocol recognises that key to the enjoyment of rights is the need for an adequate infrastructure to deal with claims of violence. The first requirement therefore is that violence is recognised as a violation of human rights. Next, it requires that there be adequate administrative, social and economic measures to prevent, punish and eradicate all forms of violence against women.[97] Moreover, the state needs to punish perpetrators of violence and also provide rehabilitation to victims[98] and facilitate the provision of reparations if necessary.[99] Recognising the need for a multi-pronged approach, the Women's Protocol provides in article 8 for the state to provide access to justice by providing legal aid and training judges and providing information. The duty of the state to provide adequate remedies is reinforced in article 25 of the Women's Protocol.

The recommendations made in both the *Fernandez* and *AT* cases offer clear pointers to African states about what they will need to do to ensure that the African Women's Protocol provisions proscribing

---

95 International Conference on the Great Lakes Region Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, 30 November 2006 http://www.icglr.org/ common/docs/docs_repository/protsexualviolence.pdf (accessed 31 January 2008).

96 *MC v Bulgaria* ECHR (Application 39272/98) Judgment, Strasbourg, 4 December 2003, para 166.

97 Art 4(2)(b) African Women's Protocol.

98 Art 4(2)(e) African Women's Protocol.

99 Art 4(2)(f) African Women's Protocol.

violence against women are enforced.[100] The problem of violence against women requires that states go beyond the legal to take on responsibility for the provision of alternative housing, the guarantee of support to victims and their children as well as effective sanctions and compensation being offered. This requires adequate resource and budgetary provision.[101] For a continent strapped for resources, this constitutes a tall order. It may require a 'joined up' reading and interpretation of the African Women's Protocol so that the provisions on the state minimising defence spending in order to spend more on social development[102] can be used to prioritise spending on health, education and initiatives to tackle violence against women, thus moving resources from a negative form of violence (war) to violence prevention in the family and community.

Specific types of violence covered in the African Women's Protocol will now be considered.

5.2 Trafficking

Reflecting the renewed interest in trafficking[103] is article 4(2)(g), which requires the state to prevent and condemn the practice while prosecuting those involved in trafficking and offering assistance and protection to those most at risk. Although often associated with the sex trade, much of the trafficking that takes place in parts of Africa, especially West Africa, is linked to trafficking of children for labour.[104] Girl children are trafficked for domestic service.[105] In addition to being a violation of children's rights, the trafficking issue may also highlight the problem of domestic and other migrant workers in general and thus the need for African states to ratify the Migrant Workers Convention, 1990.[106] Although there are protocols on how to deal with trafficked people, much can be learnt from the ECOWAS Declaration on Trafficking, 2001, which anticipates inter-state co-operation to tackle the practice, includ-

---

100 South African courts have set an admirable precedent in dealing with cases of gender-based violence. See *S v Baloyi (Minister of Justice & Another Intervening)* 2000 2 SA 425 (CC); 2000 1 BCLR 86 (CC); *Carmichele v Minister of Safety & Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); *Omar v Government of the Republic of South Africa & Others* CCT 47/04; *Kern v Minister of Safety and Security* CCT 52/04.

101 Art 4(2)(i) African Women's Protocol.

102 Art 10(3) African Women's Protocol.

103 See eg R Masika *Gender, trafficking and slavery* (2002).

104 Compare art 13(g) African Women's Protocol.

105 Human Rights Watch *Borderline slavery: Child trafficking in Togo* (2003); 'Nigeria: Domestic workers or modern day slaves?' http://www.pambazuka.org/en/category/wgender/37175 (accessed 18 September 2006).

106 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families GA Res 45/158 of 18 December 1990. See Chinkin *et al* (n 7 above) 30-31; B Ehrenreich & A Hochschild *Global woman: Nannies, maids and sex workers in the new economy* (2003).

ing the setting up of specialist trafficking units, as well as education, together with punishment of the traffickers. It is worth noting that measures should also include the provision of counselling and support services for the victims of trafficking. The victims of trafficking should not be prosecuted or punished for immigration control violations because they did not enter the country voluntarily but under duress.[107]

5.3 Harmful practices

It is true to say that harmful practices receive the most attention in the African Women's Protocol.[108] They are defined thus:[109]

> 'Harmful practices' means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.

Interestingly, this definition identifies many of the consequences of violence listed in CEDAW General Recommendation No 19.[110] Article 5 of the Women's Protocol focuses on the elimination of harmful practices, noting that states have an obligation to take all 'necessary legislative and other measures to eliminate such practices'.[111]This is an area in which African states have already acted, with many having enacted legislation to prevent harmful practices such as female genital cutting. (FGC).[112] The question becomes, is law by itself enough? Indeed, is law an effective tool to deal with what is a cultural practice?[113] Much time and thought has gone into addressing these questions, with the result that the common consensus is that states should adopt a multi-pronged approach which uses law as well as education as a preventative measure and rehabilitation for those affected. These should be provided by the state.[114]

Article 5 requires states not only to outlaw harmful practices, but also to educate the public about the practice, to set up outreach programmes, to rehabilitate victims and to protect women and girls at risk

---

107 UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002, UN Doc E/2002/68/Add 1.

108 See Preamble, arts 2(1)(b) & 2(2) African Women's Protocol.

109 Preamble, art 1(g) African Women's Protocol.

110 CEDAW General Recommendation No 19 para 11.

111 Art 5 African Women's Protocol.

112 The term 'female genital mutilation' is used in the Protocol. A Rahman & N Toubia *Female genital mutilation: A guide to laws and practices* (2000); Centre for Reproductive Rights *Female genital mutilation: A matter of human rights* (2003). See also Cairo Declaration for the Elimination of Female Genital Mutilation, 2003 http://www.stopfgm.org/stopfgm.doc/EN/216.rtf (accessed 31 January 2008).

113 C Momoh 'FGM and issues of gender and human rights of women' in C Momoh (ed) *Female genital mutilation* (2005) 13.

114 CEDAW General Recommendation No 14 on Female Circumcision, UN Doc A/45/38 (1990); CEDAW General Recommendation No 19 on Violence against Women; CEDAW General Recommendation No 24 on Health, UN Doc A/54/38 (2003). See also art 24(3) CRC and art 21(1)(b) African Children's Charter.

of being subjected to said practices. Significantly, the Women's Protocol provides that it does not matter if female genital cutting is taking place within a medical establishment; the state still has an obligation to eradicate it. This is an important innovation as it deals with the argument that female genital cutting is only a problem if performed under unsafe or unsanitary conditions. The drafting in article 5 highlights the fact that the practice falls squarely within the parameters of gender-based violence and cannot be tolerated whatever the surroundings in which it is perpetrated.

Given that harmful practices, especially FGC and early marriage, affect young girls disproportionately, it will be important for state parties to take measures to mitigate the vulnerability and powerlessness of young girls which leaves them open to being cut. This may include educating teachers to alert officials, mediators and educators to talk to family and community members about why these practices are harmful. It may also entail the provision of psychological counselling and medical assistance to those who are already affected.[115]

5.4 Family

It is in the home and within the confines of the family that women are most likely to experience violence against them.[116] The effects of violence against women in the family are manifold. The economic vulnerability of women and children is compounded by their lack of voice and general powerlessness which leaves them open to experiencing abuse and the violation of their rights.[117] It is for this reason that violence needs to be taken seriously.[118] This will require states to train law officials to deal sensitively with victims of violence. It will also require states to put into place measures to deal with cases of violence against women which will need to include protection orders or interdicts prohibiting the violator from approaching or violating the woman again, fast-tracking legal services, instituting interim measures to ensure that violence ceases while a full hearing is organised, counselling and rehabilitation services, refuges if necessary and if appropriate, as well as providing financial support for the woman and any children that she might have.

---

115 United Nations General Assembly Traditional or Customary Practices Affecting the Health of Women and Girls, Report of the Secretary-General A/58/169, 18 July 2003.

116 L Mcloskey *et al* 'Gender inequality and intimate partner violence among women in Moshi, Tanzania' (2005) 31 *International Family Planning Perspectives* 124.

117 See eg Sachs J in *S v Baloyi* 2000 2 SA 425 paras 11 & 12. See also CEDAW General Recommendation No 19 para 23.

118 CEDAW General Recommendation No 21 para 40.

Polygyny has been held up as constituting violence (emotional and psychological) against women.[119] The polygyny issue is somewhat tricky, for it has been argued that women's economic weakness makes marriage which may entail polygyny a necessary 'evil'.[120] On the other side of the fence are those who argue that polygyny increases the likelihood of women (and sometimes their children) experiencing economic, psychological and physical violence.[121] The final version of the African Women's Protocol does not commit to either side providing, as it does, that: 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected'.[122]

Other forms of family-related violence outlawed in the African Women's Protocol include early marriage and forced marriage.[123] Also proscribed is the practice of subjecting widows to degrading and inhuman treatment on the deaths of their husbands.[124] The abuse of widows is well documented.[125] Also proscribed in the Women's Protocol is property-grabbing, which often leads to wives and female children being deprived of their property and indeed being evicted from their homes.[126] Moreover, it is also provided that widows have the right to remarry if they wish and also that they should be allowed to choose who they marry.[127] This is an important provision which outlaws, by implication, levirate unions, sometimes known as 'inheritance marriages' and, indeed, any forced marriage. In light of the HIV/AIDS crisis on the continent, I would argue that a widow's right to choose who she remarries should be linked to article 14(1)(e) on a woman's right to be informed '... on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices'.[128]

---

119 L Tibatemwa-Ekirikubinza 'Family relations and the law in Uganda: Insights into current issues?' in A Bainham (ed) *International survey of family law 2002* (2002) 437.

120 F Kaganas & C Murray 'Law, women and the family in the new South Africa' (1991) *Acta Juridica* 116.

121 W Wabwile *Child support rights in Kenya and the United Nations* (2001) 267 fn 2.

122 Art 6(c) African Women's Protocol.

123 Arts 6(a) & (b) African Women's Protocol.

124 Art 20(a) African Women's Protocol.

125 U Ewelukwa 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 424. There are other 'traditions' which constitute degrading treatment. See also the Nigerian case of *Muojekwo & Others v Ejikeme & Others* [2000] 5 NWLR 402.

126 M Owen *A world of widows* (1996).

127 Art 20(c) African Women's Protocol.

128 See also E Durojaye 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 188.

5.5 The right to bodily integrity and violence against women

Given the sensitivities surrounding reproductive rights,[129] it is perhaps not surprising that article 14 on reproductive rights, and especially the limited right to abortion found in article 14(2)(c) has met with many objections.[130] While abortion is probably the most controversial issue in reproductive health, it is worth remembering that banning or denying women the right to abortion may lead to their having to seek the services of untrained people who may cause much physical and ultimately psychological damage by their incompetence. It is also worth remembering that abortion is a sex-specific service, meaning that inadequate or poor provision impacts solely on women to their detriment.

5.6 Violence against women and children in the work place and in school

Recognising that girl children are sometimes sexually harassed and indeed abused in schools is article 12(1)(c), which provides that states have a duty to 'protect ... the girl child from all forms of abuse, including sexual harassment in schools and other educational institutions'. The confronting of this issue, which acts as a major barrier to the enjoyment by female children of their right to education, is important.[131] Research done in South Africa yielded the following data:[132]

> Our results show that younger women were significantly more likely to report rape than older women. The largest group of perpetrators (33%) were school teachers. Our findings suggest that child rape is becoming more common, and lend support to qualitative research of sexual harassment of female students in schools in Africa.

Tackling the problem will require states to take action against teachers and others in authority who abuse their position by forcing themselves on their pupils.[133] Equally important is the injunction that states are under an obligation to provide counselling and rehabilitation services to victims of abuse and sexual harassment.[134] This should include the provision of (alternative) educational opportunities for those forced to leave school prematurely as a result of pregnancy or harassment or abuse.[135]

Although African women have a low rate of participation in the formal labour market, those that do work outside the home are sometimes

---

129 See eg Centre for Reproductive Rights *ICPD + 5 gains for women despite opposition* (2000).

130 Banda (n 94 above) 186.

131 See eg the South African report to CEDAW Initial Report of States Parties: South Africa (1998) CEDAW/C/ZAF/1 119; World Bank *Education and HIV/AIDS*: *A window of hope* (2002) 22 23.

132 R Jewkes *et al* 'Rape of girls in South Africa' (2002) 359 *The Lancet* 319.

133 Provided for in art 12(1)(c).

134 Art 12(1)(d) African Women's Protocol.

135 Art 12(2)(c) African Women's Protocol. See also art 10(f) CEDAW.

subjected to unwanted sexual advances. This constitutes harassment and is prohibited behaviour under the African Women's Protocol.[136] However, few states have laws explicitly proscribing sexual harassment in the workplace. The enactment of legislation will have to go hand in hand with workplace education tied up with enforcement to ensure that the message is received that sexual and other forms of harassment in the work place constitute a form of violence against women.[137]

Interestingly, article 13 on economic, social and cultural rights also requires states to 'take effective legislative and administrative measures to prevent the exploitation and misuse of women in advertising practices'.[138] This is an important innovation which addresses a long-standing feminist *bête noire*, namely the sexist portrayal of women in the media and in advertising which constitutes stereotyping of women.[139] This moves the debate on from seeing it as an issue of free speech to declaring it a form of gender-based violence grounded in women's inequality.

5.7 Women in armed conflict

Although there have been many critiques of the inadequacy of international humanitarian law to deal with violations perpetrated against women in armed conflict,[140] this is the area in which case law has grown exponentially.[141] With this in mind, the African Women's Protocol has a specific article on the protection of women in armed conflict.[142] It requires state parties to undertake to abide by the rules of international humanitarian law, particularly as they pertain to women.[143]

Building on the International Criminal Tribunal for Rwanda (ICTR) Statute,[144] the International Criminal Tribunal for Yugoslavia, (ICTY)

---

136 Art 13(c) African Women's Protocol. The Indian Supreme Court has ruled that sexual harassment constitutes a violation of the right to equality and also the right to life because a woman who is harassed may not be able to continue to work to earn a livelihood. *Apparel Export Promotion Council v Chopra* 1999 (1) SCC 759.

137 CEDAW General Recommendation No 19 para 18.

138 Art 13(m) African Women's Protocol.

139 See CEDAW Reporting Guidelines in United Nations, IWRAW, Commonwealth Secretariat *Assessing the status of women: A guide to reporting under the Convention on the Elimination of All Forms of Discrimination Against Women* (2000). See questions to art 5, questions 5 and 21.

140 C de Than 'Violence against women in war time' in Smith & Van den Anker (n 3 above) 360 362. See also J Gardham & H Charlesworth 'Protection of women in armed conflict' (2000) 22 *Human Rights Quarterly* 148.

141 Human Rights Watch *Genocide, war crimes, and crimes against humanity: Topical digest of the case law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia* (2004). Chinkin *et al* (n 7 above) 23; Emerton *et al* (n 33 above) xlii. However, see V Nikolic-Ristanovic 'Sexual violence, international law and restorative justice' in Buss & Manji (n 7 above) 273.

142 Art 11 African Women's Protocol.

143 N Dyani 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' (2006) 6 *African Human Rights Law Journal* 166.

144 Arts 3 & 4 ICTR Statute.

Statute[145] and the Rome Statute,[146] all of which include rape as a crime against humanity, as well as the *Akayesu* decision,[147] in which the ICTR found that rape could constitute genocide, the African Women's Protocol makes it clear that:[148]

> States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

The high incidence of rape and sexual violence against women in refugee camps and in times of war[149] on the continent indicates that states in conflict or with a refugee population in their midst will have to make tackling violence against women a priority. This is especially so when young girls are involved. The requirement in article 11(4) that children under 18 should not be recruited into combat is particularly important for female children, who are often treated as sex slaves or who become the 'wives' of soldiers or commanders, cooking for them and being forced into sexual relationships with the attendant risks of disease and pregnancy.[150]

Again, it is important to stress that states need to ensure that there are gender sensitive procedural guidelines in place. There is much to be learned from the work of the international tribunals, of whose work De Than notes:[151]

> One strength of ICTY, ICTR and now the ICC has been the extent to which their rules of procedure and evidence in the context of sexual violence cases far outstrip those of most domestic legal systems, including victim anonymity, limitations on consent defences and victims and witness units. Many of the factors that result in the extraordinarily high acquittal rate in national courts are deemed to be simply irrelevant or inadmissible, such as spurious consent defences and cross-examination of the victim as to her previous sexual experiences.

The importance of women's participation in decision making and in the post-conflict reconstruction of their societies is acknowledged in

---

145 Art 5 ICTY Statute.

146 Rome Statute for the International Criminal Court, 1998 UN Doc A/CONF 183/9 (17 July 1998) arts 7 & 8.

147 *In the Case of Akayesu* ICTR-96-4-T.

148 Art 11(3) African Women's Protocol.

149 Human Rights Watch 'Struggling to survive: Barriers to justice for rape victims in Rwanda' (2004) 16 *Human Rights Watch*; Human Rights Watch 'Seeking justice: The prosecution of sexual violence in the Congo war' (2005) 17 *Human Rights Watch*.

150 Optional Protocol to the Children's Rights Convention on the Involvement of Children in Armed Conflict GA Res A/RES/54/263 of 25 May 2000; art 38 CRC. See also art 22 of the African Children's Charter; Amnesty International 'Sierra Leone: Childhood a casualty of conflict' AI Index AFR 5/069/2000; Children and Armed Conflict, Report of the Secretary-General, 10 November 2003 UN Doc A/58/546-S/2003/1053. See also 'Coalition to stop the use of child soldiers' http://www.child-soldiers.org (accessed 31 January 2008).

151 De Than (n 140 above) 362. See also Great Lakes Protocol (n 95 above).

the Preamble, which refers to Security Council Resolution 1325 as well as in article 10(2).[152]

5.8 Violence and intersectionality

The African Women's Protocol is alive to the fact that some women may experience multiple and intersecting forms of discrimination.[153] In outlawing violence against the elderly,[154] disabled women[155] and women in distress,[156] the Women's Protocol is reminiscent of both the Preamble to DEVAW and article 9 of the Convention of Belem do Para, which provides:

> With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom.

It is positive that the African Women's Protocol recognises the fact that women are not a homogeneous group. By making separate provision for the three groups, generally classified as 'vulnerable', there is a recognition that women have different needs.

6 Conclusion

It is clear from the above general overview of the development of the prohibition of violence against women that the issue of violence against women has been recognised as important and worth normative attention the world over. The African Women's Protocol reflects many of the international gains made in the field of women's rights, and in particular issues pertaining to violence, and is to be welcomed. All that remains is for it to be enforced.

---

152 Security Council Resolution 1325 on Women, Peace and Security (31 October 2000). See Message of the Secretary-General of the United Nations on International Women's Day 8 March 2006 http://www.un.org/events/women/iwd/2006/message.html (accessed 31 January 2008). See also Report of the Secretary-General on Equal Participation of Women and Men in Decision-Making Processes at All Levels, December 2005 E/CN.6/2006/13.

153 See also Committee on the Elimination of Racial Discrimination General Comment No 25 on Gender-Related Dimensions of Racial Discrimination (20 March 2000) UN Doc A/55/18 Annex V 152 (2000).

154 Art 22(b) African Women's Protocol.

155 Art 23(b) African Women's Protocol. 'Sexual abuse of women with disabilities' *Disability Update* 28 August to 5 September 2006 http://www.kubatana.net (accessed 31 January 2008).

156 Art 24 African Women's Protocol.

ARICAN HUMAN RIGHTS LAW JOURNAL

Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote

*Dire Tladi**
Principal State Law Advisor for International Law, South African Department of Foreign Affairs, Pretoria, South Africa

Summary

Much has been made about the positions adopted by South Africa during its non-permanent tenure on the United Nations Security Council. In particular, much criticism has attached to the position adopted by South Africa with regard to a resolution introduced in the Council relating to human rights violations taking place in Myanmar. South Africa voted against the resolution on the grounds that the situation in Myanmar did not amount to a threat to international peace and security. This position, which relies on the text of article 39 of the UN Charter, has been criticised as representing an unduly restrictive and legalistic (or positivistic) approach. The essence of the critique is that human rights violations per se *should be seen as constituting a threat to international peace and security. While undoubtedly the position adopted by South Africa relies on the text of the UN Charter, the question posed by this article is whether this approach is necessarily a positivistic approach. This article does so by reflecting on the limits of the powers of the Security Council. It suggests that understanding the limits of the power of the Security Council and, in*

* BLC LLB (Pretoria), LLM (Connecticut), PhD (Erasmus, Rotterdam); tladid@foreign.gov.za. This article was inspired by sometimes heated debates between me and my colleagues, André Stemmet and JoAnn Schneeberger. I also want to express my thanks to Prof John Dugard, whose comments on the paper assisted me significantly. Needless to say, I take full responsibility for the views expressed in the paper. My views do not necessarily reflect the views of the Department of Foreign Affairs or the government of the Republic of South Africa.

particular, the rationale for the limits of the power of the Security Council, is central to determining whether the position is indeed excessively legalistic. Finally, the views contained here are inspired by the need to develop the rule of law as well as the coherence of the international legal system.

1 Statement of the issues

In January 2007, amid much excitement and contemplation, South Africa took up its seat as a non-permanent member of the United Nations (UN) Security Council. The event was widely hailed as a momentous achievement for South Africa, signifying South Africa's newly-assumed leadership position in international relations and human rights. The period leading up to South Africa's assumption of the non-permanent seat was characterised by a strong sense of goodwill and co-operation between the government, notably the Department of Foreign Affairs, the media and academia. Indeed, in keeping with this spirit of togetherness the Department of Foreign Affairs, in particular the UN Chief Directorate and the Policy and Research Unit of the Department, organised a workshop aimed at fostering engagement between academics and the government, on the approach to be adopted during our Security Council tenure.

At the time of writing this short article (November 2007), the picture is less rosy. The South African government has been criticised severely for the position it adopted in the Security Council by the media,[1] academics[2] and prominent South Africans, such as Archbishop Desmond Tutu.[3] In the main the criticisms have a common theme, namely, that South Africa has betrayed its human rights principles by voting against, for example, the UN Security Council Resolution on Myanmar. To be true, South Africa was not the only country to vote against the Resolution. Moreover, South Africa's vote was insignificant in comparison to those of China and Russia, both of which have veto power in the Security Council. South Africa's vote, however, was met with greater criticism because of its recent history as a champion of human rights and its struggle against apartheid. This short paper evaluates criticism regarding South Africa's position from a legal perspective.

While my analysis is from a legal perspective, I adopt a broad, value-based approach to law (and legal interpretation) and certainly do not

---

1 'The idiocy of SA's foreign policy' *Financial Mail* 5 October 2007; P Fabricius 'SA makes u-turn on Myanmar debacle' *The Star* 5 October 2007; 'Foreign Affairs irony' *Business Day* 2 October 2007; P Fabricius 'UN is the battleground for a new Cold War' *The Star* 10 August 2007.

2 See eg J Dugard 'Human rights in South Africa: Past, present and the future', paper presented at the Centre for Human Rights, University of Pretoria, April 2007.

3 Eg C Jacobson 'Tutu "deeply disappointed" with Myanmar vote', report of 21 January 2007 http://www.iol.co.za/index.php?set_id=14&click_id=68&art_id=iol116937588641B233 (accessed 14 October 2007).

support a literal, positivist approach.[4] For the purpose of this analysis I focus on the Myanmar issue, mainly because it is the issue that has been (and continues to be) at the forefront of the debate. In the next section, I briefly describe the political situation in Myanmar and the debates within the UN Security Council. I next evaluate South Africa's position as well as the responses thereto. This is undertaken against the backdrop of the relevant legal approaches, for example, strict positivism, literalism as well as value-based approaches to international law.

Having outlined the paper's ambit, it is equally important to delineate what falls outside of the scope of the paper. The paper is not about whether the events in Myanmar constitute gross human rights violations or whether international action is the appropriate response. The question considered here is much narrower and concerns the position adopted by South Africa in January 2007 in the Security Council. In particular, the paper examines whether South Africa, in its vote on Myanmar and the subsequent explanations of its vote, adopted an unduly legalistic, literalist or positivist approach.

2 The story of Myanmar in the Security Council

No doubt Myanmar's story is one of gross human rights violations and brutality.[5] Until 1948, Myanmar, then known as Burma, was under the control of the United Kingdom. In 1948, Sao Shwe Thaik became the first President of the Union of Burma with U Nu becoming the first Prime Minister. Democracy lasted until 1962 when General Ne Win carried out a *coup d'état* and established military rule. Civil unrest directed against perceived oppression, human rights violations and economic mismanagement followed. The government responded by violently suppressing the demonstrations. The massive demonstrations and the government's violent response led to another *coup d'état*, resulting in the establishment of the State Law and Order Restoration Council (Council), another military-led regime. It was under this Council that the name Myanmar was adopted. In 1990, under the leadership of the Council, free elections were held in which the National League for Democracy emerged victorious. The results of the election were annulled and the Council refused to surrender power. In 1991, Aung San Suu Kyi, the leader of the National League for Democracy, was awarded a Nobel Peace Prize in recognition of her fight against injustice in Myanmar.

---

4 See eg D Tladi & P Dlagnekova 'The will of state, consent and international law: Piercing the veil of positivism' (2006) *SA Public Law* 111.

5 The history of Myanmar reflected here is based loosely on various sources, including media reports and the internet. These include 'Myanmar' http://www.infoplease.com/ ipa/A0107808.html (accessed 10 October 2007); 'The Politics of Burma' http://en.wikipedia.org/wiki/Politics_of_Myanmar (accessed 10 October 2007).

The period of military rule has been characterised by oppression and human rights violations.[6] The recent prolonged house arrests, for the third time, of Aung San Suu Kyi, have served to heighten international scrutiny of the human rights situation in Myanmar. A series of pro-democracy demonstrations across Myanmar, including recent demonstrations by Buddhist monks, were met by a military show of force, leaving a number of people of dead.[7] The situation in Myanmar situation has led to calls for the UN to do something.

On 12 January 2007 a draft Resolution was introduced in the Security Council by the United Kingdom and the United States.[8] The draft Resolution called on the ruling junta to 'cease military attacks' and to put 'an end to human rights and humanitarian law violations'. The draft Resolution also called on the government of Myanmar to 'begin without delay a substantive political dialogue' with a view to 'genuine democratic transition'. The government of Myanmar was further called upon to, *inter alia,* 'allow freedom of expression' and to unconditionally release Aung San Suu Kyi. The draft Resolution was not passed, mainly because Russia and China exercised their veto power. However, what raised eyebrows, both within South Africa and abroad, was South Africa's decision to associate itself with Russia and China and to vote against the draft Resolution.

3 Evaluating South Africa's position

A useful starting place for evaluating South Africa's position is the statement by Ambassador Dumisani Kumalo, South Africa's Permanent Representative to the UN, in which he explained South Africa's vote.[9] The South African Permanent Representative begins his statement as follows:

> I regret to inform this Council that South Africa will vote against the resolution on Myanmar. My government decided on this action based on the following three reasons.

---

6 The human rights situation is captured in the Congressional Testimony provided by Tom Malinowski on 'Human Rights in Burma' 7 February 2006 http://hrw.org/english/ docs/2006/02/10/usint12658_txt.htm (accessed 11 November 2007).

7 G Peck 'Generals aloof from turmoil in their new capital' *Pretoria News* 4 October 2007 10; SAPA-AP 'Crackdown on Myanmar Protesters' *Pretoria News* 4 October 2007 10; SAPA-AFP and Reuters '"We will send loving kindness to them": Monks plead for peace in face of security forces attack' *Pretoria News* 27 September 2007 14.

8 UN Doc S/2007/14.

9 The statement is available at http://www.southafrica-newyork.net (accessed 10 October 2007).

Before explaining the reasons for the vote, Ambassador Kumalo adds that he wishes to 'reaffirm that my delegation is concerned about the situation in Myanmar'. Both the fact that the ambassador expressed 'regret' that South Africa will vote against the resolution and the statement that South Africa is 'concerned' about the situation in Myanmar, are relevant in setting out what the vote (and this article) is *not* about. The South African vote was not about whether there were human rights violations in Myanmar, nor about whether action had to be taken to deal with the situation. What is worthy for analysis is the international law argument put forward by South Africa in voting against the Resolution.

There are three reasons put forward by South Africa's Permanent Representative for his country's decision to vote against the Resolution. First, in the view of South Africa, the Resolution would 'compromise the "good offices" of the Secretary-General' in dealing with the matter. Second, the statement notes that the issues raised in the draft Resolution are best dealt with by the newly-established UN Human Rights Council. Finally, and most important for our purposes, in the view of South Africa the draft Resolution 'does not fit with the Charter mandate conferred on the Security Council which is to deal with matters that are a threat to international peace and security'.

The first two reasons are purely institutional in that they suggest different forums within the UN system that are appropriate to deal with the matter. While the final reason is also institutional in that it specifies that the Security Council is an inappropriate forum for the matter, it is also normative in that it provides a reason why the Council should not deal with this matter. There is also an important relationship between the final reason and the first two reasons, that is that the 'good offices of the Secretary-General' and the Human Rights Council are more appropriate forums for this matter because the Charter of the UN does not allow the Security Council to deal with the matter. Nevertheless, it is the final reason that caused a stir, and it is on this reason that I focus.

South Africa was criticised for this position which is said to signify a 'betrayal of our noble past'.[10] The arguments raised against the position adopted by South Africa on the Myanmar situation are numerous, but can be summarised as involving four related assertions.[11] First, the arguments point to the fact that human rights abuses no longer fall within the category of issues that are shielded from international scrutiny, as is shown by international developments since the end of World War II. Thus, the mere fact that violations of human rights take place is sufficient to trigger the concern of the international community. Second, critics of South Africa's position seem to suggest that gross

[10] 'The idiocy of SA's foreign policy' (n 1 above) 12.

[11] Eg see Dugard (n 2 above) 6.

human rights abuses, *per se*, constitute a threat to international peace and security. Third, and this is linked to the first two arguments, critics of South Africa's position point to the fact that the Security Council on several occasions found that apartheid (a policy with internal applications) was deemed to constitute a threat to international peace and security. Finally, encapsulating all the above points, the view adopted is that South Africa has adopted 'an extremely legalistic' approach to the provisions in the UN Charter relating to the powers of the Security Council.[12] Other arguments — for example arguments that other UN organs or institutions such as the Human Rights Council are ineffective — although falling outside the scope of this paper, have also been raised and therefore deserve mention.

4 The limits of Security Council power: International peace and security

In evaluating the arguments raised against South Africa's position, it is useful to begin with the overarching argument, that is that South Africa's position is positivist or 'extremely legalistic'. My sincerely held views on the matter reflect my general approach to international law. In the past I have argued against a positivist approach to international law.[13] In other words, I support a value-based, purposive approach to law and not 'an excessively legalistic' approach. It is this value-based approach that informs my approach to the proper role of the UN Security Council. Months before South Africa assumed its seat as a non-permanent member of the Council, and certainly before South Africa was confronted with criticism against the positions adopted at the Council, I concluded a paper with the following remarks:[14]

> In order to promote the rule of law in international law, all subjects and organs of international law must be bound by rules of the legal system and none can be allowed to operate above the legal system. One way that the Security Council can be held accountable for its use of power, is through constant scrutiny by observers.

In order to hold the Security Council accountable, it is important that its mandate be fully understood. In terms of the Charter of the UN, the Security Council has the 'primary responsibility for the maintenance

---

12 'Foreign affairs irony' (n 1 above). In his report in *The Star*, Peter Fabricius, who has been one of the most outspoken journalists on this issue, notes that the position adopted by South Africa as regards Myanmar, is 'widely condemned as excessively legalistic'; Fabricius 'SA makes u-turn on Myanmar debacle' (n 1 above).

13 Tladi & Dlagnekova (n 4 above).

14 D Tladi 'Reflections on the rule of law in international law: The Security Council, international law and the limits of power' (2006) 31 *South African Yearbook of International Law* 231 243.

of international peace and security'.[15] Further, article 39 provides the trigger requirements for Security Council action under chapter VII:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security.

It is on this basis that South Africa adopted the position that it did with respect to Myanmar. The question raised by this article is whether the position is 'excessively legalistic'. In other words, does the approach adopted rely too much on a literal and textual interpretation of the provisions of the Charter?[16] Without question, the approach adopted by South Africa in the Myanmar vote is consistent with a textual interpretation of the Charter. But does it reflect an approach that ignores other values?

In interpreting article 39 of the Charter, the context of the provisions as well as the context of the far-reaching powers of the Council must be borne in mind. In this regard, it must be remembered that the composition of the Security Council raises questions about the legitimacy of the institution: an institution where, essentially, five states have ultimate power internationally. From a moral point of view, and not a purely textual (or 'excessively legalistic') point of view, it would seem appropriate to raise concerns about such an institution wielding unlimited power. This fear is aptly reflected by Koskenniemi, who holds as follows:[17]

> Given the Council's composition and working methods, its monopolisation of UN resources and the public attention focused on the Council is problematic. The dominant role of the permanent five, the secrecy of the Council's procedures, the lack of a clearly defined competence and the absence of what might be called a legal culture within the Council hardly justify enthusiasm about its increased role in world affairs.

Raising the same concern, Franck has commented that[18]

> [w]hile the Council has the power to act on behalf of the UN as a whole and to commit its members to action under Charter article 25, it is only a distorted miniature executive council of the UN membership. A third of its members are unelected. To assert the legitimacy of its actions ... the Council must be seen to be acting in accordance with established procedures and limitations.

---

15 Art 24(1) Charter of the United Nations.

16 The 1969 Vienna Convention on the Law of Treaties provides that treaties (and the Charter is a treaty) are to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

17 M Koskenniemi 'The police in the temple. Order, justice and the UN: A dialectical view' (1995) 6 *European Journal of International Law* 325 327.

18 TM Franck *Fairness in international law and institutions* (1995) 218. See also S Wheatley 'The Security Council, democratic legitimacy and regime change in Iraq' (2006) 17 *European Journal of International Law* 531 532.

These concerns are real and suggest a need to restrictively interpret the powers of the Security Council, not for narrow legalistic reasons, but for reasons based on moral notions of legitimacy and democracy. It is true that this assertion, against which few would argue, does not respond directly to the more specific concerns raised about human rights as a justification for an expansive interpretation of the mandate of the Security Council. However, it is important, first and foremost, to raise the issue about the framework within which the Council is supposed to function, and then to juxtapose this framework against the human rights arguments raised in connection with Myanmar.

It seems clear that we have to accept that there are legal limits to the power of the Security Council.[19] The question is as to where those limits lie.[20] In particular, what are the limits of the discretionary power afforded to the Council under article 39 of the Charter? A purely logical approach (assuming one accepts that this discretion is not unfettered) would be that the issue at hand must raise questions of international peace and security, that is, there is a situation that either threatens or breaches international peace and/or security or an act of aggression. In my view, the conclusions reached by De Wet about what would constitute a threat to international peace are correct.[21] Having analysed various approaches, ranging from the broad to the narrow definitions, she argues that international peace has to be taken to mean the absence of armed conflict between states.[22] A threat to the peace, therefore, means a situation that has the potential of disturbing this 'absence of armed conflict'. As she correctly states (and consistent with the concerns raised about legitimacy above), to adopt a different view would imply 'unlimited discretion' which in turn would 'ignore the structural limitations which are necessary for the efficient functioning of the Charter system'.[23]

The idea that, from both a purely legal and a moral/value-based perspective, there is a need to interpret the powers of the Council restrictively should, in my view, form the framework for the analysis of the Council's role in the case of human rights violations.[24] Against

---

19 Tladi (n 14 above).

20 For a comprehensive study of the limits of the power of the Council, see E de Wet *The Chapter VII powers of the United Nations Security Council* (2004).

21 De Wet (n 20 above) 138-144.

22 De Wet (n 20 above) 144.

23 As above.

24 Dugard, in disagreement with this position, makes the following observations: 'And now there is new support for [human rights offenders] in the form of arguments raised by South Africa in the Security Council in respect of human rights violations in Myanmar and Zimbabwe. The Security Council is illegitimate by reason of its composition which means that its powers should be restrictively construed.' J Dugard 'The future of international law: A human rights perspective — With some comments on the Leiden School of International Law' (2007) 20 *Leiden Journal of International Law* 729 733.

this background, I now turn to evaluate the human rights arguments that have been used to suggest that South Africa should have adopted a different position on account of the human rights situation in Myanmar.

5 Human rights violations, international peace and the Security Council

As mentioned above, the human rights argument for Security Council intervention in Myanmar is based on three interrelated elements. First, that human rights violations no longer can be deemed to be an internal affair; second, that human rights violations are, *per se,* a threat to international peace and security; and third, that the numerous resolutions adopted by the Security Council against apartheid South Africa should be instructive in the case of Myanmar. I will deal with each of these arguments in turn.

The first argument, that human rights are the concern of the international community and can no longer be deemed to be the exclusive concern of domestic law, is not open to debate.[25] The notion that human rights law is the concern of the international community has its roots in the Nuremburg tribunal and is reflected in the myriad international human rights instruments adopted since the end of World War II. However, the fact that human rights are the concern of the international community does not take us very far in this debate. This fact is not authority for the view that the Security Council, the 'distorted miniature executive council of the UN membership', is mandated to deal with human rights issues that do not involve international peace and security. All that it tells us is that human rights violations, wherever they occur, are the responsibility of the international community. This means that the UN Human Rights Council, the body created by the international community specifically to deal with human rights issues, or the UN General Assembly, the body most representative of the international community, could never be faulted for taking action in Myanmar or any other situation of human rights violations. I leave aside, for now, the perceived ineffectiveness of the Human Rights Council and the General Assembly. What is important, though, is that the place of human rights as a concern of the international community cannot, without more, bestow on the Security Council the mandate to intervene in Myanmar or any other situation.

The second argument, on the other hand, raises fundamental questions that need to be answered with reference to the framework presented above. In terms of the argument, any situation which

25 J Dugard *International law: A South African perspective* (2005). While I quote only one source, this fact is truly trite and can be confirmed by any textbook on international law or international human rights.

amounts to a violation of human rights (particularly massive or gross human rights violations) should be the concern of the UN Security Council. In rejecting this notion, De Wet explores some of the legal reasons that are advanced for this position and determines that they are not convincing.[26] It is unnecessary to here repeat these arguments and De Wet's responses to them. It suffices to say that they are based on a purposive interpretation of the Charter and the *erga omnes* nature of some human rights, that is, that they are the concern of all humankind.[27] In responding to these arguments, it is necessary to be honest about their nature. The argument that human rights violations, *per se*, constitute a threat to international peace and security reflect sincerely held beliefs about the importance of human rights. What the argument says is that human rights are important and they must be protected at all costs, even at the cost of the legitimacy of the international system. Indeed, human rights are important and must be protected, without threatening the integrity of the system. However, the weakness of the argument that all serious human rights violations should be handled by the Security Council, whether threatening international peace and security or not, is that it implies that *all important* issues should be dealt with by the UN Security Council. The test for whether the Security Council, this body with serious democratic deficiencies, should act is no longer whether there is a threat or breach of international peace or security, but rather whether the issue is important internationally (and has a high profile). Apart from the fact that this is highly problematic from a legal point of view, it also poses a serious danger to the integrity and further development of the international legal system and, in particular, the international human rights system.

This discussion begs the question, though, why adherents to the human rights-constitutes-a-threat-to-international-peace arguments, believe all important issues belong in the Security Council. I would propose that the reason must be because of a perception that the Security Council gets things done and that all other UN organs and institutions are ineffective talk shops. This argument falls outside the scope of this paper, but nevertheless two points can be offered in response. First, if it is true that the Security Council is the only effective organ of the UN, then, surely, if we are concerned about the protection of human rights internationally, the response should not be to send everything to the Security Council, but rather to put in place measures that will ensure that bodies that are appropriate to deal with human rights issues are strengthened so as to make them more effective. Second, while recognising the power that the Security Council yields, it is important not to overstate its effectiveness (power should not be equated with effectiveness). There are countless situations which can

26 De Wet (n 20 above) 142.

27 As above.

more realistically be deemed to constitute threats to international peace and security and with which the UN Security Council has been seized, which have not been resolved, notwithstanding the Council's protracted involvement.[28]

Finally, it is appropriate to address the argument that apartheid, although not constituting a classic case of a threat to peace, was the subject of numerous UN Security Council Resolutions. In terms of this argument, the rationale that was used in the case of apartheid should be used in the case of Myanmar. The reliance on the apartheid situation is misplaced, principally because in the case of apartheid, a link between apartheid and a threat to international peace and security was established. In this regard, it is important to draw a clear distinction between the types of resolutions adopted by the Security Council with respect to South Africa.[29] The Security Council adopted only one resolution with respect to apartheid under chapter VII.[30] The rest of the resolutions were adopted under chapter VI.[31] The distinction is relevant because the mandates of the Council under these chapters are different. The threshold for action under chapter VI is much lower and is met where there is a situation 'which is likely to endanger international peace'. As Dugard points out, it is clear that the Council considered apartheid to be a situation that constituted 'a "potential threat" to international peace *and not an actual "threat to the peace" or "breach of the peace"*'.[32] I cite Dugard here because, while he has also relied on the comparison between Myanmar and apartheid to criticise the restrictive interpretation of the threat to international peace requirement, he himself has recognised this distinction previously.

It must be said that the draft Security Council Resolution on Mynamar does not declare itself to be a chapter VII resolution. I have used the notion of a 'threat to the peace' as the basis for analysis principally because the debates within the Council, as well as the subsequent critique of South Africa's position, have all assumed the 'threat to the peace' dimension as the focus of the debate. More to the point, while the 'potential threat' to international peace requirement in chapter VI imposes a lower threshold, the need to provide evidence of a *potential* threat nevertheless remains. This means that, while it is not necessary

---

28 These include the Middle East conflict, Iran, Darfur and, before the US invasion, Iraq.

29 For a full discussion, see Dugard (n 25 above) 487. Interestingly, Dugard in his lecture (n 2 above), while comparing the Myanmar situation to apartheid, does not highlight these differences which he clearly highlights in the textbook.

30 UN Security Council Resolution 418 of 1977. Resolution 421 of 1977 was adopted pursuant to Resolution 418 and set up mechanisms of implementation.

31 There are numerous examples, but one can mention Resolution 417 of 1977, Resolution 189 of 1964, Resolution 190 of 1964 and Resolution 282 of 1970.

32 Dugard (n 25 above) 487. See B Simma *The Charter of the United Nations: A commentary* (1994) 610, who says that 'an abstract distinction between the threat to the peace and the mere endangering of peace does not seem possible'.

to show an *actual* threat to the peace, the *potential* must nevertheless be shown.[33] The result is that the mere existence of serious human rights violations, by itself, does absolve us from the responsibility to provide some evidence linking the violation to international peace and security.

While comparison between the resolutions adopted by the Council under chapter VI and the Myanmar situation are inappropriate because of the difference of the mandate of the Council under the respective chapters, the comparison between the Myanmar situation and the Security Council Resolution 418 of 1977 is inappropriate for another, more important, reason. In Resolution 418, the link, tenuous though it may have been, between the situation in South Africa and potential destabilisation in the region was established.[34] It was for this reason that the Resolution primarily required states to implement an arms embargo against South Africa.

The distinction between the treatment of Myanmar in the Security Council and Resolution 418 provides an opportunity to raise another important issue. The argument advanced in this paper is *not* that the situation in Myanmar does not warrant Security Council action. Rather, the argument advanced here is that the mere fact that there are gross human rights violations does not, in and of itself, justify the Council's involvement. In order for the Council to be properly seized of the matter, an argument has to be made, which the Council must rationally consider, that there exists a threat to international peace and security. That argument was made with respect to South Africa, but not with respect to Myanmar. With Myanmar only arguments raising human rights violations were raised. Indeed, it will be recalled that South Africa, when explaining its vote against the draft Myanmar Resolution, made the following comments linked to the regional situation:

> Finally, it is worth recalling that the Association of Southeast Asian Nations (ASEAN) has stated that Myanmar is not a threat to its neighbours. Just yesterday, on 11 January 2007, the ASEAN Ministers meeting in the Philippines reaffirmed that Myanmar is no threat to international peace and security.

The Council could legitimately act in the Myanmar situation if, and only if, it had been shown that there was some connection between that situation and a threat to international peace and security. In this regard, the point, already made, must be emphasised: The position taken in this paper is *not* that human rights violations or any other internal situation cannot constitute a threat to the peace, for surely it

---

33 Simma (n 32 above) 555.

34 The second preambular paragraph of the Resolution, eg, states that the Council recognises 'that the military build-up by South Africa and its persistent acts of aggression against neighbouring states seriously disturbs the security of those states'. See also De Wet (n 20 above) 150 151. With regard to this Resolution, De Wet reminds the readers that South Africa had been involved in armed operations against Zambia and Marxist-backed forces in Angola.

can.[35] Rather, the argument is that, in any given situation, before the Council takes up a matter, a link between the situation and a threat to international peace must be shown. In the case of Myanmar, no evidence has been provided to substantiate such a link. Had the Security Council acted in such a case (and should they act in the future under the same circumstances), then such actions would be beyond the scope of the Council's mandate and consequently illegal under international law. This does not mean that the international community should be passive. Indeed, with regards to the Myanmar situation, the international community has been everything but passive. The good offices of the Secretary-General, in the form Ibrahim Gambari, continue to seek a resolution to the Myanmar situation.[36] At the same time, the Human Rights Council, at a special session, adopted a strongly-worded resolution by consensus against Myanmar.[37] The Resolution, amongst other things, provides that the Council '*strongly deplores* the continued violent oppression of peaceful demonstration in Myanmar'[38] and '*urges* the government of Myanmar to ensure full respect for human rights'.[39]

It is apposite, at this point, to make a remark about the possible implications of this position for Africa, particularly the situation in Zimbabwe. The link between the position on Myanmar and Zimbabwe looms large in many of the discussions.[40] The question is whether the position outlined above implies that human rights abuses on the continent, such as in Zimbabwe, fall outside the mandate of the Security Council. The answer is no. All that the position outlined above implies is that in any given situation, whether in Zimbabwe, Myanmar or elsewhere, an argument is needed on why the particular situation qualifies as a threat to international peace and security. Thus, if it may be argued that any situation on the continent or elsewhere, including in Zimbabwe, meets this test, then the Security Council *can* place the situation on its agenda. Whether the Security Council does in fact place such a matter on its agenda will depend, unfortunately, not on considerations of human rights or international law, but rather on political considerations, flowing mainly from the interests of the five permanent members.

---

35 Simma (n 32 above) 611 states that it now seems 'accepted that extreme violence within a state can generally be qualified as a threat to the peace'. It is clear from the rest of his analysis that some kind of link with a threat to the international peace must be shown.

36 'UN sees progress in Myanmar' published on 8 November 2007 on http://www.thetimes.co.za/News/Article.aspx?id=608685 (accessed 11 November 2007).

37 Res S-5/1: Situation of human rights in Myanmar. It is worth mentioning that the draft UN Security Council Resolution was no stronger in its condemnation than the adopted Human Rights Council Resolution.

38 Para 1 Res S-5/1.

39 Para 2 Res S-5/1.

40 See contributions in n 1.

6 Concluding remarks

Human rights violations, wherever they occur, should be condemned by the international community and action should be taken wherever possible. Whether this necessarily implies that such action should be taken by the Security Council is more problematic. The mandate of the Council is limited and should be interpreted restrictively. This flows not only from the clear textual directive in the Charter, but is also consistent with moral tenets of legitimacy and democracy. We should not, in trying to deal with real problems facing us, rush to discard fundamental principles which could come back to haunt us. The recent vociferous calls for the Security Council to act in situations where it is not shown that there is a threat to international peace and security will lead to the entrenchment of the dominance of the Council (and attendant illegitimacy) and the erosion of the rule of law, the principle of equality of states and true multi-lateralism in international law. I conclude with a statement by Dugard who, himself a critic of South Africa's position on the Myanmar situation, offers the following warning against an overly-broad interpretation of the Security Council's mandate:[41]

> The Security Council is using its enforcement powers to adopt normative resolutions that are legally binding on all members of the United Nations. In so doing, it has assumed the role of international law-maker. Such legislative role may be justified *if it is restricted to action taken under chapter VII, designed to maintain international peace and security and confined to subjects that threaten international peace* ... Clearly, this legislative role, in which a 15-member Council takes decisions that bind 191 states, must be exercised with care.

[41] Dugard (n 25 above) 494 (my emphasis).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community

*Daleen Millard**
Associate Professor in Private Law, University of Johannesburg, South Africa

Summary

The Southern African Development Community (SADC) region currently experiences spontaneous migration of citizens across borders in search of job opportunities and a better standard of living. Generally, freedom of movement across borders which manifests in migration, is a distinguishing feature of globalisation and should be respected as a basic human right. However, what is of growing concern in SADC is the portability of migrants' social security benefits. Do the current SADC structures allow migrants to preserve, maintain and transfer social security benefits such as pension benefits independent of their nationality or country of origin? This article explores the social security measures in individual SADC member states and the extent to which these national measures provide protection for migrants in SADC. Comparing the situation within SADC to that in the European Union, the article concludes that, although there is no simple solution to the problem, it is imperative that SADC member states recognise international standards pertaining to migrants and, more importantly, standards pertaining to the portability of benefits. Ideally, SADC member countries should gradually extend social protection to non-citizens who contribute to their economies through their labour and thereby enhance the right to freedom of movement.

* BIur LLB LLM (Pretoria), LLD (Johannesburg); daleenmillard@gmail.com. This article is based on a paper presented at an international workshop held on 18 and 19 January 2006 in Johannesburg, as a joint project by the Max Planck Institute for Foreign and Comparative Social Law, Münich, Germany, and the Centre for International and Comparative Labour and Social Security Law at the University of Johannesburg. I am greatly indebted to my colleague, Marius Olivier, for the opportunity to have participated in the workshop.

1 Introduction

One of the most pressing social security issues in present-day Southern Africa is the social protection of people who migrate from one country in the region to another. Although the level and frequency of regional migration have not been established satisfactorily due to a lack of reliable statistics, it is well known that a significant number of people migrate daily across borders within the Southern African Development Community (SADC)[1] in the hope of making a living elsewhere.[2]

What is really at stake in instances where migrants leave their country of birth to work elsewhere is the portability of benefits from one fund or country to another. Holzman *et al* explain that '[p]ortability in this context is understood as the migrant worker's ability to "preserve, maintain and transfer acquired social security rights" independent of nationality and country of residence'.[3] Furthermore, the interests that are the subject of transfers are usually long-term benefits based on social insurance considerations.[4]

There is no commonly-accepted generic or general legal concept of 'migrant' in international law.[5] However, the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (CPRMWMF) defines a migrant worker as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national'.[6] While most countries welcome an influx of professionals, migrants who engage in menial, dirty, dangerous and difficult jobs are subjected to poor

---

1 The Southern African Development Community was formed in 1980 as a loose alliance of nine majority-ruled states in Southern Africa known as the Southern African Development Co-ordination Conference (SADCC). Their main aim was to co-ordinate development projects in order to lessen economic dependence on the then apartheid South Africa. The member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. For more information on the activities of SADC, see in general http://www.tralac.org/scripts/content.php?id=3032 (accessed 17 March 2008).

2 MP Olivier *et al* 'Equitable trade and the social dimension in SADC: Recent experiences and proposals for enhanced protection' paper presented at IIRA/CIRA: 4th Regional Congress of the Americas and 39th Canadian Industrial relations Association Annual Meeting, Toronto, 25-29 June 2002.

3 R Holzman *et al* 'Portability regimes of pension and health care benefits for international migrants: An analysis of issues and good practices' 2005 *Social Protection Discussion Series* 4.

4 Holzman *et al* (n 3 above) 5.

5 O Dupper 'Migrant workers and the right to social security: An international perspective' (2007) 18 *Stellenbosch Law Review* 217.

6 Dupper (n 5 above) 220.

working and living conditions that are often far inferior to those available to the citizens of a specific country.[7]

On this point, note that the distinction between different types of migrants is important.[8] Economic migrants may be sub-divided into unskilled labour migrants, highly skilled migrants and business migrants, migrants who reunite with their families, and refugees,[9] who may be sub-divided into conventional refugees[10] and asylum seekers.[11]

Regardless of the reason for migration, freedom of movement across borders which manifests in migration is a distinguishing feature of globalisation. While globalisation is not a new phenomenon, the present era of globalisation has distinctive features, namely, that shrinking space, shrinking time and disappearing borders link people's lives 'more deeply, more intensely, more immediately than ever before'.[12] In SADC, the problem is compounded by the fact that there is no formal labour market. This makes a comparison with a labour market like the European Union (EU), which has a formal labour market, rather difficult, but nevertheless a worthwhile exercise.

This article investigates the social security measures that exist in individual SADC member states and the extent to which these national measures provide protection for migrants in SADC. Because the focus is on migration between countries, this article discusses instruments which provide protection at a supra-national level. Finally, the article compares the situation within SADC to that in the EU against the background of the European Convention.

This article will proceed as follows: After clarifying some definitional issues, the focus turns to an overview of the protection systems that exist in 11 of the SADC member states – omitting the lusophone and francophone countries with a civil law tradition (Angola, Democratic Republic of Congo and Mozambique). Thereafter, it discusses the existing structures in SADC and finally it investigates the EU as a possible source of information on the viability of cross-border agreements. Finally, the article makes recommendations as to how SADC member states can harmonise legislation and truly provide protection

7 As above.

8 B Schulte 'Institutional framework, legal instruments and legal techniques relating to the promotion of access to social security to non-citizens — A German perspective' unpublished paper read at a joint international workshop by the Max Planck Institute for Foreign and Comparative Social Law, Münich, Germany, and the Centre for International and Comparative Labour and Social Security Law at the University of Johannesburg held on 18 and 19 January 2006 in Johannesburg.

9 Schulte (n 8 above) 10.

10 Geneva Convention; see Schulte (n 8 above) 10.

11 As above.

12 V Taylor 'Social protection challenges in Southern Africa' (2001) 2 *Co-operation South Journal* 49.

to migrants. All along, the reader should bear in mind that migration has to be managed on two levels, namely, politically, by harmonising the laws that deal with immigration, and on a social protection level, by aligning the protection measures that exist at a national level in different SADC countries. Furthermore, to afford social protection to such a diverse group is extremely problematic, as immigration requirements vary. For example, asylum seekers and highly skilled workers with temporary residence in a foreign country are subjected to different immigration requirements than are unskilled labour migrants. The discussion of country-specific systems that follows outlines protection systems within SADC countries and examines whether these systems succeed in affording protection to both nationals and non-nationals. This article does not aim to provide the ultimate solution to the multi-faceted problem of cross-border migration, but it does suggest a number of possibilities.

2 Protection systems within SADC countries

2.1 South Africa

Section 27(1)(c) of the South African Constitution[13] provides that everyone has the right to have access to social security. The South African Constitution appears to endorse the difference between 'social insurance' and 'social assistance'.[14] The South African social insurance system consists of retirement schemes, health insurance, workmen's compensation, unemployment insurance and the Road Accident Fund. Apart from the Road Accident Fund, these systems are all employment-based. As far as the responsible institutions are concerned, Olivier and Kalula observe that a bewildering number of institutions administrate social insurance in South Africa.[15]

As far as social assistance is concerned, a number of grants are available in South Africa. These include an old-age grant, a disability grant, a foster care grant, a care-dependency grant and a child support grant.[16]

The portability of benefits within the South African social security system has received no attention in jurisprudence. This aspect of social security gains importance where long-term benefits, such as pensions, are concerned. Currently, section 14 of the Pension Funds Act[17] contains rather limited provisions on the transferability of pension benefits.

---

13 Constitution of the Republic of South Africa 1996.

14 MP Olivier *et al* (eds) *Social security: A legal analysis* (2003) 23.

15 MP Olivier & ER Kalula 'Scope of coverage' in Olivier *et al* (n 14 above) 144.

16 Social assistance is payable in accordance with the Social Assistance Act 13 of 2004.

17 Act 24 of 1956.

However, apart from this arrangement, the transfer of benefits between funds is an aspect that is largely neglected.[18]

Another weak aspect of social security in South Africa is the position of non-nationals. Apart from some exceptions for foreigners with permanent residence status, non-nationals generally are excluded from social security in South Africa.[19] This is particularly evident in social insurance in South Africa. As far as employment-based schemes are concerned, entitlement to benefits mainly depends on employee-status. It follows that only those who have permanent residence, or whose stay in the country is otherwise legal, may qualify to be 'employees' in terms of the Unemployment Insurance Act[20] or the Compensation for Occupational Injuries Act.[21] In addition, pensions and provident funds are set up only for those in formal employment. Those who are self-employed or employed in the informal sector must make their own arrangements.

The Road Accident Fund is the only public social security scheme in South Africa that is not employment-based. The objective of the Fund, as stated in the Road Accident Fund Act,[22] is to compensate any victim who sustained bodily injuries where someone caused damage by the negligent driving of a motor vehicle. Nationality plays no role in eligibility for compensation. A victim needs to lodge his claim timeously and dispose with the burden of proof.[23] This feature of the South African

---

18 Sec 14(1) reads: 'No transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless (a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar; (b) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection; (c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer; (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and (iii) to the payment of minimum benefits referred to in section 14A, and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory.'

19 Olivier & Kalula (n 15 above) 136.

20 Act 63 of 2001.

21 Act 130 of 1993.

22 Act 56 of 1996.

23 In order to succeed with a claim, the plaintiff needs to prove that the wrongdoer drove a motor vehicle negligently. See in general HB Klopper *Law of third party compensation* (2000) 2. The writer indicates that the claimant needs to prove all the elements of a delict, namely, conduct, unlawfulness, fault, causation and damage.

social security system is unique. In all other SADC countries, migrants must procure private insurance against possible claims arising from negligent driving.[24]

As far as social assistance is concerned, the landmark case of *Khoza and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*[25] signalled a departure from the introspective and nationalistic approach towards social assistance that previously characterised the South African system. In this case, the Constitutional Court ruled that benefits in terms of the Social Assistance Act[26] should be extended to non-citizens with permanent residence status.[27] In addition, the Court held that refugees, who have obtained refugee status in terms of the Refugee Act,[28] qualify for all the socio-economic rights guaranteed in section 27 of the South African Constitution.[29]

South Africa has long been the economic stronghold of the region. One would think that a country whose mine companies actively recruit labour from other countries in SADC would have provided for cross-border portability of benefits. Although these foreign labourers obtained work permits and qualify as 'employees' in terms of various South African statutes, the true challenge has proven to be the actual payment of pensions, unemployment benefits and compensation for occupational injuries and diseases to those who inevitably return to their home countries. The absence of agreements between South Africa (as the host country) and other states (as sending countries) results in great injustices. As far as Lesotho is concerned, the Taylor Report states that arrangements have been made for migrant workers from Lesotho to receive South African old-age and disability pensions 'since during their active years they contributed to South Africa's revenue base through income and value-added sales tax'.[30] Those migrants who have been granted permanent residence are entitled to social assistance in South Africa. On workman's compensation, Taylor comments as follows:[31]

> Lesotho has also made use of South African workers' compensation for occupational injuries and diseases, including migrant Basotho workers who were injured in South African mines and have returned home.

---

24 On the requirements for liability, see D van der Nest 'Motor vehicle accidents' in Olivier *et al* (n 14 above) 501.

25 2004 6 BCLR 569 (CC).

26 Act 59 of 1992. This Act was replaced by the Social Assistance Act 13 of 2004 (see n 16 above).

27 *In casu*, the majority ruled that permanent residents are entitled to, *inter alia*, the old-age grant, the child support grant and the care dependency grant.

28 Act 130 of 1998.

29 n 13 above.

30 Taylor (n 12 above) 56.

31 As above.

It is submitted that the case of Lesotho is special for at least two reasons. First, its geographical position as a kingdom with no harbour and limited natural resources makes it dependent on South Africa. Second, the scarcity of employment opportunities leaves many of its residents with no choice other than to migrate to South Africa. Consequently, the extension of benefits to Lesotho migrants is definitely equitable. In the light of Lesotho's example, the question arises whether there have been similar successful agreements with other countries in SADC on the portability of benefits. On this point, Olivier and Mhone comment as follows:[32]

> A perusal of international agreements applicable to South Africa reveals that South Africa is not yet, barring a limited number of exceptions, linked to the network of bilateral conventions on the co-ordination of social security. In this regard, South Africa mirrors largely the position obtaining in most countries in the SADC region. Co-ordination of social security is presently almost totally absent in the region. The few examples that do exist do not function satisfactorily, while attempts to enter into more comprehensive arrangements still have to bear fruit.

This position does not only affect non-citizens who migrate to South Africa, but also South Africans who take up employment in other countries.[33] While it is true that a number of citizens from other countries have benefited from pensions and benefits in terms of employment-based schemes in South Africa, the lack of formal agreements makes it very difficult for beneficiaries and their dependants to actively enforce their rights once outside the borders of South Africa.

To sum up, the South African social security system is largely fragmented, does not encourage or compel the transfer of benefits between schemes nationally and, unfortunately, displays very little cross-border co-ordination.

2.2 Botswana

Taylor explains that social security in Botswana is relatively underdeveloped.[34] The majority of Botswana's people rely heavily on kinship-based support.[35] Current schemes include programmes for destitute persons, an orphan care programme, supplementary feeding for vulnerable

---

32 MP Olivier & GCZ Mhone 'Social protection in SADC: Developing an integrated and inclusive framework - The case of South Africa' in MP Olivier & ER Kalula (eds) *Social protection in SADC: Developing an integrated and inclusive framework* (2004) 136.

33 As above.

34 Taylor (n 12 above) 55.

35 As above.

groups, a universal old-age pension, a World War II veterans' allowance, a labour-based drought-relief programme, cover for people living with HIV/AIDS and other informal social assistance programmes.

The system in Botswana is not rights-based. According to Ntseane and Solo:[36]

> At present, most of the social security programmes that are in place do not have a legal basis. The constitution of Botswana contains a bill of fundamental rights, containing political and civil rights also known as first generation rights. Since it was crafted as far back as 1966, it did not have socio-economic rights or second-generation rights, as do recent constitutions.

Apart from the absence of a rights-based framework, one should note that Botswana has not ratified any international social security conventions and does not have any plans to do so in the foreseeable future.[37] Consequently, because of the underdeveloped, needs-based system that is in place in Botswana, one can safely conclude that this specific system is focused on residents of Botswana, that it lacks the sophistication of portability of benefits nationally and that there are no multi-national agreements with any other SADC countries pertaining to benefits for migrant workers.

2.3 Lesotho

As was stated above,[38] Lesotho is very reliant on its South African neighbour in the area of social security. Arrangements exist between Lesotho and South Africa, albeit more in the form of South Africa as a host country of migrants and Lesotho as a sending country. Taylor states that Lesotho is currently in the process of designing its own social security scheme. The purpose of this new scheme is to cover old age, invalidity, death and maternity.[39] Informal agreements between South Africa and Lesotho seem to be of the more successful ones in the SADC region.[40]

---

36 D Ntseane & K Solo 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Botswana' in Olivier & Kalula (n 32 above) 89.

37 Ntseane & Solo (n 36 above) 92.

38 See sec 2.1 above.

39 Taylor (n 12 above) 56.

40 Lesotho is an enclosed area that relies heavily upon South Africa for its economic well-being. Agreements are in place as a matter of necessity and not of policy, as many citizens of Lesotho move across the border into South Africa in order to work. The absence of agreements would have disastrous consequences for a small country like Lesotho. If workers who have spent a lifetime working in South Africa were denied a pension upon retirement, it would lead to disastrous consequences for those workers and everyone else who are reliant upon them.

2.4 Malawi

According to Kanyongolo, the Malawian Constitution does not specifically provide for the right to social security.[41] Even so, there are some provisions that deal with aspects related to social security, such as the right to development,[42] equality of opportunity[43] and the right to education.[44]

In Malawi, social security measures include sickness benefits, maternity benefits, severance pay, pensions, disability benefits, a minimum wage and a number of social assistance arrangements.[45] Sickness and maternity benefits are very restricted.[46] The Workers' Compensation Scheme provides benefits to victims of employment injuries, and in this respect there exists an agreement between Zambia and Malawi on the payment of these benefits to migrant workers.[47] The Labour Law Reform Task Team states: [48]

> Two SADC member states, viz Zambia and Malawi, have entered into what appears to be a successful and operative broad-based bilateral social security agreement, providing for the cross-border payment of a range of social security benefits. It is suggested that this may serve as an example for developing similar approaches to be adopted in retirement benefits portability arrangements Tanzania could enter into at a SADC and EAC level.

This document was drafted in the friendly atmosphere that marks relations between the two countries. Problems that were highlighted in the public pension fund included, *inter alia*, delays in receiving cheques resulting in cheques turning stale, cheques bearing a signature not recognised by the banks in Malawi, widows and minors not being paid survivors' benefits, the stopping of payment due to unexplained reasons, the reduction of pensions due to exchange rate fluctuations and the failure of pensioners to cash cheques because they do not have bank accounts. Other problems that were identified included those experienced by other pension funds and the workers' compensation fund. These include, *inter alia,* the inability of the funds to trace dependants and pay compensation to them.

---

41 NR Kanyongolo 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Malawi' in Olivier & Kalula (n 32 above) 97.

42 Sec 30(1) Constitution of Malawi.

43 Sec 30(2) Constitution of Malawi.

44 Sec 5 Constitution of Malawi.

45 Kanyongolo (n 41 above) 109.

46 Taylor (n 12 above) 56.

47 As above.

48 Report of the Tanzanian Labour Law Reform Task Team (May 2005) 123. See also the discussion on the proposed Tanzanian legislation in sec 2.10 below.

These limited measures are aimed mainly at poverty alleviation. On this point, Taylor states:

> Malawi has been chronically food-insecure for the past three to five years; most households are unable to produce enough food to meet their subsistence requirements due to the effects of drought, floods and other factors in some areas. A Safety Net Intervention has been initiated to provide relief to vulnerable households and assist people to move out of poverty; it focuses on food security and combines government and donor involvement.

Once more, the pattern is one of addressing basic needs nationally. Because of the underdeveloped system and the fact that very few Malawians insure themselves privately,[49] there is indeed very little need for portability of benefits between funds nationally. Apart for the arrangement with Zambia, cross-border agreements do not exist.

From the agreement between Malawi and Zambia it is evident that both countries realise their interdependence. Zambia, as a receiving country, uses Malawian labourers on its mines. Upon their return to Malawi, these workers experience problems in accessing their pensions and other social security benefits and have to turn to the Malawian government for assistance. The Malawi/Zambia agreement is commendable and should be regarded as an example for similar agreements between other countries.

2.5 Mauritius

In Mauritius, social security measures include free education, health services, subsidised food as well as old age, disability and death benefits, offered through a universal social insurance system.[50] While the pension system covers all residents, earnings-related pensions are paid to employees.[51] In terms of social assistance systems, poor families with three or more children also receive a family allowance.[52]

In a country with a national social security system, the portability of benefits is clearly superfluous. However, the cross-border transfer of benefits is something that should receive attention.

2.6 Namibia

Olivier and Kalula elevate Namibia to be one of the countries with the most innovative social security approaches, structures and models. They explain this recent transition as follows:[53]

---

49 Kanyongolo (n 41 above) 110.

50 Taylor (n 12 above) 57.

51 As above.

52 As above.

53 MP Olivier & E Kalula 'Regional social security' in Olivier *et al* (n 14 above) 666-667.

> Firstly, Namibia embarked upon a comprehensive codification of the social insurance part of its system, inclusive of retirement and — in principle — health provision. Secondly, a centralised institution (the Social Security Commission) was set up to implement the reforms and to administer the new system, which tasks included publicising the system and introducing a user-friendly, distinct social security number and social security card for identification and claim purposes. Thirdly, and partly in order to inform and sensitise the population regarding the need for and practical benefits of a (public) social insurance system, Namibia has been implementing some of the short-term schemes first.

This new scheme provides for payment to employees of maternity and sick leave, benefits for occupational injuries, death, invalidity, funeral and survivors' benefits.[54] As part of the new innovative system, ordinary employees as well as domestic and casual workers contribute to social security.[55] While employment injury benefits are financed entirely by employers, retirement benefits are payable to workers over 60 who have worked and contributed to social security for at least 15 years. A future project is the development of a medical aid scheme.[56]

Despite all these innovations, Olivier and Kalula warn that much still needs to be done, especially in the areas of informal social security and the extension of social security to non-citizens.[57] One can predict that multilateral agreements with other SADC member states will strengthen the position of non-citizens in Namibia and provide a wider support network to migrants in the region.

2.7 Seychelles

In the Seychelles, old-age, disability and death benefits are paid to employees, the self-employed and the unemployed.[58] The Seychelles pension scheme covers all full-time workers with 25 or more working hours per week.[59] The system also includes a survivor pension as well as sickness and maternity benefits to employed and self-employed persons.[60] For the latter there is no minimum qualifying period.[61]

---

54 Taylor (n 12 above) 57.
55 As above.
56 As above.
57 Olivier & Kalula (n 53 above) 667.
58 Taylor (n 12 above) 57.
59 As above.
60 As above.
61 As above.

Once again, this particular system is very insular and does not contain any cross-border agreements.

2.8 Swaziland

According to Taylor, social security in Swaziland is still in the early stages of development.[62] Employers in the private, agricultural and industrial sector make compulsory contributions to a pension fund, and employees contribute half the total amount.[63] Public servants with more than 10 years of service are eligible for pensions.[64] Apart from these, there are private pensions, private life insurance schemes, means-tested targeted relief to needy people and welfare services for those with disabilities and other special needs.[65]

In 1983, Swaziland introduced workmen's compensation, based on employer liability for occupational injuries and diseases, permanent disability, temporary incapacity and death.

Currently, Swaziland lacks arrangements on the transfer of benefits from one fund to the other nationally, and no formal agreements with other countries exist. Innovative legislation and multinational agreements between Swaziland can bridge this gap in order to extend protection to both Swazi nationals and non-nationals.

2.9 Tanzania

In Tanzania, a number of funds provide social security benefits to its members. The National Social Security Fund covers workers in the private sector as well as non-pensionable and non-permanent employees in the civil service and parastatal organisations.[66] The self-employed are covered by the Parastatal Pension Fund.[67] The latter fund was initially intended for pensionable and permanent employees in parastatal organisations, but cover has been extended to all those who want to join.[68] The Local Authority Pension Fund covers employees of local authorities and the Public Service Pension Fund and the National Health Insurance Fund cover government workers and all public servants respectively.[69]

The Labour Law Reform Task Team was instructed to review social security legislation in Tanzania. Although all the above-mentioned schemes have been retained, the Task Team had some reservations about

---

62 Taylor (n 12 above) 57.
63 As above.
64 As above.
65 As above.
66 Report of the Tanzanian Labour Law Reform Task Team (n 48 above) 10.
67 As above.
68 As above.
69 As above.

this.[70] Apart from recommendations on contributions and the payment of benefits, the Task Team also made extensive recommendations on the movement of members from one public fund to another, notably:

- retention of benefits built up under the first fund;[71]
- refusing an employee's withdrawal of benefits upon completion of service with a former employer and assumption of services with a new employer;[72]
- recognition of periods of contribution with an old fund as periods of contribution with the new fund;[73]
- allowing the said employee to be a member within the framework of the new fund on the basis of contributions applicable to the new fund and deciding whether one fund should be solely liable for payment of all relevant benefits or whether payment of contributions should be shared between the old and the new fund.[74]

These recommendations are commendable and have been included in Tanzania's Social Security Bill.[75]

As far as agreements with other jurisdictions are concerned, the Bill explicitly provides for bilateral or multilateral agreements between the government of Tanzania and other governments or international organisations. These agreements may prescribe the conditions and procedures for the transfer of membership of funds when an employee transfers to employment outside the borders of Tanzania.[76] The clause specifies that in entering into bilateral or multilateral agreements, the government shall consider the need or otherwise to implement within the framework of the agreement any one or all of the internationally applicable cross-country social security principles, including equality, choice of law for benefit claims, aggregation of insurance premiums, maintenance of acquired rights, payment of benefits even though the beneficiary does not reside in his home country, and the modification, adaptation or amendment of the provisions of this bill or any other law to give effect to the agreement.

This particular innovative approach in Tanzania should be used as a model for similar agreements in other countries in SADC. Not only does it provide for possible bi-and multilateral agreements, but it also highlights a number of core values, such as equality and the main-

---

70 Report of the Tanzanian Labour Law Reform Task Team (n 48 above) 115. Eg, it was argued that the system needed a complete overall and that very little should remain of the existing social security system.

71 Report of the Tanzanian Labour Law Reform Task Team (n 48 above) 119.

72 As above.

73 As above.

74 As above.

75 Social Security Bill 2005. See cl 323.

76 Cl 324(2) Social Security Bill 2005.

tenance of acquired rights. Furthermore, it is unique to a developing country and is not overly idealistic.

2.10 Zambia

Unlike Tanzania, whose economy is mainly dominated by agriculture, the main economic activity in Zambia is mining.[77] As far as social protection is concerned, Chisupa explains that section 7 of the Zambian Constitution[78] determines that the state will endeavour to provide social protection to its citizens subject to the availability of resources.[79] This principle is executed through various instruments enacted by the government. Social protection legislation in Zambia comprises the National Pension Scheme Act,[80] the Public Service Pension Act,[81] the Workers Compensation Act[82] and the Local Authorities Superannuation Act. [83]

The National Pension Scheme Act came into operation in February 2000.[84] Membership of this scheme is compulsory for employees, civil servants and those employed by the local authorities.[85] This particular scheme pays retirement benefits, invalidity pensions, survivors' pensions as well as a funeral grant.

The Public Service Pension Fund pays benefits to those employed in the public service and those who became disabled whilst on duty.[86]

Older than these two funds, the Local Authorities Superannuation Fund was established in 1954. This particular scheme covers employees of all local authorities, the Zambia Electricity Supply Corporation and the National Housing Authority.[87] This scheme provides protection against retirement and invalidity and pays benefits to survivors.[88]

For occupational injuries and diseases, the Workers' Compensation Fund provides benefits to all employees except those in the police and armed forces.[89]

---

77 Taylor (n 12 above) 59.

78 Constitution of Zambia, 1996.

79 N Chisupa 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Zambia' in Olivier & Kalula (n 32 above) 198.

80 Chisupa (n 79 above) 198 (no clearer reference available).

81 Act 35 of 1996.

82 Chisupa (n 79 above) 201 (no clearer reference available).

83 Chisupa (n 79 above) 200-201 (no clearer reference available).

84 As above.

85 Chisupa (n 79 above) 198-199.

86 Chisupa (n 79 above) 200.

87 As above.

88 As above.

89 Chisupa (n 79 above) 201.

Finally, a number of non-statutory schemes and private pension schemes exist that provide benefits to those who are not covered by the public schemes.[90]

On the social assistance side, there are the Public Welfare Assistance Scheme and the programme against malnutrition.[91]

It is not clear whether there are arrangements concerning transfers between pension funds. There is, however, a very successful broad-based bilateral agreement with Malawi that provides for the payment of a range of social security benefits.[92] No other agreements exist with other countries in the SADC region.

2.11 Zimbabwe

According to Taylor, Zimbabwe does not have a comprehensive social security system, but rather a number of fragmented schemes under separate laws for workmen's compensation, pension and provident funds, state service disability benefits, welfare assistance and war victims' compensation.[93] The pension scheme covers workers in formal employment only.[94] Employers and employees both contribute towards this pension scheme.[95]

The Accident Prevention and Workers' Compensation Act provides protection against injuries or deaths occurring in the workplace. Only those in the formal sector benefit from this particular scheme. As with most other schemes, only employers contribute. Benefits include medical care, a disability pension and assistance towards medical care.[96]

As far as social assistance is concerned, Zimbabwe has a means-tested system aimed at the poorest members of society.[97] Finally, there is access to health services and drought relief.[98]

On the system as a whole, Kaseke states that social protection schemes in Zimbabwe do not promote integration and inclusion. Furthermore, coverage is low because the existing scheme does not cover people in the informal sector at all. Also, the government assists approximately only one in every thousand needy applicants.[99]

From the above it is evident that Zimbabwe's social protection system fails nationally. Consequently, there are no agreements with other SADC countries about the portability of benefits whatsoever. It is

---

90 As above.

91 As above.

92 Report of the Tanzanian Labour Reform Task Team (n 48 above).

93 Taylor (n 12 above) 59-60.

94 E Kaseke 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Zimbabwe' in Olivier & Kalula (n 32 above) 220.

95 As above.

96 As above.

97 As above.

98 As above.

99 Kaseke (n 94 above) 224.

submitted that, because there are so many migrant workers who flock to South Africa, it should be a priority of both governments to enter into agreements about the transfer of long-term benefits.

2.12 Conclusion

From the discussion above, it is clear that social protection in SADC member states is not at all integrated. Each member state has a national system that is fragmented and, in most cases, severely strained. Better protection for non-citizens can only take place in a well-organised structure where there is mutual consensus on core values. The next paragraph looks at the existing structures in SADC and the way in which these structures aim at uniformity and co-operation.

3 The role of existing structures and agreements

The existing SADC structures include, *inter alia*, the Summit of Heads of State and Government, the Council of Ministers, commissions and a tribunal.[100] In most member states there are already a SADC national committee as well as a range of national programmes.[101]

When considering developments in the region and possible restructuring, one must bear in mind that there is no formal labour market in the SADC region and that labour market regulation is urgently needed.[102] Labour market regulation is needed in order to prevent 'beggar thy neighbour' policies.[103]

Unfortunately, other international human rights instruments on the continent are of limited value in the area of migration. Article 12(1) of the African Charter on Human and Peoples' Rights (African Charter)[104] contains provisions pertaining to the right to freedom of movement and residence of individuals. Article 12(1) of the African Charter guarantees an individual's right to leave any country, including his own, and to return to his country. Furthermore, article 16 provides for the right to health, article 17 for the right to education and article 22 for the right to economic, social and cultural development. The African Charter recognises socio-economic rights in a unique way by referring

---

100 See in general Olivier & Kalula (n 53 above) 658.

101 Olivier & Kalula (n 53 above) 660.

102 Olivier & Kalula (n 53 above) 668.

103 As above. Olivier & Kalula summarise SADC's objectives as follows: ' ... the promotion of economic and social development and the establishment of common ideals and institutions ... The treaty commits member states to the fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy and rule of law, equity, balance and mutual benefit.'

104 OAU Doc OAU/CAB/LEG/67/3/Rev 5.

to economic development within the context of group solidarity.[105] Unfortunately, when compared to other international and regional instruments, the African Charter makes little mention of social security and it places little emphasis on social security.[106] However, one need not despair: Jansen van Rensburg and Lamarche explain that the African continent has a unique way of addressing social security rights. The focus is on the duties of families and communities towards the destitute members of society. The African Charter reflects this value in the duty that is placed upon an individual to maintain his or her parents in the event of need.[107]

The only other international human rights instrument that originated on the African continent that deals with social security is the African Charter on the Rights and Welfare of the Child (African Children's Charter). This instrument addresses a child's rights to survival, protection and development, education, health and health services and the right not to be exploited economically.[108]

When looking at international treaties such as the African Charter, one should bear in mind that such an instrument should first be ratified and adopted. It is only when a country brings its national legislation up to par with an international instrument that the instrument has any value in providing legal protection. The countries discussed in paragraph 3 above should do more than simply ratify existing treaties if they are to extend social protection to migrants. With this in mind, the discussion turns to the EU as a model for cross-border protection in order to see whether it provides possible solutions for problems related to the protection of non-citizens in SADC.

4 Cross-border protection of non-citizens in the European Union: Lessons to be learnt?

By way of comparison, one can draw from the European Community Regulation 1408/71 that applies to families who move around within the EU. A number of basic principles apply in the EU, namely:[109]

- choice of law, regarding the identification of the applicable legal system;
- equal treatment;

---

105 L Jansen van Rensburg & MP Olivier 'International and supra-national law' in Olivier *et al* (n 14 above) 633. See also BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American system' (1984) 6 *Human Rights Quarterly* 141 147.

106 As above.

107 L Jansen van Rensburg & L Lamarche 'The right to social security and assistance' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 232.

108 As above.

109 Olivier & Kalula (n 53 above) 670-671.

- aggregation of insurance periods; and
- maintenance of acquired benefits and the payment of benefits to community residents, irrespective of their place of residence.

These principles are universal and should ideally be implemented in any sound legal system that deals with migrants, regardless of the labour market it serves. In order to achieve these principles, four possible regimes may be followed in order to solve the problem of portability of benefits across borders, namely:

- access to social security benefits and advanced portability regulated by bilateral agreements between the migrant-sending and receiving country;[110]
- access to social security benefits in the absence of bilateral agreements;[111]
- no access to portable social security benefits;[112] and
- undocumented but legal migrants who participate in the informal sector of the host country.[113]

Where access to social security benefits and advanced portability are regulated by bilateral agreements between the migrant-sending and receiving country, it should be easy for a migrant to have his benefits transferred from one country to another.[114] However, not all bilateral social security agreements cover all benefits, with the result that a migrant worker may still experience inconvenience with transfers.[115]

In the case of the second possibility, namely, where there is an absence of bilateral agreements, the national social law of the host country alone determines if and how benefits may be accessed after the return to the home country.[116]

The third possibility, namely, where migrants have no access to social security benefits, is probably the most inequitable situation.[117] Typically, migrants are not allowed to contribute to long-term protection schemes such as old-age pensions.[118] Where one can expect the fairly well-to-do to invest in private retirement schemes, the average migrant in SADC is not in a position to make such private arrangements.[119]

---

110 Holzman *et al* (n 3 above) 7.

111 As above.

112 As above.

113 As above.

114 As above.

115 As above.

116 As Holzman *et al* (n 3 above) 7 correctly argue: 'This is obviously a broad category with a varying quality of portability, as the national social law varies greatly across countries. Most legal immigrants who do not benefit from bilateral agreements fall within this category.'

117 As above.

118 As above.

119 As above.

In the final instance, every bit as problematic as the third possibility, is the case in which undocumented but legal immigrants participate in the informal sector of the receiving country. These migrants usually are not entitled to any social protection and they inevitably end up with no portable rights at all.[120]

From the discussion of the country-specific arrangements above,[121] it is evident that social security benefits in most SADC member states are very limited at the national level. For those who do migrate between member states, there are usually no bilateral agreements, or no access to social security benefits and in most cases, migrants are taken up in the informal sector where they have no or little protection, and definitely no prospect of portability of benefits.

This is a multi-dimensional problem that cannot be solved through the efforts of one or two member states alone. Instead, urgent and creative solutions are needed. The next section looks at a number of possibilities that may be explored in the near future.

5 Recommendations

5.1 General

The importance of a tailor-made solution for the SADC region cannot be over-emphasised. By merely copying the existing structures in the EU or other economic areas, the specific challenges that face SADC member states can easily be overlooked. The EU is much older and is made up of countries such as Germany, Belgium and Holland, who have a history of social security that goes back a very long way. Although international standards should definitely be considered, one should not be naïve about the potential and capacity of social protection structures within SADC. With this in mind, the next paragraph advances a number of possible solutions.

5.2 Portability at a national level

As was seen above, each SADC country has a specific system within which protection is afforded. The most pressing issue on a national level is the portability of pension fund benefits. In this regard, it is suggested that countries adopt a similar approach than what was suggested for Tanzania, namely that benefits built up under the first fund be retained, that employees not be allowed to withdraw pension benefits when their employment contracts terminate for whatever reason, that various periods of contribution are recognised and that funds reach agreements on transfers and payments of benefits to

[120] As above.

[121] See para 3 above.

employees.[122] Transferability of other benefits, such as medical care and disability benefits, will definitely in due course follow the same pattern, especially if the pension funds model as suggested here is successful. The proposed legislation as envisaged by the Tanzanian Labour Law Reform Task Team[123] may just as profitably be implemented by other member states in SADC.

The most important issue nationally is for the legislator to force employees to transfer their benefits, either into a new fund or into a long-term fixed deposit for later use. Currently, members of funds withdraw their benefits prematurely without being penalised. By eliminating this problem and by educating employees about the consequences of early withdrawal, employees are protected from the devastating effects of using their benefits on commodities that have no long-term value. Unfortunately, most funds are regulated by legislation and a change in legislation is the only way in which the non-transferability of benefits can be achieved.

5.3 Cross-border portability of benefits

Before one can even start to make recommendations regarding portability of benefits, it is necessary to look at core values and importantly, issues concerning human rights.

According to the Taylor Report,[124] a number of important measures have already been undertaken in order to synchronise systems in SADC. For instance, a Protocol on Freedom of Movement of Persons in SADC was concluded in May 1998.[125] The Protocol 'suggests a phased approach, whereby the objectives of freedom of movement of persons, namely visa-free entry, residence and establishment for SADC citizens in the territories of member states, are incrementally and progressively attained'.[126]

As far as values are concerned, the Social Charter of Fundamental Rights has been agreed upon and is open for ratification by member states. According to the Taylor Report:[127]

> The Charter contains provisions relating to the social protection of both workers and those who are not employed — and regulates the position of

---

122 See MP Olivier 'Acceptance of social security in Africa' paper delivered at the ISSA Regional Conference for Africa held at Lusaka, Zambia, from 9-12 August 2005 15.

123 See sec 2.10 above.

124 Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present - Protecting the Future draft consolidated report Pretoria (2002) — Committee of Inquiry into a Comprehensive System of Social Security for South Africa (Taylor Report) http://www.welfare.gov.za/documents/2002/May/pdf (accessed 30 August 2007) 561.

125 As above.

126 As above.

127 As above.

workers (in terms of social protection) more comprehensively that those who do not work.

Furthermore, the African Charter contain provisions on the protection of peoples' rights, group solidarity, the protection of the family, the right of the aged and the disabled to special protection.[128]

It therefore seems as though most of the SADC member states have reached consensus on the values that should underpin social protection structures.

As far as the co-ordination of social security structures is concerned, the Taylor Report favours bilateral and multilateral agreements that make provision for choice of law, equal treatment, aggregation of insurance benefits and maintenance of acquired benefits as well as the payment of benefits to community members.[129] Olivier is in favour of the same arrangements.[130]

The establishment of bilateral and multilateral agreements is not a new idea. As far back as 1997, a Draft Protocol on the Facilitation of Movement of Persons in the SADC envisaged a number of detailed objectives.[131] These objectives are *inter alia* the following:[132]

- facilitation of movement of citizens of member states by gradually removing obstacles which impede such movement;
- expanding the network of bilateral agreements as a step towards a multilateral regional agreement;
- co-operation in preventing illegal movement of citizens;
- co-operation in improving control over external borders of the SADC community; and
- promotion of common policies with regard to immigration matters where necessary and feasible.

The ratification of Protocols such as these will no doubt pave the way for detailed agreements, such as those provided for in the Tanzanian Social Security Bill of 2005.[133]

Apart from the above suggestions, it is submitted that there are two crucial steps that need to be taken before the portability of benefits can be tackled. First, all member countries should obtain statistics pertaining to migration. These statistics should show why workers migrate, the frequency of their movements (for instance annually), the type of work they engage in and the funds they belong to, both in their home country and in the receiving country. This should sketch a clear picture of the patterns that exist between countries and shed light on the need

---

128 Taylor Report (n 124 above) 562-563.

129 Taylor Report (n 124 above) 564.

130 Olivier (n 122 above) 15.

131 Olivier *et al* (n 2 above) 58.

132 See art 2 of the Draft Protocol.

133 Proposed sec 324(2) of the Social Security Bill 2005.

for cross-border agreements. For instance, if it is clear that there are no migrants travelling between South Africa and the Seychelles, it is unnecessary for those two countries to enter into bilateral agreements. However, if it is evident that a multitude of labourers migrate from Zimbabwe to South Africa, it is obvious that agreements are needed as a matter of urgency.

A second solution is for existing funds, especially retirement funds, to compile a database of non-nationals who contribute to funds. These funds are enabled to collect payments from employers and employees alike because of national legislation. At the very least, these funds can initialise procedures for cross-border transfers to other funds or into bank accounts on fixed-term deposits. Because long-term benefits are administered by funds and they are in a position to draw considerable benefits from keeping large amounts of money in their account, one can expect them to employ a bit of capital and to set up and maintain structures aimed at the portability and preservations of benefits.

Finally, if member states in SADC do proper research into migration and long-term benefit funds install and maintain proper databases, it will be possible for member countries to deal with the problem of the portability of benefits and to enter into meaningful bilateral and multilateral agreements.

6 Conclusion

SADC, as an economic region, currently experiences the spontaneous migration of citizens in search of job opportunities and a better standard of living. More often than not, these migrants enjoy limited protection and find that they have nothing to show after a lifetime of hard work.

Migration cannot and should not be stopped, as freedom of movement is an internationally-recognised right. Instead, individual countries should respect the fundamental rights of their citizens as well as the right to a decent standard of living of migrants. By recognising international standards pertaining to migrants and, more importantly, standards pertaining to the portability of benefits, SADC member countries should gradually extend social protection to non-citizens who contribute to their economies through their labour and thereby enhance their right to freedom of movement.

There can be no doubt that this is a multi-faceted problem for which there is no one-dimensional answer. It is suggested that member states of SADC gather accurate data on migration in the area and that funds play a key role in setting up databases and structures to track the payment of benefits between funds, both nationally and multi-nationally. Finally, once it is clear exactly what the extent of migration is, countries should adopt legislation on a national level on the portability of benefits, provide for bilateral and multilateral agreements and then

eventually enter into binding agreements with other member states. Legally binding agreements will ensure that non-citizens have an enforceable right against pension funds or any other institutions that provide social security benefits.

In the final instance, it is submitted that the principles that underpin EU Protocols are sound and comply with international human rights standards. Once the basic structures are in place in SADC, these principles are well worth incorporating in supra-national legislation that deals with the social protection of migrants.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Corporal punishment in public schools: A call for legal reform

*Nicole O'Neal**
JD Candidate 2008, Florida International University College of Law, USA

Summary

The use of corporal punishment within the public educational system of African states is unlawful, detrimental to the health and welfare of the children, and an unnecessary impediment to educational excellence in the region. Public school corporal punishment violates several international and regional human rights treaties, customary international law, and may breach jus cogens *norms prohibiting torture and recognising a fundamental right to respect for human dignity. The United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights expressly condemn all forms of corporal punishment. In addition, the Universal Declaration of Human Rights, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the African Charter on the Rights and Welfare of the Child can also be interpreted to prohibit the practice of public school corporal punishment. Most African states have ratified these international and regional human rights instruments; therefore, laws authorising this practice should be repealed and alternative methods should be encouraged through legal reform. This article explains how laws authorising public school corporal punishment breach human rights law, and calls for law reform in African states. In addition to the repeal of such laws, this article suggests legislation that could be implemented domestically to condemn and prohibit this practice.*

* BA (Salem College); nonea001@fiu.edu. Many thanks to Jeanelle Ferrill, Dr Susan Bitensky, Prof Andrea Smith, Prof Charles Pouncy and Prof Heather Hughes.

1 Introduction

On 22 February 2006, Alice Williams caned her student, Georgina Archer, for disrupting the classroom.[1] According to Georgina and her classmates, the teacher used a bamboo cane to strike her head and shoulders, while she sat at her desk trying to shield herself with her arms. The cane struck Georgina in the left eye, causing permanent blindness. Georgina was a 12 year-old junior secondary student at Sakumono Complex Schools in Tema, Ghana.

The facts of the case of *Republic v Williams*[2] illustrate why human rights law condemns the practice of public school corporal punishment.[3] Corporal punishment is a painful, intentionally inflicted physical harm administered by a person in authority for disciplinary purposes.[4] Historically, the general rationale justifying the use of corporal punishment is that the infliction of pain, injury, humiliation and degradation would deter offenders from committing similar conduct in the future.[5] However, experts and scholars contend that, rather than deterring future offences, corporal punishment only results in promoting violent behavior in children and towards them.[6]

---

1 Interview with William Archer, father of Georgina Archer, in Tema, Ghana (10 June 2006); interview with Charles Archer, attorney for Georgina Archer, the law offices of Charles Archer in Tema and Accra, Ghana (10 & 12 June 2006 respectively). Mr Archer and Charles Archer provided most of the facts from the case discussed in this section; the remaining facts are derived from the author's personal observations of the criminal proceedings that took place on 10 June 2006.

2 Court case D8/30/06. The Tema Circuit Court 'A' had not rendered a decision at the time this article was written.

3 See also *United Nations study on violence against children,* 61st session, UN Doc A/61/299 (2006) (a comprehensive report on the implementation of corporal punishment against children, including within educational settings).

4 CP Cohen 'Freedom from corporal punishment: One of the human rights of children' (1984) 2 *New York Law School Human Rights Annual* 1; MA Straus *Beating the devil out of them: Corporal punishment in American families and its effects on children* (2001) 4; *Canadian Foundation for Children, Youth and the Law v Attorney-General in Right of Canada* [2004] SCR 76 http://www.canlii.org/en/ca/scc/doc/2004/2004scc4/2004scc4.html (accessed 31 March 2008).

5 Amnesty International *Combating torture: A manual for action* http://www.amnesty.org/resources/pdf/ combating_torture/sections/appendix15.pdf (accessed 15 November 2007); see 'A trauma-organised society? Looking at the numbers http://www.sanctuaryweb.com/Documents/Downloads/Trauma-organized%20society%20Bearing%20Witness.pdf (accessed 15 November 2007).

6 n 3 above, paras 24-37; 'Is corporal punishment an effective means of discipline?' http://www.apa.org/releases/spanking.html (accessed 27 October 2007); 'Research: effects of corporal punishment' http://www.stophitting.com/disathome/effectsOfCP.php (accessed 27 October 2007); ChildAdvocate.org, http://www.childadvocate.org/1a_arguments.htm (accessed 27 October 2007); 'A trauma-organised society?' (n 5 above);' SH Bitensky *Corporal punishment of children: A human rights violation* (2006) 192.

The children of Africa have a fundamental right to education.[7] However, in order to exercise this right they must face the threat of physical harm issued directly by the state government. Parents who do not want their children subjected to corporal punishment at school have little choice if they cannot afford to send the child to a private school, or to educate the child themselves.

This article explains how laws authorising public school corporal punishment breach human rights law, and calls for legal reform in African states.[8] Furthermore, it is suggested that legislation should be implemented domestically to condemn and prohibit this practice. [9]

2 Public school corporal punishment and human rights law

The corporal punishment of children by the government of a state within a public school setting breaches their fundamental rights as human beings, including (1) respect for their human dignity and physical

---

7 Art 18(3) International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UN Doc A/6316 (16 December 1966); art 13 International Covenant on Economic, Social, and Cultural Rights, GA Res 2200A (XXI), UN Doc A/6316 (16 December 1966); art 29(1) United Nations Convention on the Rights of the Child, 28 ILM 1448, 1577 UNTS 3 (20 November 1989).

8 The scope of this article addresses every child attending public or state-sponsored educational institutions that are prior to college, undergraduate, or professional studies (ie grade schools). The age and gender of the child are irrelevant to the arguments being asserted. The author recognises that public school corporal punishment breaches the human rights obligations of all nations; however, the scope of this discussion will be limited to African nations that continue the practice. *Ending legalised violence against children: Global Report 2007* http://www.crin.org/docs/GI_report_07.pdf (accessed 19 October 2007) (providing a list of African countries that continue the practice of public school corporal punishment). This article will not condemn corporal punishment within all settings. Nonetheless, the author recognises that corporal punishment within the home as well as judicial and military settings may also violate international law. See W O'Neill *A humanitarian practitioner's guide to international human rights law* http://www.ciaonet.org/wps/watson/onw01.pdf (accessed 5 December 2007); *Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment* http://ec.europa.eu/external_relations/human_rights/ torture/guideline_en.htm (accessed 24 December 2007); 'Special Rapporteur on Torture concludes visit to Togo, HR/07/63' http://www.unhchr.ch/huricane/huricane.nsf/view01/ 5FD294437C596102C12572C1004E7457?opendocument (accessed 31 January 2008); 'In war on terror, many countries violating human rights standards, Third Committee told', GA/SHC/3830 http://www.un.org/News/Press/docs/ 2005/ gashc3830.doc.htm (accessed 31 January 2008); General Comment of the Committee on the Rights of the Child, 42nd session para 12, UN Doc CRC/C/GC/8 (2006). The historical roots of corporal punishment within African societies and educational systems as well as the reasons for the continuation of the practice would require an exhaustive analysis that is not within the scope of this article. The purpose of this article is to explain the legal grounds and claims for prohibiting public school corporal punishment. The author realises that establishing a legal standard is only one step towards solving the problem. The issue of implementation raises context and culture-specific issues that are beyond the article.

9 *Ending legalised violence against children* (n 8 above).

integrity, and (2) freedom from torture and other cruel, inhuman or degrading treatment or punishment.[10] The United Nations (UN) Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (CCPR), and the African Charter on Human and Peoples' Rights (African Charter) expressly condemn all forms of corporal punishment. In addition, the Universal Declaration of Human Rights (Universal Declaration), the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) can also be interpreted to prohibit the practice of public school corporal punishment. Most African nations have ratified these international and regional human rights instruments.[11]

Below, section 2 discusses applicable human rights law and considers international cases addressing corporal punishment.

2.1 Application of human rights law to the practice of corporal punishment in public schools

2.1.1 The United Nations Convention on the Rights of the Child

The UN Convention on the Rights of the Child (CRC) was created to ensure that all persons under the age of 18 are afforded the necessary protection of their human and individual rights.[12] The Committee on the Rights of the Child (CRC Committee) is an 18-member body of highly regarded experts on children and the law, and was established to monitor compliance with this treaty.[13] The members are selected

---

10 Arts 5 & 7 Universal Declaration of Human Rights, GA Res 217 (III), UN Doc A/810 (10 December 1948); arts 28 & 37(a) CRC; arts 7, 10, 24(1) & 26 CCPR; arts 1, 2 & 16 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, 39 UN GAOR Supp (No 16) (1984); art 5 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev 5 (1981); art 16 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990).

11 Status of Ratifications of the Principal International Human Rights Treaties http://www.unhchr.ch/pdf/report.pdf (accessed 18 October 2007); List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on Human and People's Rights, http://www.achpr.org/english/ratifications/ratification_charter_en.pdf (accessed 18 October 2007); List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on the Rights and Welfare of the Child, http://www.achpr.org/english/ratifications/ratification_ child_en.pdf (accessed 18 October 2007).

12 Art 1 CRC.

13 n 15 above, art 43 paras 1-3; see Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child-Members http://www.ohchr.org/english/bodies/crc/ members.htm (accessed 27 January 2007); see CP Cohen 'A guide to linguistic interpretation of the Convention on the Rights of the Child: Articles 1, 41 and 45' in CP Cohen & HA Davidson (eds) *Children's rights in America: UN Convention on the Rights of the Child compared with United States law* (1990) 33; see Y Iwasawa 'The domestic impact of international human rights standards: The Japanese experience' in P Alston & J Crawford (eds) *The future of human rights treaty monitoring* (2000) 245 258-59.

by state parties and consideration is given to geographical and legal system distribution.[14]

Several CRC articles apply to the prohibition of corporal punishment within public schools. Article 37(a) states that all state parties shall ensure that '[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.'[15] Additionally, article 19 reads as follows:[16]

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from *all forms of physical* or mental *violence*, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

In its General Comment No 8, the CRC Committee on the Rights of the Child interpreted articles 37(a) and 19 jointly and reasoned that, because corporal punishment is a form of violence, it is unacceptable under the Convention.[17] Furthermore, this Committee called for the elimination of legislation allowing for reasonable or moderate correction, and the repeal of all legislation allowing schools the authority to practise corporal punishment.[18] This Committee stresses that such legislation does not conform to the Convention, as it requires that *all forms* of violence against children be eliminated.[19]

Public school corporal punishment clearly violates article 37(a) of CRC because it mandates that physical violence be employed by the government to maintain discipline.[20] Furthermore, article 19 is breached when the local Ministry of Education authorises the practice in public schools.

Pursuant to articles 29(1) and 28(2), public education systems that use corporal punishment fail to provide an environment that promotes nonviolence or that ensures disciplinary measures consistent with the child's human dignity. Article 28(2) of the Convention provides that '[s]tate parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's

---

14 Art 43 CRC.

15 Art 37(a) CRC.

16 Art 19(1) CRC (my emphasis).

17 Report of the UN Committee on the Rights of the Child on the Seventh Session, UN Doc CRC/C/34, Annex IV 63 (November 1994); see also Concluding Observations of the Committee on the Rights of the Child: Ethiopia, 26th session, paras 38-39, 47, UN Doc CRC/C/15Add 144 (2001); and Concluding Observations of the Committee on the Rights of the Child: Mozambique, 29th session, paras 38-39, UN Doc CRC/C/Add 172 (2002).

18 CRC Committee General Comment No 8, 42nd session paras 32-33, UN Doc CRC/C/GC/8 (2006); see also Concluding Observations of the Committee on the Rights of the Child: Kenya, 28th session para 64, UN Doc CRC/C/15/Add 160 (2001); Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania, 27th session para 67, UN Doc CRC/C/15/Add. 156 (2001).

19 General Comment No 8 (n 18 above).

20 n 18 above, para. 8.

human dignity and in conformity with the present Convention'.[21] The CRC Committee has interpreted article 28 as limiting the forms of discipline that can be administered by schools, and as promoting non-violence.[22] Furthermore, article 29(1) of the Convention sets forth 'that the education of the child shall be directed to (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential'.[23] The CRC Committee interpreted article 29(1) as including, within the right to an education, a need to provide the child with the ability to achieve 'a balanced, human rights-friendly response' to challenges in the world through disciplinary measures respectful of one's dignity.[24] The right to an education extends to the environment within educational institutions, and thus the Committee has stated that schools should be 'child-friendly' and that education must be provided in a way that respects the child's dignity.[25]

2.1.2 The International Covenant on Civil and Political Rights

The UN Human Rights Committee, the interpretative body for the International Covenant on Civil and Political Rights (CCPR), has stated that the prohibition against torture in the Covenant extends to corporal punishment and excessive chastisement 'ordered as punishment for a crime or as an educative or disciplinary measure'.[26] Furthermore, this Committee has directed state parties to notify them 'if corporal punishment is imposed to enforce a regulation',[27] and to punish offenders.[28] In accordance with these interpretations of CCPR, public school corporal punishment clearly breaches article 7 of the treaty.

Article 9 provides that '[e]veryone has the right to liberty and security of person'.[29] Furthermore, article 24 of CCPR states:[30]

---

21 Art 28(2) CRC.

22 CRC Committee General Comment No 1, 26th session para 8, UN Doc CRC/GC/2001/1 (2001); SH Bitensky 'Educating the child for a productive life: Articles 28 and 29' in Cohen & Davidson (n 13 above) 167 174.

23 Art 29(1) CRC.

24 CRC Committee General Comment No 1 (n 22 above).

25 n 22 above, para 8; see eg, Concluding Observations of the Committee on the Rights of the Child: Andorra, 29th session paras 39-40, UN Doc CRC/C/15/Add 176 (2002); see also Concluding Observations of the Committee on the Rights of the Child: Chile, 29th session paras 31-32, UN Doc CRC/C/15/Add. 173 (2002); see also Concluding Observations of the Committee on the Rights of the Child: Cape Verde, 28th session paras 35-36, UN Doc CRC/C/15/Add. 168 (2001).

26 Human Rights Committee General Comment No 20, 1138 mtg para 5 (1992) http://www.refugeelawreader.org/316/General_Comments_of_the_Human_Rights_Committee_No._20.pdf (accessed 31 January 2007). Art 7 of CCPR states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...'

27 Human Rights Committee General Comment No 28, para 13, UN Doc CCPR/C/21/Rev 1/Add 10 (2000).

28 Human Rights Committee General Comment No 20 (n 26 above) para 13.

29 Art 9(1) CCPR.

30 Art 24 CCPR.

> Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

However, inherent in the administration of corporal punishment is a violation of the child's security of person since he is being subjected to physical violence against his will. Furthermore, the state cannot simultatneously protect the child pursuant to article 24, while engaging in the administration of cruel, inhuman or degrading punishment that breaches the child's human rights under article 7. [31]

2.1.3 The Universal Declaration of Human Rights

Article 1 of the Universal Declaration states that '*[a]ll human beings* are born free and equal in dignity and rights'.[32] Article 2 further supports that the rights and freedoms afforded to adults are also applicable to children.[33] Article 5 of the Universal Declaration states that '*no one* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[34] While the Universal Declaration is held to be non-binding, the non-derogable rights enshrined within it, such as article 5, are held to be binding under customary international law.[35]

---

31 SH Bitensky 'Spare the rod, embrace our humanity: Toward a new legal regime prohibiting corporal punishment of children' (1998) 31 *University of Michigan Journal of Law Reform* 412.

32 Art 1 Universal Declaration (my emphasis).

33 Art 2 Universal Declaration: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration.'

34 Art 5 Universal Declaration (my emphasis).

35 P Sieghart *The international law of human rights* (1983) 53; O Schachter 'International law in theory and practice' in HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (2000) 226 229; see PG Lauren *The evolution of international human rights visions seen* (2003) 232; Committee on the Enforcement of Human Rights Law, International Law Association, Final Report on the Status of the Universal Declaration of Human Rights in National and International Law in RB Lillich & H Hannum *International human rights: Problems of law, policy and practice* (1995) 166 166; MG Johnson 'A Magna Carta for mankind: Writing the Universal Declaration of Human Rights' in MG Johnson & J Symonides *Universal Declaration of Human Rights: A history of its creation and implementation 1948-1998* (1998) 19 67. The principle of international law prohibiting torture is generally accepted as *jus cogens*, a mandatory norm accepted and recognised by the international community and from which no derogation is permitted. See United Nations General Assembly Official Records, 50th session para 177 A/50/44/ (1995); United Nations General Assembly Official Records, 51st session para 65(i) A/51/44 (1996); *see* JH Burgers & H Danelius *The United Nations Convention Against Torture: A handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 12; H Charlesworth & C Chinkin 'The gender of *jus cogens*' in Steiner & Alston (above) 173-74.

This declaration of the right not to be subjected to torture or inhumane treatment, in most written constitutions, is declared to be an absolute unqualified right. It is not derogable, even in an emergency. The legislature cannot whittle the right down, or legislate it away in the interests (for example) of public order.[36]

Corporal punishment is held to be 'inconsistent with the prohibition of torture and other [cruel, inhuman or degrading] treatment or punishment enshrined in the Declaration'.[37]

Through the state-sponsored corporal punishment of children, several African nations continue to breach their human rights obligations under this international declaration. Allowing for the lawful use of corporal punishment within the public educational system clearly violates the non-derogable right set forth in article 5 of the Universal Declaration, which is applicable to all human beings, including children.

The Special Rapporteur on Torture considers corporal punishment a violation of CCPR, as the practice also breaches the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).[38] Paragraph 21(h) of those Guidelines states that '[e]ducation systems should, in addition to their academic and vocational training activities, devote particular attention to avoidance of harsh disciplinary measures, particularly corporal punishment'.[39] As well, paragraph 51 emphasises that 'no child shall be subjected to harsh or degrading correction or punishment'.[40] The Special Rapporteur notes that these provisions reveal that allowing corporal punishment would be contrary to its own Preamble as well as that of the Universal Declaration.[41] Accordingly, public school corporal punishment clearly violates paragraphs 21(h) and 51 of the UN Guidelines for the Prevention of Juvenile Delinquency.

2.1.4 The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) defines torture as[42]

> [a]ny act by which severe pain or suffering, whether physical or mental,

---

36 *State v Pickering* [2001] AILR 51 http://www.austlii.edu.au/au/journals/AILR/2001/51.html (referring to art 5 of the Universal Declaration and art 7 of CCPR).

37 Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para 48, A/57/173 (2 July 2002).

38 n 37 above, para 51.

39 United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) GA Res 45/112 para 21(h) (1990).

40 n 37 above.

41 n 37 above, para 53.

42 Art 1 CAT.

> is intentionally inflicted on a person for such a purposes as ... punishing him for an act he or a third person has commited or is suspected of having committed, or intimidating or coercing him or a third person ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

This treaty also seeks to ban acts that may not rise to the level of torture, but nonetheless violate a person's individual and human rights.[43] Article 16(1) of CAT states as follows:[44]

> Each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

While public school corporal punishment may not reach the level of severity necessary to fall within the ambit of article 1, this punishment may consistently lie within the scope of article 16(1).[45] The teachers and administrators are acting in an official capacity on behalf of the state when punishing their students. Therefore, the only element that must be determined in order to find a violation of this Convention is severity.

The Committee Against Torture (CAT Committee) has stated that corporal punishment may constitute a violation of CAT, and the Commission on Human Rights has also noted in its resolutions that 'corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture'.[46] '[C]hildren are necessarily more vulnerable to the effects of torture and, because they are in the critical stages of physical and psychological development, may suffer

---

43 Former Rapporteur for and member of the Committee on the Rights of the Child, Marta Santos Pais, has stated that it is a mistake to identify torture with 'extremely serious and massive cases' since it may 'cover a wide degree of situations', even those which cause 'unperceivable mental suffering' or those involving 'a disciplinary measure which may be degrading or inhuman'. Bitensky (n 31 above) 353 396-97 (citing Address at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Dublin, Ireland, 22 August 1996) (transcript on file with *University of Michigan Journal of Law Reform*).

44 Art 16(1) CAT.

45 NS Rodley 'Foreword' in G van Bueren (ed) *Childhood abused: Protecting children against torture, cruel, inhuman and degrading treatment and punishment* (1998) xv.

46 Report of the Committee Against Torture, UN GAOR, 50th session Supp 44 paras 169 & 177, UN Doc A/50/44 (1995); see eg Commission on Human Rights Resolution 2002/38 para 5, 50th mtg. pmbl UN Doc E/CN 4/Res/ 2002/38 (2002); Commission on Human Rights Resolution 2001/62 para 5, 77th mtg pmbl UN Doc E/CN 4/Res 2001/62 (2001); Commission on Human Rights Resolution 2000/43 para 3, 60th mtg pmbl UN Doc E/CN 4/Res /2000/43 (2000); Commission on Human Rights Resolution 1999/32 para 3, 55th mtg pmbl UN Doc E/CN 4/Res /1999/32 (1999).

graver consequences than similarly ill-treated adults.'[47] Furthermore, the CAT Committee has expressed the view that the elimination of corporal punishment is a positive development in a state's advancement towards implementing CAT.[48]

Article 2 of CAT requires that state parties to the Convention ensure that 'effective legislative, judicial, and administrative measures are enacted to ensure that torture or degrading treatment does not occur within its borders'.[49] The CAT Committee has clearly stated that merely limiting the punishment does not constitute effective legislative measures to restrict corporal punishment.[50] Thus, the incorporation of public school corporal punishment into the laws of a state violates article 2 of this Convention. Futhermore, limiting the beatings in order to promote 'reasonableness' does not constitute effective legislative measures to prevent cruel, inhuman or degrading treatment in accordance with article 2.[51]

2.1.5 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) has two provisions that are relevant to ensuring that the child is protected from corporal punishment issued by the state within educational settings. Article 5 states:[52]

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 5(1) of the African Charter notes that 'all individuals shall have the right to dignity and all forms of torture or degrading punishment

---

47 Report of the Special Rapporteur, Mr Nigel S Rodley, submitted to Commission on Human Rights, Concerning the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 52nd session, para 10, UN Doc E/CN4/1996/35 (1996).

48 Consideration of Reports Submitted by States Parties Under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 21st session para 74(d), A/54/44 (17 November 1998).

49 Art 2(1) CAT.

50 Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para 53, UN Doc A/57/173 (2002). ('[T]he Special Rapporteur believes that any form of corporal punishment of children is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment of punishment. He therefore calls upon states to take adequate measures, in particular legal and educational ones, to ensure that the right to physical and mental integrity of children is well protected in the public and in the private spheres.')

51 See generally United Nations General Assembly Official Records, 50th session A/50/44/ (1995); see generally United Nations General Assembly Official Records, 51st session A/51/44 (1996).

52 Art 5(1) African Charter.

should be prohibited by the state'.[53] However, inherent to the administration of corporal punishment is an intentional, physical harm caused to another human being against his or her will; therefore, public school corporal punishment breaches a child's right to human dignity and article 5 of the Charter.

Article 18 states that '[t]he state shall ensure the ... protection of the rights of the woman and the child as stipulated in international declarations and conventions'.[54] International law recognises the right to be free from torture or cruel, inhuman or degrading treatment or punishment, and the right of respect for human dignity. Furthermore, corporal punishment has been categorised, at a minimum, as a form of cruel, inhuman or degrading treatment and several committees have interpreted various human rights treaties as calling for the repeal of laws that allow this practice. Therefore, public school corporal punishment breaches obligations under article 18 and applicable international laws. Furthermore, as it would be reprehensible to submit adults to corporal punishment, children have a right to freedom from such treatment as well. There is no legitimate basis to discriminate in the treatment of adults and children with respect to the administration of corporal punishment by the government of a state. Pursuant to the African Charter, several African states, including Zambia, have outlawed the use of corporal punishment in schools.[55]

2.1.6 The African Charter on the Rights and Welfare of the Child

Under the African Charter on the Rights and Welfare of the Child (African Children's Charter), article 16 requires that the educational measures practised within a state must be such that they protect the child from degrading maltreatment.[56] Furthermore, this Charter establishes that, even when a child is subjected to discipline within schools, they should still be treated with humanity and dignity.[57] Under article 16 of the African Children's Charter, public school faculties, acting as proxies for the government, cannot simultaneously protect the child from degrading treatment, and engage in the practice of corporal punishment. Even if a child has been struck in the name of discipline, it is a violation of

53 As above.

54 Art 18(3) African Charter.

55 Zambia's initial state report on the implementation of the African Charter, http://www.achpr.org/english/state_reports/40_Zambia%20initial%20report_Eng.pdf (accessed 11 March 2007); see The African Commission on Human and Peoples' Rights: Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa http://www.achpr.org/english/declarations/Guidelines_Trial_en.html (accessed 11 March 2007); see n 7 above and accompanying text.

56 Art 16 African Children's Charter.

57 Art 11 African Children's Charter.

the African Children's Charter and international standards because it breaches her right to human dignity. Therefore, pursuant to the African Children's Charter, signatories to this human rights treaty should cease public school corporal punishment.

2.2 Application of international case law to public school corporal punishment

The African Commission on Human and Peoples' Rights (African Commission) and national courts have found that corporal punishment can amount to cruel, inhuman or degrading treatment, or even torture. While these legal decisions may not have a binding effect on African nations, they persuasively highlight that the practice of corporal punishment in public schools contradicts human rights law.

2.2.1 African case law

The African Commission monitors the implementation of the African Charter,[58] and has heard at least one case regarding the administration of corporal punishment by the government of a state.[59]

In *Doebbler v Sudan*,[60] the African Commission addressed the question whether the action of administering 'lashes' to a student amounted to corporal punishment, and whether such an act was in violation of the Charter. The Commission held as follows:[61]

> Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.

In reaching its decision, the African Commission noted that a determination of cruel, inhuman or degrading treatment or punishment depends upon the circumstances of the case, and that article 5 would be interpreted as broadly as possible 'to encompass the widest possible array of physical and mental abuses'.[62] The Court relied upon the reasoning of the European Court of Human Rights in *Tyrer v United Kingdom*.[63] The Commission held that[64]

---

58 Art 45 African Charter.

59 Art 5 African Charter. List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on Human and Peoples' Rights (n 11 above).

60 (2003) AHRLR 153 (ACHPR 2003).

61 n 60 above, para 36.

62 As above.

63 Discussed below.

64 n 60 above, para 42.

> [t]here is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty.

The African Commission requested the government of Sudan to abolish the penalty of lashes and 'take appropriate measures to ensure compensation of the victims'.[65]

Corporal punishment in public schools clearly constitutes a violation of article 5 of the African Charter when applying the reasoning set forth in *Doebbler*. The government, through its agents in the educational system, is applying physical force to children for various offences. Since the Commission interprets article 5 to have a wide scope, several types of punishment could fall within the ambit of inhuman and degrading treatment. Since many African nations have ratified the African Charter, public school corporal punishment should cease in these states pursuant to the African Commission's interpretation and application of article 5.

The following cases are African constitutional decisions regarding public school corporal punishment. As such, the jurisdiction of the Court and the binding power of the case are limited to the state governed by the Constitution under review. Nonetheless, these cases show that parts of the continent have already banned the practice of public school corporal punishment as a violation of the rights to human dignigty and freedom from cruel, inhuman or degrading punishment.

In *Ex parte Attorney-General of Namibia, In re Corporal Punishment by Organs of State*, the Supreme Court of Namibia held that corporal punishment by or on the authority of the government was contrary to article 8 of the Constitution of Namibia,[66] which recognises the rights to respect for human dignity and protection from inhuman or degrading treatment or punishment.[67] Therefore, public school corporal punishment contradicted the Constitution and was held to be unlawful.[68]

In *A Juvenile v State*, the Supreme Court of Zimbabwe held that the imposition of corporal punishment on schoolchildren violated section 15(1) of the Constitution of Zimbabwe and constituted degrading treatment.[69] In reaching this decision, the Court relied on jurisprudence

---

65 n 60 above, para 44.

66 Art 8(2)(b) of the Namibian Constitution provides that 'no persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'. T Maluwa *International law in post-colonial Africa* (2000) 47.

67 [1992] LRC (Const) 515.

68 As above. In *S v Williams & Others*, the Constitutional Court of South Africa held that juvenile whipping was unlawful and unconstitutional under secs 10 and 11(2) of the new Constitution of the Republic of South Africa ([1995] 2 LRC 103). See also A Lester 'The relevance of international human rights norms' (1996) 7 *Developing Human Rights Jurisprudence* 23 42.

69 Maluwa (n 66 above).

from the European Court of Human Rights to interpret the Constitution and article 5 of the African Charter.[70]

In South Africa, the legislature passed the South African Schools Act in 1996.[71] Section 10 of the Act provides:[72]

> (1) No person may administer corporal punishment at a school to a learner.
> (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

In the case *Christian Education South Africa v Minister of Education*, the constitutionality of this Act was challenged, and the Constitutional Court of South Africa upheld the Act as valid and constitutional.[73] The Court held that[74]

> the outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.

2.2.2 The European Court of Human Rights

Several cases on the subject of corporal punishment have been adjudicated before the European Court of Human Rights (European Court). These cases involved claims brought under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[75] In applying article 3, the European Court applies a severity standard to the totality of the circumstances to determine if a breach of the Convention has occurred.[76] In order to fall within the scope of article 3, the ill-treatment must attain a minimum level of severity.

The decisions discussed below further illustrate that corporal punishment is widely held to be cruel, inhuman or degrading treatment and that state-sponsored corporal punishment is a breach of human rights law. Furthermore, these cases demonstrate the operation of the severity standard which is used to determine what forms of punishment constitute cruel, inhuman or degrading treatment.

---

70 As above.

71 *Christian Education South Africa v Minister of Education* 1999 2 SA 83 (CC).

72 As above.

73 As above.

74 As above. The Court cited CCPR several times throughout the opinion.

75 European Convention for the Protection of Human Rights and Fundamental Freedoms art 3, 213 UNTS 221 (1953).

76 *Assenov & Others v Bulgaria*, 96 Eur Ct HR 3264 3288 (1998).

In *Costello-Roberts v United Kingdom*, the European Court of Human Rights applied the severity requirement by considering if the petitioner had produced[77]

> evidence of severe or long-lasting effects as a result of the treatment complained of. A punishment which does not occasion such effects may fall within the ambit of Article 3 ... provided that in the particular circumstances of the case it may be said to have reached the minimum threshold of severity required.

The petitioner had been struck three times on his clothed buttocks with a rubber-soled shoe, and there was no visible sign of bruising.[78] The Court held that, based on these facts, the petitioner had 'adduced no evidence of any severe or long-lasting effects as a result of the corporal punishment he received'.[79] Therefore, there was no violation of article 3 of the European Convention.[80]

However, in the case of *Warwick v United Kingdom*,[81] the Court held that a single cane stroke across the petitioner's hand, which resulted in a bruise, was sufficient to consitute degrading punishment. 'The punishment consisted of a physical injury inflicted by a man, in the presence of another man, on a 16 year-old girl, who under domestic legislation is a woman of marriageable age.'[82] Another important factor which affected the Court's deliberation was the presence of a bruise that was not 'of a merely trivial nature'.[83] The Court also noted that it could not '[exclude] that the punishment also had adverse psychological effects'.[84]

In *Y v United Kingdom*,[85] the petitioner was a 15 year-old male who was caned four times on his clothed buttocks, and the punishment left heavy bruising and swelling. The Court held that the headmaster's punishment constituted a violation of article 3 of the European Convention, reasoning that 'the injuries inflicted on the applicant cannot be dismissed as trivial'.[86]

In *Tyrer v United Kingdom,*[87] the Court held that the administration of lashings, although carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the

---

77 *Costello-Roberts v The United Kingdom,* 247 Eur Ct HR 47, 59-60 (1993).

78 *Costello-Roberts* (n 77 above) 52-53.

79 *Costello-Roberts* (n 77 above) 59-60.

80 *Costello-Roberts* (n 77 above).

81 *Warwick v United Kingdom* App No 947/81, 60 Eur Comm'n HR Dec & Rep 16-17 (1986).

82 As above.

83 n 81 above, 17.

84 As above.

85 *Y v United Kingdom*, App No 14229/88, 17 Eur HR Rep (Ser A) 238, 239-43 (1991) (Commission report).

86 n 85 above, 239 241-43.

87 *Tyrer v United Kingdom* 26 Eur Ct HR (Ser. A) (1978), 2 EHRR, 1 para 30 (1979-80).

exhaustion of appeal rights, violated the rights of the victim. The Court reasoned that[88]

> the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by law, ordered by the judicial authorities of the state and carried out by the police authorities of the state. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment whereby he was treated as an object in the power of authorities constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

In the aforementioned cases, the severity standard is applied by considering the totality of the circumstances. However, evidence of physical harm is an important factor in reaching a determination. The greater the evidence of physical harm (ie swelling, bruising, scars, etc), the more likely that the European Court will find that the administration of punishment reached the level of cruel, inhuman or degrading treatment. Also, the embarrassment endured by the victim and the identity of the person administering the punshment in relation to the victim play a significant role in this determination.

As discussed in *Tyrer v United Kingdom*, public school corporal punishment allows 'institutionalised violence' to be implemented by the authorities of the state, and children are treated as 'an object in the power of authorities'. In accordance with the decision in that case, even the threshold required by the severity standard could not save this practice under article 3 of the European Convention.

3 A recommended solution: Implementation of a severity standard through local legislation

An important issue raised in the cases discussed above is the existence of a severity standard when human rights law prohibits the use of corporal punishment in any form, at any level of reasonableness. Is the severity standard a regional or national analysis that is inconsistent with international law?[89] The answer is that there cannot be such a standard, because all forms of punishment cannot be categorised as corporal punishment. Thus, the standard creates a means of identifying what forms of punishment should be prohibited by law, and what forms are acceptable.

---

88 As above.

89 See generally U Kilkelly *The child and the European Convention on Human Rights* (1999) 160-161.

Several courts have asserted that, included within the right to freedom from cruel, inhuman or degrading punishment, is a right against disproportionality.[90] In *Buzani Dodo v The State*,[91] the Constitutional Court of South Africa stated that '[t]he concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading'. Therefore, the severity standard is a manifestation of the right against disproportionality that courts use to determine if a punishment has reached the level of cruel, inhuman or degrading treatment.

For example, in the case of *Canadian Foundation for Children, Youth and the Law v Attorney-General in Right of Canada*, the Supreme Court of Canada held that section 43 of the Criminal Code does not violate sections 7,[92] 12,[93] and 15(1)[94] of the Canadian Charter of Rights and Freedoms.[95] Section 43 justifies the reasonable use of force by way of correction by parents and teachers against children in their care.[96] In its reasoning, the Court utilised a severity standard to narrow the scope of section 43 to disciplinary measures that would not breach its human rights obligations by amounting to corporal punishment.

The force must have been intended to be for educative or corrective purposes, relating to restraining, controlling or expressing disapproval of the actual behaviour of a child capable of benefiting from the correction. While the words 'reasonable under the circumstances' on their face are broad, implicit limitations add precision. Section 43 does not extend to an application of force that results in harm or the prospect of harm. Determining what is 'reasonable under the circumstances' in the case of child discipline is assisted by Canada's international treaty obligations, the circumstances in which the discipline occurs, social consensus, expert evidence and judicial interpretation. When these considerations are taken together, a solid core of meaning emerges for

90 Eg *State v Pickering* (n 36 above); *S v Vries* (1996) 12 BCLR 1666.

91 2001 3 SA 382 (CC).

92 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' Constitution Act 1982, being Schedule B to the Canada Act 1982, ch 11 (UK) http://www.canlii.org/en/ca/const/const1982.html#sec7 (accessed 31 January 2007).

93 'Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.' Constitution Act 1982 (n 92 above).

94 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' Constitution Act 1982 (n 92 above).

95 *Canadian Foundation for Children, Youth and the Law v Attorney-General in Right of Canada* (n 4 above).

96 As above.

'reasonable under the circumstances', sufficient to establish a zone in which discipline risks criminal sanction.[97]

Thus, if the severity standard bans all corrective measures that can be characterised as corporal punishment, then legislation authorising the practice will be repealed.[98] However, alternative disciplinary measures that do not meet the severity threshold will be permissible, and will allow schools to maintain discpline and order amongst students.

While the severity standard signifies the advancement of children's human rights, the test could be more comprehensive. Also, the severity standard is usually applied on a case-by-case basis by considering the totality of the circumstances, as demonstrated in the European Court cases, which can hamper uniformity in the administration of the law. As previously discussed, international human rights calls for the complete elimination of *all* forms of corporal punishment.[99] The reasonableness, moderation or justifiability of the punishment is irrelevant.[100] Thus, this article asserts that a definitional standard should be added as the first prong of the severity standard to characterise certain forms of punishment as illegal *per se*, regardless of the severity with which they are administered. African legislatures could clearly define acts that constitute corporal punishment, and then apply the severity standard as a catchall for acts that are not expressly stipulated in the definition of corporal punishment, but nonetheless reach a level of severity that requires its elimination. For the first prong, the author recommends the adoption of the definition set forth by the CRC Committee:[101]

> [a]ny punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involve hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In addition, there are other non-physical forms of punishment ... for example,

---

97 As above. However, it must be noted that Justice Binnie dissented in part, stating: 'By denying children the protection of the criminal law against the infliction of physical force that would be criminal assault if used against an adult, sec 43 of the Criminal Code infringes children's equality rights guaranteed by sec 15(1) of the Charter. To deny protection against physical force to children at the hands of their parents and teachers is not only disrespectful of a child's dignity but turns the child, for the purpose of the Criminal Code, into a second class citizen.' Justices Arbour and Deschamps also dissented.

98 'Top court upholds spanking law' http://www.corpun.com/cad00401.htm#teachers (accessed 28 October 2007). International Covenant on Civil and Political Rights: Fifth Report of Canada http://www.pch.gc.ca/progs/pdp-hrp/docs/fifth_iccpr/fifth_e.pdf (accessed 28 October 2007).

99 CRC General Comment (n 18 above) para 2; see United Nations Study on Violence Against Children, 61st session UN Doc A/61/299 (2006).

100 As above.

101 n 18 above, para 11.

> punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.

The repeal of laws authorising public school corporal punishment, and the implementation of this two-pronged analysis would be consistent with international law, promote judicial efficiency, and uphold the right against disproportionality.

4 Conclusion

The use of corporal punishment within the public educational system of African states is unlawful, detrimental to the health and welfare of children, and an unnecessary impediment to educational excellence in the region. Public school corporal punishment violates several international and regional human rights treaties, customary international law, and may breach *jus cogens* norms prohibiting torture and recognising a fundamental right to respect for human dignity. Therefore, laws authorising this practice should be repealed and alternative methods should be encouraged through law reform. 'We must remember that children struggle every day to cope with the pressure that violence brings into their lives,' said Ms Cheryl Gilwald, South Africa's Deputy Minister of Correctional Services.[102] 'The true measure of a nation's humanity is the respect with which it treats its children.'[103]

[102] UNICEF 'Call to ban corporal punishment wraps up South Africa meeting on violence' http://www.unicef.org/infobycountry/media_27721.html (accessed 13 March 2007).

[103] As above.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Oil on troubled waters: Multi-national corporations and realising human rights in the developing world, with specific reference to Nigeria

*Hakeem O Yusuf**
Tutor and Doctoral Candidate, School of Law, University of Glasgow, United Kingdom

> *It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against oppression, that human rights should be protected by the rule of law.*[1]
>
> *It is like paradise and hell. They have everything. We have nothing ... if we complain they send soldiers.*[2]

Summary

This article examines the current state of tension in the Niger Delta of Nigeria. It locates the current unrest in the continued denial of economic, social and cultural rights to the oil-rich communities in the area. The author argues that this denial happened with the complicity and acquiescence of the international community. The Nigerian government as well as multi-national corporations operating in the area have not been responsive to the development needs of the people. The article argues that, although the primary obligation for realising the economic, social and cultural rights of

* LLB (Hons) (Lagos), LLM (Ulster), Barrister and Solicitor (Supreme Court of Nigeria); h.yusuf.1@research.gla.ac.uk. I am grateful to Prof Mashood Baderin for his useful comments on an earlier draft of this article. I also express appreciation to the peer reviewers of the *African Human Rights Law Journal* for their valuable comments. The usual caveats apply.

1 Preamble to the Universal Declaration of Human Rights, 10 December 1948 UN GA Res 217 A (III), UN Doc A/810 71 (1948).

2 Eghare Ojiogor, Chief of the Ugborodo community, an oil-rich area in Delta State, Nigeria, quoted in Amnesty International 'Claiming rights and resources: Injustice, oil and violence in Nigeria' http://web.amnesty.org/en/library/info/AFR44/020/2005 (accessed 12 January 2007).

host communities rests on the government, multi-national corporations in developing countries, considering their awesome resources and influence on government policies, should be similarly obligated to respect, promote and protect those rights.

1 Introduction

Successive Nigerian governments have continually denied the people of the oil-rich Niger Delta area of the country their economic, social and cultural rights, and, by extension, their right to development. This has led to social restiveness, and lately, the agitation of varying colourations in the area. The social discontent manifests itself in paramilitary criminality, hostage taking, the sabotage of oil installations and car bombings in the area.[3]

This has resulted in substantial economic losses for the major beneficiaries of oil exploration in Nigeria: the Nigerian state and the multi-national corporations (MNCs) operating in Nigeria. The latter include Shell Petroleum Development Company (Shell), Texaco, Total, Exxon-Mobil and Chevron. The impact is felt globally in high oil prices: Tensions in the Niger Delta have been identified as one of the factors responsible for the rise in international oil prices. When the Movement for the Emancipation of the Niger Delta (MEND), the most organised and militant group to emerge in the area, attacked some of Shell's installations on 16 January 2006, there was a $1 per barrel rise in world oil prices the next day.[4] The situation resulted in the loss of over $4,45b to the Nigerian government in 2006 alone.[5]

The people of the Niger Delta complain about environmental degradation resulting from oil exploration activities in the area, social deprivation and a lack of jobs. They have to contend with political marginalisation in the Nigerian polity and a dearth of infrastructures in their area. This is despite the fact that oil from the area accounts for a major share of the country's total revenue.

In Nigeria, economic, social and cultural rights do not form part of the constitutional Bill of Rights. They are provided for only as non-justiciable 'fundamental objectives and directive principles of state policy'. [6] Economic, social and cultural rights are dispersed in the various provisions of sections 14 to 18 of the Nigerian Constitution.

---

3 International Crisis Group *Swamps of insurgency: Nigeria's Delta unrest* (Africa Report 115 2006) http://www.crisisgroup.org/home/index.cfm?id=4310 (accessed 7 January 2007).

4 International Crisis Group *Fuelling the Niger Delta crisis* Africa Report 118 (28 September 2006) 6 http://www.crisisgroup.org/home/index.cfm?id=4394 (accessed 7 January 2007).

5 E Amaefule 'Nigeria loses N570b to Niger-Delta crisis' *The Punch* 9 January 2007.

6 Ch II Constitution of the Federal Republic of Nigeria 1999.

The country has, however, ratified the International Covenant on Social and Economic Rights (CESCR).[7]

The African Charter on Human and Peoples' Rights (African Charter)[8] guarantees economic, social and cultural rights and peoples' rights alongside civil and political rights. Nigeria ratified the treaty early on. The African Charter has, in accordance with the country's constitutional practice, been enacted (without amendment) as municipal legislation and incorporated into domestic law as far back as 1983.[9] It is also significant to note that, in spite of the non-justiciable status of economic, social and cultural rights under the Nigerian Constitution, the country has not entered a reservation, declaration or objection to any of the provisions of CESCR.

Nigeria as a state is a subject of international law. It may be argued that MNCs and the local communities are also 'subjects' of international law. This article proposes that international human rights law, in particular, provides a working template for achieving desired positive ends in the relationship of the state, the local communities and the MNCs through the institutionalisation of economic, social and cultural rights with the active participation of MNCs. Repressive measures can only exacerbate the volatile situation in the Niger Delta with serious consequences, not only for Nigeria and the MNCs, but for the international community as well. There is a threat of civil war in the region. The refugee problem this portends can be dire, granted that official 2006 provisional census figures put the country's population at over 140 million.[10] Even now, the country exports millions of economic migrants to various parts of Africa, Europe and the United States. A foreboding of conflict alone is capable of flooding not only Africa, but other parts of the world with refugees.[11] This is concomitant of an increasingly globalised world; political, social or economic action at a local level may sometimes impact on geographically far-flung locations.[12]

After part 1, the introduction, part two examines the current situation of restiveness in the oil-producing Niger Delta region of Nigeria. It situates this situation within the context of the historical, social, economic,

---

7 Nigeria submitted its ratification to the UN on 29 July 1993 and it entered into force in the country on 29 October 1993.

8 Adopted 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58. Nigeria signed it on 31 August 1982 and ratified it in July 1983.

9 African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) ch A9 Vol 1, Laws of the Federation of Nigeria 2004.

10 *BBC News* 'Population in Nigeria tops 140m' 29 December 2006 http://news.bbc.co.uk/ 1/hi/world/africa/6217719.stm (accessed 29 December 2006).

11 International Crisis Group *Want in the midst of plenty* Africa Report 113 19 July 2006 http://www.crisisgroup.org/home/index.cfm?id=44274 (accessed 8 January 2007).

12 D Held 'Democratic accountability and political effectiveness from a cosmopolitan perspective' (2004) 39 *Government and Opposition* 365-366.

political and legal regimes of the largest black nation in the world. This is to highlight how the ongoing conflict has developed.

Part three analyses the significance of the African Commission on Human and Peoples' Rights (African Commission) decision on the economic, social and cultural rights of the Ogoni community of the Niger Delta, in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*SERAC* case).[13] Part four focuses on the obligations of MNCs under international human rights law. It advances the Privity Theory as a legal basis for enforcing a sustainable obligation on MNCs for realising the economic, social and cultural rights of their host communities. Part five makes a case that the international community has been complicit in the denial of economic, social and cultural rights to the people of the Niger Delta.

2 Antecedents of the conflict

Oil, first drilled in 1956 at Oloibiri, a small community in the Niger Delta area of Nigeria, is at the centre of the current debacle. Nigeria, bolstered by soaring oil prices in the late 1960s and early 1970s, quickly shifted emphasis in its economy from agriculture to crude oil production. Oil currently accounts for over 90% of the country's total revenue. Nigeria's 35,9 billion barrels of proven oil reserves ensures its place as the largest producer of oil in Africa.[14]

Despite its enormous oil wealth, most communities in the Niger Delta are in a sorry state. Their problems include large-scale environmental degradation,[15] a lack of basic infrastructure and poor or non-existent social amenities. The unemployment rate of the youth is high, partly from poor education and a lack of skills. Life is literally 'hard' in the area.

The advent of democracy in Nigeria has witnessed repeated expressions of frustration by the local communities in the Niger Delta area. There has been 'a wave of attacks'[16] on oil installations in the Niger Delta. Virtually all the multi-national oil exploration companies have had to scale back their production and in some cases they had to declare an inability to guarantee the fulfilment of their existing contractual

13 (2001) AHRLR 60 (ACHPR 2001).

14 Energy Information Administration *Country analysis briefs: Nigeria 1* http://www.eia.doe.gov/emeul/cabs/ Nigeria/Oil/html (accessed 12 June 2006).

15 n 14 above, 2.

16 *BBC News* 'Nigeria's shadowy oil rebels' 20 April 2006 http://news.bbc.co.uk/1/hi/world/africa/ 4732210.stm (accessed 13 February 2006).

obligations.[17] The continued tensions in the Nigeria Delta have earned the country the status of one in current or potential conflict.[18]

Shell has the largest operations in the Nigerian oil industry. A recent report commissioned by Shell declared that the level of conflict in the area was akin to that in Colombia and Chechnya.[19] While this may be an overstatement, it is a pointer to the state of near crisis existing in the Niger Delta.

2.1 A restive delta: Agitations for self-determination

The Ogoni Bill of Rights (Bill) was 'presented to the government and people of Nigeria' in November 1990. This was in the days of military dictatorship in the country. The Bill advanced by the Movement for the Survival of the Ogoni People (MOSOP) is indicative of the demands and agitations of the peoples of the Niger Delta. The Ogoni, while affirming their wish to remain a part of Nigeria, demand 'political autonomy' to participate in the affairs of the country as a 'distinct and separate entity' along with a right to the control of a 'fair proportion' of their resources for their development.

The Bill also demands the right to protect their environment and ecology from further degradation as well as the full development of the Ogoni language and culture. They demand an end to gas flaring and the payment of $10 billion in royalties from oil produced in Ogoniland since 1958 and in compensation for environmental degradation suffered as a result.[20]

However, if the Ogoni struggle was the first to receive international attention in the context of the struggle for community-based control of the country's oil resources, it has been overshadowed in recent times by that of the Ijaw. In the Kaiama Declaration, issued in 1998, the Ijaw declared their resolve to cease recognition of all[21]

> undemocratic Nigerian state legislations such as the Land Use Decree, 1978 and the Petroleum Decrees of 1969 and 1991, the Lands (Title Vesting, etc) Decree No 52 of 1993 (Osborne Land Decree), the National Inland Waterways Authority Decree No 13 of 1997, etc.

In essence, the Ijaw 'repealed' all the legislations they deemed to facilitate the vesting of the land and natural resources, namely oil and gas, on the Federal Republic of Nigeria. It is now a matter of public record

---

17 Human Rights Watch 'The Niger Delta: No democratic dividend' http://www.hrw.org/ reports/2002/nigeria3/nigerdelta.pdf (accessed 10 September 2006).

18 *Crisis Watch* 41 2 January 2006 4 http://www.crisisgroup.org/library/documents/crisiswatch/ cw_2007/cw41.doc (accessed 10 January 2007).

19 *BBC News* 'Nigerian oil fuels Delta conflict' 25 January 2006 http://news.bbc.co.uk/2/hi/africa/4617658.stm (accessed 10 January 2007).

20 Ogoni Bill of Rights http://www.waado.org/nigerdelta/RightsDeclaration/Ogoni.html (accessed 6 January 2007).

21 Kaiama Declaration (11 December 1988) http://ijawcenter.com/kaiama_declaration.html (accessed 9 February 2008).

that militants in the name of the Ijaw cause have engaged the Nigerian state and MNCs in the Niger Delta (home of the Ijaws and sundry ethnic groups) in an ongoing violent conflict. A number of palliative measures, including the zoning by the Vice-Presidency of the ruling party in the 2007 general elections, the historic appointment of an Ijaw as the Chief of Army and another as the Inspector-General of Police, have so far been unsuccessfully employed to assuage their feelings of neglect and exclusion from the mainstream of power in the country.

2.2 Position of the multi-national corporations

The attitude of Shell to the Ogoni Bill of Rights typifies the response of MNCs in the Niger Delta. Shell maintains that these demands are 'clearly political' as well as 'constitutional' and thus 'outside the influence' and 'jurisdiction of a private oil company'.[22] It also 'completely rejects all accusations of the abuse of human rights'. This culture of denial is at the heart of the present conflict in the Niger Delta. The escapist stance is typical of the response of MNCs to the realisation of economic, social and cultural rights of the communities they operate in, particularly in developing countries. To cite but one example, following the 3 December 1984 Bhopal incident, which has been referred to as the 'world's worst industrial disaster',[23] Union Carbide Industries maintained the incident which resulted in the loss of thousands of lives[24] (thousands are reportedly still dying or suffering debilitating health conditions in the aftermath)[25] was due to sabotage rather than its own negligence.[26] This was in spite of the fact that the company had reportedly ignored several warnings on the danger its manufacturing operations posed to the local population.

Shell insists that it has made its largest 'social investment' in the area compared to all others in which it operates. As far as it is concerned, the fuss being made around the issue of 'environmental devastation'

---

22 Shell Nigeria Press Release 'Shell's submission' (to the Oputa Panel sitting in Port Harcourt Rivers State, Nigeria 23 January 2001) 3 http://www.shell.com/home/content/nigeria/news_and_library/press_releases/2001/2001_2301_01031504.html (accessed 11 September 2006).

23 Green Peace has led an over two decades-old campaign for justice for victims of the incident. See eg Green Peace Bhopal *The world's worst industrial disaster* http://www.greenpeace.org/international/footer/search?q=worst+industrial+disaster (accessed 13 September 2006). For a detailed analysis of the incident, see I Eckerman *The Bhopal saga - Causes and consequences of the world's largest industrial disaster* (2004).

24 Union Carbide admits 3 800 died, but twice and even much higher figures (as much as 10 000) have been cited by independent observers, eg, Amnesty International puts the figure at 7 000. See *Clouds of injustice- Bhopal 20 years on* http://www.amnesty.org/en/library/info/ASA20/01512004 (accessed 13 September 2006).

25 R Dhara & R Dhara 'The Union Carbide disaster in Bhopal: A review of health effects' (2002) 57 *Archives of Environmental Health* 391.

26 Bhopal Information Centre *Statement of Union Carbide Corporation regarding the Bhopal tragedy* http://www.bhopal.com/ucs.htm (accessed 13 September 2006).

is a deliberate attempt to 'attract attention to justifiable development needs of the Niger Delta'.[27] The company's position hinges on the concept of corporate social responsibility, largely based on the normative perspective of positive voluntary action, and finds support in some quarters. The weakness associated with it has been traced not to the normative basis but the exclusion of the local communities in the implementation of the model as a development initiative.[28] But the foregoing statement clearly constitutes an implicit admission of the deprivation of the people in the area, despite supposed 'huge social investment' of the company. It leaves a question mark on the validity of such claims. More importantly, it acknowledges the right of the peoples of the Niger Delta to economic, social and cultural rights, including the right to development. Despite ongoing contestations, there is now international affirmation of the right to development.[29]

2.3 Political and legal framework

The Nigerian state, as represented by the federal authorities, who control the nation's natural resources, has exhibited mixed reaction to the situation. It hovers between repression and pacification. Successive military regimes receive the greatest blame for the current state of under-development and violent conflict in the Niger Delta. In 1994, the military ruler, General Sanni Abacha, ordered the trial of writer and human rights activist Ken Saro-Wiwa and eight others. This followed a communal conflict between supporters of the regime and its opponents led by the late Saro-Wiwa. The 'Ogoni 9' (some members of the faction in opposition to the government) were tried, convicted and executed in breach of due process. The ensuing protests in Ogoniland were met with a militarisation of the area. The aggrieved community had earlier forced Shell to shut down its operations in 1993.

As noted earlier, the Nigerian Constitution provides only for civil and political rights. Economic and social rights are variously interspersed and only provided for as part of the 'fundamental objectives' and 'directive principles of state policy'. These objectives, stated in chapter II of the Constitution, include a duty on the state to protect and improve the environment and safeguard the water, air, forest, land and wild life of Nigeria, and to provide free education at all levels. State policies must ensure the provision of suitable and adequate shelter, food, a reasonable national minimum wage and pension rights.

Section 13 of the Constitution provides that it 'shall be the duty and responsibility of all organs of government, and of all authorities and

---

27 n 22 above.

28 U Idemudia & UE Ite 'Corporate-community relations in Nigeria's oil industry: Challenges and imperatives' (2006) 13 *Corporate Social Responsibility and Environmental Management* 194.

29 A Sengupta 'The human right to development' (2004) 32 *Oxford Development Studies* 179.

persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of the chapter. But section 6(6)(b) of the Constitution overrides any attempt at judicial review or enforcement of the rights that can be deduced from the section. It provides that the judicial powers conferred by the section shall not[30]

> except as otherwise provided by this Constitution, extend to any issue 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.

The Nigerian Bill of Rights, contained in chapter IV of the Constitution, excludes economic, social and cultural rights. It has thus become a feature of Nigerian constitutional law that fundamental principles of state policy are non-justiciable. Like similar provisions in the Indian Constitution, they are exhortations of best practice. The Supreme Court re-affirmed this principle in *Attorney-General of Ondo State v Attorney-General of the Federation and 35 Others* (*ICPC* case).[31] It held, among others, that the provisions of the Fundamental Objectives and Directive Principles of State Policy can only be enforced through the promulgation of laws.[32]

The provisions of the Nigerian Constitution, it can be argued, do not fulfil the country's obligations as a state party to CESCR. The country therefore falls into the category of state parties to CESCR who treat the Covenant with suspicion. These countries dichotomise human rights, according primacy to civil and political rights perceived as *negative* rights that do not require economic commitment by the government. Economic, social and cultural rights, on the other hand, are perceived as *positive* rights with the need to commit financial resources, often leading to a redistribution of wealth.

Such a perception, as noted by Eide,[33] is wrong. It has been posited that, in accordance with the provisions of sections 55 and 56 of the Charter of the United Nations,[34] all nations are bound to observe economic, social and cultural rights in the same way as civil and political rights.[35] It is equally worth noting that the International Covenant on Civil and Political Rights (CCPR)[36] strengthens the argument for the non-divisibility of rights. Article 1 provides as follows

---

30 Constitution of the Federal Republic of Nigeria, 1999.

31 (2002) 6 SC Pt I 1 (179).

32 n 31 above, 69.

33 A Eide 'Economic social and cultural rights' in A Eide *et al* (eds) *Economic, social and cultural rights* (2001) 8.

34 Adopted at San Francisco 26 June 1945; entered into force 24 October 1945 1 UNTS xvi.

35 A Sengupta 'Realising the right to development' (2000) 31 *Development and Change* 553 554.

36 Adopted at New York 16 December 1966; entered into force March 1976 GA Res 2200A (XXI) UN Doc A/6316 (1966) 999 UNTS 171.

1 All peoples have the right of self-determination ... and [they] *freely pursue their economic, social and cultural development.*
2 All peoples may, for their own needs, freely dispose of their natural resources .... In no case may a people be deprived of its own means of subsistence.

Section 162 of the 1999 Constitution of Nigeria attempts to address the need for special provisions for the Niger Delta. It provides a 'derivation fund' for oil-producing communities. Section 162(2) provides for the distribution of federal revenue in a manner that ensures that at least 13% of the revenue derived from natural resources is allocated to the source of derivation.

The current administration, it appears, took advantage of the benefit of hindsight. It established, by legislation, the Niger Delta Development Commission (NDDC) in 2000. The NDDC is an interventionist institution meant to address decades of social and infrastructural underdevelopment of the Niger Delta. Its primary aim is to 'conceive plans and implement programmes for the sustainable development' of the region.[37] The creation of the NDDC appears to be ordinarily in conformity with the provisions of article 2(1) of CESCR, which require state parties 'to take steps ... by all appropriate means, including particularly the adoption of legislative measures'. The creation may be a step in the right direction, considering the dire needs of the Niger Delta. However, it is argued that the establishment of the NDDC falls short of the government's obligations under CESCR.

All individuals resident in Nigeria, and not just the Niger Delta peoples, are entitled to the enjoyment of economic, social and cultural rights. In particular, article 2(1) of CCPR provides that each state undertakes to 'respect and ensure to all individuals within its territory and subject to its jurisdiction' the rights recognised in the Covenant, 'without distinction of any kind'. But no other part of Nigeria suffers from the same problems as those of the Niger Delta that required the establishment of the NDDC. The creation of the NDDC can be considered a positive measure to redress the imbalances in the Niger Delta identified above. International human rights recognise the principle of 'affirmative action' with the general prohibition of non-discrimination. This position finds support in the decisions of the Human Rights Committee (HRC) in its General Comment No 18 in relation to affirmative action under CCPR,[38] and its General Comment No 5 on CESCR.

Further, adequate provision is not made for the democratic representation of the local communities on the board of the NDDC. There is a need to accord them such rights under articles 1(1) and 21 of CESCR and African Charter respectively. Feelings of neglect go to the heart

37 Sec 7 Niger Delta Development Commission Act 2000.

38 Nigeria submitted its ratification on 29 July 1997 and it entered into force in the country on 29 October 1993.

of the matter.[39] Community stakeholder representation is crucial to allow the representatives of the communities to prioritise their needs and allocate resources in the most efficient manner. In all events, it engenders trust for the organisation among the communities it is meant to serve. The present situation, where government appointees, though from various ethnic, corporate and other interest groups in the country, constitute the board of the NNDC and dictate its priorities, violates the rights of the communities to adequate representation.

Ironically, some of the foregoing 'gains' are being eroded by a number of actions taken by the federal government itself. One is a legal action, in which it sought and obtained a declaration which limits the proportion of accruable revenue to the oil-producing areas under the 'principle of derivation'. This followed the agitation by states of the Niger Delta for a larger share of federal funds through the principle.

The Supreme Court of Nigeria in *Attorney-General of the Federation v Attorney-General of Abia State and 35 Others*[40] (*Resource Control* case) declared that the littoral states (including the Niger Delta) had no claims to resources within the continental shelf of the country. This was in line with the position of the federal government. The littoral states, on the other hand, had contended that there was no basis for a distinction between onshore and offshore natural resources.[41] The communities of the Niger Delta regard this as another assault on their right to self-determination and control of their natural resources. However, the decision in the case was viewed as being unduly favourable to the federal (central) government. Eventually, the parties resorted to a political solution that somewhat assuaged the discontent of the littoral states.

The right of a people to control over their natural resources is widely couched and limited only by obligations to other sovereign states under international law. Article 21(1) of the African Charter provides as follows:

> All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

The seemingly absolute terms of article 21(1) are not free from problems. The subsection seems to strongly suggest that every group that is regarded as a 'people' has an unqualified right to control its natural resources. But who are the 'people' in a multi-ethnic state? Is it, as claimed by the Ogoni, an ethnic stock ('nation') in a region or geographical location in an independent state? Or the agglomeration of ethnic groups in a defined territory (country) with certain other features

39 n 3 above, 18.

40 (No 2) [2002] 6 NWLR pt 764, 542.

41 For an analysis of the case, see KSA Ebeku 'Nigerian Supreme Court and ownership of offshore oil' (2003) 27 *Natural Resources Forum* 291.

recognised within an international comity of nations like the UN? In the *SERAC* case, the African Commission actually noted that the origin of this provision is traceable to colonial times, when the resources of Africa were exploited by foreigners, so 'peoples' in that context was in relation to the African states under colonisation. However, the African Commission noted as well that in post-colonialism, African governments now have obligations under this provision to protect their citizens.

The issue is further complicated by the seemingly divergent position of CESCR on the matter. It is possible to argue that CESCR accords some legitimacy to the Supreme Court's decision in the *Resource Control* case. Support for this proposition can be obtained from a combined reading of the provisions of articles 1 and 4 of CESCR. While articles 1(1) and (2) guarantee the right of peoples to self-determination and the disposition of their natural resources 'for their own ends', the state may 'subject such rights only to such limitations as are determined by law'. Such limitations are only required to be compatible with the nature of 'these rights' (ostensibly economic, social and cultural rights). The only other limitation to this power of state parties is that the law must be aimed at promoting the general welfare in a democratic society. The position of the federal government of Nigeria, sanctioned by the Supreme Court limiting the claim of the Niger Delta communities to the low water mark of the sea rather than the continental shelf, appears to satisfy this criterion. After all, the need exists to ensure that there are adequate resources for other parts of the country.

Further support for the foregoing view would also appear to come from the *SERAC* case. The African Commission, while recognising the rights of the Niger Delta communities to health and a clean environment, affirmed that

> [u]ndoubtedly and admittedly, the government of Nigeria, through NNPC, has the right to produce oil, *the income from which will be used to fulfil the economic and social rights of Nigerians.*

The *SERAC* case thus maintains the balance between the rights of communities who own natural resources and others in a state party. Resources-rich communities are entitled to have the wealth derived from their natural endowments committed to their development. The decision goes further to affirm the right of other communities within the same state, which may not be similarly endowed to a share of the resource wealth.

The seemingly restrictive approach to the interpretation of the right to resource control by 'peoples' in this case may also be connected with the definition of 'peoples' in the African Charter. Unique as the use of the term may be by the regional human rights instrument, its use in different articles is rather an anomaly. To compound the situation, the African Charter defines the term nowhere. The African Commission is likely to place a restricted definition on the concept of 'peoples'. This seems to be in accord with the history of the African human rights

system with its sensitivity to the issue of national sovereignty and the correlative principle of non-interference.

2.4 The attack on Odi town: Another round of human rights and due process violations

In November 1999, Odi town in the Niger Delta was burnt down by armed soldiers, ostensibly with the acquiescence of the Nigerian government. Several hundred people, including women and children, were massacred as they fled from their burning homes. This was a reprisal operation for the killing of 12 policemen by unruly youths, protesting the neglect of the community.[42] Government is yet to bring any of the soldiers to book. Prosecution does not appear to be on the government's agenda in this instance.[43] This, despite the fact that it is possible to trace the troops involved.

The Odi incident has been characterised by the Nigerian government as an isolated incident of the break-down of law and order. It is unlikely that the incident constitutes a 'war' situation and thus should not come under the purview of international criminal law. However, what cannot be contested is the fact that the rights of the victims were violated during the reprisal action. These include the right to life, health and property; all guaranteed by CCPR, CESCR and the African Charter, to which Nigeria is party. These treaties create binding obligations of respect, promotion, protection and fulfilment on all parties. In this case, it translates into the requirement for the proper investigation and remedy for victims particularly in view of the use of lethal force by government security agents.

In summary, developing countries, like all other states, are the traditional subjects of international law. They bear primary responsibility for their treaty obligations. Despite the theory regarding the indivisibility of rights, the experience has been different in practice. Most states still do not make economic, social and cultural rights justiciable. A systematic erosion of the ability of developing countries to deliver on economic, social and cultural rights has accompanied the growth of MNCs. It is necessary that MNCs be made responsive to obligations to deliver on economic, social and cultural rights. For their part, the Niger Delta communities appear to have been driven to desperation, partly by the failure of the Nigerian government to heed the decision of the African Commission in the *SERAC* case.

---

42 I Okonta 'The lingering crisis in Nigeria's Niger Delta and suggestions for a peaceful resolution' (2000) http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm (accessed 31January 2008).

43 Amnesty International (n 2 above) 2.

3 The *SERAC* case

This part of the article examines how the *SERAC* case sets the tone for the subsequent recognition of the economic and social rights of the oil-bearing communities in the Niger Delta. I will argue that the *SERAC* decision constitutes a model for the recognition of economic, social and cultural rights. The challenge faced by such a position, however, is whether the rights affirmed by the decision have or can be brought home to the local communities of the Niger Delta.

The *SERAC* case was an attempt on behalf of the people of Ogoniland to assert and enforce their economic, social and cultural rights. The applicants (two non-governmental organisations (NGOs) based in Nigeria and the United States respectively) alleged that the oil exploration activities of Shell had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people. They complained, among others, that the multi-national corporation had been in violation of applicable international law on environmental standards. This had resulted in various health complications for the people of the community.

Further, they claimed that the Nigerian military government that was in power at the time not only failed to monitor the activities of Shell, but also condoned and facilitated these breaches of international standards. Also of interest is the complaint that the Ogoni communities were neither consulted about, nor involved in, the decisions affecting the development of Ogoniland. Rather, efforts at protesting such violations had been met with the destruction of their homes and the execution of Ogoni leaders.

The African Commission found for the applicants on all the alleged violations. It held that the rights to life, health as well as a good environment guaranteed by the African Charter had been violated. In accepting and determining the application under section 56 of the African Charter, the African Commission set a precedent for the justiciability of economic, social and cultural rights. This is relevant regionally and globally.

The African Commission stated that, being a party to the African Charter as well as CESCR, Nigeria has an obligation to respect, promote, protect and fulfil its treaty obligations. This pronouncement, extending the frontiers of protection to economic, social and cultural rights, is significant in the context of Nigeria, whose Bill of Rights excludes the protection of economic, social and cultural rights.

Further, the African Commission upheld the right of the Ogoni to freedom from exploitation guaranteed under article 21(5) of the African Charter. It affirmed the duty of the Nigerian state to 'eliminate all forms of economic exploitation, particularly that practised by international monopolies' to enable the 'peoples to fully benefit from the advantages derived from their natural resources'.

SERAC further stressed the position under international law that a

state can be held responsible for the acts of its agents, both public and private. It affirmed the obligations of states under international law to ensure, through executive and legislative action, that private actors such as MNCs refrain from violations of economic, social and cultural rights and other rights of every person within the Nigerian state. The only problem with this approach is that MNCs have deeper pockets than some poor states, so it would have been better to go directly after them for better redress for human rights victims.

Further, the African Commission stated that there was a violation of the right to representation. It stated that an adequate opportunity for representation in the 'development decisions affecting the communities' was an obligation placed on the government. This, it declared, was in accordance with the spirit of articles 16 and 24 of the African Charter.[44]

The decision further emphasised that collective and environmental rights as well as economic, social and cultural rights are 'essential elements of human rights in Africa'. No other regional adjudicatory system puts the case more forcefully. However, the viability of pursuing the recognition and enforcement of these rights in the Nigerian domestic forum remained largely untested, until two recent decisions. Before examining these cases, it is important to stress a reservation regarding the *SERAC* and other decisions of the African Commission.

Admittedly, the advisory nature of the decisions of the African Commission has attracted strong criticism.[45] What is the use of recommendations that may be and are largely ignored in practice? A response to this reservation about the African Commission is that the Commission does articulate applicable human rights standards at a regional level. That makes it arguably easier for state parties to identify with its decisions and not consider them imperial impositions and opportunistic neo-colonialism. The African Commission itself affirms this relativist approach, when it declared that[46]

> [t]he uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights impose upon the African Commission an important task. International law and human rights must be responsive to African circumstances.

African countries, particularly the founding fathers of the Organisation of African Unity (OAU), were decidedly wary of the international human rights regime. They very jealously guard their sovereignty against perceived mechanisms for interference with their newly and sometimes

---

44 *SERAC* case (n 13 above) para 53.

45 M Mutua 'The African human rights system: A critical evaluation' http://hdr.undp.org/en/reports/global/hdr2000/papers/mutua.pdf (accessed 31 January 2008). For a comprehensive exposition of the genesis of the African Charter, see F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2004) 20-48.

46 *SERAC* case (n 13 above) para 68.

hard-won independence. This was largely responsible for their reluctance to warm up to the idea of human rights. Thus, there is scarce mention of human rights in the Charter of the OAU, unlike the UN Charter. However, the increased universal awareness and acceptability of the notions of human rights[47] and its primacy in the contemporary state, has been reflected in the Constitutive Act of the African Union (AU).

The Preamble of the Constitutive Act, for instance, provides *inter alia* that the Heads of State and Government of the member states are 'determined to promote and protect human and peoples' rights'. Further, article 3(h) of the Act states that one of the objectives of the AU shall be to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments. Provisions on the new focus on human rights are contained in article 4 of the Act. It is clear that the African Commission has played a central role in actuating this turn-around.

In sum, *SERAC* is in line with the principle that rights are indivisible and that economic, social and cultural rights have the same force and justification as civil and political rights.[48] Judicial developments in Nigeria after the *SERAC* case demonstrate the cardinal role the African Commission can play in developing human rights law and practice within the African context.

4 Vistas of hope

The ice surrounding the justiciability of economic, social and cultural rights in Nigeria has been broken by two cases decided in Nigerian courts. Like the *SERAC* case, they both challenge violations by MNCs of human rights in their operations in the Niger Delta. The pride of place for the pursuit and realisation of economic, social and cultural rights before the Nigerian courts should perhaps go to the decision in *Jonah Gbemre v Shell Petroleum Development Company and 2 Others*.[49]

The plaintiff brought the action on behalf of himself and the Iwherekan community in Delta State. In the action, supported by three NGOs, Friends of the Earth (Nigeria), Climate Justice Programme (United Kingdom) and Environmental Rights Action, he claimed *inter alia* that the flaring of gas by the company within the Iwherekan community constituted a violation of the right to life and human dignity under the Constitution of the Federal Republic of Nigeria, 1999, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights

47 JK Mapulanga-Halston 'Examining the justiciability of economic, social and cultural rights' (2002) 6 *The International Journal of Human Rights* 29.

48 Mapulanga-Halston (n 47 above).

49 Suit FHC/B/CS/53/05, Federal High Court of Nigeria, Benin (CV Nwokorie presiding judge) 14 November 2005 (order made 15 November 2005). See 'Nigeria: Court stops gas flaring Shell appeals' *The Guardian* 15 November 2005.

(Ratification and Enforcement) Act referred to above. For its part, the first defendant denied it was flaring gas in the Iwherekan community. It further argued that in all events, gas flaring was authorised by section 3 of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1984.

In its judgment, the court declared that gas flaring is dangerous to the health of individuals and deleterious to the environment and that its failure to carry out an environmental impact assessment was illegal. Further, it held that the actions of the MNC in flaring gas were illegal and a violation of the constitutionally guaranteed, fundamental rights to life and human dignity as contained in sections 33(1) and 34(1) of the Constitution, as well as articles 4, 16 and 24 of the African Charter. In upholding his claim, the Federal High Court ordered Shell to stop gas flaring. An important aspect of the decision is the Court's voiding of sections of the Associated Gas Re-Injection Act and Regulations relied upon by the first defendant for being inconsistent with the applicants' constitutional rights.[50]

In the second case, *Ijaw Aborigines of Bayelsa State v Shell*,[51] a group of Ijaw from Bayelsa State instituted an action against Shell before the Federal High Court sitting in Port Harcourt. The plaintiffs sought an order of the court to enforce the payment of the sum of US$ 1,5 billion awarded in damages for pollution, made to the oil-producing communities in the state by the Nigerian legislature after a public hearing by both parties before the National Assembly.

In its judgment of 24 February 2006, the Court held that Shell was bound to pay the sum which had been awarded by a resolution of the National Assembly. The Court stated that the resolution arose from a consensual attendance at the committee hearings of the National Assembly. Shell's lawyers had argued unsuccessfully that the Joint Committee of the National Assembly lacked the power to compel the company to pay. Shell has, however, appealed the decision.[52]

---

50 The full text of the decision and enrolled order of the court respectively are available at http://www.climatelaw.org/cases/country/nigeria/gasflares/2005Nov14 (accessed 10 February 2008). However, see the case of *Barr Ikechukwu Opkara & 4 Others* (for themselves and as representing Rumuekpe, Eremah, Akala-Olu and Idamah communities of Rivers State) *v Shell & 5 Others*, Suit FHC/PH/CS/518/05, Federal High Court of Nigeria, Port-Harcourt (unreported, judgment delivered on 29 September 2006). In the latter case, the court upheld the objection that under Nigerian law, human rights were personal and a representative action could not be maintained for its enforcement, specifically rejecting the precedent set in *Gbemre*. http://www.climatelaw.org/cases/country/nigeria/gasflares/22092006 (accessed 10 February 2008). The decision has been appealed by the plaintiffs.

51 Unreported case, judgment delivered by Justice Okechukwu Okeke, Federal High Court Port Harcourt, Rivers State, Nigeria on 24 February 2006.

52 *BBC News* 'Shell told to pay Nigeria's Ijaw' 24 February 2006 http://news.bbc.co.uk/-/1/hi/world/africa/4746874.stm (accessed 10 September 2006) and Rhys Blakely and Agencies '$1.5bn Shell Nigeria fine upheld' http://business.timesonline.co.uk/tol/business/market/ africa/articles/34579.ece (accessed 6 January 2007).

The significance and potential ramifications of the Federal High Court's decision were not lost on observers of international law. It was voted as the 'international law case of the month' when it was delivered.[53] Although the fulcrum of the case is the disputed implementation of what can best be described as an arbitral award, it is significant that the award itself constitutes formal recognition of the right to a clean, pollution-free environment, an important subset of economic, social and cultural rights.

The case provides a test case for the otherwise conservative Nigerian appellate judiciary to pronounce on the justiciability of economic, social and cultural rights beyond the narrow confines of whether the National Assembly, a legislative body, had the jurisdiction to make an award against Shell and also compel the MNC to pay. Specifically, the appellate courts had the challenge of developing the jurisprudence on the right to a pollution-free environment, sustainable development and damages for infractions of those rights. It is particularly significant that the African Charter has been domesticated as municipal legislation and should be considered by the appellate courts in this case. The case affords an opportunity for the courts to go beyond the consideration of the non-justiciable economic, social and cultural rights provisions in the Nigerian Constitution. Recourse should rather be had to the country's international human rights obligations. The jurisprudence articulated in the *SERAC* case is quite relevant as an authority on these issues.

The Court, in coming to this decision, established a link among the rights to life, health and a clean environment. The Court finds support and a precedent in the *SERAC* case, though explicit mention does not appear to have been made of it. The African Commission made the significant pronouncement in the *SERAC* case that 'pollution and environmental degradation to a level humanly unacceptable' amounted to a violation of the right to life of the Ogoni society as a whole.[54] As in the *Ijaw Aborigines* case above, Shell immediately appealed the judgment, but committed itself to a gradual phasing out of the obnoxious practice. An important feature of the judgment in *Gbemre* is that it links the right to life, popularly conceived of as a 'civil' right, with the right to a good environment, a 'social' right. In that way, the Court lends itself to the progressive conception of the indivisibility of all human rights. The implementation of these rights is problematic everywhere. It is instructive that the United States has not ratified CESCR. Ironically, it played an important role in articulating the normative framework for the inclusion of economic, social and cultural rights in the UN Charter,

---

53 R Alford 'Case of the month: *Shell v Ijaw Aborigines of Bayelsa State* (*Opinio Juris*)' http://lawofnations.blogspot.com/2006/02/case-of-month-shell-v-ijaw-aborigines.html (accessed 10 February 2008).

54 *SERAC* case (n 13 above) 11-12.

the Universal Declaration of Human Rights (Universal Declaration) and CESCR.[55]

It is expected that the appellate courts in Nigeria will seize on the gauntlet provided by *Ijaw Aborigines* and *Gbemre* to tow the line of the Supreme Court of India and entrench economic, social and cultural rights as justiciable rights in Nigeria. India, like Nigeria and many other developing countries, also has non-justiciable provisions in respect of economic, social and cultural rights. However, the Court has utilised its interpretative powers to extend the frontiers of enforceable rights in the country. Take the example of the right to life guaranteed and justiciable under the Indian and Nigerian Constitutions. The Indian courts have consistently held that good health is cardinal to the enjoyment of the right to life.[56] Thus, the right to health is linked to the right to life. In today's globalised world, there is an urgent need for international law to proceed to extend its reach to major players in the enjoyment of economic, social and cultural rights, the ever-expanding MNCs.

5 Multi-national corporations and international human rights law

One of the central features of globalisation is the immense financial clout of MNCs. The phenomenon is a direct result of the democratisation of the global economic space championed by neo-liberal economics.[57] The flagrant neglect of economic, social and cultural rights by MNCs is somewhat of an irony. The disproportionate growth of MNCs in recent times stems from economic democracy. MNCs ought to be, even if only from the moral point of view, in the vanguard of human rights protection given its inextricable tie to democracy.

MNCs constitute some of, if not the principal actors in this new economic equation.[58] The new international economic order, promoted by the Bretton Woods institutions, has led to MNCs accumulating so many resources that they have become mega-actors on the international economic, social and political scene. In more than a few cases, the presence of MNCs 'has often removed decision making from the

---

55 Eide *et al* (n 33 above). See also JS Gibson *Dictionary of international human rights law* (1996) 135-136 and Sengupta (n 29 above) 554.

56 See eg *Paramand Katra v Union of India* [1989] AIR 1989 SC 2039: 1990 Cvi LJ 671 and *Bandua Mukti Morcha v Union of India* [1984] AIR 1984 SC 802. See also the High Court decision in *Mahendra Pratap Singh v State of Orissa* [1997] AIR 37.

57 D Aguirre 'MNCs and the realisation of economic, social and cultural rights' (2004) 35 *California Western International Law Journal* 53 53.

58 K Nowrot 'New approaches to the international legal personality of MNCs: Towards a rebuttable presumption of normative responsibilities' http://www.esil-sedi.eu/english/pdf/Nowrot.pdf (accessed 10 September 2006).

national sphere and state control'.[59] The immense influence of MNCs, Bengoa declares, has resulted in 'a clear loss of sovereignty on the part of the state and a greater globalisation of the decisions affecting the world's population'.[60] General Motors, a MNC, has 'a larger economy than all but seven nations'.[61]

Bengoa's view, considered in relation to developing countries, is that MNCs, particularly in the extractive industry, wield immense power in many developing countries, including Nigeria. The privileged position of MNCs as key players on the national and international scene ought to go with some responsibility.[62]

While MNCs are typically driven by the capitalist economic philosophy of profit maximisation, it must also be conceded that the primary responsibility in international human rights law lies with states.[63] This is because, essentially, human rights are a 'compact between governments and individuals'.[64] However, there is a progressive expansion of the reach of international law. Relevant private actors are now conferred with duties under international law. Individuals whose actions contravene international criminal law are held directly accountable. A definitive manifestation of this is the creation of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda. The position finds further support in the creation of the International Criminal Court at The Hague for the trial of war crimes, crimes against humanity and genocide based on individual responsibility. Ratner has noted that international law can and should provide for a theory of corporate responsibility.[65] The 'privity theory', it is proposed, is a viable option.

5.1 Multi-national corporations and the privity theory

MNCs, with their supranational reach, currently exert increasing control over the lives of people everywhere. United Nations Conference on Trade and Development (UNCTAD) statistics show that their

---

59 J Bengoa *Existence and recognition of minorities* Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities (6th session, 22-26 May 2000) 9.

60 n 59 above, 10.

61 Aguirre (n 57 above) 54.

62 C Backer 'Multi-national corporations, transnational law: The United Nations norms on the responsibilities of transnational corporations as a harbinger of corporate responsibility in international law' (2005) 37 *Columbia Human Rights Law Review* 287 highlights the growing scholarly debate on the issue in recent times. The article also comprehensively discusses the implications of the Norms on the regulatory relationship between states, MNCs and international institutions.

63 Aguirre (n 57 above).

64 K Bennoune 'Towards a human rights approach to armed conflict' (2004) 11 *University of California Davis Journal International Law and Policy* 171 180.

65 SR Ratner 'Corporation and human rights: A theory of legal responsibility' (2001-02) 111 *Yale University Law Journal* 443 449

growth has out-paced total world output.[66] But that growth, despite its profound impact on the majority of the world's population, has been accompanied by a decidedly low level of corporate responsibility. The situation has attracted considerable opposition to their activities.[67] Their power in relation to local communities in developing countries, where they have some of their largest operations, is awesome. As mentioned earlier, it is a fact that the resources of MNCs often go beyond that of the countries in which they operate.[68] This reality creates an imperative for imposing direct obligations on them as relevant actors in the field of human rights.

The dominance of MNCs over economic and social policy dictates that they are made subject to the international human rights regime.[69] It must, however, be noted that some international law experts still question the validity of making private actors like MNCs the subject of international law.[70] Others assert that it is plainly unworkable.[71] However, there are many on the oppposite side of the divide advocating the propriety of extending the jurisdiction of the international human rights regime to MNCs.[72]

Arguably, the whole construct of human rights law is essentially aimed at securing the dignity of the individual from the wide-reaching powers wielded by the state. In other words, human rights law is engaged to protect the susceptibilities of the 'weak' and 'vulnerable' (individual) from the 'strong' and 'invincible' (state).[73] The foregoing construct is dictated by the historical origin of contemporary human rights law dating back to World War II. In contemporary times, MNCs, though non-governmental, private entities, often conduct their business in a manner that intervenes in the relationship between the state and the individual. This intervention of MNCs is such that they bestraddle and actually overwhelm the latter. The very fact of 'affective intervention' justifies regulation of MNCs. At the least, such regulation should ensure the fulfilment of the obligations of the state to the individual.

A theory for conferring direct responsibility on MNCs under international human rights law, which does not appear to have been clearly

---

66 UNCTAD *World Investment Report 2002: TNCs and export competitiveness*, Geneva, United Nations.

67 M Koenig-Archibugi 'Transnational corporations and public accountability' (2004) 39 *Government and Opposition* 234 235.

68 J Nolan 'Human rights responsibilities of transnational corporations: Developing uniform standards' (paper presented at the ANZIL Conference 18-20 June 2004, Canberra, ACT) (on file with author).

69 Aguirre (n 57 above) 54-55.

70 Nowrot (n 58 above) 4.

71 Ratner (n 65 above).

72 See eg Ratner (n 65 above); TF Maassarani *et al* 'Extracting corporate responsibility: Towards a human rights impact assessment' (2007) 40 *Cornell International Law Journal* 135.

73 Nolan (n 68 above) 3.

articulated, is the 'privity theory'.[74] This follows on the 'weak' versus 'strong' paradigm. The basis of the state is the wilful submission of the individual of his rights and freedoms to the state in a 'social contract'. Thus, the state exists as an expression of the agglomeration of individuals' 'sovereignties'.

It can be posited that the social contract between the individual and the state dictates that concessions ('sub-contracts' in contract theory) made by the latter operate to bind the privy ('sub-contractor') to the head contract to the extent of the expected impact of such areas of operation. In that way, licencees and concessionaires (such as MNCs) can be made to take on some of the obligations of their principal (the state) and become bound to fulfil them based on the doctrine of privity of contract. They could then become substantially bound to perform some of the important 'terms' of the contract between state and society. Thus, MNCs, by virtue of the privity theory, will be required to observe some of the treaty obligations of the country.

It may be argued in some quarters that this proposition contradicts the law of treaties for seeking to create obligations for third parties without their consent. An alternative argument could then be canvassed that, under international law, states have an obligation not to allow their territory to be used to violate the rights of others; a principle well recognised under international environmental law.[75]

The position that responsibility for the realisation of international human rights lies primarily with the state does not obviate state licencees such as MNCs. Rather, it strengthens the position that consensual participants in state craft are bound by the same obligations as the government. In a way, they are 'extensions' of the government in that they operate in spheres implicitly reserved for government under the social contract theory. But they are 'extensions' that exercise undue weight over the primary structure, almost to the point of subduing the former.

Critics of a legal framework that seeks to extend the liability of MNCs for economic, social and cultural rights insist that states as sovereigns have the responsibility to ensure the realisation of the rights of their citizens. While it is conceded that normative sovereignty lies with the state, it is now generally recognised that there is a radical shift in the

---

74 See E Palmer 'Multi-national corporations and the social contract' (2001) 31 *Journal of Business Ethics* 245 for an extensive discussion of the fundamentals of the 'contractarian' theory. He argues that 'reason requires that the activities of enterprises accord with standards of environmental and governmental sustainability in addition to consortium, national law and international agreements'.

75 M Zurn 'Global governance and legitimacy problems' (2004) 39 *Government and Opposition* 260 268: 'International regimes for overcoming global environmental problems are typical examples here. The ultimate addressees of regulations issued by international institutions are largely societal actors. While the states act as intermediaries between the international institutions and the addressees, it is ultimately societal actors such as the consumers and businesses who have to alter their behaviour in order, say, to reduce CO2 or CFC emissions.'

reach of state control. Although states have retained legal authority to protect their economies through numerous economic and political measures, the reality in the contemporary period is that the continued retention of those formal legal powers does not guarantee the attainment of state policy objectives. Rather, in order to ensure the welfare of their citizens, states have had to 'work with other powerful agencies' and are now 'obliged to share power'. The exercise of state power is now in the normative and, perhaps more so, in the political context, channelled through a 'fractured sovereignty'.[76] Perhaps nowhere is the effect of the paradigm shift in the cognitive limitations of state power over economic policies felt more than the (in)ability of developing countries to control the operation of MNCs due to the latter's awesome resources.

Existing legal positions that insist on exclusive state responsibility for the realisation of human rights are derived from the classical philosophical narrative in which the state possessed absolute sovereignty. Current realities have moved well beyond this traditional view. The development of connective technology, the conduct of globalised trading and economic relations, and the operation of international regulatory bodies, among other factors, have continued to seriously erode the power of states, particularly developing ones, to retain absolute command of their territories.[77] In view of the challenges posed by globalisation to the hitherto pre-eminent position of the state as the dominant player in economic and political affairs,[78] there is a compelling need to reassess the state-centric focus on realising economic, social and cultural rights in particular, and the welfare needs of citizens within a territory in general. Again, the peculiar developmental needs of local communities in developing countries (with decidedly weaker governmental structures), challenged by ever-expanding socio-economic globalisation dynamics, strongly recommend the adoption of a more inclusive and arguably pragmatic approach.

MNCs, like states, are bound to observe the obligations engendered by the voluntary actions of the state. An analogous example is the principal–agent relationship. In that relationship, the obligations of the principal bind the agent. Conversely, the actions of the agent in pursuance of his agency bind the principal. In this instance, the principal is the state with its obligations under international human rights as the guarantor of individual rights. MNCs constitute the state's concessionaires.

The case for regulation of MNCs and ensuring that international human rights law binds them is strengthened by the reality of the disproportionate swing in their growth. The 'opportunity cost' for their

---

76 M Loughlin *Sword & scales: An examination of the relationship between law and politics* (2000) 145-147.

77 Held (n 12 above).

78 Loughlin (n 76 above) 140-144.

growth is the requirement for less state control of the economic sphere, which negatively impacts the delivery of economic, social and cultural rights.[79] Neo-liberal structural adjustment programmes imposed by International Financial Institutions (IFIs) require states to minimise government role in policy formulation and control of the economy. This erosion of state sovereignty appears designed to, or at least works in favour of, MNCs.

The case for a 'privity theory' to hold MNCs responsible for the realisation of economic, social and cultural rights is further invigorated by the recognition that 'transnationalised production challenges the standard model of public accountability of corporations through governmental action and supervision'. This has led to the identification of accountability gaps between MNCs and their hosts, particularly in weak states. The primary source of accountability, the government, all but abdicates that responsibility due to internal (some of which are structural deriving basically from underdevelopment) or external factors.[80]

According to Zurn, the external or rather extraneous element implicated is *reflexive denationalisation*.[81] Itself a product of an embedded liberalism, it has resulted in 'a process in which boundaries of social transactions increasingly transcend national boundaries' and, consequently, 'challenged the capacity of national policies to bring about desired social outcomes'. Specifically, the ability of the state to effectively intervene in the national socio-economic scene and to effect social welfare programmes in the interest of its nationals is severely handicapped by the 'rapid increase in direct investments and highly sensitive financial markets'.[82] The negative effects of the continually expanding global economic activities of MNCs are worst felt in developing countries. Thus, recourse to an externalised normative framework for facilitating the realisation of economic, social and cultural rights of the largely underprivileged communities in developing countries ought to be considered a viable option.

In sum, then, it can be asserted that the encroachment of MNCs into developing economies impede the delivery of economic, social and cultural rights in those largely weak states. Such rights are thereby neither diminished nor dissolved. They usually recede into abeyance to the detriment of residents/citizens of those countries. It can be contended that the vacuum created by the receding institutions of the state in favour of MNCs transfers at least some responsibility for the promotion, protection and fulfilment of the economic, social and cultural rights (and other rights for that matter) on the latter. That space

79 Aguirre (n 57 above) 54-5.
80 Koenig-Archibugi (n 67 above) 238-245.
81 Zurn (n 75 above) 262.
82 Zurn (n 75 above) 265-266.

must be regulated under an imperative framework rather than on a voluntary-compliance basis.

6 International complicity?

For too long, the violation of the economic, social and cultural rights of local communities in developing countries has continued with the complacency of the international community. It may not be wrong to contend that there is complicity on the part of the international community on this issue. No doubt measures have been taken and initiatives introduced at the international level to hold MNCs responsible for economic, social and cultural rights. However, it would be contended below that these measures and initiatives have been weak and platitudinous. What is required is affirmative and enforceable action.

The UN Global Compact on MNCs (UN Global Compact), initiated in 1999 by former UN Secretary-General, Kofi Annan, is representative of such measures and initiatives. The drawback in its effectiveness is a reliance on voluntary compliance, for which it has been rightly criticised.[83] The UN Global Compact cannot be expected to substantially facilitate the resolution of the current debacle in the Niger Delta or the problems of other communities caught between the might of MNCs and inept governments, as it lacks the aspiration to monitor the standards it so eloquently advocates.[84]

The same can be said about the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms),[85] despite its description as the most ambitious attempt at defining the corporate obligations of MNCs with regard to human rights. The Preamble to the UN Norms sets out an extensive list of human rights instruments, including those that deal with civil, political, economic, social and cultural rights which MNCs have an obligation to respect. Article 10 provides that, in the conduct of their operations, Transnational Corporations and other business enterprises 'shall recognise and respect applicable norms of international law, national laws and regulations, the public interest ...' Article 12 further elaborates that they

> shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realisation, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom

---

83 C Hillemanns 'UN norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights' (2003) 4 *German Law Journal* 1055.

84 However, see G Kell 'The global compact: Selected experiences and reflections' (2005) 59 *Journal of Business Ethics* 69 71-73 for the view that the UN cannot achieve a monitory/enforcement model and that such model is in any case undesirable.

85 UN Doc E/CN.4/Sub.2/2003/12/Rev 2 (2003).

> of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realisation of those rights.

These provisions are laudable for their comprehensiveness. Nevertheless, absent a monitoring and enforcement mechanism, they hardly advance the rights of MNCs' host communities. The UN Norms (and similar instruments) remain astute theoretical postulations on 'best practices', rather than mechanisms for realising its elegantly crafted provisions.

The current array of *initiatives* at the international and regional levels would not transcend the level of platitudes if they continue to be based on voluntary subscription and moral adjurations. The realisation of economic, social and cultural rights will likely affect the maximisation of profits, the 'bottom-line' of commercial enterprise. The formulation of the laudable principles around a non-enforceable and sanction-less framework does little to advance the rights of the weak and poor host communities. Tripathi, while discussing the regulation of MNCs in conflict zones, has argued that[86]

> a company is not obliged to honour commitments it makes in any voluntary mechanism. Voluntary tools, therefore, are necessary but not sufficient to change a company's behaviour in a zone of conflict. This is equally applicable to the context of realising the economic, social and cultural rights of MNCs' host communities.

The 'soft law' approach may be commendable for its attempt at inclusiveness and fostering voluntary subscription by MNCs. Koenig-Archibugi, while arguing in support of the approach, observed that the voluntary commitment by MNCs to accountability provides information to consumers, investors and other stakeholders (the last group presumably includes indigent host communities) and greatly assists them in making informed choices.[87] The approach, he notes, is currently the favoured over enforceable mechanisms.[88]

In the context of European Community (EC) law, 'soft law' is best regarded as 'rules of conduct' or 'commitment' without binding legal force, but not without legal effect altogether.[89] The common expectation is that they can form the basis of customary international law or binding treaties.[90] This characterisation of the status of soft law is generally applicable in international law.[91] As non-treaty law, soft law is

---

86 S Tripathi 'International regulation of multi-national corporations' (2005) 33 *Oxford Development Studies* 117 122.

87 Koenig-Archibugi (n 67 above) 246.

88 Koenig-Archibugi (n 67 above) 258.

89 L Senden 'Soft law, self-regulation and co-regulation in European law: Where do they meet?' (2005) 9 *Electronic Journal of Comparative Law* 1 27 http://www.ejcl.org/91/art91-3.PDF (accessed 8 February 2008).

90 J Rehman *International human rights law: A practical approach* (2003).

91 P Malanczuk *Akerhurst's a modern introduction to international law* (1997) 54-55.

not recognised as creating legal obligations. At best, it is regarded as a different regime of 'law' which falls outside of the principles of treaty law under international law.[92]

Two distinctive objections can be raised against the 'soft law' approach as advocated by Koenig-Archibugi. First is the assumption that all consumers and stakeholders have a capacity to constructively assess the information provided under such voluntary mechanisms. This may well be the case in developed countries, where basic education can be taken for granted. However, it is a fact that inadequate education and, sometimes, a complete absence of basic education characterise underdeveloped countries. They are thus deprived of such access and consequently lose any benefits this may hold. The second objection derives from the assumption that consumers and stakeholders are socio-economically empowered to make any *choice* at all. This again is simply not the reality in underdeveloped or developing countries. Choices presuppose some level of empowerment, an asset rarely within the reach of low income-earning and less educated communities.

However, the voluntary mechanisms approach is probably more fundamentally flawed in its basic assumption that neo-liberal capitalism (the impetus for MNCs' operations) subscribes to some high notions of morality. Why should it be assumed that MNCs will be interested in respecting, protecting, promoting and fulfilling the obligations of their host states to the obvious detriment of their profits? Such an assumption is hardly based on past or recent experience. Take the Organisation for Economic Co-operation and Development Guidelines for the Operation of MNCs as an example. Its existence of over 30 years has not reversed the fact that MNCs from state parties constitute some of the worst violators of the human rights of host communities.[93]

The 'lethargic response'[94] of the international community to rein in MNCs and ensure the realisation of economic, social and cultural rights constitutes an abdication of its obligation under international human rights law. A number of international human rights law instruments oblige UN member states to ensure the realisation of economic, social and cultural rights by states and private actors. The Preamble of the Universal Declaration, while proclaiming it a common standard of achievement for all peoples and nations, imposes a duty on 'every individual and every organ of society to secure their effective recognition and observance, both among member states and among the peoples of territories under their control'. Articles 22 to 27 of the Universal Declaration provide for economic, social and cultural rights. This

---

92 H Hillgenberg 'A fresh look at soft law' (1999) 10 *European Journal of International Law* 499.

93 OECD Watch 1 April 2003 http://www.germanwatch.org/tw/kw-inl01.pdf (accessed 4 April 2006).

94 Aguirre (n 57 above) 57.

clause in the Preamble, read together with articles 22 to 27, obliges the international community to go beyond imposing a duty on MNCs to respect the economic, social and cultural rights of local communities, as would appear to be the intent of the UN Norms. The Universal Declaration provisions further require definitive measures to ensure their implementation and enforceability. This may be better actualised by replacing the norms with an enforceable treaty.

Further, and perhaps of greater significance, are the implications of articles 55 and 56 of the UN Charter. Article 55 stipulates that the UN shall promote higher standards of living, full employment and conditions of economic development. The UN is also obliged to ensure universal respect for human rights and observance of human rights and fundamental freedoms for all. Article 56 emphasises the imperative nature of this duty, affirming that all members *pledge* their commitment to take *joint and separate action* to ensure the achievement of the purposes set out in article 55.

In light of the provisions of articles 55 and 56 of the UN Charter, developed countries in particular have an obligation to ensure the regulation of MNCs. This is particularly so in view of the fact that they invariably are the 'home' states of the MNCs. Thus, MNCs, even as corporate individuals, are their 'citizens'. They are obliged at the national level to regulate the conduct of MNCs' of their business, both within their territories and, arguably, internationally.

The foregoing proposition on extra-territorial regulation of MNCs is not alien to international law. Under international criminal law, for instance, nationals of a country can be tried in their home countries for offences committed abroad. The existence of this principle can be extended to international human rights law to scrutinise and regulate the activities of MNCs by developed home states. Such regulation is particularly germane now that MNCs are not easily amenable to regulation and control by developing countries keen on attracting or retaining them.

According to a pragmatic view of the current situation, genuine and concerted international action is required to combat the enormous reach of MNCs. Aguirre has noted that 'the MNC has transcended national legal systems and ignored the feeble international system to make the imposition of human rights [on them] nearly impossible'.[95] But regulated they must be, as neglect can threaten global peace.

Developing countries, faced with the dilemma of de-emphasising economic, social and cultural rights to gain on competitiveness or close regulation of MNCs and lose out on Direct Foreign Investments (DFI), usually settle for the former. The apprehension that MNCs may move their operations elsewhere to obtain the benefits of fewer regulatory

95 Aguirre (n 57 above) 56.

burdens, is a potent one for developing countries at least.[96] They are constrained by the 'race to the bottom'[97] to avoid adequate regulation of MNCs.

Considering their awesome resources, regulation of MNCs cannot be achieved without the co-operation of their 'home' countries. They hold the key to effective and compulsory regulation of MNCs considering their advantaged status. They benefit immensely from the profits of MNCs in the form of taxes and profit repatriation. They owe more than a moral obligation to ensure the delivery of economic, social and cultural rights by their 'proxies', MNCs. Their co-operation in achieving this laudable objective is required under the UN Charter and other legal instruments that constitute the very foundations of international law.

7 Conclusion

In many developing countries, economic, social and cultural rights are still non-justiciable. The role of NGO advocacy to challenge the neglect and violations of these rights cannot be over-emphasised. This is obvious from the decision in the *SERAC* case and the Nigerian cases examined in the article. Exploring supra-national adjudicatory mechanisms holds some promise. A wide gap existing between states' formal commitment to international human rights instruments and the effective implementation of the obligations thus created, giving much cause for concern.[98]

Here, the inauguration of the African Court of Human and Peoples' Rights is important. An institution with more than recommendatory powers is arguably the appropriate mechanism for reigning in the currently immense, largely unchecked, power of MNCs with regard to their human rights obligations focused on in this discourse. Considering their multi-national nature, an international court, such as the International Criminal Court (ICC), with supra-national composition and jurisdiction, may be even more effective. Thus, the composition, material and human resources of such an adjudicatory institution will be important to secure and retain the international respect and confidence required to meet the challenges of the global violations of economic, social and cultural rights by players with globalised resources.

The laws of standing before the Court, like those of the ICC, should similarly be liberal. It should provide for individual, group and third state or other interested party complaints alongside state-compliant

96 Ratner (n 65 above) 463.

97 S Chesterman 'Oil and water: regulating the behaviour of multi-national corporations through law' (2004) 36 *New York University Journal of International Law and Policy* 308.

98 F Viljoen & L Louw 'The status of the findings of the African Commission: From global persuasion to moral obligation' (2004) 48 *Journal of African Law* 1 18.

procedures. The current state of the non-justiciability of economic, social and cultural rights in many state jurisdictions (especially in developing countries where the violations are most acute), coupled with the weakness or apparent lack of political will to ameliorate the violations of economic, social and cultural rights, particularly commend this approach on standing to institute proceedings. However, like the position on jurisdiction of the ICC, it is further suggested that the rules of complementarity which allow for priority to be accorded to adjudication of cases within the state courts, where this is available or the parties are willing to approach the courts, should be incorporated into an enabling statute for such a court.

It is worth noting that Shell, like other MNCs, recognises the need to obtain and maintain a cordial relationship with the communities in the Niger Delta in which it operates. What is in dispute is the way to secure and maintain that valuable relationship. It is certainly not by maintaining a culture of denial. A resort to satisfying rent-seeking individuals and groups provides a decidedly short-lived reprieve. What is required is a proactive approach which centres on the recognition of the company's obligations under international human rights law.

None of the parties to the conflict can reasonably expect to achieve a meaningful solution to the current debacle with their current stance. All concerned — the Nigerian government, the MNCs, the local communities and the international community — have to revise their current strategies. There is a need to embrace the opportunity offered by the broad framework of international human rights with defined rights and responsibilities for all sides. The repression or violence and all sorts of criminality can only exacerbate the issues. This unfortunately is still the current situation; the backlash resonates in today's global village.

It is important that the international community creates an enforceable treaty with an independent enforcement mechanism which can employ mandatory sanctions against MNCs. This accords with existing international law instruments such as the Universal Declaration and the UN Charter, which require concerted efforts for the universal entrenchment of human rights for all. It is no longer acceptable to maintain, as Nolan asserts, that 'international law generally, and human rights law in particular, is still undergoing the conceptual and structural evolution required to address their accountability'.[99] That process has gone on too long already. The existing soft laws can be transformed into enforceable mechanisms to rein in MNCs into the treaty framework. Such an approach holds the promise of pouring oil on the troubled waters of the Niger Delta.

[99] Nolan (n 68 above) 3.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The status and fate of the Eritrean Constitution

*Simon M Weldehaimanot**
TMF Human Rights Fellow, Institute for Human Rights and Development in Africa, Banjul, The Gambia

Summary

Between 1993 and 1997, Eritrea was engaged in a constitution-making process. In accordance with the legal framework set to guide the process, the constitution-in-the-making was finalised on 23 May 1997. There is disagreement about the status of this Constitution. Although it remained supportive throughout the constitution-making process, the transitional government of Eritrea has declined to implement the Constitution more than ten years after the Constitution had been ratified. The government of Eritrea's reluctance is ascribed to the absence of an entry into force clause in the Constitution and the 1998-2000 border conflict between Eritrea and Ethiopia. The government used this as a pretext and as a result, constitutional development in Eritrea has been arrested for a period of ten years. This article investigates the factors affecting the status of the Constitution and concludes that, in spite of certain flaws in the constitution-making process, the Constitution is a legitimate pact that has been in force since the date it was ratified.

1 Introduction

Considering the way state formation finally took shape in Africa as a result of colonisation, Eritreans believed that they were entitled to an autonomous state of their own. However, they were put together in

* LLB (Asmara), LLM (Human Rights and Democratisation in Africa) (Pretoria); simoxen2001@gmail.com. The author is grateful to Daniel R Mekonnen for his invaluable contribution in this work.

a federation with neighbouring Ethiopia.[1] The federation that gave Eritrea a semi-autonomous status was not respected. As a result, political resistance to the Ethiopianisation of Eritrea led to the first sporadic instances of armed struggle, and as the decade progressed, this defiance coalesced into a potent guerrilla force under the leadership of the Eritrean Liberation Front (ELF).[2]

In the early 1970s, a group of ELF commanders defected from ELF and, after forming many factions, eventually formed a rival group, the Eritrean People's Liberation Front (EPLF).[3] Both fronts continued fighting against Ethiopian domination and from time to time fierce fighting took place between the two fronts (during the 1970s and 1980s).[4] By 1981, EPLF had vanquished ELF, removed the latter from Eritrea to exile and had become the only significant armed resistance movement on Eritrean soil.[5] EPLF fighters survived continual Ethiopian offensives and, by the late 1980s, they were beginning to claim significant battlefield victories and ultimately, on 24 May 1991, EPLF forces entered Asmara, the Eritrean capital.

On the other hand, since its exile, ELF generated factions that now stand as opposition political parties in exile.[6] Their organisational existence did not face the same setbacks as their military defeat.[7] Yet, they are so weak that many of them are run by part-time leaders with no or little public support. [8]

Some important post-May 1991 events were that EPLF formed a provisional government, later re-named as 'the government of Eritrea' (GoE); a referendum was conducted by which the fate of the *de facto* inde-

---

1 The birth of the Eritrean statehood is a contested terrain. For more, see BH Selassie 'Self-determination in principle and practice: The Ethiopian-Eritrean experience' (1997) 29 *Columbia Human Rights Law Review* 92-142; E Gaym *The Eritrean question* (2000); GN Trevaskis *Eritrea: A colony in transition 1941-52* (1960); D Weldegiorgis *Red tears: War, famine and revolution in Ethiopia* (1989) and M Haile 'Legality of secessions: The case of Eritrea' (1994) 8 *Emory International Law Review* 479-537.

2 D Connell *Against all odds: A chronicle of the Eritrean revolution* (1997) 76.

3 See generally Connell (n 2 above) and Z Yohannes 'Nation building and constitution making in Eritrea' (1996) 1 *Eritrean Studies Review* 157-8.

4 See Connell (n 2 above) 73-91.

5 Yohannes (n 3 above) 158.

6 Awate Team 'Eritrean political organisations: 1961-2007' (2007) http://www.awate.com/ portal/content/view/4485/9/ (accessed 23 November 2007).

7 A Bariagaber 'Eritrea: Challenges and crises of a new state' (October 2006) 5 (a Writenet Report commissioned by United Nations High Commissioner for Refugees, Status Determination and Protection Information Section (DIPS)).

8 Not much is known about the size of each political party. The number of the parties also fluctuates because of frequent mergers and splits. In 2005, 16 political parties formed an umbrella organisation called the Eritrean Democratic Alliance (EDA); and there are few outside the EDA. Apart from the political parties, as the GoE became increasingly repressive, a growing number of individuals and civic organisation have been opposing the GoE. The author's reference to 'opposition' thus denotes a broader group than the opposition political parties.

pendent Eritrea was decided along the line of self-determination and, subsequently, the GoE took the initiative to prepare a constitution.

2 The constitution-making process

Much has been written by Eritreans and non-Eritrean observers about the Eritrean experience of constitution making.[9] What follows is a brief presentation of the facts of the constitution-making process to the extent relevant to this article.

2.1 Prelude to the process

It was in 1992 that the EPLF formed the GoE.[10] Ideally, the post-independence era was ripe for a process of national reconciliation and forming a transitional government that includes the opposition parties.[11] Generally, the opposition forces expected a transitional government of national unity to be formed and they would thus have a say on the transitional affairs of Eritrea.[12] Nevertheless, the issue of national reconciliation was not accepted by the GoE in the way the opposition forces wished, which required recognition of not only the latter's contribution to free Eritrea, but also the latter's right to participate in the transitional governance.[13] However, EPLF led the independence struggle to its end and thus felt it had the sole right to preside over the transition, as was manifested in some of the legislation it had promulgated.[14] As was true with many early post-colonial African governments, EPLF was not enthusiastic about seeing a multi-party system in Eritrea immediately

---

9 BH Selassie *The making of the Eritrean Constitution: The dialectic of process and substance* (2003); RA Rosen 'Constitutional process, constitutionalism, and the Eritrean experience' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 263-311; Selassie (n 1 above); GH Tesfagiorgis 'When the drafting of a constitution is not confined to men of stature or legal experts: The Eritrean experience' (1998) 2 *Eritrean Studies Review*; RA Rosen & BH Selassie 'The Eritrean constitutional process: An interview with Dr Bereket Habte Selassie' (1999) 3 *Eritrean Studies Review*; Yohannes (n 3 above) and other contributions hosted at the Eritrean cyber space.

10 See Proclamation 23/1992.

11 T Medhanie 'First things first: Reconciliation before "national" conference' paper presented at the Seminar on Dialogue for National Reconciliation in Eritrea (Stockholm, 23 May 2002).

12 ELF-RC's 'Constitution and constitutional commission' (1994) 12 *Demokrasawit Eritrea* 22; ELF-RC 'Our demand is constitutionalism, not constitution' (1996) 21 *Demokrasawit Eritrea* 4; ELF-RC 'Interview with fighter Ahmed Nasr' (1996) 18 *Demokrasawit Eritrea* 4 & ELF-RC 'Interview with ELF-RC chairperson ...' (1996) 19 *Demokrasawit Eritrea* 3 (all sources are in Tigrinya).

13 Medhanie (n 11 above).

14 Preambles of Proclamations 23/1992 & 37/1993. See also S Ibrahim 'From exemplary revolution towards a failed state: What went wrong with the Eritrean dream?' (2005) http://www.awate.com/artman/publish/article_4314.shtml (accessed 31 January 2008).

after the hard-won independence. The only sign of a willingness to promote reconciliation was EPLF's willingness to let the opposition leaders abandon their organisations and join EPLF and the GoE.

Thus, when some of the opposition leaders were boycotting the GoE's call for assimilation, the GoE presented the opposition forces as mere terrorist groups with 'sub-national agendas'.[15] The GoE did all it could to claim all the credit for liberating Eritrea.[16] As a result, as one observer noted, the GoE was able to make the Eritrean public believe that there was no adversary political force with which EPLF needed to be reconciled.[17]

Furthermore, amidst the jubilation of the independence days, according to the perception of many Eritreans, there were no major political differences or ethnic or religious issues that needed to be dealt with sensitively during the constitution-making process. However, the country is made up of nine ethnic groups, each with its own dialect, though multilingualism is common and roughly half of the population is Christian and half is Muslim. Three years after the *de facto* independence, the whole nation was enthusiastically celebrating.[18] Thus, Eritreans felt or were made to believe that they were 'one people' with one way of thinking and nobody was outside or excluded.[19] Indeed, the opposition forces have gained little public support, even at a time when the GoE turned extremely repressive.

2.2 Evaluating the pre-constitutional process setting

A flaw in early post-1991 Eritrean politics was a complete ignorance of the need for a post-conflict process of reconciliation. When seen with the advantage of hindsight, these different political groups should have reconciled with each other after the aim of the struggle for which they had all fought had been achieved. Regrettably, this did not happen. As a result, the constitution-making process was dictated by the GoE. The reluctance of EPLF to accommodate other political forces, on the face of it, looks like a blemish, and is the main source of the opposition's discontent regarding the Constitution.[20]

---

15 DR Mekonnen 'Transitional justice: Framing a model for Eritrea' (November 2007) 169 (thesis submitted in accordance with the requirements for the Degree of Doctor of Laws in the Faculty of Law, Department of Constitutional Law and Philosophy of Law at the University of the Free State — first draft).

16 This attitude of the government is irritating to the opposition and remains the main variable defining relations between the opposition and the government as reflected in the EDA Political Charter, para 3.

17 Rosen (n 9 above) 307.

18 Rosen (n 9 above) 281.

19 As above.

20 ELF-RC 'The question of constitution from democratic and dictatorial perspective' (1995) 13 *Demokrasiawit Eritrea* 8 & 9.

The Eritrean public deserves a share of the blame for not pressurising the GoE to correct this mistake in time. Unlike the Eritreans of the 1970s, who attempted to reconcile the antagonistic factions, those who on Independence Day simply rejoiced with the winning side were unaware of the need for reconciliation. Some even went ahead and alienated the opposition parties from the Eritrean political scene.[21]

Nevertheless, the GoE called members of the opposition parties to abandon their organisations and join it; but the opposition forces, questioning the genuineness of such an offer, opted to stay separate.[22] Thus, the opposition forces are also criticised for self-exclusion.[23] In addition, the opposition forces were criticised for not contributing to the process by outlining their position in many issues that they considered constitutional matters.[24]

2.3 The legal framework of the process

A step towards the constitution-making process was taken when, in 1993, Proclamation 37/1993 was enacted, providing for the structure, powers and responsibilities of the GoE. The same proclamation stated that the GoE was established with various responsibilities and, above all, with the responsibility of preparing the ground and laying the foundation for a democratic system of government.[25]

As a mechanism of discharging the above-mentioned responsibility, it is provided that the National Assembly (the legislature of the GoE) shall establish a constitutional commission charged with the responsibility of drafting a constitution and organising popular participation in such a process.[26] Accordingly, Proclamation 55/1994, the Proclamation to Provide for the Establishment of the Constitutional Commission (the Commission), was issued on 15 March 1994.[27]

---

21 P Tesfagiorgis 'A new crusade to end the conspiracy of silence of Eritreans in the Diaspora' (2007) http://www.awate.com/portal/content/view/4501/5/ (accessed 26 November 2007).

22 Many did join the GoE. See ELF-RC 'Fighters returned to their country faced harassment' (1996) 17 *Demokrasiawit Eritrea* 2 & 3. In spite of the harassment alleged to have been committed against the returnees, their attempt to influence the GoE was commendable. In this regard, it is enlightening to note that the most notable challenge to the GoE came in 2000/01 from within. For those challenges, see generally D Connell *Conversation with Eritrean political prisoners* (2005).

23 In this regard, SAA Younis observed: 'When the constitution-drafting process began, there were three classes of Eritreans: those who were opposed to it on the basis that it was illegitimate, those who had reservations with it but agreed to participate, and those who embraced it wholeheartedly ... Those who had reservations ... participated with the view that it is only by doing so that we can affect the end result.' Reaction e-mail written to the author by Younis on 26 April 2007 on the issue of the Constitution.

24 Rosen & Selassie (n 9 above) 174.

25 Art 6.

26 Arts 4(6)(a) & (b).

27 Rosen & Selassie (n 9 above) 143.

Proclamation 55/1994 required that the Commission be composed of a Council and an Executive Committee.[28] The Council was supposed to be composed of 50 members that had to be elected by the National Assembly.[29] The qualification set for membership is that 'members of the Council shall be experts and other citizens with proven ability to make a contribution to the process of constitution making representing a cross-section of Eritrean society'.[30] The National Assembly was empowered to appoint commissioners.[31]

The missions of the Commission, *inter alia,* were to (1) organise and manage a wide-ranging and all-embracing national debate and education through public seminars and lecture series on constitutional principles and practices;[32] (2) draft a constitution after such deliberations; (3) present the draft to the National Assembly for a final public discussion; and (4) at the conclusion of such public discussion, prepare a final draft and submit it to the National Assembly for approval.[33] Again, the approved draft had to be submitted to a 'democratically formed representative body' for ratification.[34] Two years later, Proclamation 92/1996 (the Constituent Assembly Proclamation) required the 'democratically formed representative body' to be composed of (1) the members of the National Assembly; (2) members of the six regional assemblies; and (3) 75 representatives elected from among Eritreans residing abroad.[35]

2.4 The process in practice

The formal appointment of the Commission was made by the National Assembly early in 1994.[36] It is important to examine the composition of the National Assembly that appointed members of the Commission and approved the drafts of the Constitution.[37] On 19 May 1993, the GoE repealed Proclamation 23/1992 by Proclamation 37/1993. Among the reasons that prompted the replacement of the proclamation was the need to consider representation of the Eritrean people.[38] Thus,

---

28 Art 2(2).

29 Art 6(1).

30 Art 6(2).

31 Arts 6(1) & (3).

32 Public participation was sought for two ends. One end was to get input and reflect the wishes of the Eritrean public in the draft. The other end was to teach the Eritrean public about the basic ideals of constitutional government and constitutionalism (art 5).

33 Art 4 Proclamation 55/1994.

34 Art 6(b) Proclamation 37/1993.

35 Art 2 Proclamation 92/1996.

36 See also Awate 'An exclusive interview with Dr Bereket Habte Selassie' (2001) http://www.awate.com/artman/publish/article_81.shtml (accessed 31 January 2008).

37 As above.

38 Preamble Proclamation 37/1993.

Proclamation 37/1993 envisaged a National Assembly composed of the Central Council of EPLF and 60 others.[39] From the 60, 30 were drawn from the regional assemblies of the then 10 administrative regions of Eritrea.[40] Of the remaining 30, 10 had to be female, and were selected by the Central Council[41] of EPLF.[42]

This part of Proclamation 37/1993 was, however, repealed very soon by Proclamation 52/1994, which provided that the National Assembly had to be composed of the 75 members of EPLF's Central Council and 75 others elected by the Eritrean public.[43] Nevertheless, this provision did not take effect immediately. Hence, the same proclamation added that, pending elections, the National Assembly would retain its composition. It was only in May 1997, after elections for the regional assemblies were conducted and the Constituent Assembly was constituted to consider ratification of the Constitution, that the National Assembly assumed the composition required by Proclamation 37/1993.[44]

With the exception of some members of the Executive Committee who were included for their unique expertise, the primary consideration the National Assembly used in selecting the members of the Commission was their participation in Eritrea's independence struggle, and the small number of members who were not liberation fighters reflected the concern of the appointing authorities for representation of Eritrean society.[45] Nevertheless, within these parameters, representation in terms of ethnic, religious and gender balance was considered.

Looking at the actual composition of the Commission, all the nine ethnic groups of Eritrea were represented.[46] The two major religions, Christianity and Islam, were represented on an equal basis. There were 23 female members, who represented 47% of the total membership, and the average age of the members of the Commission was about 50, ranging from 32 to 80 years.[47] The majority of ELF-originated political forces (often referred to as fronts), now composing the bulk of opposition, were not represented as an entity in spite of official requests.[48] Some of the members of the Commission were, however, ex-opposition members who joined the GoE following the latter's call

39 Art 4(2).

40 The Chairperson, the Secretary and one elected female member from each regional assembly (art 4(2)).

41 The Central Council is the legislative arm of the EPLF (now called PFDJ). See PFDJ Charter http://www.shaebia.org/PFDJ_Charter_1994.html (accessed 21 April 2007).

42 Art 4(2) Proclamation 37/1993.

43 Arts 2(3) & (4).

44 Rosen & Selassie (n 9 above) 172.

45 Awate (n 36 above).

46 Tesfagiorgis (n 9 above) 144.

47 Rosen & Selassie (n 9 above) 144.

48 Rosen (n 9 above) 306. See also Rosen & Selassie (n 9 above) 175.

after and before independence.[49] In this regard, one Eritrea political analyst observed:[50]

> Much is said about the diversity of the commissioners — that the gender, age, religious diversity reflected Eritrea's cross-section. That is true. The one diversity that was not accommodated was ideological diversity.

The Commission prepared its first draft which was submitted to the National Assembly for comments.[51] A second draft was submitted to the National Assembly who approved it. Afterwards the draft was submitted to the Constituent Assembly and was eventually ratified.[52]

2.5 Evaluating the legal framework and practice

In my view, the envisaged legal framework of preparing the Constitution was not undemocratic, although the non-participation of the opposition forces was the main flaw. Rosen differs on two grounds. First, Rosen questions whether there was 'an opposition that accepted nationhood and represented a meaningful portion of the population at least in a form that would have necessitated their inclusion in the process', and second, even if such opposition existed, its non-participation is 'not necessarily a fatal flaw undermining the legitimacy of the constitutional process'.[53]

By contemporary standards of democratic constitution making, the democratic deficiency one sees when looking at the legal framework is minimal.[54] The constitution-making process lacked a national referendum. Nevertheless, a referendum as a means of public participation in a constitution-making process is not always a desirable step.[55] A typical constitution, no matter how concise it may be, embraces numerous issues on which submissions to a referendum are not practically feasible. Often, when the whole draft is submitted to a referendum and voters are required either to accept or reject the entire draft, voters tend to judge the entire draft based on a single or few provisions with which they agree or disagree.[56] It was, however, possible to submit certain

---

49 Rosen (n 9 above) 306.

50 S Younis 'Constitutions as a door stop' (2007) (paper presented to a conference organised by the African and Afro-American Studies Department of the University of North Carolina at Chapel Hill entitled Islam, Politics and Law in Africa, 12-14 April 2007).

51 Rosen & Selassie (n 9 above) 166-168.

52 As above.

53 Rosen (n 9 above) 304.

54 Rosen (n 9 above) 307.

55 JS Read 'Nigeria's new Constitution for 1992: The Third Republic' (1991) 35 *Journal of African Law* 175-6.

56 The 1992 experience of Seychelles is illuminative. A considerable number of the voters voted 'no' for the Constitution because, led by the influential Catholic Church, they opposed a provision permitting abortion.

contentious issues; although the poor economic situation of the war-ravaged nation could have justified the absence of a referendum.

In evaluating the legal framework and the practice, it is important to focus on the three main bodies involved: the Commission, the National Assembly and the Constituent Assembly. Some have argued that the Commission should have been a democratically elected body rather than being appointed by the National Assembly.[57] Others, however, argue that this was unnecessary given all the circumstances of the country at the time the Commission was formed and its limited mandate which again was checked by the National Assembly and the Constituent Assembly.[58]

Another important query is whether the Commission did what it was obligated to do: involving and educating the Eritrean public in the course of preparing the draft and incorporating the wishes of the public. Much has been written on the Commission's work by non-Eritrean writers and their assessment has been positive. Rosen, for example, noted:[59]

> No description of the Eritrean constitution-making process is complete without a discussion of the truly outstanding characteristic of the Eritrean experience, the Commission's extensive campaign, at every stage, to educate and involve the public in the constitutional process. Using everything from comic books to musical plays, radio broadcasts to secondary school essay contests, the Commission introduced people who had never even heard the word 'constitution' to the notion of the primacy of the Constitution, and to the need to respect the rights of those protected by it.

Similarly, Hart observed:[60]

> Between 1994 and 1997, Eritreans engaged in constitutional education and consultation, addressing a nation with markedly low literacy rates through songs, poems, stories, and plays in vernacular languages, and using radio and mobile theatre to reach local communities.

To an insider who knows the politics of the Eritrean independence struggle and the Eritrean public, the most authoritative testimony in this regard is Connell's observation.[61]

> Meanwhile, the year-long mobilisation for the 1993 referendum on Eritrea's political status brought thousands of people into the political process for the first time. Following close on this was a highly-participatory, three-year constitution-making process that produced a legal foundation for the articulation, exercise and future contestation of the basic civil and human rights

---

57 DR Mekonnen 'The reply of the Eritrean government to ACHPR's landmark ruling on Eritrea' (2006) 31 *Journal for Juridical Science* 50; Rosen (n 9 above) 304 and ELF-RC 'Interpretation of democracy in a democratic system' (1996) 18 *Demokrasiawit Eritrea* 16 & 17.

58 Rosen & Selassie (n 9 above) 145.

59 Rosen (n 9 above) 290.

60 V Hart 'Democratic constitution making' (2003) 7 Special Report 107 of the United States Institute for Peace http://www.usip.org/pubs/specialreports/sr107.pdf (accessed 25 March 2007).

61 Connell (n 22 above) 7.

> ... the manner in which [the Constitution] was produced, involving tens of thousands of Eritreans at home and abroad in discussions of what rights they held dear and what they wanted from their newly created state, added value well beyond the document itself or the specific articles it contains.

McCord agrees:[62]

> A constituent assembly ratified Eritrea's first Constitution on May 23, 1997, bringing to closure a three-year process involving extensive public participation and consensus-building ... Nearly 400 grassroots trainers were mobilised and trained to conduct civic education at the village level. Committees and seminars were also conducted among the diaspora in North America, Europe, the Middle East, and Africa. In all, an estimated 500 000 people [out of Eritrea's 3,5 million population] actively participated in the civic education activities.

However, some Eritrean opposition critiques question the genuineness of the public participations and argue that the whole endeavour was window-dressing and that the contribution of the public was simply discarded.[63]

At the stage of the National Assembly and the Constituent Assembly some argue that EPLF/PFDJ had a majority in the first body and a notable presence in the latter. However, in terms of public support and membership, they failed to note that by then EPLF/PFDJ was so popular that it embraced almost the entire Eritrean public. They add that neither body was democratically formed.[64] In forming the Constituent Assembly, 75 members of the PFDJ Central Council were moved into the Assembly together with another 75 representatives of the Eritrean Diaspora of whom one might be inclined to say that they were hand-picked by the GoE. The rest of the members of the Constituent Assembly (375 people) were, however, elected by the public.

Bereket concludes that the public elections were free and fair.[65] Mekonnen differs and ponders whether it is 'possible to have a free and fair election when there are no independent political parties, no independent professional and non-professional organisations ... no independent civil society, no free press, no independent parliament and no independent judiciary'.[66] Leaving aside whether or not all these democratic institutions were completely absent or whether there was substitution, Mekonnen's observation is valid in principle.

In assessing whether or not the elections were free and fair, however, apart from general benchmarks, peculiarities of the Eritrean society — a society that wants to know not only the candidate's profile but also his

---

62 MR McCord 'The challenges of constitution making in Eritrea' (1997) 6(3) *African Voices* 3. McCord JD by then was a democracy fellow with the USAID mission in Eritrea.

63 Younis (n 23 above) and& ELF-RC (n 12 above).

64 DR Mekonnen 'Comments on the draft article: "Ten years old yet not born: The status of the 1997 Eritrean Constitution"' (March 2007) 5 & 6 (on file with author).

65 Rosen & Selassie (n 9 above) 175.

66 Mekonnen (n 64 above) 2.

genealogy — should be considered. The Eritrean public hardly needed the above democratic tools to identify the persons it wanted to elect. Indeed, there is a strong tradition of tracing a person's genealogy, social status and other factors that election campaigns (often suffocated with false promises) do not uncover. Drawing a comparison from the Gambian society — a society comparable to that of Eritrea, not only in numbers but also in many other features — the author is able to note that within such societies, candidates are identified from their position in and contribution to the society in a long and complicated process.[67] Although comprehensive statistics are not available, the free and fair nature of the elections was demonstrated by the fact that officials of the former Ethiopian government, who had proven their commitment to their constituencies, were elected as members of the regional assemblies, in spite of the general public prejudice against such officials.

Another important factor is the way in which the GoE approached the elections for regional assemblies. Perceiving that they have little effect on the politics of the GoE, the GoE took an independent position *vis-à-vis* the process of the elections — leaving the public to choose whom it wants. This is an important benchmark and, seen from this angle, the elections for regional assemblies were conducted in a free atmosphere, more so than the referendum of which the outcome was not questioned by the opposition.[68] While what the GoE wanted from the people was apparent in the referendum, namely to vote, and as there was strong apprehension or fear of doing the 'wrong thing',[69] elections for the regional assemblies were conducted freely. In the same manner, under the repressive GoE, free and fair elections for various grassroots democratic institutions, such as magistrates of the communal courts, were conducted. Perceiving the minimal effect such grassroots institutions can have on the politics of the GoE, the latter showed no interest in tampering with them.

This writer concludes that the legal framework of the constitution-making process was not totally undemocratic and neither was its practice, except that the opposition forces were not permitted participation in the way they demanded. In theory, the opposition could have enriched the constitution-making process in terms of ideology, as contended by Younis.[70] However, there were no meaningful ideological differences

---

67 The author resided in The Gambia from July 2007 to March 2008 and closely observed the preparation for regional assembly elections.

68 For critical observations on the Referendum, see generally K Tranvoll 'The Eritrean referendum: Peasant voices' (1996) 1 *Eritrean Studies Review* 23-67. Written from an anthropological perspective, the article introduces benchmarks of evaluating elections which electoral formulas do not often consider.

69 As above.

70 Younis (n 50 above). Younis contended that the 'people [commissioners] that were shortlisted passed a litmus test imposed by the one-party one-ideology National Assembly. If a city is trying to pass an ordinance banning smoking, it cannot exclude smokers on the basis that smoking is bad for you, nor can it include ex-smokers and claim "Everybody was invited".'

between the GoE and the opposition forces.[71] Importantly, the process was conducted in a free environment in a sprit of optimism and jubilation. The Constitution that was eventually ratified (which many have described as progressive) contains numerous provisions that are not approved of by the GoE — a fact that attests to the independence of the process. That the GoE is hesitant to implement the Constitution is another testimony to the quality of the Constitution. For those and other reasons explained below, particularly the fact that the public did participate, it is reasonable to conclude that the Constitution passes the legitimacy threshold.

3 Divergence of views on the legitimacy of the Constitution

While simplifying matters somewhat with regard to the legitimacy and status of the Constitution, it is possible to categorise five positions.

In the view of many Eritreans the Constitution is legitimate, both in its making and its substance. This first group is spearheaded by the Chairperson of the Commission who has already written much on the Constitution and who, when once asked in 1999 if there is anything he would have done differently, responded that he would not have done anything of substantive importance differently.[72] A group of 13 Eritrean intellectuals, often referred to as G-13, also strongly echoed their call for implementation.[73]

The second group maintain that the Constitution, in spite of its shortcomings, can be used as a fundamental strategic tool to bring all Eritreans to a common ideal and that all other concerns, issues and reservations can be contested later by means of amendments.[74]

A third group maintain that the Constitution can be shaped and moulded to meet the demands of the opposition.[75] Stressing the non-participation of the opposition camp as a flaw, they decline to accept the Constitution as it is and rather call for a mechanism (constitutional convention) to revise and enact the Constitution which they recognise

---

71 Squarely on the issue, Younis observed that 'the ELF and the EPLF were mostly left-of-centre revolutionaries and their views overlapped in many important areas'. Connell also sees no ideological difference between ELF and EPLF. Younis (n 23 above) and Connell (n 2 above) 73-91.

72 Rosen & Selassie (n 9 above) 178.

73 Letter of concerned Eritreans to President Isaias Afwerki, October 2000, quoted in BH Selassie 'The disappearance of the Eritrean Constitution' (2001) http://news.asmarino.com/ Articles/2001/01/bhs-20.asp (accessed 31 January 2008).

74 KG Kahsai 'Pull-push strategy: Common fallacies amongst us' (2003) http://eri24.com/Article_146.htm (accessed 31 January 2008).

75 Younis (n 50 above).

as a good draft.[76] They schedule this task after the 'collapse' of the GoE. Nevertheless, their position can only be characterised as a rejection of the Constitution. Their position could have been considered a meaningful acceptance of the Constitution if an agreement existed within the opposition camp on acceptable parts of the Constitution and on provisions that needed revision. However, there is no such agreement and there is no guarantee that the process cannot regress into considering each and every section of the Constitution. In addition, from a legal point of view, the status of the Constitution can either be that of a legitimate binding covenant or not. To take the Constitution as a good draft document and also demand final touches falls outside of legal discourse into the realm of politics which can be settled by means of a compromise.

A fourth group does not regard the ratified Constitution as 'legitimate'.[77] Independently, some Eritreans[78] might share the point that a new constitution should be written, but it is evident that this is the position of some 16 political forces that formed the Eritrean Democratic Alliance (EDA).[79] Some of these rejected the constitution-making process from the very beginning and rejected the ratified Constitution.[80]

The GoE's position *vis-à-vis* the Constitution can be regarded as a fifth position and can be seen along two lines: substance and implementation. On substance: During the constitution-making process, officials of the GoE and its party were thought to be against the need to limit the number of terms of office of the President.[81] By then, their main concern was that it was not wise to deny the nation the services of persons such as the incumbent President.[82] Some officials of the GoE were against multiparty democracy and advocated a 'guided democracy', saying that for a long time to come, Eritrea needed to have only one party.[83] On both points, the Constitution rejected the desires of the GoE.[84] Nevertheless,

---

76 Reflecting this view, Younis (n 23 above) commented that 'next month will mark 10 years since the Constitution has been shelved. It is not going to be as simple as pulling it out of a drawer and implementing it — there is a lot of footwork we will have to do. A lot of discussion — without malice, without arrogance and with humility and a spirit of compromise.' See also A Hidrat 'The red herring on the constitutional process' (2007) http://zete9.asmarino.com/index.php?itemid=883 (accessed 26 November 2007).

77 Z Ibrahim 'Legitimising the illegitimate' (2003) http://www.gabeel.com/modules.php?name= News&file=article&sid=82 (accessed 31 January 2008).

78 See eg TA Taddesse 'The roadmap to democracy and prosperity in Eritrea' (2005) http://news.asmarino.com/Comments/August2002/DrTATaddesse_27.asp (accessed 31 January 2008).

79 See the Political Charter of the EDA in which the EDA envisaged to write a new constitution after the fall of the GoE.

80 ELF-RC 'The EPLF and its "Constitution"' (June/July 1994) 59 *The Eritrean Newsletter* 12-13.

81 Rosen & Selassie (n 9 above) 162.

82 As above.

83 Rosen & Selassie (n 9 above) 166.

84 The Constitution limits the office term of the State President to two terms of five years each and it provides for multi-parties (arts 19(6), 41(2) & 41(3)).

the GoE supervised the whole process and the National Assembly, dominated by its members, twice approved the drafts and eventually ratified the Constitution together with other members of the Constituent Assembly. One can thus reasonably expect the GoE to be comfortable with the Constitution. Contrary to this, ten years after the Constitution was ratified, the GoE has not started its implementation.

The GoE has been paradoxical in its position with regard to the Constitution. Generally, the government has used three excuses: (1) the lack of an entry into force clause; (2) intervening factors; and (3) a rejection of constitutional democracy.

The Constitution does not contain an entry into force clause or transitional provisions that would have bound the GoE to a fixed time-frame to implement the Constitution.[85] The only relevant provision is that the Constituent Assembly, which ratified the Constitution, is empowered

[85] In the context of the Eritrean Constitution, it is important to note that a demand for the implementation of the Constitution is different from a demand for a full or high level of compliance with the Constitution. In many African countries, certain parts of constitutions are violated or they are paid lip service. Yet, such constitutions are part of the legal system and government actions are taken or alleged to have been taken in accordance with these. At least, such constitutions are often cited by government authorities, judicial officials, legal professionals and activists. The situation with the Eritrean Constitution is different. Once ratified, the Constitution is completely ignored by the GoE. The term 'constitution' itself is a term which Eritreans do not dare to say publicly. Except for two initiatives started in 1997 and in 2000 and soon halted, no other action was taken to bring about a transformation from the transitional to the constitutional setting. Logically, elections for the establishment of the constitutional National Assembly had to come first, as the National Assembly is empowered to put the head of the executive and many other constitutional institutions in place. Thus, the Constituent Assembly had to issue relevant laws and establish relevant institutions that are needed to conduct elections for the National Assembly, such as an electoral law and election-supervising body. After being constituted, the constitutional National Assembly has to elect from its members the President and has to issue laws that are required for the full implementation of the Constitution. Afterwards, both the Assembly and the President have to, according to the Constitution, put in place all the relevant institutions. Once these acts have been done and the main state apparatus have been transformed from transitional structures to constitutional structures, it can be said that the constitutional setting has been put in place. Therefore, when one says that the Eritrean Constitution is not implemented, it means that none of the above transformative steps have taken place, nor are the directly operative parts of the Constitution being respected. There is not even a pretentious resemblance to the constitutional order. Institutions and laws which clearly contravene the Constitution have not yet been abolished. Ironically, however, probably assuming that it is hidden from the Eritrean public, the GoE recently heavily relied on the Constitution to defend a case before the African Commission on Human and Peoples' Rights. In its consolidated second and third reports under the Convention on the Rights of the Child submitted to the Committee on the Rights of the Child on 14 June 2007, the GoE again cited almost every part of the Constitution to fool the Committee. See Communication 275/2003, *Article 19 v Eritrea* (ACHPR, 22nd Activity Report, 2007) para 58. See also the submission of the GoE on the merits, page 2, as attached to the letter of the Ministry of Foreign Affairs, 19 April 2006, reference AAP/244/06. See also SM Weldehaimanot 'The Eritrean journalists' case before the African Commission' (2008) 27-32, http://selfi-democracy.com/?p=2&l=e (accessed 5 April 2008). See the report http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.ERI.3.pdf (accessed 8 May 2008).

to 'take, or cause to be taken, all the necessary legal steps for the coming into force and effect of the Constitution'.[86] Thus, a whole year (May 1997 to May 1998) passed after the Constitution had been ratified, without the GoE taking any of the transformative actions that would have implemented the Constitution.[87] Nevertheless, considering the supportive stand the GoE took during the entire process, there was no public call for implementation. Indeed, there was confidence in the GoE and it was this confidence that gave rise to the lack of a specific entry into force clause.[88]

From May 1998 to 2000, Eritrea and Ethiopia engaged in full-fledged war. It was consequently virtually impossible to embark on the implementation of the Constitution. After both countries signed an agreement to resolve the conflict by international arbitration, a group of high-ranking government, party and military officials criticised the democratic deficiencies within the GoE and publicly called for democratic reform.[89] One of their demands was the implementation of the Constitution. Under this pressure the GoE agreed to a time-frame (December 2001) for the implementation of the Constitution and started to take some preparatory steps.[90] Nevertheless, while the attention of the world was focused on the events of 'September 11', the GoE arrested 11 of the reformers, closed all the private newspapers, and took numerous illegal actions that effectively silenced the reform initiative.[91] The term 'constitution', itself, became prohibited and citizens did not dare mention it in public. Effectively, the GoE eliminated the Constitution, not only from its priorities but even from its propaganda.

After the signing of a peace agreement in 2000, and up to the time that the dispute was decided in April 2002,[92] the GoE, whenever forced

86 Art 3(2) Proclamation 92/1996.

87 In 1997, six months after the ratification of the Constitution, the government appointed a committee to prepare the ground for elections in accordance with the Constitution. It did not continue, though. Selassie (n 73 above).

88 In this regard, the Commissioner lamented: 'I see that it was a mistake to be too trusting of the government and not to insert in the Constitution a definite effective date.' BH Selassie 'Grammar of politics: The Eritrean Constitution and its implementation (part seven)' (2004) http://www.asmarino.com (accessed 31 January 2008).

89 See generally Connell (n 22 above).

90 In the summer of 2000, the National Assembly, decided elections for the Constitutional National Assembly to be conducted in December 2001 and appointed a committee to draft the electoral and party formation laws. This too was stopped. Awate Team 'The chronology of the reform movement' (2004) http://www.awate.com/artman/publish/article_3629.shtml (accessed 31 January 2008).

91 M Ephrem & S Kesete *The ruling* (2004).

92 Eritrea and Ethiopia signed the Cessation of Hostilities Agreement in June 2000 and the Framework for Comprehensive Peace Agreement (Algiers Peace Agreement) in December 2000. The main case (delimitation of their common boundary) was decided on 13 April 2002.

to speak about the Constitution,[93] alleged that the war situation, coupled with 'internal sabotage', have hampered the implementation of the Constitution.[94] At times, other factors have also been added: The Eritrean people are not ready for constitutional government because of their low level of education, cognition, and awareness on constitutional matters;[95] the Eritrean people need 'bread not democracy';[96] the implementation of the Constitution should not be a priority over 'economic development';[97] the Eritrean people has rejected a multiparty system;[98] and other reasons.

When the GoE echoed such reasons, it implied that the Constitution had never been implemented. Paradoxically, however, certain government officials declared that the Constitution was being enforced and respected although their government (GoE) did not have a 'ribbon-cutting' ceremony to signify its implementation.[99] Recently, a presumably pro-GoE writer, but believed to be GoE's mouthpiece, stated that the Constitution was being 'implemented' partially and that full implementation would follow.[100] Using the conclusion some Eritrean lawyers had reached on the status of the Constitution, the same writer alleged that the GoE obeyed the immediately- operative parts of the Constitution while working to take actions that would amount to a full implementation of the Constitution. In addition, the GoE recently relied heavily on the Constitution to defend a case before the African Commission on Human and Peoples' Rights (African Commission) and in its consolidated second and third reports under the Convention on the Rights of the Child submitted to the Committee on the Rights of the Child.[101]

Objectively assessing the GoE's excuses, except for the time of war (May 1998 to 2000), nothing has hindered the implementation of the Constitution and all the allegations are unfounded. In addition, as the reports of respected human rights organisations have indicated, the GoE has never respected the directly-operative parts of the Constitu-

---

93 Such questions come from foreign quarters and often focus on why the Constitution has been shelved. The issue of the Constitution has been so thorny to the GoE that its officials regard it with agitation.

94 At the end of 2003, eg, the State President stated that it is the prevailing war situation or the 'no 'peace or no war' situation that hindered the implementation process. See the President's interview in *PFDJ* 'Interview with President Issaias Afewerki' (December 2003) *Hidri* (PFDJ's quarterly official magazine) 16 & 17 (in Tigrinya).

95 Kahsai (n 74 above).

96 Nharnet.com 'Editorials: elections under PFDJ dictatorship' http://www.nharnet.com/Editorials/ EritreaToday/pfdj_elections.htm (accessed 31 January 2008).

97 Kahsai (n 74 above).

98 P Tesfagiorgis 'In search of a normal Eritrea' (2003) http://eritreaone.com/pipermail/opinion_eritreaone.com/2003q4.txt?ABCDEFGH (accessed 31 January 2008).

99 Younis (n 50 above).

100 S Tesfamariam 'US-Eritrea relations: Soured by design' (2007) http://www.shaebia.com/ (accessed 28 September 2007).

101 n 85 above.

tion. It is very clear that the GoE has rejected the notion of the rule of law by flagrantly acting above the law. The body of Eritrean laws have never been respected to the extent that they tend to limit the powers of the GoE. The Constitution faced the same fate.

This is unequivocally expressed in the President's repeated attempts to reject a constitutional democracy.[102] Whereas on one occasion he has rightly pointed to the fallacy of reducing democracy to formalities — elections and their periodicity, the existence and pluralism of political parties[103] — in his interviews with his government's media, in particular, he has tried to limit the definition of democracy to the realisation of some socio-economic rights only.[104] The effect of such expression is to eliminate many facets of democracy as are enshrined in the Constitution.[105] This was repeated unequivocally recently by the President who, when asked when his government was planning to implement the Constitution, bluntly said:[106]

> The constitution is a paper ... It's only a paper. I don't want to cheat everyone with this paper. I don't want to mislead everyone that this paper is a panacea. We have to create a conducive environment for a viable political process in this country.

These different positions finally boil down to indicating the status of the Constitution. Considering the process that gave rise to the birth of the Constitution, whether the Constitution passes a legitimacy test is a point that is discussed above and touched upon below. There is also another angle, akin to the fluidity of the GoE, that merits consideration in order to fully dispose of the status of the Constitution. Both angles are dealt with below.

4 The status of the Eritrean Constitution: The government of Eritrea's side of the argument

When the coming into operation of the Constitution was delayed, some Eritrean lawyers argued that, in the absence of any specific date on which the Constitution should have come into force, the (entire) Constitution should be considered as having come into force the min-

---

102 See eg I Afewerki 'Democracy in Africa: An African view' (1998) 2 *Eritrean Studies Review* 133-141.

103 Afewerki (n 102 above) 134.

104 PFDJ (n 94 above) 16-17.

105 In 2002, eg, the National Assembly was forced to pronounce that the Eritrean people do not want a multi-party democracy. Tesfagiorgis (n 98 above).

106 Interview with Edmund Sanders, *Los Angeles Times* Staff Writer http://www.latimes.com/news/nationworld/world/africa/la-fg-eritreaweb2oct02,1,7946352.story?coll=la-africa&ctrack=1&cset=true (accessed 3 October 2007).

ute it was ratified.[107] Their argument is to a large extent valid.[108] That the Constitution does not indicate a specific date on or after which it has to come into force, does not mean that implementation measures cannot take place forever.

However, considering the transformative steps required by the implementation of the Constitution, it is inevitable that certain provisions of the Constitution could not have entered into force automatically the minute the Constitution was ratified. A period of time (six months to one year) within which the necessary transformation should take place and after which it would be wise to rule scenarios of non-compliance as unconstitutional, is mandatory. On the other hand, the directly operative parts of the Constitution can be considered as having been in force from the date of ratification.[109] That the GoE has done nothing to implement the Constitution ten years after its ratification and seven years after the war with Ethiopia was resolved is tantamount to a violation of the Constitution.

5 The status of the Eritrean Constitution: The question of legitimacy

A query as to the legitimacy or illegitimacy of the Constitution is relevant on the principle that not all laws that are passed by those who claim to have law-making power are legitimate. This is the democratic element of law making and in this democratic era it has paramount importance. Thus, the opposition's questioning of the legitimacy of the Constitution is valid in principle. However, there are no hard and fast rules of quantifying the legitimacy or illegitimacy of law makers and the process they follow, particularly in transitional periods such the Eritrean constitution-making era. This author offers three ways of civilly disposing of the legitimacy/illegitimacy contentions: (1) a political solution; (2) a referendum; or (3) arbitration by third parties.

A constitution-making process is often a highly politically-charged venture. Although public participation in the making of the Constitution was high, the Eritrean public would not object to any compromise reached by the GoE and the opposition parties as main political stakeholders. This compromise could be (1) accepting the Constitution by the opposition force, or (2) allowing a new process that remedies the mistakes of the past to take place. In a related manner, the stakeholders can also agree on submitting the Constitution to a referendum so that,

---

[107] Awate (n 36 above).

[108] Immediate implementation of the Constitution after its ratification was clearly envisaged in the various legislations. Arts 3(2) and 4(4) of Proclamation 37/1993 clearly indicate that the lifespan of the GoE is four years (1993 to 1997) maximum and immediately thereafter a constitutional government should have been established.

[109] See chs 2 and 3 of the Constitution. See Awate (n 36 above).

in a similar way to the referendum of 1993, the Eritrean public may be asked whether or not it accepts the Constitution. Even in the opposition's assumption that it will remove the GoE, the opposition would be wrong to run to a new constitution-making process without consulting the Eritrean public on the fate of an already ratified Constitution.

Although one could risk a counter-majoritarian dilemma, an adjudicative or arbitration mechanism is another solution. This is premised on the fact that disputes on the fairness or otherwise of elections, which are similar to contention over the Constitution, are often resolved in an arbitration or adjudication. Indeed, the judicial disposition of disputes has advantages over democratic tools such as simple majority takes all, because the first is often based on reason as opposed to the latter which is based on preference.[110] Recourse to arbitration is feasible as it can be done outside of Eritrea and the interested parties can argue their own positions. Arbitration needs to be formal — both parties can set the arbitrating body and provide it with the guidelines. A point to settle should be whether the Constitution passes the legitimacy test and whether, given the overall circumstances, the Eritrean public will have an interest in all Eritrean political forces accepting the Constitution now and working for its implementation.

Along this line, this author backs a conclusion that the Constitution can be accepted by all Eritreans. Pertinent to this conclusion is an evaluation of constitution-making experiences and an evaluation of how the Eritrean experience fits into the scale. An evaluation from third party experts is not only predominantly positive,[111] but also presents the Eritrean constitution-making process as a new model and the eventually ratified Constitution as beautiful and progressive.[112] Apart from this angle, this author also relies on other benchmarks outlined below.

5.1 Re-inventing the wheel

The position that the Constitution is legitimate is further reinforced by the way the EDA envisaged writing a new constitution which would repeat worse errors than the process out of which the existing Constitution was born, which many parties within the EDA loudly criticised. In 2005, the EDA wrote its Political Charter, by which it crudely outlined how it envisaged going about governing Eritrea, including writing a constitution after the defeat of the GoE.

---

110 A good example is the role the South African Constitutional Court played in the constitution-making process of South Africa.

111 Considering the fact that relations between the GoE and the opposition parties and among the opposition parties themselves are hostile, observations of both sides in the constitution-making process and the eventually ratified Constitution are biased. The opposition, in particular, suffers from 'opposition syndrome' of viciously criticising everything the GoE did which in return affects the opposition's maturity and credibility.

112 See eg Hart (n 60 above); Rosen (n 9 above) and Connell (n 22 above) 7.

The EDA planned to erect a transitional government from the opposition camp only.[113] The defeated elements would not be part of the transitional government. In addition, the defeated elements would not be included in the National Transitional Assembly. The EDA planned to constitute a National Reconciliation Conference in which all political forces and cross-sections of Eritrean public were allowed to participate.[114]

This the GoE did, and, on the basis of 'winner takes all', the opposition criticised the process and rejected the Constitution. This shows that in rejecting the Constitution, the EDA leaders were motivated by sheer hatred and their desire was to undo and redo what has been done by the GoE.[115] The flaw of the EDA is noted by a leading opposition website that asked the EDA to re-consider 'provisions for including forces that might actively participate in bringing about change inside Eritrea in the provisional government'.[116]

As described above, one of the criticisms directed against the constitution-making process was that members of the Constitution Commission should have been popularly elected rather than appointed by the National Assembly. However, EDA's approach in this regard is worse. The EDA gave the executive branch of the transitional government the power to establish a constitution-drafting commission.[117] In comparison, the Commission that led the constitution-making process was established by the National Assembly of the GoE.

Another factor that should inform whether the Constitution should be taken as legitimate is the content of the Constitution. In recent discourse, the constitution-making process *per se* is given greater value — participatory process is assumed to confer legitimacy and ownership to a constitution.[118] In principle, however, any party which does not participate in the making of a constitution but agrees with the contents of the eventually-ratified one lacks valid justification to reject such a constitution. Related to this point is the fact that a constitution cannot satisfy all its subjects. Even if all the subjects embrace the same values, these can be expressed in many forms. It is naïve to say that there is a model that could satisfy four million Eritreans and thus even in a participatory process, there could be a loser and a winner.

---

113 Art 3(2)(a) EDA Political Charter.

114 See art 3(3) in conjunction with art 3(4)(2).

115 To understand the controversy on the Constitution, it is important to note the fact that personal hatred does exist between the high echelon of the GoE and the personalities of the opposition political parties.

116 Awate Team 'Strengthening the EDA' (2006) http://www.awate.com/portal/content/view/4223/2/ (accessed 22 November 2007).

117 Art 3(6)(2) EDA Political Charter. What is even worse, the EDA gave the executive branch of the transitional government the power to establish an electoral commission (art 3(6)(3)).

118 K Samulels 'Post-conflict peace building and constitution making' (2006) 6 *Chicago Journal of International Law* 667. See also Hart (n 60 above).

Content-wise, the EDA has accepted the Constitution, albeit inadvertently. The Constitution is very concise. Even the 1997 Constitution of The Gambia (a country comparable to Eritrea in many respects, including its geographical size) is six times longer in scope than the Eritrean Constitution. The Eritrean Constitution has left many issues (which other constitutions treat in detail) to be governed by legislation. This means that fewer contentious issues are addressed in the Constitution.[119] As such, it contains basic principles, many of which are a reflection of customary international law and some peremptory norms. Some principles are codified in international treaties,[120] and others are a reflection of international soft law.[121] The EDA has accepted many of these provisions by committing itself to abide by international charters and treaties.[122] One sensible Eritrean academic who questions the legitimacy of the constitution-making process agrees that, content-wise, there is nothing to object to in the Constitution.[123] This is further reinforced by a bold admission on the website of one of the important political parties, the ELF-RC, which rejects the Constitution:[124]

> Like most of the programmes of the Eritrean political organisations, contents of constitutions are similar the world over. Let alone a document prepared by an Eritrean expert like Dr Bereket, even the two centuries old American Constitution may have up to 70-80% relevant in its content ... If we are asked to write a draft, may be over 90% of what we have in the PFDJ Constitution could be acceptable.

Most commentators agree that the content of the Constitution reflects internationally-agreed norms. During the struggle days for Eritrea's liberation, the views of EPLF and ELF overlapped in many important areas. However, there were a few major differences on emotional issues: the flag,[125] the issue of the Eritrean language,[126] the preservation of the cul-

---

119 These included the issue of decentralisation (art 1(5)); citizenship (art 3(2)(3)); the meaning of national symbols (art 4); political parties' law (art 19); electoral law and the detailed organisation, powers and duties of the Electoral Commission (arts 20, 30(2) & 58(3)); land ownership (arts 8(3) & 23(2)); the tenure and number of justices of the Supreme Court (art 49(4)); the jurisdiction, organisation and function of lower courts and the tenure of their judges (art 50); the detailed organisation, powers and duties of the Judicial Service Commission (art 53(2)); the powers and duties of the Advocate-General (art 54), the Auditor-General (art 55(3)), the National Bank (art 56(3)) and Civil Service Administration (art 57(2)).

120 See chs 1, 2 & 3 of the Constitution.

121 See the sections of the Constitution related to the independence of the judiciary, the Electoral Commission, the Advocate-General and the Auditor-General.

122 Art 1(10) EDA Charter.

123 Mekonnen (n 64 above) 5 & 6.

124 Nharnet Team 'Democratic constitution making' (2006) http://www.websitetoolbox.com/tool/ post/adal/vpost?id=1209620&trail=15#3 (accessed 8 April 2007).

125 In addition to the blue Eritrean flag, the EPLF had a party flag but the ELF did not.

126 The EPLF advocated 'equality of all languages', while the ELF advocated Tigrinya and Arabic to be official languages.

tural values of the Eritrean public,[127] land ownership and nationality.[128] In criticising the Constitution, some people from the opposition argue that, on all three points the position of EPLF is reflected in the Constitution and add that these are important issues that should have been seriously debated or required a popular referendum.[129]

However, the same parties have made it clear that such differences are not important. Interestingly, the EDA has embraced the 'contentious' provisions of the Constitution. Specifically on the issue of language, all the Constitution provides is that 'equality of all Eritrean languages is guaranteed'.[130] When asked about the meaning of this provision, Professor Bereket, the Chairperson of the Commission, observed that it was left to the wisdom of the judiciary and, by implication, the legislature to handle.[131] Indeed, the Constitution does not prohibit Eritrea from adopting an official language by legislation and the EDA has endorsed this position when it affirmed the equality of all Eritrean languages and nominated Tigrinya and Arabic as official languages.[132]

On the issue of the national flag, the contention of the opposition is that the GoE in 1993 replaced the blue Eritrean flag of the 1950s (when Eritrea was a semi-autonomous state). The blue flag was used by the liberation forces as the Eritrean flag all through the struggle days. The opposition parties, except those PFDJ splinters, still consider the blue flag as the Eritrean flag.[133]

Stipulating that the 'Eritrean flag shall have green, red and blue colours with golden olive leaves', the Constitution does adopt a similarly coloured flag to the one the GoE adopted in 1993.[134] A detailed description of the flag is, however, left to be determined by law.[135] Although the colours are specified, the Constitution does not specify the layout and, considering the alleged historical injustices the present flag embodies, its constitutionality may be challenged. Using the colours provided by the Constitution, a different-looking

---

127 The EPLF favoured social transformation while the ELF believed that the national culture should remain unmolested.

128 Younis (n 23 above).

129 See ELF-RC 'Interview with fighter Ahmed Nasr' (1996) 18 *Demokrasawit Eritrea* 5. (The source is in Tigrinya.)

130 Art 4(3).

131 Awate (n 36 above).

132 Art 1(6) EDA Charter. The only difference is thus that the Constitution left the issue of an official language to subsidiary legislation and probably the EDA will make it a constitutional matter.

133 A glance at the websites of the opposition parties (link to all websites is available at http://www.meskerem.com) shows the politics related to the national flag.

134 Adopted by art 10 of Proclamation 37/1993.

135 Art 4(1).

flag from both flags can be adopted as a compromise.[136] Apart from these differences, the EDA reaffirmed what has been provided in the Constitution.[137]

5.2 Other benchmarks

In addition to the above grounds, there are many advantages in regarding the Constitution as legitimate. At present, the Eritrean political 'struggle for democratic change' lacks a unifying factor — a body of ideals for which citizens should struggle and on the basis of which advocacy strategies of internal forces (the Eritrean public) and external forces (the African Union (AU) and others) should be pursued. One may argue that the EDA Political Charter is a common denominator for the 16 political parties. However, the Charter is not accepted by the GoE and, by extension, its supporters. In addition, the Charter is a crude outline of how to dispose the GoE[138] and subsequently erect a transitional government and write a new constitution. In addition, the Charter is not the product of public participation as the Constitution is. Thus, the EDA is waiving the many advantages it can gain by its intent to write a new constitution after the 'defeat' of the GoE, instead of pressing the GoE to respect the Constitution.

5.2.1 Legal and political advantages: The relevance of the African Charter on Democracy, Elections and Governance

First, the EDA ruled out the possibility that the Constitution will bring about a regime change. The implementation of the Constitution is an important tool by which the opposition can score a peaceful victory over the GoE. Many scholars have convincingly argued that a right to democratic governance now exists both as part of customary

---

136 This author differs from Prof Bereket's position that only the dimension of the flag is left by the Constitution to be determined by law. The layout, which is the most important, is left unspecified. See Awate (n 36 above).

137 Even the provision of the EDA Charter that tends to provide for a federal form of government is unclear and it can be read as referring to a decentralised unitary form of government which the Constitution provides for. Art 1(8) EDA Charter. On land and nationality, the Charter is silent.

138 Art 2(2). The EDA is permitted to resort to any means of struggle. Many of the parties within the EDA have military wings with a few armed forces. Awate Team 'Proliferation of armed resistance In Eritrea' (2007) http://www.awate.com/portal/content/view/4660/9/ (accessed 26 November 2007).

international law and treaty law.[139] According to these scholars, constitutional governance has been cemented into the domain of customary international law. The AU's emphasis on the protection of human rights and the promotion of democracy and good governance in its Constitutive Act[140] attests to the consolidation of the right to democracy even in Africa — a continent that not only has been resistant, but hitherto to a certain extent remains undemocratic. This commitment was further and strongly reinforced when the AU adopted the African Charter on Democracy, Elections and Governance (Charter).[141]

The AU adopted the Charter, among other reasons, (1) inspired by the objectives and principles enshrined in the Constitutive Act of the AU, which emphasise the importance of good governance, popular participation, the rule of law and human rights; (2) committed to promote the universal values and principles of democracy, good governance, human rights and the right to development; (3) seeking to entrench in Africa a political culture of change of power based on the holding of regular, free, fair and transparent elections; and (4) concerned about the unconstitutional changes of governments that are one of the essential causes of insecurity, instability and violent conflict in Africa.[142]

Thus, the objectives of the Charter included (1) the promotion of adherence, by each state party, to the universal values and principles of democracy and respect for human rights and enhancement of adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order; (2) the promotion of the holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments; and (3) the prohibition, rejection and condemnation of unconstitutional change of government in

---

139 See eg R Ezetah 'The right to democracy: A qualitative inquiry' (1997) 22 *Brooklyn Journal of International Law* 495-534; L Fielding 'Taking the next step in the development of new human rights: The emerging right of humanitarian assistance to restore democracy' (1995) 5 *Duke Journal of Comparative and International Law* 329-77; J Ebersole 'National sovereignty revisited: Perspectives on the emerging norm of democracy in international law' (1992) 86 *American Society of International Law Proceedings* 249-71; NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209-87; RA Barnes 'Democratic governance and international law' (2000) 8 *Indiana Journal of Global Legal Studies* 281-99; JI Levitt 'Pro-democratic intervention in Africa' (2006) 24 *Wisconsin International Law Journal* 785-832.

140 See arts 3 and 4 of the Constitutive Act of the African Union adopted in Lomé, Togo, on 11 July 2000.

141 Adopted by the 8th ordinary session of the Assembly of Heads of State and Government, held in Addis Ababa, Ethiopia, on 30 January 2007. The Charter, although hitherto with no ratification (merely adopted and signed by 17 states) is a clear manifestation of the consolidation of the right to democratic governance in Africa.

142 See the Preamble to the Charter.

any member state as a serious threat to stability, peace, security and development.[143]

Respect for human rights and democratic principles, access to and exercise of state power in accordance with a constitution and the principle of the rule of law, promotion of a system of government that is representative, holding regular, transparent, free and fair elections, condemnation and total rejection of unconstitutional changes of government and strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law, are the key principles on the basis of which African states have committed themselves to implement the Charter.[144]

As one of the many enforcement mechanisms, member states are committed to co-operate with each other and to take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.[145] Article 23 of the Charter defines illegal and unconstitutional means of changing government not only to include the obvious *coups* or *putsch* against a democratically elected government, but also any refusal by an incumbent government to relinquish power. The same article stipulates that such an act shall be met by appropriate sanctions by the AU. The Peace and Security Council of the AU is empowered to exercise its responsibilities in order to maintain the constitutional order in accordance with the relevant provisions of the Protocol[146] relating to the establishment of the same council.[147]

Specifically, in accordance with article 25(1) of the Charter, when the Peace and Security Council observes that there has been an unconstitutional change of government in a member state, and that diplomatic initiatives have failed, it shall suspend the said state from the exercise of its right to participate in the activities of the AU in accordance with the provisions of articles 30 of the Constitutive Act and 7(g) of the Protocol. The suspension shall take effect immediately. In addition, article 25(7) of the Charter empowers the Assembly of Heads of State and Government to decide to apply other forms of sanctions on perpetrators of unconstitutional change of government, including punitive economic measures.

Although inversely, the GoE's reluctance to end its transitional existence and open the country for constitutional democracy typically fits into the definition of unconstitutional change of government provided

---

143 Art 2.

144 Art 3.

145 Art 14.

146 Protocol Relating to the Establishment of the Peace and Security Council of The African Union, adopted by the 1st ordinary session of the Assembly of the African Union held in Durban, 9 July 2002.

147 Art 24 of the Charter.

under article 23(4) of the African Charter on Democracy, Elections and Governance. The Eritrean case demonstrates a typical case of illegal perpetuation of transitional government beyond the reasonable transitional period in clear contempt and defiance of a popularly prepared constitution. The Constitution was written to govern, not to be stashed away indefinitely. Nevertheless, it has been 10 years and the Constitution is yet to be implemented and there is no time-frame set for the implementation of the Constitution. In accordance with the Constitution, two rounds of elections for the national legislature should already have been held. This has not happened and there are none scheduled. In this regard, lamenting on the GoE defiance of the implementation process and its implications, Bereket rightly notes that '[t]here is no excuse for such failure ... To neglect a ratified constitution is tantamount to negating the will of the people whose delegates ratified the Constitution.'[148] This writer has previously commented:[149]

> ... by its own laws and calendars, the GoE has been rendered illegal since long and thus illegitimate. In accordance with Proclamation 37/1993 — the interim constitution — the GoE should have ended its life span in 1997 and opened the country for constitutional democracy ... the Eritrean Constitution that was ratified in 1997 (the very Constitution that was prepared with full support of the GoE) also put an end to the life span of the GoE. Because of the border conflict which due to mishandling of the governments in Ethiopia and Eritrea escalated into devastating war, many Eritreans excused the GoE to extend its presence up to few months after the signing of peace agreement in 2000. At any time afterwards, the GoE has no justification to detain the process of transformation to constitutional governance.

The unimplemented Constitution is therefore an important tool that the Eritrea opposition may use before AU forums to exert pressure on the GoE and to gain the benefits the Charter offers. By accepting the Constitution, without the opposition participating in its making, the opposition could have proved that it does not suffer from the typical opposition syndrome of 'boycotting everything' an incumbent government does. In so doing, the opposition could legally and diplomatically have placed the GoE in a weaker position. The Eritrean constitution-making process has been complimented by many as 'democratic' and 'participatory' and the eventual Constitution is credited as 'progressive' and 'beautiful' by politically influential quarters.[150] In addition, the

---

148 Quoted in SM Weldehaimanot 'Ten years old not yet born: The status of the Eritrean Constitution' (March 2007) http://selfi-democracy.com/?p=2&l=e (accessed 10 April 2008).

149 SM Weldehaimanot 'Government in exile and its legitimacy: Insight to EDA' (March 2008) http://www.awate.com/portal/content/view/4807/5/ (accessed 10 April 2008).

150 See the yearly (2000-06) reports of US Department of State on human rights practices of Eritrea, lamenting that the Constitution has remained unimplemented. See also Department of State *Country report on human rights practices for 1997*(1998) 105 that observed: 'After a broad process of consultation and civic education, the Constitution was ratified by a constituent assembly elected from newly elected local assemblies.'

main criticism the GoE is facing is due to its reluctance to implement the Constitution.[151]

Two feasible outcomes could, therefore, follow from the opposition's acceptance of the Constitution. First, when a united pressure of Eritreans join the call from non-Eritreans for the implementation of the Constitution, it is possible to force the GoE to accept the implementation of the Constitution in a short and agreed upon time-frame. Second, in the alternative, after putting the GoE in clear default, the opposition may convincingly form a constitutional government in exile, thus leading the struggle for democratic change in Eritrea in a unified manner. The idea of forming a government in exile is currently seriously contemplated by many leaders within the opposition camp.[152] Although the idea is valid, it can have a stronger legal anchor when the opposition bases itself on the African Charter and also on the very Constitution popularly ratified with the full support of the GoE. The very Constitution the GoE sponsored gives the right to the opposition to form a constitutional government in Diaspora. Diaspora Eritreans make up one-third of the Eritrean population.[153]

Pertinent parts of the Constitution read (1) that the Constitution 'enunciates the principles on which the state is based and by which it shall be guided and determines the organisation and operation of government'; (2) that the Constitution 'is the source of government legitimacy and the basis for the protection of the rights, freedoms and dignity of citizens and of just administration'; (3) that in 'the state of Eritrea, sovereign power is vested in the people, and shall be exercised pursuant to the provisions of this Constitution'; (4) that the Constitution is the supreme law of the country and the source of all laws of the state, and all laws, orders and acts contrary to its letter and spirit shall be null and void'; (5) that 'all organs of the state, all public and private associations and institutions and all citizens shall be bound by and remain loyal to the Constitution and shall ensure its observance'.[154]

5.2.2 Disadvantages

Another problem with the EDA's position of rejecting the Constitution is the EDA's over-simplistic and narrow perception of the transitional period in which it contemplated writing a new constitution. The entire EDA transitional project is scheduled to cause the fall of the GoE, and the collapse of the GoE envisaged by the EDA is the same kind of regime change Asmara witnessed in May 1991 — a total collapse of the GoE.

---

151 Statement by The Honourable Jendayi Frazer, US Assistant Secretary on African Affairs before Senate Foreign Relations Sub-Committee on African Affairs' Hearing on Horn of Africa Policy, 11 March 2008.

152 Weldehaimanot (n 148 above).

153 Awate Team (n 116 above).

154 See arts 1 and 2 of the Constitution in 'Constitution of Eritrea' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 521-45.

The EDA is very naïve to assume so. As far as the EDA remains weak and disunited, Asmara can produce another government that can contend with or monopolise power. If the local force is to chart out implementation of the Constitution as a matter of priority and call the EDA to participate, the current position of the EDA could entail huge political losses to the EDA because the Eritrean public does not have the luxury of choosing between constitutions. On the other hand, the EDA that has accepted the Constitution, or the EDA that already formed a shadow government in the Diaspora based on the Constitution, can be a force strong enough to influence Asmara. In case Asmara faces a military *coup*, such EDA can also force a military regime to swiftly allow civilian government to take power on the basis of the Constitution and the African Charter.

Even if the local forces accept the writing of a new constitution in accordance with the EDA's Political Charter, coming up with an acceptable constitution cannot be taken as a simple matter. What must be borne in mind are the atmosphere in which the process takes place and a whole range of other factors. The present Constitution is written in a mood of optimism and jubilation — an important aurora to hammer agreements. After the bad times Eritreans have passed through recently, a new venture might have similar advantages. One can take it as inevitable that those who participated in the previous constitution-making process would approach the new initiative with dissenting tendencies and high standards. If the new constitution is to look similar to the existing one, then the 're-inventing the wheel' argument would haunt the new venture. If the draft of the new constitution is to show a big difference, dissent would be another problem. At the very least, fault-finding is simple.

Along this line, the political maturity of the 'would-be' key actors should be considered. In addition, the state of 'semi-political vacuum' in which the actors negotiate is important to bear in mind. The EDA naïvely fails to contemplate the possibility of failing to achieve its goals, which can lead to chaos. At present, the main unifying factor for the opposition block is the repressive GoE in Asmara. Apart from this unifying factor, although not different in their programmes, the history of the opposition political parties is known for forming rounds of alliance and ending up in disputes. The formation of the EDA in 2005 and the agreement 16 political parties reached on a political charter brought hope. However, the EDA divided into two blocks a year later on unimportant matters.[155] Thus, there is a real concern that a leadership vacuum in Asmara that would give a free opportunity for all the opposition parties to land in Asmara and form a transitional government could fail. Con-

[155] S Bizen 'EDA: From where to where' (June 2007) http://www.emdhr.org/ (accessed 26 June 2007).

sidering the weakness and disunity within the opposition, Eritreans are thus rightly worried about what Asmara will produce thereafter.[156]

In addition, a rejection of the Constitution will definitely entail legal chaos in Eritrea. Potentially, all the laws (proclamations and legal notices) hitherto passed and the international treaties ratified by the GoE can be challenged on the same ground that confronts the Constitution.[157] Indeed, considering the undemocratic law-making process, very few of these laws can pass the legitimacy standard the Constitution is subjected to.[158] Already, opposition academics follow an unconvincing selection of and reliance on transitional laws. Mekonnen, for example, although he questions the legitimacy of the Constitution, relies on many of the transitional legislation and the treaties the GoE ratified.[159] On the other hand, Article 19 and the Eritrean Movement for Democracy and Human Rights (EMDHR) have relied on the Constitution in their communications filed before the African Commission.[160] The opposition parties are not articulate on how to handle such a phenomenon. At a time international treaties are gaining supremacy over municipal laws, including constitutions, it seems that opposition parties are unaware of the implications of the treaties the GoE has ratified for the constitutional debate.

6 Conclusion

The Constitution, in spite of certain flaws in its making, is a democratic document that has the potential to be a national covenant if accepted by the dissenting opposition. Although all the actions of the GoE imply rejection of the Constitution, the GoE has no valid ground to rebuff the Constitution ratified after such extensive public participation. The opposition's acceptance of the Constitution can bring a unifying body

---

156 DG Mikael 'Unsolicited advice to Mr Isaias Afeworki' (2007) http://www.awate.com/portal/ content/view/4635/5/ (accessed on 26 November 2007).

157 It is true that a constitution is of a higher level of importance than ordinary legislation. Generally a constitution is different from ordinary legislation in three respects: (1) Apart from common contents, what is contained in a constitution is generally considered of higher importance. (2) In almost all countries, a constitution is supreme over ordinary legislation in that the first prevails over contradictory provision of the latter. (3) In almost all countries, a constitution is more entrenched than ordinary legislation. Thus, it is arguable that the reason why the opposition targeted only the Constitution but not the rest of the laws could be due to the above peculiarities of the Constitution.

158 SM Weldehaimanot & DR Mekonnen 'The nebulous law-making process in Eritrea' (2008 under review) *Journal of Legislative Studies.*

159 See Mekonnen (n 15 above). See also DR Mekonnen 'Annihilation of rule of law: Cause for all pitfalls in Eritrea' (article series in Tigrinya, part 1 to part 6) (2007) http://www.awate.come (accessed 22 November 2007).

160 *Article 19 v Eritrea* (n 85 above). The communication filed by EMDHR was filed in August 2007 and is expected to be seized of by the African Commission on Human and Peoples' Rights in its 43rd ordinary session.

of ideals to the Eritrean political spectrum the realisation of which all Eritreans can work towards. A unified call for the implementation of the Constitution can force the reluctant GoE to agree. In the alternative, using the Constitution, after proving manifestly the GoE's defiance of the rule of law, the opposition can legitimately step in to form a government in exile. In addition, accepting the Constitution can save Eritreans from the uncertainties of the future. As the GoE is getting weaker, Asmara may face a political vacuum, in which case the failure of the succeeding political actors to produce a constitution could lead to a dangerous political crisis. A military junta could take power and could use the pretext of writing a new constitution to reinforce its grip of power.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The protection of participants in clinical research in Africa: Does domestic human rights law have a role to play?

*Annelize Nienaber**
Senior Lecturer, Faculty of Law, University of Pretoria, South Africa

Summary

This article investigates the protection of clinical research participants in sub-Saharan Africa by domestic human rights instruments. It assesses the weaknesses in the existing regulatory framework in the form of international and national ethical guidelines, and surveys domestic human rights law in selected African countries to ascertain whether domestic human rights law may be used to augment and enhance the existing system of protection. It concludes that domestic human rights law has an important (if hitherto unutilised) role to play in the protection of clinical research participants in sub-Saharan Africa.

1 Introduction

A little over ten years ago Marcia Angell, the editor of *The New England Journal of Medicine*, sparked an acrimonious debate with her editorial in the September issue of that journal when she accused the scientists who conducted HIV peri-natal transmission[1] trials in Uganda of

* BA (Hons) (Wits) LLB, LLM, LLD (Pretoria); annelize.nienaber@up.ac.za
The article draws on sections of the writer's unpublished doctoral thesis, entitled 'Ethics and human rights in HIV-related clinical trials in Africa with specific reference to informed consent in preventative HIV vaccine efficacy trials in South Africa', University of Pretoria, 2007.

1 Also known a 'mother-to-child-transmission' or MTCT.

unethical conduct.[2] Angell criticised the scientists conducting the Ugandan trial for using a placebo arm[3] instead of providing the control group with anti-retroviral medication, in violation of the Declaration of Helsinki.[4] She argued that, if the trial had been conducted in the United States or another developed country, this would have been considered unethical, and the trial would not have been allowed.[5]

Angell's fundamental question concerning the ethical issue of conducting a trial in a developing country in a manner that is considered unethical in a developed country[6] continues to haunt research practices in Africa. In light of this, the article investigates the protection of clinical research participants in sub-Saharan Africa, assessing whether the existing regulatory framework, namely, international and national ethical guidelines, provides sufficient protection to research participants. Human rights law, in the form of domestic bills of rights, is proposed as a viable system to augment and enhance the existing system of protection.

The article begins with a brief examination of the burden of disease in sub-Saharan Africa, arguing that it is critical that clinical research be

---

2 See M Angell 'The ethics of clinical research in the Third World' (editorial) (1997) 337 *The New England Journal of Medicine* 847; H Varmus & D Satcher 'Ethical complexities of conducting research in developing countries' (1997) 337 *The New England Journal of Medicine* 1003; P Lurie & SM Wolfe 'Unethical trials of interventions to reduce perinatal transmission of the Human Immunodeficiency Virus in developing countries' (1997) 337 *The New England Journal of Medicine* 854. The controversy concerned the use of a placebo in the trial where a known effective treatment exists. Such a trial would not have been allowed in the developed world, as it would have violated various principles of research ethics, such as art II.3 of the Declaration of Helsinki.

3 A 'placebo' is a dummy treatment or no treatment at all. Usually sugar tablets are given to the placebo or control group in a clinical trial, instead of the medication that is being studied.

4 Angell (n 2 above) 847. The Declaration of Helsinki, issued by the World Medical Association (WMA), is an international code of ethics overseeing biomedical research involving human participants. The Declaration of Helsinki was adopted by the WMA's 18th Assembly, held in Helsinki, Finland, in 1964, and has been revised several times, most recently in October 2000.

5 R Bayer 'The debate over maternal-fetal HIV transmission prevention trials in Africa, Asia, and the Caribbean: Racist exploitation or exploitation of racism?' (1998) 88 *American Journal of Public Health* 568. Such a trial would be considered unethical because it is not trying to find an intervention that is at least as effective as, or better than the prevailing standard of care (the 076 regimen of AZT). Several authors have subsequently commented upon the views expressed by Angell in her editorial. See eg H Vermus & D Satcher 'Ethical complexities of conducting research in developing countries' (1997) 337 *The New England Journal of Medicine* 1003. Varmus and Satcher argue that placebo-controlled trials alone are able to provide definitive and clear answers about whether the interventions have worked and maintain that no clear answer would be gained by testing two or more interventions of unknown benefit against each other as it would not become clear whether either intervention would be more effective than no intervention. A more recent response to Angell is presented by EJ Emanuel 'The ethics of placebo-controlled trials — A middle ground' (2001) 345 *The New England Journal of Medicine* 915.

6 Angell (n 2 above) 848. See also the sources referred to in n 26 below.

undertaken to alleviate the problems faced in this regard by the region. Next, the existing system of protection, ethical guidelines, is examined, and an important weakness in the system is pointed out, after which the protection afforded by domestic human rights law to research participants in selected countries is surveyed. The article concludes with a few recommendations regarding the protection of clinical research participants in sub-Saharan Africa.

It is important to note that the article has a very specific focus: the protection of clinical research participants under *domestic* human rights law. The protection afforded to clinical research participants in sub-Saharan Africa by the regional human rights system is investigated in a subsequent article.[7] As well, it is important to stress at the outset that domestic human rights law is not proposed as an *alternative* to the existing system, but that it is suggested as a possible way to augment and strengthen the protection afforded by ethical guidelines.

2 Sub-Saharan Africa's heavy burden of disease

Despite the fact that only 11% of the world's population live in sub-Saharan Africa, the region carries a disproportionate burden of disease. The HIV and AIDS figures of the region are particularly alarming — more than 66,6% of all people living with HIV/AIDS live in sub-Saharan Africa.[8]

Disease has had a dramatic effect on the life expectancy of the people living in sub-Saharan Africa. While most people born in the developed world have a life expectancy of 70 years or greater, those born in sub-Saharan Africa have a life expectancy of less than 55, even as low as 40 years.[9] This is not only due to HIV/AIDS, but also to the incidence of diseases such as tuberculosis (TB), hepatitis, malaria and diarrhoea.

Not only do people in sub-Saharan Africa carry a heavier burden of disease, but they also have fewer resources available to spend on health care. Because of other priorities, in part, developing countries devote a smaller proportion of their GDP to health care.[10] For example, whereas the United States of America spends $3 724 per year per person on health, Uganda spends $44, Sierra Leone $31 and Somalia $11 per person per year.[11]

The following tables reflect the core health indicators of selected countries in sub-Saharan Africa (Angola, Benin, Botswana, Burundi, Congo,

---

7 See A Nienaber 'The protection of clinical research participants in Africa by the African regional human rights system' (forthcoming).

8 UNAIDS (2006) AIDS epidemic update 6; 58% of them are women.

9 See below.

10 UNAIDS (n 8 above) 20. See Table A below.

11 Nuffield Council on Bioethics *The ethics of research related to healthcare in developing countries* (2002) 20.

Eritrea, Ethiopia, Ghana, Kenya, Lesotho, Malawi, Mali, Mozambique, Namibia, Nigeria, Senegal, South Africa, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe). Brazil, Canada and India have been included for the purposes of comparison.[12]

	Life expectancy at birth (years)	**HIV prevalence rate (adults 15<) per 100 000**[13]	**Infant mortality rate (per 1 000 live births)**	**TB prevalence rate per 100 000**
Angola	39(M) 41(F)	3 3281	154	333
Benin	52(M) 53(F)	1 635	89	144
Botswana	42(M) 41(F)	23 624	86	556
Burundi	46(M) 48(F)	3 132	114	602
Congo	54(M) 55(F)	4 731	79	449
Eritrea	59(M) 63(F)	2 180	52	515
Ethiopia	50(M) 53(F)	...	109	546
Ghana	56(M) 58(F)	2 225	68	380
Kenya	51(M) 51(F)	6 125	78	936
Lesotho	42(M) 41(F)	22 684	102	588
Malawi	47(M) 46(F)	15 528	78	518
Mali	45(M) 47(F)	1 572	120	578
Mozambique	46(M) 45(F)	14 429	100	597
Namibia	52(M) 52(F)	17 676	46	577
Nigeria	47(M) 48(F)	3 547	101	536
Senegal	54(M) 57(F)	837	77	466
South Africa	50(M) 52(F)	16 579	51	511
Swaziland	38(M) 37(F)	34 457	104	1 211
Uganda	48(M) 51(F)	6 304	79	559
Tanzania	48(M) 50(F)	5 909	76	496
Zambia	40(M) 40(F)	15 819	104	618
Zimbabwe	43(M) 42(F)	19 210	60	631
Brazil	68(M) 75(F)	454	28	76
Canada	78(M) 83(F)	222	5	4
India	62(M) 64(F)	747	56	299

Table A: Male (M) and female (F) life expectancy at birth (expressed in years) (2004); HIV prevalence rate in adults 15-49 per 100 000 of population; infant mortality rate (per 1 000 live births); TB prevalence rate per 100 000 of population.

The information speaks for itself; overall the healthcare situation in sub-Saharan Africa is in a parlous state. The infant morality rate per 1 000 live births is at least 20 times higher in some sub-Saharan African countries than it is in Brazil, Canada and India.

TB is a serious problem in sub-Saharan Africa: In Kenya, South Africa and Swaziland, the TB prevalence percentage per 100 000 of the population is 936, 511 and 1 211 respectively, compared to four in Canada.

Due to the impact of diseases such as HIV and TB, the life expectancy

12 Information in both tables from WHO (2007) *World Health Statistics 2007*. These are the same countries that are included in the study of constitutional provisions of countries in sub-Saharan Africa (para 4 below).

13 Of the population.

in the region has dropped very low: Compare the life expectancy of Angola (39 and 41 years) to that of Canada (78 and 83 years).

The following table displays additional health care indicators for these countries:

	Physicians per 1 000[14]	Nurses per 1 000	Adult literacy rate (%)	Total expenditure on health as % of GDP[15]
Angola	0.08	1.31	67.4	1.9
Benin	0.04	0.72	34.7	4.9
Botswana	0.40	2.65	81.2	6.4
Burundi	0.03	0.19	59.3	3.2
Congo	0.20	0.96	82.8	2.5
Eritrea	0.05	0.55	...	4.5
Ethiopia	0.03	0.21	45.2	5.3
Ghana	0.15	0.20	57.9	6.7
Kenya	0.14	0.74	73.6	4.1
Lesotho	0.05	0.62	82.2	6.5
Malawi	0.02	0.59	64.1	12.9
Mali	0.08	0.45	19.0	6.6
Mozambique	0.03	0.21	...	4.0
Namibia	0.30	3.06	85.0	6.8
Nigeria	0.28	1.03	...	4.6
Senegal	0.06	0.25	39.3	5.9
South Africa	0.77	4.08	824	8.6
Swaziland	0.16	4.24	79.6	6.3
Uganda	0.08	0.55	66.8	7.6
Tanzania	0.02	0.30	69.4	4.0
Zambia	0.12	1.56	68	6.3
Zimbabwe	0.16	0.72	...	7.5
Brazil	1.15	3.84	88.6	8.8
Canada	2.14	9.95	...	9.8
India	0.60	0.80	61	45.0

Table B: Number of physicians per 1 000 of the population; number of nurses per 1 000 of the population; adult literacy rate as a percentage; and total expenditure on health care as a percentage of the country's GDP.

Again, the position in sub-Saharan Africa is deplorable. People living in Southern Africa experience a lack of access to health care personnel. Whereas in Canada and Brazil there are more than two and more than one physicians per 1 000 of their populations, Malawi, for example, has 0,02, Mozambique 0,03, and Lesotho only 0,05. As well, the region has many fewer nurses than Canada.

Significantly, countries in sub-Saharan Africa spend less on health care as a percentage of their GDP — Angola 1,9%, Burundi 3,2% and Mozambique 4% (South Africa and Malawi are exceptions).

In sub-Saharan Africa, a heavy burden of disease is combined with a lack of access to health care. Other factors, such as low levels of education, high levels of poverty, poor nutrition and the lack of readily available clean water, inadequate sanitation, civil wars and

14 Of the population.

15 Gross Domestic Product. The figure is that of 2004.

disintegrating infrastructure, play a role in increasing the already heavy burden of disease carried by these countries.[16] Benatar places these considerations in a wider context:[17]

> Africans must clearly take some responsibility for the state of their continent since post-colonial independence. Poor governance, corruption, internal exploitation, nepotism, tribalism, authoritarianism, military rule and over-population through patriarchal attitudes and disempowerment of women have all contributed to this sad state. However, to be fair, these shortcomings must be seen in the context of powerful external disruptive forces acting over several centuries to impede progress in Africa.

In light of the heavy burden of disease, health care research is essential in sub-Saharan Africa. However, research is under-funded in the region, as it is in other developing countries.[18] The Nuffield Council on Bioethics[19] quotes a 1990 report by the Commission on Health Research for Development[20] to the effect of the vast gap between health needs and research expenditures.[21] The World Health Organisation (WHO)'s *ad hoc* Committee on Health Research refers to the difference as the 10/90 disequilibrium[22] — of the 50 to 60 billion US dollars that each year is spent world-wide on health care-related research, only 10% is spent on the health problems of 90% of the world's population.[23]

Developing countries, generally, lack the resources to carry out health care research by themselves, and spend their limited resources on primary care rather than on research:[24]

Despite the great need for research to determine the most effective interventions in developing countries, the indigenous capacity to conduct the research is severely limited. The lack of appropriate infrastructures, expertise and resources are major constraints. Externally supported research that does not address this issue of development of capacity in research may greatly limit the long-term value of research.

Therefore, developing countries in sub-Saharan Africa and elsewhere, to a large extent, rely on research sponsored by developed countries. Considering high levels of poverty, social inequality and human rights

---

16 Nuffield Council on Bioethics (n 11 above) 21.

17 SR Benatar 'The HIV/AIDS pandemic: A sign of instability in a complex global system' in AA van Niekerk & LM Kopelman (eds) *Ethics and AIDS in Africa: The challenge to our thinking* (2005) 75.

18 Benatar (n 17 above) 83.

19 The Nuffield Council on Bioethics was established by the Trustees of the Nuffield Foundation in 1991 to identify, examine and report on the ethical questions raised by recent advances in biological and medical research. Since 1994, if has been funded jointly by the Nuffield Foundation, the Medical Research Council and The Wellcome Trust http://www.nuffieldbioethics.org/go/print/aboutus/page_2.html (accessed 15 January 2008).

20 CRD *Health research: Essential link to equity in development* (1990).

21 Nuffield Council on Bioethics (n 11 above) 22.

22 As above.

23 As above.

24 n 21 above.

violations, it is patently obvious that in this climate there exist endless possibilities for the exploitation of research participants.[25]

3 The regulation of clinical research in Africa: Problems with the current system

At the beginning of the article, I referred to an instance of unethical conduct during clinical research in Uganda. This is not an isolated instance — accusations of unethical and illegal conduct by international pharmaceutical companies are many.[26] But why are abuses of this nature occurring?

Africa has become a sought-after destination for multi-national clinical research endeavours and international pharmaceutical corporations increasingly conduct clinical trials here. Africa offers large numbers of treatment-naïve research participants, making it possible to obtain a speedier result which, in turn, leads to the accelerated approval of new drugs.[27] Sponsors of clinical research tend to search out the least expensive, least burdensome regulatory environment with the lowest liability exposure, in order to avoid litigation in the event of injury to participants.[28] In many countries in Africa, there exists little, if any, legislation or even regulation governing clinical trails.[29] Meier writes that

---

25 It is also self-evident that, despite the prevailing circumstances, research sponsored by developed countries and carried out in developing countries need not, by definition, be exploitative.

26 See eg R Macklin *Double standards in medical research in developing countries* (2004) chs 1, 3 & 4; DB Resnik 'Exploitation in biomedical research' (2003) 24 *Theoretical Medicine* 233; DM Carr 'Pfizer's epidemic: A need for international regulation of human experimentation in developing countries' (2003) 35 *Case Western Reserve Journal of International Law* 15.

27 J Ford & G Tomossy 'Clinical trials in developing countries: The plaintiff's challenge' (2004) 1 *Law, Social Justice and Global Development* 3.

28 As above; eg Malawi, Tanzania and Zambia lack legally binding informed consent procedures (see BM Meier 'International protection of persons undergoing medical experimentation: Protecting the right of informed consent' (2002) 20 *Berkeley Journal of International Law* 533, fn 124).

29 Kelleher writes: 'Because their impoverished governments would otherwise be unable to provide medical treatment to their citizens, host countries — African nations in particular — have no legislative protection for subjects of clinical trials. Researchers in such countries, faced with dire medical conditions, understaffed hospitals, language and cultural barriers, and research subjects who would otherwise have no access to medical treatment, thus find it expedient to violate the minimum ethical standards for the protection of human subjects' (F Kelleher 'The pharmaceutical industry's responsibility for protecting human subjects in clinical trials in developing nations' (2004-2005) 38 *Columbia Journal on Law and Society* 67).

It should be noted that Kelleher's statement does not present the whole truth. In several African countries, local ethical guidelines exist over and above international guidelines. As well, in many instances a great deal of effort has been put into educating researchers about the content of ethical guidelines and into building the capacity of research ethics committees. Rather, the problem lies with enforcing these guidelines — see below.

'African nations vie to minimise regulation on the conduct of medical research. They fear that legislation, and resulting lawsuits, could have a chilling effect on beneficial research efforts.'[30] As well, in some host countries, 'corruption often prevents [research ethics committees] from protecting the interests of experimental subjects'.[31]

A regulatory framework for the protection of research participants is established by international ethical guidelines, such as the Nuremberg Code, the Council for International Organisations of Medical Sciences' International Ethical Guidelines for Biomedical Research involving Human Subjects and the Declaration of Helsinki.[32] However, this regulatory framework often fails to protect clinical research participants sufficiently, resulting in their injury and death. This failure to protect research participants is due to a number of reasons, the most important of which is the fact that international and national ethical guidelines are not enforceable — they are non-legal, non-binding ethical *principles*. Compliance with and enforcement of the system rely on professional sanction and other non-legal means. It is assumed that researchers are 'ethical' people who will uphold the guidelines of clinical research. Because of the non-legal nature, to a large extent, observance of ethical guidelines depends on the sanction of various professional bodies and research funding agencies. Other than a refusal to fund or a refusal to publish unethical research, there is little to guard against unethical research conducted by unscrupulous agencies. Meier comments:[33]

> The medical profession has been shown not to have the ability to police itself. Although physicians have formed international medical organisations to promote medical responsibility, there is little evidence to suggest that these organisations have regulated physician behaviour or protected the rights of subjects to free and informed consent.

And:[34]

> The Nuremberg Code, Helsinki Declaration, and CIOMS Guidelines are not legally binding documents capable of placing legally enforceable obligations on states or individuals. They are not widely accepted or followed by physicians. Because they have no enforcement mechanisms, legal or medical, they have little effect on the regulation of human research.

To augment the current system of protection, this article proposes domestic human rights law as a means of protecting clinical research participants. At the domestic level, many states have promulgated constitutions which include justiciable bills of rights, making human rights immediately enforceable in a domestic court of law.

---

30 Meier (n 28 above) 532.

31 Meier (n 28 above) 533.

32 See RJ Levine *Ethics and regulation of clinical research* (1986) 12-13; 425-427 for more on the history and promulgation of these codes of ethics.

33 Meier (n 28 above) 531.

34 As above.

4 Survey of specific human rights provisions in domestic bills of rights potentially useful in the protection of clinical research participants

This section examines specific human rights provisions in domestic constitutions relevant to the protection against the abuse of participants in clinical research in Africa.

As indicated in the introduction to the article, the investigation is limited to countries in *sub-Saharan* Africa. Moreover, not every country in sub-Saharan Africa is included: The survey is limited to 22 countries selected from each region (north, south, central, east and west). Most countries situated in Southern Africa are included. Sudan has been omitted as its Constitution has been suspended in the wake of the civil war.

The investigation centres in human rights provisions in the Constitutions of the following countries (in alphabetical order): Angola; Benin; Botswana; Burundi; Congo; Eritrea; Ethiopia; Ghana; Kenya;[35] Lesotho; Malawi; Mali; Mozambique; Namibia; Nigeria; Senegal; South Africa; Swaziland; United Republic of Tanzania; Uganda; Zambia; and Zimbabwe. (Also refer to paragraph 3 above for tables presenting the core health indicators of these countries.)

The survey investigates the following questions:

- Is a provision specifically mentioning clinical research contained in the country's Constitution?
- Does the Constitution guarantee freedom from torture and other inhuman and degrading treatment which could be used to defend participants in clinical research against abuses of their person?
- Is the right to physical integrity guaranteed by the Constitution (for similar reasons as above)?
- Is the right to dignity guaranteed (clinical research undertaken without the informed consent of a participant may be regarded as a violation of dignity)?
- Does the Constitution contain a provision guaranteeing equality, which could be used to ensure that the rights of research participants who are, or are perceived to be, HIV positive are protected; as well as a clause ensuring the equality of minority groups taking part in research and who are prone to stigma and discrimination, such as men who have sex with men (MSM), women who have sex with women (WSW), sex workers and injection drug users (IDUs)?
- Does the Constitution guarantee the individual's privacy?

[35] Kenya is included in the survey, although its Constitution may be suspended in the light of recent events in that country.

- Does the Constitution guarantee women's and children's rights which may be violated during clinical trial participation?
- Is the right to health care or access to health care guaranteed by the Constitution, giving an indication of whether clinical research will be seen by research participants as an opportunity to gain access to heath care that is not otherwise available?

4.1 Angola

Part II of the Constitutional Law of the Republic of Angola[36] sets out 'fundamental rights and duties'. Several provisions are relevant to clinical research, but Part II does not make direct reference to clinical research.

Article 18 of the Angolan Constitution ensures the equality of all Angolan citizens. The list of prohibited grounds of discrimination includes 'colour, race, ethnic group, sex, place of birth, religion, ideology, level of education or economic or social status'. Article 20 obliges the state to respect and protect the human person and human dignity.[37]

Article 47(1) of the Angolan Constitution is significant. It guarantees that the state will promote the measures needed to ensure the rights of citizens to medical and health care.[38] Although clinical research is not mentioned explicitly, the article could be interpreted as supporting measures undertaken by the Angolan government that encourage research which promotes medical and health care, such as HIV and TB-related clinical research.

Part II, article 23 reads: 'No citizen may be subjected to torture or any other cruel, inhuman or degrading treatment or punishment.' The provision in the Angolan Constitution is identical to article 5 of the Universal Declaration of Human Rights (Universal Declaration), and article 7 of the International Covenant on Civil and Political Rights (CCPR). Unlike the corresponding article in CCPR, however, the Angolan Constitution does not contain an additional sentence prohibiting medical experimentation without informed consent. Further, the provision contains an internal qualifier — 'citizens' alone are entitled to the right. These limitations apart, it is submitted that article 23 of the Angolan Constitution can be called upon to protect the rights of research participants in Angola, as well as the rights already mentioned.

Children's rights are protected.[39] Women's rights are protected only within the context of the family, in which women and men are held to have equal rights.[40]

---

36 Constitutional Law of the Republic of Angola, adopted 25 August 1992; http://www.chr.up.ac.za/hr_docs/constitutions/docs/Angola%20Constitution(rev).doc (accessed 31 January 2008).

37 Arts 18 & 20 Constitutional Law of the Republic of Angola.

38 Art 47 Constitutional Law of the Republic of Angola.

39 Art 30 Constitutional Law of the Republic of Angola.

40 Arts 18 & 29(2) Constitutional Law of the Republic of Angola.

4.2 Benin

Title II of the Constitution of the Republic of Benin[41] contains provisions dealing with the 'rights and duties of the individual'. Several provisions are relevant to clinical research, but Title II does not refer directly to clinical research.

Article 8 guarantees the sacred and inviolable nature of the human being. Article 15 reads: 'Each individual has the right to life, liberty, security and the integrity of his person.' This article may be enforceable against clinical research which threatens or violates the life or integrity of the person.

Article 18 reads: 'No one shall be submitted to torture, nor to maltreatment, nor to cruel, inhumane or degrading treatment.' Note 'no one': Unlike a similar provision in the Angolan Constitution, the Benin provision is applicable to all persons within Benin territory, not only to citizens of Benin. Article 19 prohibits acts of torture and inhuman or degrading treatment carried out by someone in an official capacity.

Article 26 guarantees equality before the law, and the list of prohibited grounds of discrimination are: origin, race, sex, religion, political opinion and social position. Women and men are regarded equal under the law.[42] A duty is placed upon the state to protect the family, especially the mother and child.

4.3 Botswana

Chapter II of the Constitution of Botswana[43] contains a Bill of Rights. Several provisions are relevant to clinical research, but chapter II does not make direct reference to clinical research.

Article 3 protects the fundamental rights and freedoms of the individual, whatever her 'race, place of origin, political opinions, colour, creed or sex'. Article 7(1) reads: '[N]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment.' It is submitted that this provision can be called upon to protect participants of clinical research in Botswana.

The individual's right to privacy is protected, and no search of her person may be carried out without her permission.[44] However, the right to privacy is limited by, amongst others, anything that is 'reason-

---

41 Constitution of the Republic of Benin, adopted 2 December 1990; http://www.chr.up.ac.za/hr_docs/constitutions/docs/BeninC(englishsummary)(rev).doc (accessed 31 January 2008). Interestingly, the Benin Constitution incorporates the human rights guaranteed by the African Charter in its Bill of Rights (see art 7 Constitution of the Republic of Benin).

42 Art 26 Constitution of the Republic of Benin.

43 Constitution of Botswana, adopted in 1966, last amended in 1999; http://www.chr.up.ac.za/hr_docs/constitutions/docs/Botswana(summary)(rev).doc (accessed 31 January 2008).

44 Art 9 Constitution of Botswana. However, the right to privacy is limited by, amongst others, anything that is 'reasonably required in the interests of public health'.

ably required in the interests of public health'.[45] No special mention is made of women's or children's rights in the Botswana Constitution.

4.4 Burundi

The Constitution of the Republic of Burundi[46] contains human rights provisions which are relevant to the position of research participants, but the Constitution does not mention clinical research specifically.

Article 15 prohibits arbitrary treatment; article 19 explicitly prohibits discrimination against people living with HIV or AIDS; article 25 ensures confidentiality of personal communications; article 33 concerns participation in public life (which could be interpreted to mean participation in a public good, such as clinical research); and article 35 relates to child health and well-being.

Article 17 is of special significance to clinical research as it guarantees the right to life, security of the person and physical integrity.

4.5 Congo

The Constitution of the Republic of the Congo[47] contains a Bill of Rights in Title II, 'rights and fundamental liberties'. Although no reference is made to clinical research, the Constitution of the Congo does contain provisions which are relevant to participation in clinical research.

Equality is guaranteed, and the prohibited grounds of discrimination are 'origin, social or material situation, racial, ethnic, gender, education, language, religion, philosophy or place of residence'.[48] Privacy is guaranteed,[49] as is the secrecy of correspondence.[50] The state guarantees the public's health[51] and the rights of the mother and child within the family are guaranteed.[52]

The situation of children and adolescents participating in clinical research may be covered by article 34. Although initially not intended for this purpose, article 34 may be used to prevent the exploitation of children and adolescents in such research. Article 34 determines

---

45 This article may be relied upon by proponents of mandatory or 'opt out' HIV testing in public hospitals in Botswana.

46 Constitution of Burundi, 2004; http://democratie.francophonie.org/article.php3?id_article=368&id_rubrique=94 (accessed 31 January 2008).

47 Constitution of the Republic of the Congo, 1992; http://www.chr.up.ac.za/hr_docs/constitutions/docs/CongoC%20(english%20summary)(rev).doc (accessed 31 January 2008).

48 Art 8 Constitution of the Republic of the Congo.

49 Art 14 Constitution of the Republic of the Congo. This provision may be limited to privacy of the home.

50 Art 20 Constitution of the Republic of the Congo.

51 Art 30 Constitution of the Republic of the Congo.

52 Art 31: 'The state has the obligation to assist the family in its mission as guardian of the morality and the traditional values recognised by the community. The rights of the mother and the child are guaranteed.'

that the state must protect children and adolescents from 'economic exploitation'.[53] Clinical research of an exploitative nature in which children and adolescents are enrolled is thus prohibited.

4.6 Eritrea

Chapter 3 of the Constitution of Eritrea[54] contains provisions on human rights, entitled 'Fundamental Rights, Freedoms and Duties'. Several provisions are relevant to clinical research, but chapter 3 does not refer directly to clinical research.

Article 14 prohibits discrimination on a range of listed grounds. They are 'race, ethnic origin, language, colour, gender, religion, disability, age, political view, or social or economic status'. Discrimination based on what is referred to as 'other improper factors' is also prohibited. Article 18 protects the individual's privacy.

The right to human dignity is protected in article 16. Article 16(2) reads '[N]o person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' A *verbatim* copy of article 5 of the Universal Declaration and article 7 of CCPR, this article could be read as prohibiting clinical research in Eritrea which constitutes 'cruel, inhuman or degrading treatment or punishment'. It is submitted that clinical research without proper informed consent, clinical research which is exploitative and clinical research which is not responsive to the needs of the community at the very least, are 'degrading'.

Article 21 provides every citizen with the right to equal access to publicly-funded social services and states that the state shall endeavour to make available to all citizens health, education, cultural and other social services. Women are protected in the 'Democratic Principles', of which article 7 protects against participation in 'any act that violates the human rights of women or limits or otherwise thwarts their role and participation is prohibited'.

4.7 Ethiopia

Chapter 3 of the Constitution of the Federal Republic of Ethiopia[55] sets out fundamental rights and freedoms; several provisions are relevant to the situation of clinical research participants in Ethiopia.

Article 14 protects the individual's 'inviolable and inalienable right to life, the security of [the] person and liberty'. Article 15 protects the right to life and article 16 protects the rights of every person against 'bodily harm'. Under certain conditions, clinical research could

---

53 Art 34 Constitution of the Republic of the Congo.

54 Constitution of Eritrea, adopted by the Constituent Assembly on 23 May 1997; http://www.chr.up.ac.za/hr_docs/constitutions/docs/EritreaC.pdf (accessed 31 January 2008).

55 Constitution of the Federal Democratic Republic of Ethiopia; http://www.chr.up.ac.za/ hr_docs/constitutions/docs/EthiopiaC(rev).doc (accessed 31 January 2008).

constitute 'bodily harm', and the provision may be called upon in an action against perpetrators of research which causes harm.

Article 18 reads: 'Everyone has the right to protection against cruel, inhuman or degrading treatment or punishment.' This article mirrors the protection in the Universal Declaration and in CCPR, and could be interpreted to include violations by researchers in clinical research.

A general equality provision is contained in article 25, and the prohibited grounds of discrimination are 'race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status'. It is not a closed list, and the words 'other grounds' might cover 'real or perceived HIV status'. Article 25 would protect participants in clinical research from being discriminated against based on their real or perceived HIV status.

Article 35 prohibits harmful customs and elaborates rights with respect to the transfer of property to women and women's inheritance. Article 36 guarantees children's rights. Article 41 states that every Ethiopian has the right to equal access to publicly-funded social services and that the state must allocate ever-increasing resources to provide to the public health, education and social services.

4.8 Ghana

The Constitution of the Republic of Ghana[56] contains human rights provisions in chapter 5. Several provisions are relevant to clinical research, but chapter 5 does not refer directly to clinical research.

Article 12(2) ensures the rights and freedoms in the Constitution to everyone, regardless of 'race, place of origin, political opinion, colour, religion, creed or gender'. Article 15 guarantees the individual's dignity. Article 15(2) reads:

> No person shall, whether or not he is arrested, restricted or retained, be subjected to —
> (a) torture or other cruel, inhuman or degrading treatment or punishment;
> (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.

This utility of this provision in protecting participants in clinical research is self-evident.

Article 17 prohibits discrimination on the grounds of 'race, place of origin, political opinions, colour, gender, occupation, religion or creed'. Article 27(1) ensures special care to mothers before, during and after child-birth, and article 27(3) ensures equal training and opportunities for women. Children's rights are protected in article 28. Article 28(3), which reads '[a] child shall not be subjected to torture or other

[56] Constitution of the Republic of Ghana, 1991; http://www.chr.up.ac.za/hr_docs/constitutions/ docs/GhanaC.pdf (accessed 31 January 2008).

cruel, inhuman or degrading treatment or punishment', is especially important.

4.9 Kenya

The Constitution of Kenya[57] contains human rights provisions that are relevant to the situation of clinical research participants. Chapter 5 is entitled 'protection of fundamental rights and freedoms of the individual'.

Article 74 prohibits 'inhumane treatment' but appears to limit such treatment to 'forced labour'. Article 76 guarantees privacy and reads: 'Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.'[58]

Article 82 prohibits discrimination based upon 'race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description'.[59] The provision includes an internal limitations clause, restricting the general right on the basis of marriage, adoption, burial, devolution of property upon death, and so on.[60]

An amendment to the Constitution which has been proposed would add health status as a protected ground.[61] Also, women are afforded greater protection in the new amendment,[62] and specific provisions dealing with children have been included.

4.10 Lesotho

The Constitution of Lesotho,[63] in chapter 2, contains fundamental rights and freedoms which are relevant to the protection of research participants. No direct reference is made to clinical research.

Article 8 guarantees freedom from inhumane treatment. Article 8(1) reads: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.' Article 11 guarantees

---

57 Constitution of Kenya, adopted in 1963 and amended in 1999; http://www.chr.up.ac.za/ hr_docs/constitutions/docs/KenyaC(rev).doc (accessed 31 January 2008).

58 Art 76(1) Constitution of Kenya.

59 Art 82 Constitution of Kenya.

60 Art 82(4)(b) Constitution of Kenya.

61 Art 37 Proposed New Constitution of Kenya, 2005.

62 Art 38 Proposed New Constitution of Kenya.

63 Constitution of Lesotho, adopted in 1993, amended 1996, 1997, 1998 and 2001; http://www.chr.up.ac.za/hr_docs/constitutions/docs/LesothoC(summary)(rev).doc (accessed 31 January 2008).

privacy of the person, and article 18 guarantees freedom from discrimination. The prohibited grounds are:[64]

> race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Because this is not a closed list, it is conceivable that perceived or actual HIV status may be 'read into' the provision, giving research participants protection against discrimination during HIV-related clinical research. However, the rights in article 18 are subject to an internal limitations clause in sub-article (4), which includes 'adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law'.[65]

In chapter III of the Lesotho Constitution, principles of state policy are set out. Article 27 reads:

> Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens, including policies designed to —
> (a) provide for the reduction of stillbirth rate and of infant mortality and for the healthy development of the child;
> (b) improve environmental and industrial hygiene;
> (c) provide for the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
> (d) create conditions which would assure to all, medical service and medical attention in the event of sickness; and
> (e) improve public health.

From the wording of the article and the fact that it is not contained in the chapter on fundamental rights, but as a 'directive of state policy',[66] it is clear that article 27 is not immediately enforceable against the Lesotho state. However, the provision may be used to argue that the state should put in place policies and frameworks which facilitate clinical research and protect the rights of participants in such research.

---

64 Art 18(3) Constitution of Lesotho.

65 Arts 4(b) & (c) Constitution of Lesotho.

66 So-called 'directive principles of state policy' and 'fundamental objectives of state policy' (see the Constitution of Nigeria below) are not justiciable human rights. Rather, they serve as a guide to the executive or legislature in the exercise of their functions. They are often used by the judiciary as a guide to the interpretation of the Constitution and other laws.

4.11 Malawi

The Constitution of the Republic of Malawi[67] contains human rights provisions in chapter IV relating to the situation of clinical research participants. The Constitution of the Republic of Malawi specifically refers to clinical research.

The right to life is guaranteed in article 16. Article 19 guarantees the human dignity of the person. Article 19(3) dictates that '[n]o person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment'. This provision is similar to that in other constitutions. However, the Constitution of Malawi goes further. In article 19(5) the following prohibition is added: '[N]o person shall be subjected to medical or scientific experimentation without his or her consent.' The Malawian Constitution is a departure from the norm in taking cognisance of clinical research and guaranteeing the right not to be subjected to medical experimentation without consent. Although not precisely the same, the wording of article 19 mirrors the prohibition on research without consent in article 7 of CCPR.

Article 20(1) prohibits discrimination on the grounds of 'race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status'. 'Other status' may be interpreted to include HIV status. The right to privacy is guaranteed in article 21. Children's and women's rights are protected by the Malawian Constitution.[68]

4.12 Mali

The Constitution of the Republic of Mali,[69] in Title I, contains provisions on human rights that are relevant to the situation of clinical research participants.

Article 1 guarantees human dignity which is regarded as 'sacred and inviolable'. The article further provides that '[e]ach individual has the right to life, liberty, and the security and integrity of his person'. Discrimination based on the grounds of 'social origin, colour, language, race, sex, religion, or political opinion' is prohibited. Article 6 guarantees privacy.

Article 3 reads: 'No one will be put to torture, nor to inhumane, cruel, degrading, or humiliating treatment' and is especially significant. The article provides further that anyone found guilty of such an act, 'either on his own initiative, or by another's command, is punishable at law'.

---

67 Constitution of the Republic of Malawi, entered into force on 18 May 1994; http://www.chr.up.ac.za/hr_docs/constitutions/docs/MalawiC.pdf (accessed 31 January 2008).

68 Arts 23 & 24 Constitution of Malawi.

69 Constitution of the Republic of Mali, adopted in 1992; http://www.chr.up.ac.za/hr_docs/ constitutions/docs/MaliC(rev).doc (accessed 31 January 2008).

Health care is to 'constitute some of the social rights'.[70] Women's and children's rights are not singled out for mention.

4.13 Mozambique

The new Mozambican Constitution[71] came into effect in 2005. Article 35 guarantees equality:[72]

> All citizens are equal before the law, and they shall enjoy the same rights, and shall be subject to the same duties regardless of colour, race, sex, ethnic origin, place of birth, religion, educational level, social position, the marital status of their parents, their profession or their political preference.

Article 40 guarantees everyone the right to life and physical and moral integrity. Article 41 guarantees the protection of privacy. Article 45(e) states that everyone has a duty to their community to defend and promote health. It is submitted that participation in clinical research with the aim of defending and promoting health could be such a duty.

Article 47 protects children's rights. Article 89 of the Mozambican Constitution guarantees all citizens the right to medical and health care, but within the terms of the law.

4.14 Namibia

The Constitution of Namibia[73] contains a Bill of Rights in chapter 3, setting out the protection of the fundamental rights and freedoms of all persons in Namibia. Several of the provisions in the Constitution are relevant to the protection of clinical research participants, though clinical research is not mentioned specifically.

Articles 8, 10 and 13 of the Constitution are of particular interest. Article 8(1) ensures that 'the dignity of all persons shall be inviolable'; article 10 ensures equality. The grounds of prohibited discrimination in article 10 are 'sex, race, colour, ethnic origin, religion, creed or social or economic status'. Article 13 protects the right to privacy and article 15 protects children's rights.

4.15 Nigeria

The Constitution of the Federal Republic of Nigeria[74] does not contain a bill of rights as such, but rather 'fundamental objectives of state

---

70 Art 17 Constitution of the Republic of Mali.

71 Constitution of Mozambique 2005; http://www.chr.up.ac.za/hr_docs/constitutions/docs/ Mozambique.doc (accessed 31 January 2008).

72 Art 35 Constitution of Mozambique.

73 Constitution of Namibia, adopted in February 1990, amended on 24 December 1998; http://www.chr.up.ac.za/hr_docs/constitutions/docs/NamibiaC(rev).doc (accessed 31 January 2008).

74 Constitution of the Federal Republic of Nigeria, entered into force on 29 May 1999; http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter_1 (accessed 31 January 2008).

policy',[75] the provisions of which could be relevant in the protection of clinical research participants.

Article 15(2) prohibits discrimination on the grounds of 'place of origin, sex, religion, status, ethnic or linguistic association or ties'. Article 17(3)(d) declares that the state 'shall ensure that there are adequate medical and health facilities' for all persons. Article 21 places a duty on the state to 'protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter; *and encourage development of technological and scientific studies which enhance cultural values*'.[76] It is doubtful whether this is a reference specifically to HIV-related clinical research.

4.16 Senegal

The Constitution of the Republic of Senegal[77] in Title II contains provisions relating to 'public liberties and the person'. Clinical research is not mentioned specifically.

Article 7 reads:

> The human person is sacred. The human person is inviolable. The state shall have the obligation to respect it and to protect it. Every individual has the right to life, to freedom, to security, the free development of his or her personality, to corporal integrity, and especially to protection against physical mutilation.

The right of privacy is guaranteed in article 13, and the rights of 'wives' to marital property and to 'worldly goods' in article 19.

4.17 South Africa

The South African Constitution[78] contains a Bill of Rights in chapter 2. Apart from a specific provision on informed consent in clinical research in section 12(2)(c), the South African Constitution provides in section 9 for the right to equality; in section 10 for the right to human dignity; in section 11 for the right to life; and in section 14 for the right to privacy.

The Constitution also guarantees the right of access to health care services in section 27: 'Everyone has the right to have access to health care services, including reproductive health care.' Furthermore, the state must take 'reasonable legislative and other measures, within available resources, to achieve the progressive realisation of each of these rights'.

---

75 See n 66 above.

76 My emphasis.

77 Constitution of the Republic of Senegal, adopted on 7 January 2001; http://www.chr.up.ac.za/hr_docs/constitutions/docs/SenegalC%20(english%20summary)(rev).doc (accessed 31 January 2008).

78 Constitution of the Republic of South Africa 1996.

Children's rights are guaranteed in section 28, as well as their right to 'basic health care services'.

4.18 Swaziland

Chapter III of the 2005 Constitution of the Kingdom of Swaziland guarantees the fundamental human rights and freedoms of the individual.[79] A number of rights in chapter III are relevant in the protection of participants in HIV-related clinical research.

Personal liberty is guaranteed in section 16(1): 'A person shall not be deprived of personal liberty save as may be authorised by law.' Article 18 guarantees the dignity of the individual. Article 18(2) states that '[a] person shall not be subjected to torture or to inhuman or degrading treatment or punishment'. Reflecting as it does the provisions of the Universal Declaration and CCPR, article 18(2) could be relied on as a remedy by research participants in Swaziland who have been subjected to inhuman or degrading treatment.

Section 20 guarantees all persons the right to equality before the law: 'All persons are equal before and under the law.' Specifically, no one is to be 'discriminated against on the grounds of gender ... or disability'.[80] Section 22 guarantees the right against arbitrary searches: '[A] person shall not be subjected ... to the search of the person' except when 'reasonably required in the interests of' fundamental social objectives such as the promotion of 'public order, public morality ... public health'.[81] Children's rights are protected alongside those of mothers in section 27: 'Motherhood and childhood are entitled to special care and assistance by society and the state.'[82]

There is no provision specifically dealing with the protection of participants in clinical research in the Swaziland Constitution.

4.19 Tanzania

Part III of the Constitution of the United Republic of Tanzania[83] contains several human rights provisions relevant to the protection of participants in clinical research, but does not mention clinical research specifically.

Section 12 guarantees equality and states that all persons are born free and are equal. Everyone is entitled to the recognition and respect

---

79 Constitution of the Kingdom of Swaziland, 2005; http://www.chr.up.ac.za/hr_docs/constitutions/ docs/Swaziland.doc (accessed 31 January 2008).

80 Art 20(1)(2) Constitution of the Kingdom of Swaziland 2005.

81 Arts 22(1)(a) & 22(2)(a) Constitution of the Kingdom of Swaziland 2005.

82 Art 27(4) Constitution of the Kingdom of Swaziland 2005.

83 Constitution of the United Republic of Tanzania, 1998, incorporates and consolidates all amendments made in the Constitution since its enactment by the Constituent Assembly in 1977 up to 1998; http://www.chr.up.ac.za/hr_docs/constitutions/docs/TanzaniaC.pdf (accessed 31 January 2008).

of their dignity. Section 13 prohibits discrimination on the grounds of 'nationality, tribe, place of origin, political opinion, colour, religion or station in life'. Section 14 guarantees the right to life and the right to protection of life by the society in accordance with law. Section 16 guarantees the right to respect of the person and privacy.

4.20 Uganda

The Constitution of the Republic of Uganda[84] includes a number of rights and entitlements that affect people participating in clinical research, though there is no specific reference to clinical research. Equality and freedom from discrimination are guaranteed in article 21. Article 22 protects the right to life, article 27 the right to privacy and article 33 women's rights. Amongst others, laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited.[85] Article 34 protects children's rights.

4.21 Zambia

The Zambian Constitution[86] guarantees human rights, but clinical research is not referred to specifically. The right to life in articles 12 and 17 protects the privacy of the person. Article 15 prohibits 'torture, or [...] inhuman or degrading punishment or other like treatment'.

Zambia currently has as well a draft Constitution which guarantees human rights. Article 40 of the draft Constitution prohibits discrimination based on race, sex, pregnancy, health, marital, ethnic, tribe, social or economic status, origin, colour, age, disability, religion, conscience, believe, future, language or birth.[87]

Article 41 guarantees equal treatment for men and women. Article 41 further prohibits any law, culture, customs or traditions that undermine the dignity, welfare, interest or status of women or men.[88]

---

84 Constitution of the Republic of Uganda, 1995; http://www.chr.up.ac.za/hr_docs/ constitutions/ docs/UgandaC(rev).doc (accessed 31 January 2008).

85 Art 33(6) Constitution of the Republic of Uganda 1995.

86 Constitution of Zambia, as amended by Act 18 of 1996; http://www.chr.up.ac.za/ hr_docs/ constitutions/docs/ZambiaC(rev).doc (accessed 31 January 2008).

87 Draft Constitution of Zambia Cap 1.

88 Art 41(5) Draft Constitution of Zambia.

4.22 Zimbabwe

The Constitution of the Republic of Zimbabwe[89] contains a 'declaration of rights' in chapter 3. Although clinical research is not mentioned, several of the rights in the Constitution of Zimbabwe apply to the situation of clinical trial participants.

Article 12 protects the right to life, and article 15 protects the individual's freedom from inhuman treatment. Article 15(1) determines that '[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment'; which is relevant to the situation of clinical research participants.

Article 17 protects privacy; article 23 prohibits discrimination based on race, tribe, place of origin, political opinions, colour, creed or gender. Real or perceived HIV status is not mentioned, neither are the rights of persons who belong to minority groups subject to stigmatisation and discrimination, such as MSM, WSW, sex workers and IDUs.

4.23 General

It is not in the purview of the survey to include information on the *implementation* of the constitutional provisions. Factors, such as a dysfunctional state and judiciary, civil war, corruption, poverty, illiteracy and a lack of effective access to the law, compromise the force of human rights provisions guaranteed in a country's constitution. All that is intended is to demonstrate that in national constitutions there are provisions that could be called upon in protecting participants in clinical research in sub-Saharan Africa.

The following section offers conclusions and recommendations in the light of the survey in this section.

5 Conclusion

In contrast to the traditional approach, this article places the protection of participants in clinical research in Africa within the context of the domestic human rights discourse. It is argued that domestic human rights law, because it has the force of law, may be used effectively to protect clinical research participants in the region. Rather than replacing ethical guidelines altogether, enforceable human rights law may augment and reinforce existing ethical guidelines, where they exist.

Based upon the survey of domestic bills of rights above, the following conclusions may be drawn:

---

89 Constitution of the Republic of Zimbabwe, as amended to no 16 of 20 April 2000 (amendments in terms of Act 5 of 2000 (Amendment 16) are at sections 16, 16A (Land Acquisition) and 108A (Anti-Corruption Commission)); http://www.chr.up.ac.za/hr_docs/constitutions/docs/ZimbabweC (rev).doc (accessed 31 January 2008).

First, all the countries contain provisions guaranteeing human rights in their constitutions and all the constitutions surveyed include at least some provisions relevant to providing protection for research participants. For example, the right to equality is guaranteed in the constitutions of 21 of the 22 countries; the right to human dignity in the constitutions of ten countries; and the right to privacy in the constitutions of 16 countries. Many of the constitutions guarantee children's and women' rights as well.

As a vehicle for the protection of clinical research participants, the above-mentioned rights are under-utilised at the present time. For example, the right to equality may be used to guarantee communities participating in research post-trial access to pharmaceutical products developed by that research; or it may be used to ensure that participants in research are selected equitably in cases where participation in research confers some benefit upon participants.[90] The right to privacy and the right to dignity may be employed to ensure that medical facts concerning research participants remain confidential;[91] and children's rights may be used to ensure that the child's best interests are paramount in every research endeavour in which the child participates.

Second, of special significance in guarding against possible abuses of clinical research participants, the right to freedom from torture and other degrading and inhuman treatment or punishment is declared in 12 of the 22 constitutions surveyed and the right to physical integrity or security of the person is guaranteed in the constitutions of six countries. These rights have an important role to play in the protection of research participants against being subjected to clinical research without their informed consent. Although informed consent is guaranteed in countless ethical guidelines, domestic human rights law creates justiciable rights which may be used to litigate against research sponsors who violate consent requirements. Further, these rights may be utilised to ensure that not just the form, but also the spirit of the informed consent requirement is adhered to.[92]

---

90 Such benefit may take many forms, such as increased access to anti-retrovirals, antinatal health care or cancer treatment only available at the research site.

91 In this regard, see the South African case of *NM & Others v Smith & Others (Freedom of Expression Institute as* Amicus Curiae) 2007 7 BCLR 751 (CC), which affirms the notion that the unauthorised disclosure of research participants' HIV status during a preventive HIV-related clinical trial or thereafter constitutes a violation of participants' rights to privacy, dignity and psychological integrity.

92 See eg SMC Smith 'Misinforming the uninformed? Issues of informed consent in the multicultural context of HIV vaccine trials' unpublished BHons dissertation, University of the Witwatersrand, 2004. Also see NJ Ives *et al* 'Does an HIV clinical trial information booklet improve patient knowledge and understanding of HIV clinical trials?' (2001) 2 *HIV Medicine* 241, who conclude that, while participants' general knowledge and understanding of clinical trials improved over time, this was not improved by the informed consent process and information booklet and that their recollection of the details of the trial protocols remained poor.

Third, only two of the constitutions surveyed — those of Malawi and South Africa — contain a provision which makes specific reference to clinical research. This may be due to a number of reasons.[93] Importantly, it may be due to the fact that clinical research is not traditionally seen as falling within the ambit of human rights provisions, but rather that of ethical guidelines.

Fourth, of the 22 sub-Saharan African countries, six potentially protect the rights of persons living with HIV/AIDS or perceived to be living with HIV/AIDS, and who are therefore likely to participate in HIV-related clinical research.[94] The Constitution of Burundi explicitly protects people living with HIV/AIDS against discrimination.

Fifth, the rights of groups especially vulnerable to abuse in the research process, such as sex workers, MSM, IDUs and prisoners or detainees, are not mentioned in any of the constitutions (although the South African Constitution prohibits discrimination based upon 'sexual orientation' and some of the others prohibit discrimination based upon 'social status'). South Africa and Swaziland grant detainees the right of access to health care.

Finally, nine of the 22 constitutions guarantee a form of health care or access to health care either as a right or as a directive principle of state policy. The Eritrean Constitution provides that 'the state shall endeavour to make available to all citizens health, education, cultural and other social services',[95] and the South African Constitution provides for the 'progressive realisation' of health care.[96] The tables containing the core health indicators in sub-Saharan African countries in a previous section[97] highlight the lack of access to health care experienced by many Africans. The right to health care, where it is included in domestic constitutions, may be used effectively to convert the duty placed by ethical guidelines upon researchers to provide post-trial access to the products of their research to trial participants and their communities into an enforceable right.

It is therefore possible to conclude that domestic human rights law may be used successfully to protect participants in clinical research in Africa from abuse and exploitation. In the context of clinical research, an

---

93 This omission may be ascribed to a variety of reasons which are explored in a different context; see AG Nienaber 'Ethics and human rights in HIV-related clinical trials in Africa with specific reference to informed consent in preventative HIV vaccine efficacy trials in South Africa' unpublished LLD thesis, University of Pretoria, 2007 478-482.

94 Here open-ended constitutional provisions on equality, such as those including the words 'other status', were taken to indicate a possibility of 'reading in' the protection of people living with HIV/AIDS, or people perceived to be living with HIV/AIDS. This study surveys only constitutional provisions; no account is given of protections provided by other legislation in force in those countries.

95 Art 21 Constitution of Eritrea.

96 Art 27 Constitution of the Republic of South Africa 1996.

97 See para 2 above.

approach based upon domestic human rights provisions goes further than prescribing ways of acting morally or ethically towards research participants. A human rights-based approach provides a justiciable, legal framework by means of which a reliance on ethical conduct or morality is converted into a legal claim.

Under domestic human rights law, the ethical obligation to treat participants in clinical research in a certain way becomes a legal imperative that may be enforced in a court of law if the need arises. For example, an ethical guideline that directs that research participants give informed consent to participation in research, or that they are given fair access to the products of research, under a rights-based approach, becomes a legally enforceable right to informed consent in clinical research and a legally enforceable right of access to the products of clinical research.[98]

More broadly, engaging with a rights-based approach is an opportunity to reflect on general issues in research ethics and the practice of international research, as well as the obligations of those engaged in international research towards clinical research participants in sub-Saharan Africa. Thus, it is a framework for reflection that politicises international clinical research sponsorship and participation.

Self-evidently, the goal of clinical research is the promotion of human health and human well-being. Human rights, as embodied in domestic human rights instruments, define and advance human well-being; a rights-based approach to research participation delivers a conceptual and a practical framework by which to assess the process.

---

98 There are further, non-legal, consequences in a rights-based approach. Human rights may be used to question the *status quo*, the established way in which things are done; F Viljoen 'The obligations of governments in a time of HIV and AIDS' (2005) 15 *Interights Bulletin* 47). Viljoen speculates that a rights-based approach, as an alternative way of seeing and thinking about experience, extends outside the courtroom; that human rights discourse is 'a language of moral authority that may be used in many ways, such as lobbying for reform or mobilising and strengthening social movements' (Viljoen 47-48).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Why the Supreme Court of Uganda should reject the Constitutional Court's understanding of imprisonment for life

*Jamil Ddamulira Mujuzi**
Doctoral Researcher, Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape; PhD Candidate, Faculty of Law, University of the Western Cape, South Africa

Summary

The issue of life imprisonment is always a contentious one. Some people argue that life imprisonment should mean what it means, namely 'whole-life'. In Uganda, life imprisonment continues to mean imprisonment of 20 years. However, in 2005 the Constitutional Court ruled that life imprisonment should mean 'the whole of a person's life'. This decision is not yet law, because the particular case is on appeal before the Supreme Court, which will either uphold the Constitutional Court's ruling or not. This article deals with the constitutionality of long prison sentences that the Constitutional Court suggested could be imposed to avoid prisoners being released after 20 years. It also argues that the Supreme Court should reject the Constitutional Court's ruling that life imprisonment should mean the whole of the prisoner's life. The human rights and administrative implications of 'whole-life' imprisonment are discussed in detail to support

* LLB (Hons) (Makerere), LLM (Human Rights and Democratisation in Africa) (Pretoria), LLM (Human Rights Specialising in Reproductive and Sexual Health Rights) (Free State); Diploma in International Humanitarian Law (Åbo Akademi); djmujuzi@yahoo.com. I am deeply indebted to Prof Dirk van Zyl Smit of the University of Nottingham for his helpful comments on the earlier draft of this article and for his encouragement. I would like to thank Mr Chacha Bhoke, Legal Counsel, Parliament of Tanzania, for his comments on an earlier draft of this article and for availing me some of the material that I used in writing this article. Thank you the anonymous referees for their constructive comments. Misstatements, if any, remain entirely my own. OSF-SA and the Ford Foundation's funding to CSPRI and CLC is acknowledged.

the view that life imprisonment should remain as is, that is, 20 years in prison. The author draws inspiration from other domestic jurisdictions and international law to support his argument. In particular, the author looks at jurisprudence from Germany, South Africa, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone, the International Criminal Court and the European Court of Human Rights. Where applicable, the views of the African Commission on Human and Peoples' Rights are highlighted.

1 Introduction

> The sentence of life imprisonment is ... unique in that the words, which the judge is required to pronounce, do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his [her] natural life, this is not the usual or intended effect of a sentence of life imprisonment ... But although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations ... and executive decisions ...[1]

The sentence of life imprisonment is truly unique. If many people, including some lawyers, were asked to explain what exactly life imprisonment means, many would say that it means that a person sentenced to life imprisonment will spend the rest of his or her life in prison or, as the Nicosia Assize Court of Cyprus in the case of *The Republic of Cyprus v Andreas Costa Aristodemou* put it, 'the sentence "imprisonment for life" means exactly what is stated by the simple Greek words, that is, imprisonment for the remainder of the biological existence of the convicted person'.[2] This may be true in some countries and circumstances, but it is not always the case. One can generally say that there are five major approaches that countries have adopted in regard to life imprisonment. The first approach is that in countries such as Costa Rica, Columbia, El Salvador,[3] Brazil and Portugal, the Constitutions proscribe the imposition of a sentence of life imprisonment on

---

1 *R v Secretary of State for the Home Department, Ex Parte Doody* [1994] 1 AC 531 (HL) 549H-550B, as quoted in D van Zyl Smit *Taking life imprisonment seriously in national and international law* (2002) 2-3.

2 *The Republic of Cyprus v Andreas Costa Aristodemou* Case 31175/87, cited in *Case of Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008) para 47.

3 D van Zyl Smit 'Life imprisonment: Recent issues in national and international law' (2006) 29 *International Journal of Law and Psychiatry* 410.

any person.[4] The second approach is to be found in the constitutions of countries such as Croatia, Norway, Portugal, Slovenia and Spain which 'make no legislative provision for life imprisonment at all'.[5] The third category is to be found in countries such as the United States of America, England and Wales, where some prisoners sentenced to life imprisonment cannot be considered for parole, neither can their sentences be remitted.[6] The fourth category is to be found in countries such as Uganda, South Africa and Botswana, where there is a legislative framework which allows a prisoner sentenced to life imprisonment to be considered for parole or to have his or her sentence remitted after serving a specified number of years. The last category is to be found in countries such as Mexico and Peru, where the respective constitutional courts have 'declared life imprisonment to be unconstitutional'.[7] With respect to the fourth category, courts in Germany[8] and South Africa (as the discussion will shortly illustrate) have held that life imprisonment is only constitutional if the offenders have a prospect of being released.

In Uganda, as this article illustrates, section 86(3) of the Prisons Act[9] provides that '[f]or the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment'. Courts that have been imposing life sentences in Uganda have always understood life imprisonment to mean a sentence of imprisonment of not more than 20 years. In the 1975 Court of Appeal decision of *Wasaja v Uganda,*[10] the appellant was found guilty of the offences of robbery and threatening to use violence. The High Court sentenced him to 15 years' imprisonment and 24 strokes of a cane when he had already spent nearly two years in custody. He appealed the sentence. The Court of Appeal reduced the sentence to 10 years' imprisonment and 12 strokes on the ground that the High Court's sentence was exces-

4 The Constitution of Brazil (of 5 October 1988) prohibits the imposition of life imprisonment on any person. Art XLVII(b) provides that '[t]here may be no sentence of life imprisonment'. In Extradition 855, decision of 26 August 2004, the Supreme Federal Tribunal of Brazil ruled that it could not order the extradition on a Chilean citizen to Chile unless Chile commuted the defendant's sentence to 30 years' imprisonment, because 'Brazilian law establishes that 30 years is the maximum of actual serving time'. See http://www.stf.gov.br/jurisprudencia/abstratos/documento.asp?seq=70&Ing=ingles (accessed 16 August 2007). It has been observed that '[i]t is noteworthy that life imprisonment is not considered everywhere as an essential form of social control. In countries such as Brazil and Portugal it is constitutionally outlawed.' See D van Zyl Smit & F Dünkel (eds) *Imprisonment today and tomorrow: International perspectives on prisoners' rights and prison conditions* (2001) 814. See also Van Zyl Smit (n 1 above) 189.

5 C Appleton & B Grover 'The pros and cons of life without parole' (2007) 47 *British Journal of Criminology* 601.

6 Generally see Van Zyl Smit (n 1 above) 20-131.

7 Van Zyl Smit (n 3 above) 410.

8 Van Zyl Smit (n 3 above) 411.

9 Act 17 of 2006.

10 *Wasaja v Uganda* [1975] EA 181.

sive and observed that '[t]he maximum sentence of imprisonment [for the offences the accused had committed] is life, which we take to be equivalent to a sentence of 18 to 20 years'.[11]

The Supreme Court of Uganda in its 1994 decision of *Kakooza v Uganda*,[12] in which the High Court found the appellant guilty of manslaughter and sentenced her to 18 years' imprisonment when she had already spent two years in prison, set aside the High Court's decision on the ground that the appellant had been effectively sentenced to 20 years, which was in effect a life sentence under the Prisons Act. In 2003, in *Wanaba v Uganda*,[13] the Court of Appeal held that 'a sentence of life imprisonment means 20 years' imprisonment'.[14] However, in its 2005 judgment of *Susan Kigula and 416 Others v The Attorney-General*,[15] the Constitutional Court is of the view that imprisonment for life should not merely mean 20 years, but that it should, in the words of Appleton and Grover, mean 'whole-life'.[16] This judgment is pending appeal before the Supreme Court of Uganda, not on the issue of life imprisonment, but rather on the issue of the constitutionality of a mandatory death penalty in the case of murder. The Supreme Court is yet to hear this appeal because at the time of writing it lacked a quorum.[17] In 2006,

---

11 *Wasaja v Uganda* (n 10 above) 184.

12 *Kakooza v Uganda* [1994] V KALR 54.

13 *Wanaba v Uganda* Criminal Appeal 156 of 2001, decided on 22 July 2003.

14 *Wanaba v Uganda* (n 13 above) 8.

15 Constitutional Petition 6 of 2003 (unreported) 140-142, quoted in n 39 below. In this case, the petitioners had been sentenced to death and they petitioned the Constitutional Court for a declaration that the death penalty was unconstitutional on the basis, *inter alia*, that it amounted to torture, cruel or degrading and inhuman treatment and that it violated the right to life. The Constitutional Court held that the death penalty was not unconstitutional and that, according to the Constitution (art 22(1)), the right to life is not absolute and it can be taken away provided due process of law has been followed. However, the Court held that a mandatory death penalty was unconstitutional because it eliminated the discretion of the courts in sentencing. The Court held that a mandatory death penalty in cases of murder meant that it was the executive and the legislature passing the sentence and not the courts.

16 Appleton & Grover (n 5 above) 603.

17 Under art 130 of the Constitution of Uganda (1995), 'The Supreme Court shall consist of (a) the Chief Justice; and (b) such number of justices of the Supreme Court, not being less than six, Parliament may by law prescribe.' Under article 131: '(1) The Supreme Court shall be duly constituted at any sitting if it consists of an uneven number not being less than five members of the court. (2) When hearing appeals from decisions of the Court of Appeal sitting as a constitutional court, the Supreme Court shall consist of a full bench of all members of the Supreme Court; and where any of them is not able to attend, the President shall, for that purpose, appoint an acting justice under article 142(2) of the Constitution.' At the time of writing, there were five justices at the Supreme Court: Justice Bart Katureebe, Justice Benjamim Odoki, Chief Justice, Justice GW Kanyeihamba, Justice JN Mulenga and Justice John WN Tsekooko. See http://www.judicature.go.ug/supreme.php (accessed 3 October 2007). Justice Arthur Oder passed away in June 2006 and Justice Alfred Karokora retired in 2006. See 'Appoint judges, legislators tell President Museveni' *The New Vision* 15 September 2007 http://allafrica.com/stories/200709170134.html (accessed 3 October 2007).

a few months after the Constitutional Court's decision, a new Prisons Act was enacted which retained the provision as it is in the old Prisons Act to the effect that life imprisonment means 20 years' imprisonment. In January 2007, in the case of *Guloba Muzamiru v Uganda*,[18] in which the appellant, a 22 year-old man, was sentenced by the High Court (in 2004) to life imprisonment for defiling a two and a half year-old baby, the Court of Appeal rejected the appellant's argument that 'life imprisonment was almost as bad as death'.[19] This means that courts still consider life imprisonment to mean 20 years' imprisonment until the Supreme Court has ruled on the constitutionality of that provision in the light of what the Constitutional Court observed. As at 30 September 2007, 43 prisoners, only two of whom female, were serving life sentences in Uganda for the following offences: five for robbery; five for murder (all sentenced after February 2006 when the Constitutional Court declared the mandatory death penalty for murder unconstitutional in the *Kigula* case); six for manslaughter; one for rape and manslaughter; 20 for defilement; one for failure to protect water meters (sentenced by a military court); one for attempted murder; one for aggravated robbery; one for kidnapping with intent to murder; one for simple robbery; and one for rape. Only three had been sentenced by military courts and the rest by the High Court.[20] The aim of this article is to highlight the challenges associated with 'whole-life' life imprisonment and to recommend that the Supreme Court should take into consideration such challenges and reject the Constitutional Court's argument that life imprisonment should mean 'whole-life'.

Before I embark on a discussion of the implications of the Constitutional Court of Uganda and its understanding of life imprisonment, I look briefly at the question regarding the purpose of punishment. However, I would like to put a *caveat* that, much as the question of justice is intrinsically linked to punishment, for want of space this article does not deal with the discussion of what constitutes justice.

2 The purposes of punishment

Philosophers, lawyers, judges and many other people interested either directly or indirectly in the punishment debate have always disagreed, and will continue to disagree, on the question as to the purpose of punishment. It is beyond the scope of this article to deal exhaustively with all the known or continuously-debated purposes of punishment. However, the author will briefly discuss the five major purposes of punishment (retribution, deterrence or prevention, rehabilitation,

18 *Guloba Muzamiru v Uganda* Criminal Appeal 289/2003 (unreported).

19 *Guloba Muzamiru v Uganda* (n 18 above) 2.

20 Statistics obtained from Uganda Prisons Headquarters, Kampala in January 2008 (on file with the author).

reconciliation, and restorative justice) and illustrate the relevance of the question of life imprisonment in Uganda.

The author does not deal with the issue of alternative sentences, because in the Ugandan context this is irrelevant to people convicted of offences that attract life sentences. This is due to two reasons. The first reason is that offenders found guilty of offences that attract life sentences do not qualify for community service orders which are the only alternative sentences in Uganda under the Community Services Act.[21] Under section 3 of the Community Services Act, courts can only issue community service orders in respect of a person who committed a 'minor offence'. A 'minor offence' is defined in section 2 of the Community Services Act to mean 'an offence for which the court may pass a sentence of not more than two years' imprisonment'. As already illustrated above, all offenders serving life sentences in Uganda committed serious offences ranging from defilement to murder, which attract severe penalties under the Penal Code Act.[22] Secondly, even if they had committed offences for which they could qualify for community service orders, they would have been imprisoned because courts no longer issue community service orders as there is a lack of funding for officials who are to supervise offenders doing community service. In other words, in Uganda the community service orders project collapsed.[23] I now turn to a discussion of the purposes of punishment.

Briefly, retribution approaches punishment from a backward-looking perspective, that is, the offender is punished because of what he or she did in the past — because he or she committed an offence. He or she is not punished to be rehabilitated or to deter others or him or her from committing crime.[24] He or she is punished because he or she deserves to be punished — hence the notion of 'just desert'.[25] Retribution has been criticised for being synonymous with revenge.[26] Deterrence, on the other hand, as the name suggests, is meant to deter the offender (specific deterrence, for instance through incarceration) or potential

---

21 Community Services Act, ch 115 of the Laws of Uganda.

22 Penal Code Act, ch 120 of the Laws of Uganda. Under the Penal Code Act, a person convicted of rape is liable to suffer death (sec 124); a person convicted of defilement is liable to suffer death (sec 129); a person convicted of murder is liable to suffer death (sec 189); a person convicted of manslaughter is liable to imprisonment for life (sec 190); a person convicted of attempted murder is liable to imprisonment for life (sec 204); a person convicted of kidnapping with intent to murder is liable to suffer death (sec 243); a person convicted or robbery is liable to imprisonment for life (sec 286(1)(b)); and a person convicted of attempted robbery is liable to life imprisonment (sec 287(2)(b)).

23 See L Muntingh 'Alternative sentencing in Africa' in J Sarkin (ed) *Human rights in African prisons* (2008) 178 196-197.

24 EL Pincoffs *The rationale of legal punishment* (1966) 2-3. See also MA Rabie & SA Strauss *Punishment: An introduction to principles* (1994) 46-53.

25 SS Terblanche *Guide to sentencing in South Africa* (2007) 170.

26 A Oldenquist 'Retribution and the death penalty' (2004) 29 *University of Dayton Law Review* 335 339.

criminals (general deterrence) from committing offences. That is why some authors call it prevention. The offender is punished severely and his or her punishment is made known to others as much as possible so that they are deterred from committing the same offence as the offender.[27] Deterrence has thus been criticised for supporting the punishment of innocent people if the government fails to arrest the offender, but must send out a message to the community that crime is bad.[28]

Rehabilitation aims at rehabilitating or reforming the offender so that he or she does not commit crime in the future. It is premised on the assumption that people's behaviour can change through various interventions and that they are less likely to re-offend. Various programmes, such as education, anger management and job training skills, are implemented to equip the offenders with the necessary skills to prevent them from re-offending.[29] Rehabilitation has been criticised on the basis that its proponents take the view that the offender is sick and thus needs treatment.[30] This means that a person can be detained indefinitely until he or she is cured of the illness that made him or to offend and that, in that regard, rehabilitation ignores the aspect of proportionality of punishment to the offence committed.[31]

Reconciliation, as the name suggests, aims at reconciling the offender with the victim of his or her crime.[32] Finally, restorative justice aims at restoring 'good blood' between the offender and victims of his crime. It has the following features: encounter, reparation, reintegration and participation.[33]

Life imprisonment in Uganda should be viewed through the lens of retribution, deterrence and rehabilitation, because Ugandan law does not accommodate reconciliation and restorative justice in any criminal cases on the basis that they encourage impunity. The same also applies to African traditional practices and their approach to punishment. They do not apply to criminal cases in Uganda.[34] In the few cases where reconciliation had taken place, it has been the initiative of the prison

---

27 Terblanche (n 25 above) 156.

28 CS Steiker 'No, capital punishment is not morally required: Deterrence, deontology, and the death penalty' (2005) 58 *Stanford Law Review* 751 775.

29 A Dissel 'Rehabilitation and reintegration in African prisons' in Sarkin (n 23 above) 155-159.

30 J Brooks 'Addressing recidivism: Legal education in correctional settings' (1992) 44 *Rutgers Law Review* 699 712.

31 Brooks (n 30 above) 712-713.

32 For a detailed discussion of punishment and reconciliation, see J Sarkin & E Daly 'Too many questions, too few answers: Reconciliation in transitional societies' (2004) 35 *Columbia Human Rights Law Review* 661.

33 *David Dikoko v Thupi Zacharia Mokhatla* [2006] ZACC 10 para 114 (footnotes omitted).

34 See M Ssenyonjo 'The International Criminal Court and the Lord's Resistance Army leaders: Prosecution or amnesty?' (2007) LIV *Netherlands International Law Review* 51 64-66.

authorities and religious leaders.[35] An offender is sentenced to life imprisonment because he or she committed an offence or offences (retribution) and also because the court wants to ensure that such a person is deterred from committing crimes against his or her community (specific deterrence through incarceration) and to send out a clear message that such a crime, if committed, would be punished severely (general deterrence through imposing a life sentence). For example, in the case of *Uganda v Bahigana William*, where the accused was found guilty of defiling a two and a half year-old baby, the High Court, in sentencing him to life imprisonment, observed that:[36]

> This Court has to be merciless if society is to learn that the maximum sentence of death provided by the Law is not a formality but that it is meant to be a deterrent to would be defilers. A heavy sentence against the accused is the only answer to the rising rate of defilement of young girls and toddlers like in this case.

While in prison, people serving life sentences in Uganda undergo various rehabilitation programmes, which include formal and informal education, vocational training, sports and recreation, and religious instruction.[37] This means that the three purposes of punishment, retribution, deterrence and rehabilitation, regulate the prisoner's life from sentencing right through his prison experience.

3 The Constitutional Court of Uganda and its understanding of life imprisonment

In the case of *Susan Kigula and 416 Others v The Attorney-General*,[38] Justice Amos Twinomujuni observed, and I quote in detail:[39]

---

35 NM Sita *et al From prison back home: Social rehabilitation and reintegration as phases of the same social process (the case of Uganda)* (2005) 32-34. See generally J Gakumba *Testimonies on the impact of peace making and conflict resolution in Luzira prisons Kampala* (2007) (on file with author).

36 *Uganda v Bahigana William* (HCT-01-CR-SC-0071-2001) 6 (unreported) (on file with author).

37 Personal interview with Assistant Commissioner of Welfare/Rehabilitation, Mr Robert Omita Okoth, Uganda Prisons Services Headquarters, 8 January 2008, Kampala.

38 n 15 above.

39 n 15 above, 140-142 (emphasis in bold in original judgment; emphasis in italics added). It has to be recalled that not all justices of the Constitutional Court expressed their views on the issue of life imprisonment. However, there were discussions between both parties — the state (as the appellant) and the petitioners (in their cross-appeal) to raise the issue of life imprisonment before the Supreme Court for the Court to clarify whether the Constitutional Court's ruling on life imprisonment should be interpreted to mean that life imprisonment should mean 'whole life'. Personal interview with a senior state counsel (who preferred to remain anonymous because the case was 'sensitive'), Ministry of Justice and Constitutional Affairs, Uganda, 7 May 2008, Royal Swazi Sun, Ezulwini, Swaziland, at the 43rd ordinary session of the African Commission on Human and Peoples' Rights.

I hold the view that section 47(6) of the Prisons Act (Cap 304 Laws of Uganda) should be brought into conformity with the Constitution. It states: **'For the purpose of calculating remission of a sentence, imprisonment for life shall be deemed to be twenty years imprisonment.**' To my understanding, this provision has the effect of fettering the discretion of courts to pass a sentence of imprisonment which is greater than 20 years! Suppose, during sentencing, the court does not use the term **'life imprisonment'** and for example simply imposes a sentence of 50 years, does this provision confer the discretion on the prisons authorities to deem 20 years imprisonment as the maximum sentence imposed? Is this not another attempt by the legislature to pre-determined [*sic*] sentences without hearing the parties in order to determine an appropriate sentence? *If a **'life imprisonment'** sentence is pronounced, why can't the convict serve imprisonment for life?* I do appreciate that there will be cases where a person sentenced to serve imprisonment for life deserves remission for good behaviour [*sic*] while in prison or indeed for any other just cause. Couldn't such a case be taken care of under article 121(1) of the Constitution where the President has the power to grant remissions of sentences to deserving prisoners? *In my opinion, if the Supreme Court confirms a sentence of life Imprisonment, it will only do so in conformity with article 126 of the Constitution. It will only do so to give effect to the peoples [*sic*] wish that the convict is an undesirable character in society and should be removed and kept away forever. It would be unconstitutional for Parliament to authorise prisons authorities to alter the sentence in the guise of calculating remission. Such a person is not entitled to any remission at all. If, however, the prisons authorities think such a person is entitled to remission, they should make a representation to the President to exercise his constitutional powers under article 121 of the Constitution*. Other than the President and in accordance with the Constitution, nobody should be allowed to alter the order of the Supreme Court passed in accordance with the Constitution of Uganda. *In the circumstances, where the courts must fully comply with articles 22(1), 28 and 44(c), life imprisonment is a realistic alternative to a death penalty and it can only be a viable alternative if it means imprisonment for life, and not a mere 20 years as it is currently understood to mean*.

For a proper discussion of the Constitutional Court's opinion above, I divide it into a two broad categories and under each category I will deal with the following issues: (1) the constitutionality or otherwise of sentences imposed to prevent the legislature from releasing certain offenders; and (2) the implications of 'whole-life' life sentences.

4 The constitutionality of sentences longer than life imprisonment

In the above quotation, the Constitutional Court poses a question to the effect that, suppose the court imposed a sentence of 50 years instead of a life sentence, would the prison authorities go ahead and release the prisoner after he or she has served 20 years? What the Constitutional Court is impliedly suggesting is that in some cases, where courts predict that the prison authorities would release a prisoner earlier than what such courts would prefer, a court may impose a sentence that would in effect mean that the prisoner should not be released until he or she has served a very long period of time, that is, a period longer

than he or she would have served had he or she been sentenced to life imprisonment. In answering such a question, the Supreme Court of Uganda is encouraged to look at the jurisprudence of the Supreme Court of Appeal of South Africa.

In South Africa, after the abolition of the death penalty in the landmark Constitutional Court decision of *S v Makwanyane and Another*,[40] and in light of the increase of violent crime in that country, at a time when a sentence of life imprisonment meant that a prisoner sentenced to life sentence would serve at least 20 years of imprisonment, some courts resorted to imposing excessively lengthy sentences with the objective of ensuring that such prisoners are, to use the words of the Constitutional Court of Uganda, 'kept away forever'. In *Mhlakaza and Others v S*,[41] the accused were convicted of a number of offences, including the murder of a police officer. The first accused was sentenced to an 'effective'[42] sentence of 47 years and the second accused to 38 years. The Supreme Court of Appeal set aside the sentences and held that they were excessive. In *Nkosi and Others v S*,[43] the appellants were convicted of a number of offences including murder. The first appellant was sentenced to an effective period of 120 years' imprisonment; the second and third appellants were sentenced to an effective period of 65 years' imprisonment; and the fourth appellant was sentenced to an effective term of 45 years' imprisonment. While allowing the appeal, the Supreme Court of Appeal held that:[44]

> The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

The holding by the Supreme Court of Appeal above should answer the question by the Constitutional Court of Uganda with regard to sentences, the aim of which is to prevent the release of a prisoner on parole. Such sentences would amount to cruel, inhuman and

---

40 *S v Makwanyane & Another* 1995 3 SA 391 (CC).

41 *Mhlakaza & Others v S* [1997] 2 All SA 185 (A).

42 According to the judgment, effective sentence meant 'the difference between the cumulative and suspended sentence'. See 185. 'Appellant no 1 was sentenced cumulatively to 62 years of which 15 years were suspended; no 2, who was similarly to 62 years, had 20 years of his sentence suspended and a further two years were ordered to run concurrently. The so-called effective sentences were thus 47 and 38 years respectively.' See 187.

43 *Nkosi & Others v S* [2002] JOL 10209 (SCA).

44 *Nkosi* (n 43 above) 1.

degrading treating or punishment under article 24 of the Constitution of Uganda, article 7 of the International Covenant on Civil and Political Rights (CCPR),[45] which Uganda ratified on 21 September 1995[46] without any reservation or declarative interpretation,[47] and article 5 of the African Charter on Human and Peoples' Rights (African Charter), which Uganda ratified on 10 May 1986. As Judges Tulkens, Carbral Barreto, Fura-Sandström, Spiellmann and Jebens rightly wrote in their dissenting opinion in *Kafkaris v Cyprus,* '[u]nless one chooses to ignore reality, a sentence ... with no hope of release ... constitutes inhuman and degrading treatment'.[48]

Related to the above is the issue of imposing sentences of more than 20 years with the aim of protecting society from such criminals. Over time, researchers have proved that lengthy prison sentences are not effective in deterring offenders from re-offending when released, neither are they effective in reducing the crime rate.[49] As the Constitutional Court of South Africa rightly observed in *S v Makwanyane*,[50] the possibility of a would-be offender being arrested has a more deterring effect than the severe punishment of the unlucky few offenders who get arrested.[51] Fortunately enough, there is no court in Uganda that has ever imposed a sentence as excessive as 50 years, as the Constitutional Court noted. One remains optimistic that no court should do so in the foreseeable future. However, to avoid doubt, the Supreme Court of appeal should rule that if such a sentence were to be imposed, it would violate article 24 of the Constitution.

5 The implications of 'whole-life' life imprisonment

As mentioned earlier, in some countries, such as the United States and England, there are cases where, when a person is sentenced to life imprisonment; it means that such a person will spend the rest of his

---

45 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

46 See http://www.unhchr.ch/pdf/report.pdf (accessed 3 October 2007).

47 See http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (accessed 3 October 2007).

48 *Kafkaris v Cyprus* (n 2 above) para 6.

49 It has been observed that '... there is no evidence to suggest that longer sentences reduce crime levels, except in so far as they keep some offenders in custody, who are thus unable to commit offences in free society ... long sentences place greater strain on the resources of the criminal justice system, undermine the rehabilitative ideal, and thus make it more likely that ... offenders will re-offend'. See C Giffard & L Muntingh *The effect of sentencing on the size of the South African prison population (Report 3)* (2006) 47. See also M O'Donovan & J Redpath *The impact of minimum sentencing in South Africa (Report 2)* (2006) 22-33.

50 *Makwanyane* (n 40 above).

51 *Makwanyane* (n 40 above) para 126.

or her life in prison. This phenomenon is not only limited to those two countries. In Africa there are many countries in which life imprisonment means 'whole-life', unless a prisoner is pardoned by the President. There are also countries, apart from Uganda, in which life imprisonment does not mean 'whole-life'. The table below illustrates this point:

Table A: The meaning of life imprisonment in nine African countries

Country	Meaning of life sentence
Kenya	Life[52]
Tanzania	Life[53]
Zimbabwe	Life[54]
Ghana	Life[55]
South Africa	25 years[56]
Uganda	20 years[57]
Malawi	12 years[58] (B)
Botswana	7 years[59]
Mauritius	3-60 years[60] (B)

Key: '*Life*' *means that a prisoner serving a life sentence cannot be considered for parole and his or her sentence cannot be remitted unless by a presidential pardon. 'B' means that reference is being made to the Bill that is before Parliament, but otherwise the law that is intended to be amended is still in force.*

The Constitutional Court of Uganda would like life imprisonment in Uganda to change from 20 years to 'whole-life'. This will raise the following problems:

5.1 Denial of parole to prisoners serving life sentences: Cruel, inhuman and degrading punishment

Section 89 of the Prisons Act[61] provides that a prisoner who is serving a sentence of imprisonment for a period of three years or more may be released on parole within six months of the date he or she is due for release on conditions and for reasons approved by the Commissioner-General of Prisons in order to be temporarily absent from prison for a stated length of time which shall not be greater than three months.

52 Prisons Act ch 90, sec 46(1)(ii).

53 Prisons Act (Cap 34 of 1967) sec 49; and Parole Boards Act (Act 25 of 1994) sec 4(a).

54 Prisons Act (ch 7:11), secs 109, 115(1) & 121(1a); and the Criminal Procedure and Evidence Act (ch 9:07), sec 344A.

55 Prisons Service Act, NRCD 46, sec 34.

56 Correctional Services Act 111 of 1998, sec 73.

57 Prisons Act 17 of 2006, sec 86(3).

58 Prisons Bill 2003, sec 53(1)(b).

59 Prisons Act 1980, sec 85(c).

60 Criminal Procedure (Amendment) Bill VIII of 2007, sec 150A.

61 Act 17 of 2006.

Such a prisoner is supposed to obey the parole conditions imposed by the Commissioner-General, failure of which he or she is called back to prison.[62] Section 84 of the Prisons Act provides for the remission of a sentence of any convicted prisoner sentenced to imprisonment for a period exceeding one month. As mentioned earlier, for a person serving life imprisonment, remission of a sentence means that such a prisoner will serve 20 years in prison. Unlike the South African Correctional Services Act,[63] which specifically provides that a prisoner serving a life sentence may be considered for parole after 25 years[64] and lays down in detail the conditions that may be imposed on such a prisoner released on parole,[65] the Uganda Prisons Act is not so detailed.

Section 86(3) should therefore be read together with sections 89 and 84 to mean that a prisoner serving a life sentence shall also be released on parole within six months of the date he or she is due for release on conditions that may be imposed by the Commissioner-General of Prisons. This means that, if a prisoner on a life sentence were to serve 'whole-life', they would not only not benefit from sections 84 and 89, but they will never have a chance of expecting to be released at all unless through a presidential pardon, which depends on many unknown factors. As the dissenting judges in the European Court of Human Rights case of *Kafkaris v Cyprus* rightly put it, for a prisoner sentenced to life imprisonment to wait for a presidential pardon for his release, which presidential pardon depended on factors unknown to such a prisoner, such a prisoner did not have 'a real and tangible prospect of release'.[66] One has to recall that parole is an administrative decision which must be exercised in line with article 42 of the Constitution, which provides that any administrative decision must be taken justly and fairy. Parole is not a right. As the European Court of Human Rights rightly observed in the *case of Ezeh and Connors v The United Kingdom*,[67]

> [t]he early release, the remission, the conditional release, the parole or whatever one chooses to call it, *cannot* be a prisoner's right. It may be a factual 'expectation', even a reasonable one, but at bottom it is still a privilege. The privilege may or may not be granted.

However, the European Court of Human Rights' above observation should be interpreted on a case-by-case basis and the issue of human dignity should always be at the back of anybody interpreting such a decision. If prisoners serving a sentence of 10 years, for example, were to be denied parole, it could be argued that such a person can still

---

62 Sec 89(2-4).

63 Act 111 of 1998.

64 Sec 73(6)(b)(iv).

65 Ch VI & VII.

66 *Kafkaris v Cyprus* (n 2 above), joint dissenting judgment of Judges Tulkens, Cabral Barreto, Fura- Sandström, Spielmann & Jebens, para 6.

67 *Case of Ezeh and Connors v The United Kingdom* (Applications 39665/98 & 40086/98) [2003] ECHR 485 (9 October 2003) para 5.

serve his or her ten years without his right to human dignity being infringed, the rationale being that he or she expects to, and will for sure, unless otherwise, be released after 10 years. However, in a situation where a person has been sentenced to a 'whole-life' sentence, such a person does not expect to be released unless by a presidential pardon. Courts have held that such a sentence would amount to cruel, inhuman and degrading punishment. The Supreme Court of Appeal of South Africa observed that '... it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment'.[68] The Supreme Court of Namibia has held that:[69]

> A sentence of life imprisonment ... can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

The Constitutional Court of Uganda is right to assume that a person sentenced to life imprisonment, even in case where life imprisonment means 'whole-life', can be pardoned by the President under article 121 of the Constitution.[70] The problem with such an approach is that the prisoner will never know when such a pardon may come his or her way. The Federal Constitutional Court of Germany rightly held that '... the principle[s] of legal certainty ... [and] ... natural justice require that conditions, in terms of which a prisoner serving a life sentence is released and the procedure to be followed in securing his release, should be determined by legislation'.[71] Practice has also shown that, in cases where the President has pardoned prisoners, no one serving a life sentence has ever been pardoned.[72] As the Constitutional Court observes, it could all depend on the recommendations that the prison authorities may or may not make to the President that such a person

---

68 *Bull & Another v The State* Case 221/2000 [2001] ZASCA 105 (26 September 2001) para 23.

69 *S v Tcoeib* 1996 1 SACR 390 399.

70 The President, eg, used his powers under art 121 to pardon Abudallah Nasuru who had been on death row for almost 20 years. See *Susan Kigula & 146 Others v Uganda* (n 15 above) Issue 5(iii). In early February 2003, the President pardoned 92 prisoners, including a member of parliament, who were serving sentences in prisons in Uganda. I could not establish whether any of them was serving a life sentence. See http://www.newvision.co.ug/D/8/13/115199/ Mulindwa%20Birimumaaso%20 pardoned (accessed 4 October 2007).

71 BVerfGE 45 187 246, as cited in Van Zyl Smit (n 3 above) 409.

72 n 50 above. In February 2007, the President pardoned over 170 prisoners, but none of them was serving a life sentence. See S Candia & P Jaramoji 'President pardons over 170 inmates' *The New Vision* 27 February 2007 http://www.newvision.co.ug/D/8/13/551457/prisoners%20pardoned (accessed 4 October 2007). In December 2004, the President also pardoned 173 prisoners and none of them was serving a life sentence. See J Etyang & H Kiirya 'Museveni pardons 173 inmates' *The New Vision* 8 December 2004 http://www.newvision.co.ug/D/8/13/404696/ prisoners%20pardoned (accessed 4 October 2007).

should be considered for release. Such a recommendation could be made after 10 years, 20 years or 50 years, depending on the way prison authorities work.[73] This means that at the time of sentencing, the prisoner will know that he is going to be in prison for the rest of his life, which would surely infringe his right to human dignity, as courts in South Africa and Namibia have observed. Dünkel and Van Zyl Smit observe that '[t]he sentences of life without any prospect of parole .... should be condemned as fundamentally cruel and inhumane as the prospect of freedom is a fundamental human right'.[74] The African Commission on Human and Peoples' Rights (African Commission) is also supportive of the view that prisoners should have a chance of being released on parole and, where possible, they should have their sentences remitted.[75] The recommendation is therefore that the Supreme Court should hold that section 86(3) of the Prisons Act is in line with the Constitution.

5.2 Life imprisonment and rehabilitation of offenders

Under sections 5(b) and (c) of the Prisons Act, some of the functions of the Prisons Service are to facilitate the social rehabilitation and reformation of prisoners through specific training and education programmes, and to facilitate the re-integration of prisoners into their communities. The question that the Supreme Court should put into consideration before sanctioning a 'whole-life' for life imprisonment is whether it is possible for the Prisons Service to exercise the above functions with regard to prisoners who are aware that they will never be released. Why would a prisoner participate in any rehabilitation or reintegration programme when he or she knows that the possibility of being released is almost non-existent? Even in South Africa, where the law provides that a prisoner serving a life sentence will be considered for parole after 25 years, the Supreme Court of Appeal held in *S v Sikhipha*,[76] where the appellant, a 31 year-old man, was found guilty of raping a 13 year-old girl and sentenced to life imprisonment, that

---

73 It has been observed that '[i]t must be recognised that the many decisions taken by the prison authorities at every step in this process [of ensuring that prisoners serving life sentences are released] may have a bearing on when the prisoner is eventually released. For example, an administrative decision not to transfer a prisoner to an open facility may lead to a parole board deciding not to release the life conditionally.' See Van Zyl Smit (n 3 above) 415.

74 Van Zyl Smit & Dünkel (n 4 above) 846.

75 See Prisons in Cameroon: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Report to the Government of the Republic of Cameroon on the Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 2-15 September 2002) ACHPR/37/OS/11/437, where, under General Recommendations, the Special Rapporteur recommends that '[m]easures such as parole, judicial control, reductions of sentences, community service, diversion, mediation and permission to go out should also be developed'.

76 *S v Sikhipa* 2006 2 SACR 439.

'[t]he sentence of life imprisonment required by the legislature is the most serious that can be imposed. *It effectively denies the appellant the possibility of rehabilitation*.'[77] The Court reduced the sentence to 20 years' imprisonment. The German Federal Constitutional Court held that '[t]he prison institutions also have a duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialisation [read rehabilitation], to preserve their ability to cope with life and to counteract the negative effects of incarceration'.[78] Should the Supreme Court go ahead and confirm that life imprisonment means 'whole-life', it would mean that such prisoners will most probably not be rehabilitated.[79] This will not only make sections 5(b) and (c) redundant as far as this category of prisoners is concerned, but it would also fly into the face of Uganda's international obligation under article 10(3) of CCPR, which is to the effect that the essential aims of the prison system is to reform and rehabilitate prisoners.[80] It would also mean that our society would effectively have treated such prisoners as those sentenced to death — people that will never come back and make any contribution to the development of the country. As it has rightly been observed, 'to lock up a prisoner and take away all hope of release is to resort to another form of death sentence'.[81] In addition, Wright has observed that prisoners sentenced to 'whole-life' '"vehemently disapprove of their sentences" and would prefer to be executed rather than kept alive behind bars for the rest of their lives'.[82] The African Commission has also emphasised the importance of rehabilitating prisoners, which would not be achieved if prisoners are sentenced to 'whole-life' life sentences.[83]

---

77 Para 19 (my emphasis).

78 BVertGE 45, 187, 238, as cited in Van Zyl Smit (n 3 above) 408.

79 In their joint partly dissenting opinion in the case of *Kafkaris v Cyprus* (n 2 above), Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens observed, in relation to the parliamentary debates surrounding the abolition of the death penalty in the United Kingdom in 1964, that 'as a general rule "experience shows that nine years, ten years, or thereabouts is the maximum period of confinement that normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and become useful citizens"' (para 5).

80 See D van Zyl Smit 'Punishment and human rights in international criminal justice' (2002) 2:1 *Human Rights Law Review* 5.

81 Appleton & Grover (n 5 above) 606.

82 J Wright 'Life without parole: The view from death row' (1991) 27 *Criminal Law Bulletin* 334-57 346, as cited in Appleton & Grover (n 5 above) 607.

83 See Report on the Visit to Prisons in Zimbabwe by Prof EVO Dankwa, Special Rapporteur on Prisons and Conditions of Detention, 10th Annual Activity Report of the African Commission on Human and Peoples' Rights 1996/97, Annex VII, in which the Special Rapporteur recommended that '[t]he prison service should help orient public attitude to accepting that rehabilitation does occur in the prisons of Zimbabwe by employing ex-convicts whenever there is the opportunity to do so' (Recommendation 7).

5.3 Disciplining prisoners serving 'whole life' sentences

Under section 68 of the Uganda Prisons Act, '[e]very prisoner shall be subject to prison discipline and to all laws, orders and directions relating to prisons and prisoners during the whole time of imprisonment'. Many prison officials will tell you that one of the most difficult tasks is that of keeping prisoners orderly. Another challenge is disciplining prisoners who breach prison rules and laws without subjecting them to cruel, inhuman and degrading punishment. Parole has always acted as an incentive to ensure that prisoners obey prison rules and regulations because the more a prisoner follows the rules, the higher are the chances that he or she may be released on parole at the earliest available opportunity.

However, in cases of prisoners serving 'whole-life' sentences, 'the "carrot" of parole cannot be used as an incentive to ensure the compliance and co-operation of those who have neither hope of release nor anything to lose'.[84] Research has indicated that 'imposing [whole-life] sentences on violent offenders could result in a new class of "super-inmates" ... uncontrollable in prison because they have nothing else to lose'.[85] They are aware that even if they broke prison rules, any sentence of imprisonment imposed will run concurrently with the sentence they are already serving and in effect they would not have been punished for disobeying prison rules.[86] As Lord Parker observed in *R v Foy*, in which a lower court imposed a sentence of imprisonment consecutive to life imprisonment,[87]

> [l]ife imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on licence, and the sentences of life imprisonment remains on them until they die. Accordingly, if the court makes any period of years consecutive to life, the court is passing a sentence which is no sentence at all, in that it cannot operate until the prisoner dies.

Had corporal punishment not been declared a cruel, inhuman and degrading punishment in the well-known case of *Simon Kyamanya v*

---

84 Appleton & Grover (n 5 above) 604.

85 Appleton & Grover (n 5 above) 604. 'In her report ... in 2004, the Ombudswoman criticised the Cypriot authorities' interpretation of life sentence as imprisonment for the rest of the convicted person's life ... The Deputy Director of the Central Prison spoke of the difficulties in dealing with those currently serving life sentence ... both in terms of the prisoners' morale, and security issues. The usual incentives for encouraging good behaviour in prisoners were inevitably of no use in relation to those serving life sentences, and this posed security problems both for the warders and for the other prisoners.' See Follow-up Report on Cyprus (2003-2005) 'Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights' Doc Comm DH (2006) 12, cited in *Kafkaris v Cyprus* (n 2 above) para 73.

86 See generally S Rahman 'Addressing anomalies created by the fiction of life imprisonment' (2000) 8 *Waikato Law Review* 87.

87 *R v Foy* [1962] 2 All ER 246 247.

Uganda,[88] one could have argued that such prisoners could be subjected to corporal punishment. It appears under the Prisons Act that the only serious punishment that could be imposed on a prisoner serving a 'whole-life' would be punishment by close confinement under section 94. But even then, before this punishment is imposed, the medical officer must first examine such a prisoner and certify in writing that he or she is fit to undergo such punishment. The medical officer is also required to advise the officer in charge to terminate such a confinement if he or she considers it necessary on the ground of physical or mental health. It is also unlikely that a prisoner can be denied his rights, such as the right to food and/or to exercise, as a form of punishment because these are rights under sections 69 and 70 of the Prisons Act but not privileges. Any punishment imposed must also comply with rules 27 to 32 of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners.[89] What this discussion has attempted to illustrate is that, for proper discipline among prisoners, it is essential that they should expect to be released. The Supreme Court should therefore put that into consideration before it confirms the Constitutional Court's ruling that life should mean 'whole-life'.

6 Does 'whole-life' have support in international criminal law?

Under contemporary international criminal law, one would have to look at three international courts to ascertain whether the 'whole-life' approach has any support at that level.[90] These courts are the Interna-

88 *Simon Kyamanya v Uganda* Constitutional Reference 10 of 2000.

89 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

90 It should also be recalled that both the International Military Tribunal at Nuremberg (Nuremberg Tribunal) and the International Military Tribunal for the Far East (Tokyo Tribunal) sentenced some war criminals to life imprisonment. The Nuremberg Tribunal sentenced three defendants to life imprisonment (Rudolf Hess, Walter Funk and Erich Raeder); see The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany Part 22 (22-31 August 1946 and 30 September-1 October 1946) (1950) 529. Funk and Raeder were released after serving a considerable amount of years because their health had deteriorated. Even though his life had also deteriorated, Hess's release was vetoed by the Russians until he committed suicide in prison. See C Kress & G Sluiter 'Imprisonment' in A Cassese (ed) *The Rome Statute of the International Criminal Court: A commentary* (2002) 1762. It should be remembered that the Spandau Prison in Germany, where the prisoners were serving their sentences, 'was administered and guarded jointly by the four Allied Powers: the Soviet Union, France, the United Kingdom and the United States' and therefore all the representatives of all the Allied Powers had to consent for any prisoner to be released. See D Kamchibekova 'State responsibility for extra-territorial human rights violations' (2007) 13 *Buffalo Human Rights Law Review* 87 124. The reason why Hess was not released could be attributed to the fact that the

tional Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone. Of the three courts, emphasis will be put on the ICTR, because it is the only one that has sentenced and actually has prisoners serving life sentences.

6.1 The International Criminal Tribunal for Rwanda

Of all civil wars that have taken place in the world and in Africa in particular, with all their unspeakable human rights and international humanitarian law violations, the Rwandan genocide of 1994 that claimed close to one million lives was clearly in a class of its own. Tens of thousand of innocent men, women and children were massacred because of their ethnicity. These atrocities could not go unpunished and hence the establishment of the ICTR. The Statute of the ICTR empowers the Tribunal to[91]

> prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.

Hence the ICTR has jurisdictions over the offences of genocide,[92] crimes

---

Soviet judge at the Tribunal, Major General IT Nikitchenko, wrote a dissenting judgment holding that Hess should have been sentenced to death by hanging instead of life imprisonment. After indicating clearly the role Hess had played in the Nazi government, Major General Nikitchenko held that '[t]aking into consideration that among the political leaders of Hitlerite Germany Hess was third in significance and played a decisive role in the crimes of the Nazi regime, I consider the only justified sentence in his case can be death'. See Dissenting Opinion of the Soviet Member of the International Military Tribunal in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany Part 22 (22-31 August 1946 and 30 September-1 October 1946) (1950) 541. On the other hand, the Tokyo Tribunal sentenced the following accused to imprisonment for life: Araki Sadao, Hashimoto Kingoro, Hata Shunroku, Hiranuma Kiichiro, Hoshino Naoki, Kido Koichi, Koiso Kuniaki, Minimi Jiro, Oka Takasumi, Oshima Hiroshi, Sato Kenryo, Shimada Shigetaro, Suzuki Teiichi, Kaya, Shiratori and Umezu. See BVA Röling & CF Rüter *The Tokyo judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946-12 November 1948* (1977) 465-466. It has been observed in relation to prisoners sentenced to life imprisonment by the Tokyo Tribunal that '[n]ot a single Tokyo defendant ... actually served his life sentence "unless he died of natural causes within a very few years. They were all paroled and pardoned by 1958."' See MM Penrose 'Spandau revisited: The question of detention for international war crimes' (2000) 16 *New York Law School Journal of Human Rights* 553 564-565. It should also be recalled that, unlike the life sentences imposed by the Nuremberg Tribunal where there was no law specifically stipulating the minimum number of years to be served before a prisoner could be released for parole, with regard to the sentences by the Tokyo Tribunal, '[t]he Supreme Commander General did lay down criteria for early release :... offenders sentenced to life imprisonment were to be considered for parole after they had served 15 years'. See D van Zyl Smit 'International imprisonment' (2005) 54 *International and Comparative Law Quarterly* 357-385 359.

91 Art 1.

92 Art 2.

against humanity[93] and violations of article 3 Common to the Geneva Conventions and of Additional Protocol II.[94] Under article 23 the Tribunal has jurisdiction to impose the following sentences:

(1) The penalty imposed by the Trial Chambers shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
(2) In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
(3) In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Another important feature to note with regard to the punishments that can be imposed by the ICTR is article 27, which provides as follows:[95]

> If, pursuant to the applicable law of the state in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the state concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

As of 2 March 2008, the ICTR had completed 35 cases in some of which the accused were found guilty of committing acts of genocide. Whereas the ICTR has sentenced some offenders to short prison terms ranging from six to 15 years,[96] long prison sentences ranging from 25 to 45

---

93 Art 3.

94 Art 4.

95 Van Zyl Smit points out that '[t]he major difficulty [with a provision such as this one] is that the trigger lies in the national law of the states, which may vary greatly. This results in the same sentence being implemented for different for different periods depending on where it is served.' See Van Zyl Smit (n 80 above) 9. See also Rules 124-126 of the Tribunal's Rules of Procedure and Evidence.

96 See *Prosecutor v Paul Bisengimana* Case ICTR-00-60 (the offender was sentenced to 15 years' imprisonment); *Prosecutor v Samuel Imanishimwe* Case ICTR-99-46 (the offender was sentenced to 12 years' imprisonment); *Prosecutor v Elizapah Ntakirutimana* Case ICTR-96-10 and ICTR-96-17 (the offender was sentenced to 10 years' imprisonment); *Prosecutor v Joseph Nzabirinda* Case ICTR-01-77 (the offender was sentenced to seven years' imprisonment); *Prosecutor v Georges Ruggiu* Case ICTR-97-32 (the offender was sentenced to 12 years' imprisonment); *Prosecutor v Joseph Serugendo* Case ICTR-2005-84 (the offender was sentenced to six years' imprisonment); *Prosecutor v Omar Serushago* Case ICTR-98-39 (the offender was sentenced to 15 years' imprisonment); *Prosecutor v Tharcisse Muvunyi* Case ICTR-2000-55 (the offender was sentenced to 12 years' imprisonment); and *Prosecutor v Athanase Seromba* Case ICTR-2001-66.

years,[97] life imprisonment,[98] and 'imprisonment for the remainder of the offender's life',[99] the statistics show that the ICTR has sentenced more people to be in prison for the remainder of their lives than to life imprisonment. Under article 23, the Tribunal is given the powers to impose the penalty of 'imprisonment' among other penalties. The Statute does not stipulate the maximum or minimum numbers of years to which the Tribunal can sentence a person to imprisonment.[100] However, the Tribunal's Rules of Procedure and Evidence provide under rule 101(A) that '[a] person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life'.[101] One could argue that, even in cases where the Tribunal has pronounced that the offenders should be in prison for the rest of their lives; this may not mean exactly that. If such offenders were imprisoned in countries such as South Africa or Namibia, where courts have held that a prison term that would make it impossible for a prisoner to benefit from release after serving some time in prison amounts to a cruel, inhuman and degrading treatment or punishment, it is more likely that article 27 would be invoked and such people considered for release without spending their natural lives in prison. Therefore, the 'whole-life' approach has little support, if any, under the jurisprudence of the ICTR.

6.2 The International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court

The Special Court for Sierra Leone (SCSL) is a hybrid court that was established by agreement between the UN and the government of Sierra Leone pursuant UN Security Council Resolution 1315 (2000) of

---

97 *Prosecutor v Juvenal Kajelijeli* Case ICTR-98-44 (the offender was sentenced to 45 years' imprisonment); *Prosecutor v Gerald Ntakirutimana* Case ICTR-96-10 and ICTR-96-17 (the offender was sentenced to 25 years' imprisonment); *Prosecutor v Obed Ruzindana* Case ICTR-95-1 (the offender was sentenced to 25 years' imprisonment); *Prosecutor v Laurent Semanza* Case ICTR-97-20 (the offender was sentenced to 35 years' imprisonment); and *Prosecutor v Jean Bosco Barayigwiza* Case ICTR-97-19 (the offender was sentenced to 35 years' imprisonment).

98 *Prosecutor v Jean Paul Akayesu* Case ICTR-96-4; *Prosecutor v Jean Kambanda* Case ICTR-97-23; *Prosecutor v Alfred Musema* Case ICTR-96-13; and *Prosecutor v Georges Rutaganda* Case ICTR-96-3.

99 *Prosecutor v Sylvester Gacumbifsi* Case ICTR-2001-64; *Prosecutor v Jean de Dieu Kamuhanda* Case ICTR-99-54; *Prosecutor v Clement Kayishema* Case ICTR-95-1; *Prosecutor v Mikaeli Muhima* Case ICTR-95-1; *Prosecutor v Emmnuel Ndindabahizi* Case ICTR-2001-71; *Prosecutor v Eliezer Niyitegeka* Case ICTR-96-14; *Prosecutor v Ferdinand Nahimana* Case ICTR-96-11; and *Prosecutor v Hassan Ngeze* Case ICTR-99-52.

100 Van Zyl Smit (n 1 above) 186.

101 Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (as amended on 15 June 2007).

14 August 2000.[102] At the time of writing, the SCSL had handed down two judgments, in one of which, the case of *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* it sentenced the three accused as follows: two to 50 years and one to 45 years of imprisonment.[103] As Schabas rightly observes, the SCSL does not have the jurisdiction to impose life sentences because its Statute and Rules of Procedure do not authorise it to do so.[104] As with the ICTR, prisoners sentenced by the SCSL may be released before completing the determinate sentences imposed by the Court, but the President of the SCSL, in consultation with the judges, has to decide whether such prisoners should be released 'on the basis of the interests of justice and the general principles of law'.[105] This means that, whereas the Court imposed excessive sentences on the offenders, there is a possibility that they may be pardoned depending on the laws in countries where they will serve their sentences, should the President of the SCSL agree to such.

At the time of writing, the ICTY did not have any case in which the accused had been sentenced to and serving a life sentence. In one case of *Prosecutor v Milomir Stakic*,[106] the offender had been sentenced to life imprisonment by the Trial Chamber, but on appeal the sentence was reduced to 'a global sentence of 40 years' imprisonment, subject to credit being given under rule 101(C) of the Rules for the period the appellant has already spent in detention'.[107] At the time of writing, the

---

102 *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* Case SCSL-04-16-T, para 2. For a detailed discussion of this judgment, see JD Mujuzi 'The Special Court for Sierra Leone and its justification of punishment in cases of serious violations of international humanitarian law and human rights law: Reflecting on *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* in the light of the philosophical arguments on punishment' (2007) *African Yearbook on International Humanitarian Law* 105-137.

103 See also *Prosecutor v Moinina Fofana and Allieu Kondewa* Case SCSL-04-14-T (sentence of 9 October 2007) in which the accused were sentenced to six and eight years respectively.

104 See WA Schabas *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006) 549.

105 Art 23 Statute of the SCSL.

106 *Prosecutor v Milomir Staki* Case IT-97-24-A (judgment of 22 March 2006).

107 See XII Disposition. The 'reluctance' of the ICTY to impose life sentences could be attributed to the fact that its Statute does not expressly allow it to impose life sentences. As one scholar observes, '[t]he argument is not that life sentence is necessarily an inappropriate ultimate penalty for the Yugoslavia Tribunal to impose. But if the Security Council had wanted to allow the Tribunal to impose sentences of more than 20 years with life imprisonment as its ultimate penalty, it should, in the interest of legal certainty, have made this explicit in the Statute of the Tribunal rather than requiring the Tribunal to have recourse to "the general practice regarding prison sentences in the courts of the former Yugoslavia"'. See Van Zyl Smit (n 80 above) 8 (footnotes omitted). Schabas observes that '[i]n Jelisi , the ICTY Appeals Chamber stated that "it falls within the Trial Chamber's discretion to impose life imprisonment". Perhaps this was a message to the Trial Chambers, as none of them had previously seen fit to pronounce such a sentence.' See Schabas (n 104 above) 550 (footnote omitted).

International Criminal Court (ICC) had not convicted any criminal, but what is vital to note is that under articles 77(1)(b), 78(3) and 101(3) of the Rome Statute, a person sentenced to life imprisonment by the ICC shall have his or her sentence reviewed by the ICC to determine whether such a sentence should be reduced when such a person has served 25 years' imprisonment. This clearly demonstrates that the Constitutional Court of Uganda's ruling that life should mean 'whole-life' does not have support under international criminal jurisprudence.[108]

7 Conclusion

The Constitutional Court of Uganda held in the *Kigula* case that life imprisonment should not mean merely 20 years, as provided for under the Prisons Act, but rather that it should mean 'whole-life'. At the time of writing, the case was still pending appeal before the Supreme Court and the purpose of this article has been to demonstrate the likely consequences of a life sentence which means 'whole-life'. It has been illustrated that such a sentence would amount to cruel, inhuman and degrading punishment because it would deny the prisoners an opportunity to be considered for parole; it would make it difficult for the prison authorities to rehabilitate such offenders; it would make it difficult for the prison authorities to discipline such offenders; and that the jurisprudence of the *ad hoc* international criminal tribunals also supports the view that offenders should have a prospect of being released.

The author is alive to the fact that some people are of the view that, when the mandatory death penalty is abolished in Uganda, courts should be left with the discretion to determine the length of life imprisonment and, by implication, the executive should have no say in sentencing. The author relies on the South African Constitutional Court's jurisprudence to argue against that view and to maintain his stand that the executive should be left with the discretion, through legislation and remissions or commutations of sentences, to determine the meaning of the length of a prison sentence imposed by the courts in practice. This is because it is the executive, through the Uganda Prisons Service, that is to build prisons, feed prisoners, offer them medical care, rehabilitate them and ensure that they are detained in humane

[108] As early as 1990, the International Law Commission failed to support 'whole-life' sentences. It has been observed that during that time, '... the Commissioners ... considered whether life imprisonment as an alternative ultimate penalty [to the death sentence] would satisfy human rights norms. Of particular concern was the notion that no system of punishment that recognised human dignity of offenders could impose a penalty that excluded them permanently from society. Not only was the death penalty fundamentally unacceptable from this perspective, but life sentence prisoners would also have the prospect of release.' See Van Zyl Smit (n 80 above) 6 (footnotes omitted).

conditions. To deny the executive a say in sentencing would not only be unreasonable, but also impractical. The Constitutional Court of South Africa rightly held in *S v Dodo* that '[w]hen the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so' and that the executive has 'a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment'.[109] Thus, by stipulating that life imprisonment should mean 20 years, the executive is not in any way interfering with the independence of the judiciary. If courts were left with an unrestricted discretion to determine the meaning of life imprisonment, one should expect inconsistencies and discrepancies in sentences for the same offences but by different judges or the same judge. A person's ethnic group, for example, may influence the judge to impose a longer prison sentence.

[109] *S v Dodo* 2001 5 BCLR 423 (CC) paras 22-23 (footnotes omitted).

AFRICAN HUMAN RIGHTS LAW JOURNAL

The promises of new constitutional engineering in post-genocide Rwanda

Takele Soboka Bulto[*]
PhD Candidate, Melbourne Law School, University of Melbourne, Australia

Summary

Conflict of a magnitude that happened in Rwanda owes its causes to a multitude of factors, and ultimately require multi-dimensional responses, each of which plays a role in addressing the underlying roots of the genocide. A legal response to the problem, the Constitution of Rwanda, was adopted by a referendum in May 2003. This contribution is an attempt to gauge the role of the Constitution in reordering Rwandan society along a new social equilibrium. Seen against the backdrop of the genocide that decimated a tenth of the country's population, this contribution focuses on the identification of the causes of the genocide and the evaluation of the substantive, procedural and institutional innovations of the Constitution in its attempt to build a new path for post-genocide Rwanda.

1 Introduction

In a matter of just 14 weeks, the world witnessed approximately a million Rwandans gunned down, beaten to death or literally hacked to pieces by machetes, often after being tortured or forced to watch or participate in the execution of family members.[1] Throughout the

* LLB (Addis Ababa), LLM (Human Rights and Democratisation in Africa) (Pretoria), MA (Addis Ababa); t.bulto@pgrad.unimelb.edu.au; tsoboka@yahoo.com. This work has benefited from the illuminating comments of Alice Urusaro Karekezi of the Centre for Conflict Management (National University of Rwanda), Dr Ebriama Sall (CODESRIA), Dr Kayoede Fayemi and the participants of the Workshop on Citizenship Project organised at the National University of Rwanda (Butare) in March 2005, where the earlier version of this paper was presented. I remain indebted to them all.

1 BD Jones *Peacemaking in Rwanda: The dynamics of failure* (2001) 1.

genocide, Tutsi women were often raped, tortured and mutilated before they were murdered.[2] The systematic and planned killings carried out by the Rwandan government between April and July 1994 were described as 'tropical nazism',[3] where the massacre was 'five times as fast as the mechanised gas chambers used by the Nazis'.[4] The result was the greatest humanitarian crisis of this generation.[5]

The killers, now known as *génocidaires*, sought to murder every Tutsi, that is, 10% of the pre-genocide population of 7,78 million.[6] And they did, in fact, kill over 10% of the Rwandan people, leaving only 130 000 Tutsi alive.[7] Many ordinary citizens joined in the killings, either willingly or under coercion. The genocide was finally halted when the Rwandan Patriotic Front (RPF) took control of Kigali, in July 1994.[8]

Opinion is divided as to the underlying causes of the genocide. Some found its roots in tribalism, with the Hutus remembering past feuds and oppression against the Tutsis.[9] For other commentators, the genocide was a result of the culmination of an ongoing struggle for power and resources.[10] Thus, the lack of agreement on the causes of the genocide points to the necessity for further research.

Rwanda has subsequently embarked upon a process of post-genocide reconstruction, including constitutional reform. The new Constitution was adopted by referendum on 26 May 2003, and confirmed by the

---

2 Human Rights Watch 'The genocide' http://www.hrw.org/reports/1999/rwanda/Geno1-3-02.htm#P22_7285 (accessed 12 March 2008).

3 J Pottier *Re-imaging Rwanda* (2002) 32.

4 Bill Clinton, quoted in Jones (n 1 above) 32.

5 Jones (n 1 above) 1.

6 See 'The psychocultural roots of genocide' http://www.questia.com/PM.qst?Action=openPage Viewer&docId=96461856 (accessed 12 March 2008). It is important to note that figures about the killing, of course, do not even take into account the extent of the non-deadly violence: rape, maiming, and other forms of violence that were the order of the day. Thus it is impossible to determine the number of people who died as indirect results of the genocide through disease, malnutrition, or depression.

7 See Jones (n 1 above) 1. Approximately three-fourths of the Rwandan Tutsi population had been murdered. Ironically, however, the ratio of Hutu to Tutsi has not changed substantially since before the genocide. Following the *en masse* return of hundreds of thousands of Tutsi refugees who had been living for decades, and sometimes for generations, in Uganda and elsewhere, the Tutsi population continues to comprise approximately 15% of the population. See E Daly 'Between punitive and reconstructive justice: The *gacaca* courts in Rwanda' (2002) 34 *International Law and Politics* 355.

8 The RPF was formed in 1987 by the Tutsi refugee diaspora in Uganda. The first Tutsi refugees fled to Uganda to escape ethnic cleansing committed by extremist Hutus during the first genocide of 1959. The RPF ended the 1994 genocide by defeating the civilian and military authorities responsible for the killing campaign. See Human Rights Watch 'The Rwandan Patriotic Front' http://www.hrw.org/reports/1999/rwanda/Geno15-8-03.htm (accessed 17 May 2008).

9 Pottier (n 3 above) 32.

10 See eg DN Smith 'The psychocultural roots of genocide: Legitimacy and crisis in Rwanda' (1998) 53(7) *The American Psychologist* 743-746.

Supreme Court in its Ruling 772/14.06/2003 of 2 June 2003.[11] It is necessary to analyse the role of the Constitution in addressing the root causes of the conflict. It is the purpose of this contribution to briefly touch upon the roots of the conflict in Rwanda and analyse the role of the Constitution in addressing these causes.

Following this introduction to the subject and the problems pertaining thereto, part 2 of this contribution presents factors underlying the conflict. The role of post-genocide constitutional responses to the conflict are appraised in part 3. In part 4, the paper looks at the road ahead for Rwanda in the country's constitutional and other (legal) efforts to reconstitute itself along a new societal equilibrium. Finally, conclusions are drawn in part 5 of the study.

The approach used is socio-legal, but the content is limited by the hazards of brevity and generalisation. Understandably, it is impossible to address all issues pertaining to the causes of the Rwandan conflict and the role of the Constitution in resolving the same in a work of this volume. Thus, this article raises only the most salient issues.

2 The causes of the Rwandan conflict

In order to gauge whether the new Constitution has addressed the underlying causes of the genocide, one needs to identify the causes. It must be stressed that a misconception of these causes may easily lead to a misdiagnosis of the nature of the conflict, which in turn may lead to the mismatch of response and the perpetuation of conflict and suffering. Such a situation is akin to picking ants from one's body while standing on an anthill. It is imperative, therefore, to identify the real causes of the conflict.

2.1 Socio-economic causes: The struggle for resources

According to Jeong, basic needs 'provide factual, objective, rational criteria for analysing and evaluating an emergent social situation that may contain in its womb the potential for generating conflict'.[12] Food and shelter constitute the minimum or the core-of basic human needs. Human needs theory posits that conflicts result from ignoring or suppressing such needs that must be satisfied and catered for if societies are to be significantly free of conflicts.[13]

The Rwandan conflict can be explained in terms of the state's unwillingness and inability to identify and respond to the basic human needs

---

11 See Official Gazette of the Republic of Rwanda, Year 42, Special Issue 4, June 2003. See also http://www.chr.up.ac.za/hr_docs/constitutions/docs/RwandaC(rev).doc (accessed 31 March 2008).

12 HW Jeong *Peace and conflict studies: An introduction* (2000) 70.

13 SG Amoo *The challenge of ethnicity and conflicts in Africa: The need for a new paradigm* (1997) 11.

of the society.[14] Throughout the first half of the twentieth century, the Rwandan population was sparse and geographically mobile.[15] In the latter half of the twentieth century, Rwanda found itself under the tremendous pressure of an increasing population. Consequently, land occupation became a catalogue of dwindling entitlements due to the population pressure such that[16]

> [b]y the middle of the twentieth century, the typical Rwandan peasant family lived on a hill which supported between 110 and 120 inhabitants per square kilometer; in 1970 that same family had to make a living on a hill which supported between 280 and 290 persons per square kilometer.

Before the events of 1994, Rwanda was the most densely populated country on the African continent.[17] Due to this population pressure on land, agricultural production fell far short of feeding the population. Worse, the government was unable to respond to the pressing human needs for food, partly due to Rwanda's exceptionally subordinate role in the world economy.[18] Ninety-nine percent of its exports were of primary commodities — coffee, tea and tin.[19] Yet, the forces of international markets worked against Rwanda in the 1990s and the prices of coffee and tin dramatically fell, causing havoc with the financing of the Rwandan economy.

Consequently, in the late 1980s and early 1990s, Rwanda was hit by institutional confusion and breakdown, owing to land shortages and poor performance in the international market. At this juncture, the rulers reframed the nature of economic hardship, and rekindled identity politics based on the past: 'Who's who? Where do my neighbours come from? ... Are they not cultivating land my ancestors once owned?'[20] Resource competition must be understood in the overall context of pre-genocide Rwandan politics. Extremist Hutu leaders have consistently warned the Hutus that there is a danger of Tutsis in exile returning home and claiming the lands they had been forced to abandon.

Cognisant of the acute shortage of land, long before the genocide, Rwandan authorities had declared the country 'too overpopulated to permit the return of the refugees'.[21] Internally there were too many people on too little land. Tutsis were held responsible for overpopulation. With the reduction of the number of the Tutsis, argued those advocating genocide, there would be more for the survivors. The ques-

---

14 Amoo (n 13 above) 13.

15 Pottier (n 3 above) 11.

16 Pottier (n 3 above) 20.

17 ICTR judgment*The Prosecutor v Jean-Paul Akayesu,* Case No ICTR-96-4-T, para 79.

18 Africa Direct Conference http://homepages.udayton.edu/~uwiringi/genocide/understanding. html#turmoil (accessed 21 December 2007).

19 *Akayesu* case (n 17 above) para 79.

20 Pottier (n 3 above) 10.

21 Africa Direct (n 18 above) 23.

tion of knowing who were to be the victims and who the survivors was heavily determined by cultural, historical and political reasons.[22] In line with the long-standing discrimination, the Hutu regime had been in the habit of attacking the Tutsis, thereby forcing them into exile and then allocating the lands thus abandoned to the Hutu.[23] Thus the conflict at least partly owes its causes to the population density, the struggle for land and the means of livelihood, of which unscrupulous leaders took advantage to incite the population against each other.

2.2 Political causes: The struggle for power and the reluctance to democratise

According to the instrumentalist view, ethnicity is not a natural cultural residue, but a consciously crafted ideological creation. In other words, 'ethnic conflicts result from the manipulation of the elite who incite and distort ethnic consciousness into an instrument to pursue their personal ambitions'.[24]

The end of the Cold War brought this view into application in Rwanda. During the Cold War, Rwanda was ruled by a military dictator who entrenched a one party system. Allying itself with the West, Rwanda was firmly located in the Cold War, with little imperative for the Western powers to modify the way in which power was exercised in Rwanda.[25]

The end of the Cold War brought about the shift in the priorities of the Western powers in the sense that they began the search for a new source of legitimacy as the ideological war came to an end, following the disintegration of the USSR. As a result, they started experimenting with the promotion of democratic values and a free market. Desirous of recasting power relations, pressure mounted on the Rwandan government at the international, regional and national levels. Foremost, pressures came from the United States (USA), France, Belgium, the United Nations (UN), the European Union (EU), the then Organisation of African Unity and regional heads of state.[26] In June 1990, for instance, France announced that in the future its aid would be tied to democracy. Within a month, the Rwandan government had conceded to move towards multiparty democracy.[27]

These developments left Rwanda entirely at the mercy of the global forces in the reordering of the post-Cold War world. Extremely dependent as it was on the West, and obtaining more income from aid than from internal sources, Rwanda could do nothing but abide by the

---

22 G Prunier *The Rwanda crisis 1959-1994: History of a genocide* (1995) 4.

23 *Akayesu* case (n 17 above) para 90.

24 Amoo *(*n 13 above*)* 10.

25 Africa Direct (n 18 above) 23.

26 As above.

27 As above.

changing rules of the game which required it to reorder its society. From 1991 onwards, France and the USA were working behind the scenes to broker a renegotiation of how power was to be exercised inside Rwanda.[28]

This had serious implications for the Rwandan internal politics and became the power keg of the conflict. Firstly, the West's promotion of the agenda of democracy undermined existing power relations in Rwanda. In particular, it threatened the future of the one party system. Secondly, the move towards democratisation heralded competition for power. Consequently, power was soon to be shared beyond the ruling elite.

Thus, Western pressure to democratise Rwanda undermined the existing form of government, sparked competition and decisively shaped the new form that politics would take. Of paramount importance was the initiation in 1992 and conclusion in 1993 of the Arusha Peace Agreement (Arusha Agreement),[29] which paved the way for the incorporation into government of all political forces supporting democracy, pluralism and national unity.[30] Pressured by foreign donors, President Habyarimana was compelled to accept the multiparty system in principle.[31] As a result, the new Constitution introduced a multiparty system, and this was followed by the promulgation of the law on political parties.[32]

Upon its completion, the Arusha Agreement gave the President a ceremonial position, and the then ruling party, the *Mouvement Républicain Nationale pour la Démocratie et le Développement,* was allocated five out of 21 ministerial portfolios, including the defence portfolio. The RPF was given five ministerial portfolios (including the portfolio of the interior), and 50% control of the military high command. In addition, according to the Arusha Agreement, RPF forces would make up 50% of the low ranks of the armed forces.[33] The remaining ministerial portfolios went to pro-Arusha parties. Accordingly, the major opposition party, the *Mouvement Démocratique Républicain,* was given four posts, including the office of Prime Minister. The *Parti Social Démocrate* and the *Parti Libéral* were each given three portfolios, while the *Parti Démocrate Chrétien* was allocated a single ministerial position.

The rulers and supporters of the old regime realised that they risked being completely sidelined. For them to remain in power, 'a bloody last ditch war would have to be fought'.[34] Masterminding the genocide,

---

28 As above.

29 Peace Agreement between the government of the Republic of Rwanda and the Rwandese Patriotic Front, signed at Arusha, Tanzania on 4 August 1993.

30 Africa Direct (n 18 above).

31 *Akayesu* case (n 17 above) para 94.

32 As above.

33 As above.

34 As above.

this small privileged group first set the majority against the minority, so as to counter the threat of a loss of power. In this process, Tutsis and sympathiser Hutus were identified with the RPF and targeted. Faced with the RPF successes on the battlefield and at the negotiation table, members of this ruling elite transformed the strategy of ethnic division into genocide.[35] As the architects of the genocide, they believed that the extermination campaign would restore the solidarity of the Hutu power under their leadership and help them win the war with the RPF, or at least improve their chances of negotiating a favourable peace.[36]

The upshot of the whole process was that the 'spirit of democratisation, which seemed to be gaining momentum in the wake of the Cold War, receded and then suffered severe blows from the massacre in Rwanda'.[37] In effect, the violence took place in the context of a struggle for power between the old guard and the aspiring new elite associated with the multiparty initiatives and the Arusha peace process. In conclusion, one of the major causes of the Rwandan conflict identified here is the deliberate and excessively selfish choice of the elite to foster hatred and fear to keep itself in power.

2.3 The role of the media: The policy of fear

The media was instrumental in organising the genocide and disseminating hatred and fear among the population. The *akazu* (Habyarimana's household or inner circle) made every effort to demonise the RPF by making references to past Rwandan history. The essential message of this rhetoric was not only one of hate, but also one of fear.[38] Fear is a powerful tool for mobilisation in situations of civil war in the countries that have a history of past episodes of massacres and other forms of gross abuses,[39] as has been the case in Rwanda. There has been a fear of the possibility that the RPF would re-impose Tutsi rule in Rwanda.[40] The media first established the feasibility of genocide attacks by Tutsi against Hutu.[41] Evidence came from a partial genocide that had been committed just the year before, across the border in Burundi. The media sought to establish the parallels between the internal dynamics of Rwanda and Burundi by pointing to the example of the assassination of a democratically elected Hutu President of Burundi by extremist Tutsi members of his own army.

---

35 Human Rights Watch http://www.hrw.org/reports/1999/rwanda/ (accessed 12 March 2008)

36 As above.

37 I Filatova 'Democracy versus state: The African dilemma' in H Solomon & I Liebenberg (eds) *The consolidation of democracy in Africa: A view from the south* (2000) 15.

38 Jones (n 1 above) 40.

39 As above.

40 As above.

41 As above.

Hence, from the 1990s Rwanda saw several publications dedicated to the dissemination of ethnic hatred and incitement to violence. In December 1990, for instance, the *Kangura* newspaper (owned by the then high-ranking officials) published the 'Appeal to the conscience of the Bahutus', including the 'Ten Commandments', which called on Hutus to show contempt and hatred for the Tutsi minority, and to slander and persecute the Tutsi women. Moreover, it published a list of names of members of the Tutsi population and moderate Hutus, and the lists were later broadcast by *Radio Télévision Libre des Milles Collines* (RTLM), nominally a private radio, which eventually led to the killing of some of those listed.[42]

Indeed, the radio was one of the chief tools in inciting and carrying out the genocide, as broadcasts were calling for the eradication of the 'Tutsi cockroach'.[43] Broadcasts assured the Hutu listeners that plenty of targets remained.[44] Thus, during the genocide, killers often carried a machete in one hand and a transistor radio in the other.[45] In short, the media played a pivotal role in inciting hatred and instilling fear between the Hutu and the Tutsi and in organising the genocide itself.

3 Addressing the causes of the conflict: The role of the Constitution

With their dark past, the way ahead for Rwandans was bound to be extremely difficult and the path towards peace and reconciliation would be bumpy. While much can be learnt from the past, the events of the last decade reveal that there is much to discard and much to achieve in the future. Underpinned as it is with various causes, the conflict can only be addressed properly if various responses are adopted. In other words, a single strategy is rarely sufficient for a multi-causational conflict of this nature and magnitude. Each cause must be addressed on its own terms. While there is 'no single superior strategy or institutional model for addressing the [Rwandan] problem',[46] the role of the Constitution in reversing the causes of the conflict is of paramount importance.

---

42 Amended indictment of *The Prosecutor v Hassen Ngeze*, Case No ICTR-97-27 para 6.10.

43 'The United Nations and Rwanda 1993-1996' (1996) 8 *United Nations Bluebook Series* 10.

44 As above.

45 S Power 'Bystanders to genocide: Why the United States let the Rwandan tragedy happen' (September 2001) *Atlantic Monthly* 88-89.

46 S Gloppen 'Reconciliation and democratisation: Outlining the research field' http://www.cmi.no (accessed 11 March 2008).

3.1 Healing ethnic divisions and deconstructing racialisation

The fragmentation of ethnicity was one of the basic causes underlying the Rwandan genocide. With political manipulation of ethnicity as the culprit for the eventual massacre, the Constitution must facilitate co-operation among all groups by calling them back to an inclusive social system. The Hutus and the Tutsis have lived together for centuries, with little mutual hostility.[47] Reintegration of the ethnic groups of the country must occur to establish a unified national consciousness. One of the means of achieving unity is by submitting all citizens to the same rights and equal access to public resources and by providing for a supreme legal basis for all Rwandans to share in the spirit of national unity.

Predictably, the Constitution is wary of using divisive terms and in its Preamble talks of 'We, the people of Rwanda', thereby underlining the unity of all groups in the country. The Constitution is based, *inter alia*, on the principle of 'eradication of ethnic and regional divisions and promotion of national unity'.[48] The aspiration is to change the focus from ethnicity and race to the creation of a common Rwandan national identity.

In line with such an approach, the government itself is referred to as a government of national unity, and every Rwandan citizen is now a *Banyarwanda*. 'Whatever inter or intra-ethnic fault lines there may be in Rwanda today', argues Zorbas, 'references to ethnicity or any other "divisive" or "political" category are substituted with the concept of the *Banyarwanda*, the people of Rwanda.'[49] Reference to identities other than the officially-sanctioned *Banyarwanda* are regularly met with informal public shaming campaigns, labelling the individuals uttering these propositions as *génocidaires*, sympathisers and even negationists who promote divisionism.[50]

3.2 The non-divisive political competition and equitable sharing of power

In post-war situations, electoral systems serve prominent purposes: *Inter alia,* they move the conflict from the military battleground to the political arena, and initiate and consolidate the democratisation process. Yet, there is an increasing awareness that ill-timed, badly-designed or poorly-run elections can undermine both peace and democratisation in post-war situations.[51] In situations where ethnic relations are tense and volatile, as is the case in Rwanda, the introduction of competitive

---

47 E Bradley 'In search for justice — A Truth and Reconciliation Commission for Rwanda' (1998) 7 *Journal of International Law and Practice* 129.

48 See Preamble.

49 E Zorbas 'Reconciliation in the post-genocide Rwanda' (2004) 1 *African Journal of Legal Studies* 43.

50 As above.

51 See UNDP *Electoral systems and processes*: *Practice note* (2003) 9-10.

politics, especially the majoritarian electoral systems of 'winner takes all', can provide the stimulus for an explosion along ethnic lines. The salience of ethnicity in competitive politics creates ascriptive majority-minority problems where elections more or less become a census of the adult population. Thus:[52]

> [E]lectoral systems have a role in fostering and retarding ethnic conflict. The delimitation of constituencies, the electoral principle (such as proportional representation or first-past-the-post), the number of members per constituency, and the structure of the ballot all have a potential impact on ethnic alignments, ethnic electoral appeals, multi-ethnic coalitions, the growth of extremist parties, and policy outcomes.

If the Constitution fails to address problems about the rules of the game of power sharing, parties develop along ethnic lines and contest extremely divisive elections, according to which the largest ethnic group takes power in the majoritarian electoral system. In such a case, identifying the voters of each party is a simple matter as ethnic and party identifications would become synonymous. In the Rwandan context, this would practically lead to permanent rule by the Hutu, to the exclusion of the Tutsi and the Twa. Such a situation would engender the feeling of permanent exclusion on the part of the minority who would be locked out of office because of their number, and this sense of permanent exclusion generates a predisposition to a spiral of violent opposition and conflicts.[53]

The critical factor is the electoral formula which determines how votes are translated into seats. In post-war situations, the main test is how the system handles challenges of reintegration and representation. There is consensus that simple majority rule is not an effective form of democracy for such situations. A system requiring an absolute majority may induce alliances between political parties during the electoral campaign, but may also create permanent minorities. Proportional representation and power-sharing techniques that encourage broad-based governing coalitions are more appropriate.[54]

More recently, electoral innovations have been used by a growing number of severely divided societies in Asia and Africa as a vehicle for inter-ethnic accommodation. Consociational democracy, described as 'a model of democracy that seeks to resolve political differences by techniques of consensus rather than majority rule',[55] is considered a viable solution. The leaders of each ethnic group form a ruling coalition where a joint rule is based on the distribution of high-level offices.

---

52 DL Horowitz *Ethnic groups in conflict* (1985) 628.

53 Amoo (n 13 above) 19.

54 See generally JD Barkan 'Rethinking the applicability of proportional representation for Africa' in TD Sisk & A Reynolds (eds) *Elections and conflict management in Africa* (1998); R Vengroff 'Governance and the transition to democracy: Political parties an the party system in Mali' (1993) 31 *Journal of Modern African Studies* 541.

55 Jeong (n 12 above) 237.

Each group has a veto power over important government policies. The ability of the minority to veto issues of particular importance provides a high degree of autonomy. The key success of consociationalism therefore lies in the ability and willingness of elites to negotiate inter-group compromises that are acceptable to all segments of society. The choice of a particular electoral system depends, among other things, upon a country's inter-ethnic power dynamics, history and aspirations and there is no single electoral system that can be prescribed for all countries and situations. Each has its own merits and demerits.

The new Rwandan Constitution incorporated various solutions to deal with the problem of divisive majoritarian electoral politics. Firstly, under article 54, political parties are prohibited from identifying themselves with any race, ethnic group, tribe, clan, region, sex, religion or any other divisive element, as they 'must constantly reflect the unity of the people of Rwanda'. The Senate is empowered to submit a complaint to the High Court against a political party that has 'grossly violated' the duty to reflect the unity of the people of Rwanda.[56] If the party is found in breach of this duty, the High Court may impose a sanction that ranges from a formal warning to the dissolution of the party.[57] Yet, the question remains as to how and on what basis one can gauge whether a party reflects the unity of the people of Rwanda. A possible interpretation might be that a party must show the inclusion of Hutus, Tutsis and Twas. The downside of this approach is that it jeopardises the notion of *Banyarwanda*, as parties would be required to show how they have incorporated all ethnic groups, thereby revealing which member belongs to which ethnic group. Thus, in an attempt to move away from ethnicity in the political arena, the Constitution might have inadvertently drawn attention to the issue of ethnicity. However, only the future will reveal the actual application of the provisions of articles 54 and 55.

A second constitutional mechanism that is designed to ensure power sharing is the limitation imposed upon the number of deputies representing a ruling party in the Cabinet. The majority party in the Chamber of Deputies 'may not exceed 50% of all the members of the Cabinet'.[58] This restriction presumably constitutes a strong structural constraint on the power of the main party, potentially forcing it into cross-party alliances and compromises.

Thirdly, members of parliament are elected on the basis of proportional representation.[59] The principal merit of the proportional electoral system is to be found in its ability to reflect more accurately the preferences of voters in terms of the seats in parliament. Voters are said to be more willing to cast votes for smaller parties when they

56 Art 55.
57 As above.
58 Art 116.
59 Art 77.

know that their votes will produce tangible results, and when seats are allocated on the basis of the share of the popular vote. Arguably, because minority views are not marginalised, political discourse and political participation are strengthened in proportional representation electoral systems.

In addition, the Constitution requires the parties to be broad-based. A political organisation or list of independent candidates which fails to attain at least 5% of the votes cast at the national level during legislative elections cannot be represented in the Chamber of Deputies,[60] and cannot benefit from grants given to political organisations by the state.[61] Thus, constitutional safeguards to avoid the exclusion of segments of the society have been put in place.

Furthermore, the President of the Republic and the Speaker of the Chamber of Deputies may not be members of the same political party.[62] This arrangement will help to enhance the balance of power among the top officials, will provide a mechanism of close checks and balances between the legislative and the executive and should contribute towards the prevention of excesses and abuses of power, the very factors which contributed to the genocide. This arrangement would ideally reduce the possibility of excessive domination of a party over others. While the power sharing introduced under article 58 apportions power among parties, the real problem for the Rwandan conflict has been much more of an inter-ethnic competition for power. Even if the President and the Speaker of the Chamber of Deputies come from different parties, they can still be from the same ethnic group, and the arrangement may lead to the domination of top-level offices by members of the same ethnic group. The Constitution seems to be overly obsessed with power sharing among political parties without ensuring such among the ethnic groups; yet it was the latter that was at the root of the conflict in Rwanda.

In order to prevent or remedy the transgression of powers by the executive and the legislature, independent and impartial courts are established by the Constitution with a power to adjudicate, *inter alia*, disputes pertaining to the conduct of the other branches of the state.[63] The decisions of the courts are binding on all public authorities and individuals.[64]

3.3 Dealing with discrimination

Habyarimana's regime implemented an open policy of discrimination

---

60 As above.

61 Under art 57 of the Constitution, political organisations which are duly registered are entitled to grants by the state.

62 Art 58.

63 Art 140.

64 As above.

against the Tutsi by applying the quota system in universities and government services.[65] A policy of systematic discrimination was pursued even among the Hutu themselves, in favour of those from Habyarimana's native region.

The genocide brought attention only to the Tutsi and the Hutu, leaving the Twa largely ignored.[66] Thus, the Constitution should recognise the equality of its citizens without discrimination. At the conference on constitutional development in Rwanda, a working group addressed the need for the protection of political minorities.[67] This can be achieved through a constitutional equality clause coupled with a prohibition of discrimination clause.

Cognisant of this fact, the Constitution prohibited discrimination by declaring that '[a]ll Rwandans are born free and remain free and equal in rights and duties'.[68] Besides, any discrimination based on ethnic origin, tribe, clan, colour, sex, region, social origin, religion, opinion, economic circumstances, culture, language, social situation, physical or mental disability or any other form of discrimination is prohibited and is punishable by law.[69]

3.4 Regulation of the media and hate speech

Freedom of expression is a fundamental human right, recognised as a core value and bare minimum of an open society, essential to the discovery of truth, the promotion of democracy and personal fulfillment.[70] However, the assertion that the right to expression and media freedom is fundamental does not imply that the right is absolute.[71] Freedom of expression may be limited in proportion to the extent of the necessity to protect the rights of others and by the legitimate needs of the society. Obviously, the reasons for limiting a right as fundamental as the right to expression need to be exceptionally strong. Thus, '[i]t is recognised that public order, safety, health and democratic values

---

65 *Akayesu* case (n 17 above) para 93.

66 A Wing & M Johnson 'The promise of a post-genocide Constitution: Healing Rwandan spirit injuries' (2002) 7 *Michigan Journal of Race and Law* 465.

67 See 'Rights of minorities, disadvantaged, women and children' in Conference on Constitution Development, Kibuye-Rwanda (24 August 2001) (comments of Claudine Gasarabwe of Rwanda) (unpublished) 80-83.

68 Art 11.

69 As above.

70 'Expression' is a wider concept than 'speech' and includes, but is not limited to, activities such as displaying posters, painting and sculpting, dancing and the publication of photographs.

71 Under art 19 of the International Covenant on Civil and Political Rights (CCPR), to which Rwanda is a party, freedom of expression can be limited for purposes of ensuring 'respect of the rights or reputations of others' and for 'the protection of national security or of public order (*ordre public*), or of public health or morals'. See CCPR, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

justify the imposition of restrictions on the exercise of fundamental rights'.[72]

As applied to media freedom, limitations are justified by, *inter alia*, the historical context of a country and the role and contribution of the media towards the making of that history.[73] Given the prominent role that the media played in the years that preceded the 1994 genocide in Rwanda, the regulation of hate speech is of paramount importance. The propagation of hate speech continued unabated in the post-genocide period as well, as radio stations and newspapers run by extremists in exile continued to foment ethnic hatred in Rwanda.[74] Seen against the backdrop of the infamous role and contributions of the media in the pre-genocide Rwanda, 'the Rwandan government's [post-genocide] approach to the media has been shaped largely by the need to erase the harsh experience inherited from the misuse of press freedoms during the genocide'.[75] It is natural, therefore, that article 33 of the Constitution stipulates that '[p]ropagation of ethnic, regional or racial discrimination or any other form of division is punishable by law'.[76]

The Media Bill imposes a minimum jail term of 20 years for any local journalist found guilty of using the mass media to incite any section of the Rwandan population to engage in genocide.[77] Under article 89, it stipulates that anyone who successfully uses the media to incite Rwandans to genocide will receive the death penalty.[78] Article 166 of the Rwandan Penal Code 21/77 criminalises 'any speech made at public meetings or in public places which is designed to cause the citizens to rise up against one another'. Thus, through constitutional and other legislative prohibition of hate speech, an attempt has been made to curtail the potentially destructive role of the media.

3.5 Land redistribution and participatory development

As has been outlined above, agriculture is the life artery of the Rwandan economy as it provides the means of livelihood for 87% of the

---

72 n 71 above, 144.

73 Eg, in 1995, the Burundian radio station, *Radio Democracy*, coupled with extremist newspapers, was to blame for the bloodbath that claimed the lives of not less than 156 000 people. See Article 19 *Broadcasting genocide censorship, propaganda and state-sponsored violence in Rwanda 1990-1994* (1996) 175.

74 GM Khadiagala 'Country paper: Governance in post-conflict situations: The case of Rwanda' Bergen Seminar Series, Bergen, Norway, May 2004 13.

75 As above.

76 So, too, under art 20 of CCPR, '[a]ny propaganda for war shall be prohibited by law ... advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

77 L Louw 'Hate speech in Africa: Formulating an appropriate legal response for a racially and ethnically divided continent with specific reference to South Africa and Rwanda' in C Heyns (ed) *International yearbook of regional human rights Master's programmes* (2001) 186.

78 Louw (n 77 above) 187.

population of Rwanda.[79] Population pressure and the struggle to have access to land were among the most pressing causes of the genocide. By forcing the Tutsi into exile, the previous governments have been allocating land left behind by the Tutsi to the Hutu.

In addressing the problem, the Constitution has provided that '[n]o Rwandan shall be forced into exile'.[80] Besides, the 'right to private, individual or collective property' has been guaranteed and is 'inviolable'.[81] Because of non-discrimination and equality clauses, these rights can be availed by all citizens on an equal footing. This is a response to the 'bad land sharing process'.[82]

Still, equitable land redistribution must be achieved sooner than later, as the persistence of problems relating to land continues to serve as reminders of past crises. There is a pressing need to reallocate land so as to accommodate the interests of Rwandan refugees who have been returning from years of exile in other countries.

3.6 Democratic and human rights institutions

The need to promote or rediscover democratic governance in post-conflict societies necessarily entails recreating a wide range of institutions and mechanisms against the backdrop of political polarisation. Khadiagala rightly observed:[83]

> Where violence has decimated social consensus and civic norms, post-conflict governance involves resuscitating effective state authority, correcting past human rights violations, and promoting social reconciliation. The transition to a post-conflict dispensation may also require crafting new institutions to manage problems spawned by the conflict. In most post-conflict societies without a tradition of democratic governance, the institutional challenge inheres in building systems of accountability, transparency, and participation.

Mindful of this, the Rwandan Constitution establishes a handful of institutions that are charged with the responsibility of upholding and enforcing human rights and democratic ideals. With the general aim of enabling the conduct of free and fair elections, the Constitution establishes an independent National Electoral Commission,[84] responsible for the preparation and the organisation of any local, legislative and presidential election and referendum. This Commission also has the duty to ensure that elections are free and fair.

---

79 National Unity and Reconciliation Commission *Opinion survey on participation in* gacaca *and national reconciliation* (2003) Annex 2 5.

80 Art 25.

81 Art 30.

82 National Unity and Reconciliation Commission *Report on the evaluation of national unity and reconciliation* (2002) 21.

83 Khadiagala (n 74 above) 1.

84 See art 180.

The Public Service Commission is an independent public institution responsible for the recruitment of public servants in central government and in public institutions.[85] Its establishment is indicative of a constitutional effort to address discriminatory practices in the area of employment that has prevailed for a long time. The Public Service Commission ensures the equitable distribution of employment in public institutions. Article 178 establishes the National Unity and Reconciliation Commission, which is responsible, *inter alia*, for the co-ordination and promotion of national unity and reconciliation, and to denounce and fight against acts, writings and language that are likely to promote all kinds of discrimination, intolerance and xenophobia. In addition, the Commission for the Fight against Genocide has been provided for under article 179, and it is charged, *inter alia*, with the responsibility of organising a permanent framework for the exchange of ideas on genocide, its consequences and the strategies for its prevention and eradication.

Article 182 of the Constitution establishes the Office of the Ombudsman, which is generally responsible to act as a link between the citizens on the one hand and public and private institutions, on the other. The Ombudsman is empowered to prevent and fight against injustice, corruption and other related offences in public and private administration. With the aim of educating and sensitising the population on human rights, the establishment of the National Commission for Human Rights is provided for under article 177. It is also responsible for examining the violations of human rights committed on Rwandan territory by state organs, public officials using their duties as cover, by organisations and by individuals, for carrying out investigations of human rights abuses in Rwanda and filing complaints in respect thereof with the competent courts.

The Constitution thus throws up promises of addressing the problems underlying the Rwandan conflict, not only through its substantive guarantees, but also via the establishment of the necessary institutional framework responsible for translating those promises into reality. However, much still depends upon the willingness and ability of these institutions to translate the constitutional guarantees into practice.

4 Bridging the past and the future: Towards national reconciliation

It is trite that constitutions attempt to provide solutions for existing or pre-existing social, economic and political problems that a given society has experienced.[86] This is equally true of the new Rwandan

85 Art 181.

86 M Haile 'The new Ethiopian Constitution: Its impact on unity, human rights and development' (1996) 20 *Suffolk Transnational Law Journal* 3.

Constitution, which should be praised for incorporating a wider Bill of Rights, providing for mechanisms for the deconstruction of racial discrimination and the reasonable control of hate speech, equitable power sharing, multiparty politics and other democratic ideals.

Nevertheless, constitutional guarantees are indispensable but insufficient in themselves to heal deep-rooted conflicts. At best, 'the political constitution establishes an overarching framework that can hopefully facilitate the co-existence of all socially constituted entities, extending in size from the socially constituted self to the political community at large'.[87] Yet, a constitution cannot create 'a track from which no one can deviate. It is simply not humanly possible.'[88]

Much about the prospect of constitutional success or failure hinges upon the implementation of its promises and guarantees. To have an exemplary constitution is one thing. To implement it is quite another. The present Rwandan government must demonstrate the political will and commitment to implement the Constitution, thereby causing the Constitution to play its part in uprooting the causes of the conflict. Although the constitutional provisions are promising — both from the point of the human rights catalogue and the institutional mechanisms it provides for — the achievement of the level of protection envisaged by the Constitution requires a political effort of monumental proportions. Observers have warned that post-conflict constitution-making processes have been met with mixed results:[89]

> New constitutions have been promulgated in some post-war situations, and the results are mixed. At its best, constitution making can generate social consensus on constitutive issues and simultaneously serve as a healing process in deeply divided societies. At its worst, it can be a quick-fix legitimacy exercise that gives the incumbent a thin veil of legitimacy but remains a dead letter — an instrument that is abused or ignored — and thereby discredits the democratic process itself.

Even if it were implemented, due to the multitude of underlying causes of the conflict, the Constitution cannot be regarded as a panacea for all wounds. Needless to state, 'below the surface, in the hearts and minds of the population ... the real damage has been done'.[90] Because the human rights violators are fellow citizens, living alongside everyone else, the victims cannot simply forgive and forget.[91] As the proverb has it, 'the bitter heart eats its owner'.

---

87 C Willis *Essays on modern Ethiopian constitutionalism: Lectures to young lawyers* (1997) 3 (unpublished).

88 Willis (n 87 above) 30.

89 See *Governance interventions in post-war situations: Lessons learned* Bergen Seminar Series, Bergen, Norway 5-7 May 2004 4 (unpublished).

90 S Fisher *et al Working with conflicts: Skills and strategies for action* (2000) 125.

91 Fisher *et al* (n 90 above) 131.

This reality points to the pressing need for reconciliation whereby the society brings together the concepts of truth, mercy and justice.[92] Reconciliation does not happen overnight, or simply because a constitution is adopted. The full and active participation of the people who have been affected by the violence is crucial to the process of reconciliation and the establishment of peace.[93]

An attempt at a successful reconciliation is inextricably intertwined with the striving to discover the truth, to render justice and mercy. The search for the truth is based on the assumption that knowledge about the past and about the people who were responsible for planning and executing crimes and abuses can be a road to reconciliation.[94] Its major contribution hinges on the recognition of the truth of past violence by giving a voice to victims and by creating a common memory for the future. Fisher argues that the process by which the truth is reached is in itself of great importance, as it provides an avenue whereby people learn again how to relate to each other positively.[95] It has been observed thus:[96]

> A remembering process should be a chance for the victims to confront and defeat their fears, for the perpetrators to acknowledge and understand their actions and for the members of a community or society to embark on a deep process of social awareness that examines the causes and consequences of violence. Lessons need to be drawn that enable people to avoid a repetition of history.[97]

For justice to lead to reconciliation, the perpetrators must be held responsible and be punished for their crimes. However, justice cannot be taken solely as a means of retribution or revenge. It must focus on healing social relationships and must attempt to build the type of society that reflects the values of those who suffered.[98] Retributive justice is as relevant in Rwanda as restorative justice itself. It individualises a responsibility in the sense that trials help differentiate perpetrators of the heinous crimes from among members of a group, so that it cannot

---

92 As above.

93 See generally DA Crocker 'Truth commissions, transitional justice and civil society' in RI Rotberg & DF Thompson (eds) *Truth v justice: The morality of truth commissions* (2000); H Adelman 'Rule-based reconciliation' in A Suhrke *et al (*eds*) Roads to reconciliation* (2004); A Honwana 'Children of war: War cleansing in Mozambique and Angola' in Suhrke *et al*, above.

94 Gloppen (n 46 above) 52.

95 Fisher *et al* (n 90 above) 134.

96 See UNDP *Electoral systems and processes*: *Practice note* October 2003, 14.

97 As above. There is a reason to declare that '[t]hose who forget the past are doomed to repeat it' (emblazoned at the entrance to the museum in the former Nazi concentration camp in Dachau, Germany).

98 Archbishop Desmond Tutu's statement is instructive in this regard: 'Confession, forgiveness and reconciliation in the lives of nations are not just airy-fairy religious and spiritual things, nebulous and unrealistic. They are the stuff of practical politics.' From the final report of the Truth and Reconciliation Commission of South Africa (1998) as quoted in the report 135.

be said that all Hutu are guilty of genocide.[99] More importantly, it helps fight the culture of impunity in matters involving serious crimes, such as the crime of genocide and crimes against humanity.

One of the innovative means used by Rwanda in ensuring *génocidaires'* accountability for their part in the genocide is the resort to the traditional form of justice, namely, trial by *gacaca* courts as a means of local participatory justice. Because these courts are a traditional form of justice, they make the discovery of truth about the genocide easier. Presumably, perpetrators of the genocide would find it easier to come forward and confess their wrongdoings. *Gacaca* courts are also of crucial importance in boosting the formal justice system in bringing to justice the *génocidaires*, whom the formal judicial system might never be able to punish because of the large number of people involved.[100] However, concerns have been raised about the low level of education of the judges of the *gacaca* courts, problems associated with fair trial, a lack of procedural safeguards against error and the partiality of the judges.[101]

Mercy includes the concept of forgiveness, but it is also a function of the ability of people who have been affected by violence to cultivate respect for their common humanity and to agree that it is possible for them to co-exist. Within this context, reconciliation is about the way in which societies torn apart by internal conflict mend their social fabric and reconstitute the desire to live together. Accordingly, mercy presupposes the uncovering of the truth, and the knowledge of what had happened before.[102] To that end, the National Unity and Reconciliation Commission of Rwanda shoulders an immense responsibility.

5 Conclusion

Competition for access to power and resources has turned those peoples who for centuries have lived together harmoniously in

---

99 See Daly (n 7 above) 375.

100 See K Hornbergera 'Rwandan *gacaca* courts in crisis: Is there a case for judicial review?' (2007) 3 *Africa Policy Journal 9.*

101 Hornbergera (n 100 above) 11. A case has been made that 'in the post-genocide context the *gacaca* courts were the best opportunity for Rwanda to attain some semblance of closure'. See Hornbergera (n 100 above) 1.

102 The words of a witness at the Port Elizabeth (South Africa) human rights violation hearings touch the heart: 'Thank you, Bishop [Desmond Tutu], but I am sorry, there is something else that I would like to ask. Do not take me wrong, my Bishop, you cannot make peace with somebody who does not come to you and tell you what he has done. We will have peace only when somebody comes to you and says: "This is what I did. I did this and this and that and that." If they do not come, if we do not know who they are, we will not be able to. But now I will forgive who has. That is the whole truth, Sir. We take it that the people who are listening and the people who are coming to the [Truth and Reconciliation] Commission will be touched as well. Their conscience will tell them that if they want forgiveness they should come and expose themselves so that they can also get the healing that the victims are getting' (quoted in Fisher *et al* (n 90 above) 135).

Rwanda into deadly enemies. The media added fuel to a house that was already on fire through deliberately calculated hate propaganda. In order to close the door on this gloomy past, the promulgation of the new Constitution heralded a new era of reunion of all Rwandans. Together, Rwandans could start building their new identity under the new Constitution.

It is, however, not a case of all differences suddenly disappearing. As constitutions are vital instruments for social engineering, the new Constitution marks a move away from mutual insecurity towards mutual empathy. Nevertheless, there still remain questions of power sharing among the ethnic groups. The Constitution seemed to have ensured equitability of power sharing among the political parties instead of ensuring a balance of power among the ethnic groups. Yet, it was the lack of equitable access to power and, through it, access to resources among the ethnic groups that served as the powder keg of the heinous massacre. The Constitution seems to have evaded the intractable problem of power sharing among the ethnic groups, which has been at the heart of the Rwandan crisis. That said, the implementation of the multifarious economic, social, political and judicial guarantees of the Constitution has to be tackled before the Constitution will be able to fulfil its promises of reconstituting Rwanda on a new social, economic and political equilibrium. Although there is a bright light at the end of the tunnel, the implementation of the constitutional promises is bound to involve a long walk along a bumpy road.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Win some, lose some: The 10th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child

*Julia Sloth-Nielsen**
Professor of Law, University of the Western Cape, South Africa

*Benyam D Mezmur***
Researcher and PhD Candidate, Community Law Centre, University of the Western Cape, South Africa

Summary

The African Committee of Experts on the Rights and Welfare of the Child, the monitoring body of the African Charter on the Rights and Welfare of the Child, held its 10th ordinary session in October 2007. This discussion highlights the inertia of the Committee, exemplified by its failure to examine any of the state reports submitted to it. Some cause for optimism may be derived from the appointment of a permanent Secretary to the Committee.

1 Introduction

The 11-member African 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

* BA LLB (Stellenbosch), LLM (Cape Town), LLD (Western Cape); juliasn@telkomsa.net

** LLB (Addis Ababa), LLM (Human Rights and Democratisation in Africa) (Pretoria); bmezmur@uwc.ac.za. It is hereby acknowledged that this work is based upon research supported by the National Research Foundation.

(African Children's Charter).[1] The African Children's Committee held its 10th ordinary session at the Hilton Ramses Hotel, Cairo, Egypt, from 25 to 27 October 2007.[2] The Committee meets in bi-annual ordinary sessions in spring and autumn respectively.

In what follows, this update will highlight the proceedings of the 10th ordinary session of the African Children's Committee. Some of the discussions covered in this article include the celebration for 2007 and theme for 2008 of the Day of the African Child (DAC), as well as the crucial matter which was brought to the centre stage during the 10th meeting — the issue of the term of office of Committee members. In addition, recurring issues pertaining to state reporting, in particular the preparation of the pre-session for the consideration of state parties' reports, deserve examination. It would be remiss if the role of non-governmental oganisations (NGOs) in the work of the Children's Committee was not revisited and awarded some space in the discussion.

While reporting on the 9th ordinary session, it was indicated that that the Second Pan-African Forum on Children (Second Pan-African Forum) was to be held in Cairo, Egypt, in October 2007. The Second Pan-African Forum was to assess achievements made in implementing the Plan of Action on Children based on the questionnaire which was sent to member states. It also considered in-depth issues related to child survival, protection, development and participation. The outcome of the Forum was to be the adoption of a Call for Accelerated Action for Child Survival, Protection, Development and Participation, which would also be Africa's contribution to the United Nations (UN) Special Session on Children, due to be held in December 2007. The African Children's Charter and the African Children's Committee were to be central to the Second Pan-African Forum, and this article will

---

1 African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990). For a detailed discussion of the African Children's Charter, see eg D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127; D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157; A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Children's Committee of Experts: Raising the Gauntlet' (2002) 10 *The International Journal of Children's Rights* 179; M Gose 'The African Charter on the Rights and Welfare of the Child' (Community Law Centre, University of the Western Cape, 2002).

2 For a report on the 5th, 6th and 7th meetings 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. See also B Mezmur(b) 'Still an infant or now a toddler? The work of the African Committee of Experts on the Rights and Welfare of the Child and its 8th ordinary session' (2007) 7 *African Human Rights Law Journal* 258; B Mezmur(c) 'The 9th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child: Looking back to look ahead' (2007) 7 *African Human Rights Law Journal* 545.

endeavour to highlight some of the issues debated in relation to the Second Pan-African Forum at the 10th ordinary session.

With this as a backdrop, the overall aim of this paper is to support the promotion of the African Children's Charter and dissemination of the African Children's Committee's work and update the reader with the recent developments and activities the Committee has been engaged with. The recent developments will therefore focus on the work of the Children's Committee during the 10th ordinary session. However, in the process of updating the reader, this article will also attempt to highlight the challenges faced by the Committee.

This contribution does not discuss in full detail all the procedures involved and the issues deliberated upon during the 10th meeting. Finally, this is not an official report of the African Union (AU) Commission or the African Children's Committee.[3] It has been compiled to support the promotion of the African Children's Charter and wider dissemination of the African Children's Committee's work.

2 Some procedural and administrative matters

The 10th ordinary session was attended by eight of the 11 members of the African Children's Committee — a fair number above the minimum required to form a quorum[4] — as well as representatives of organisations dealing with children's issues, such as the United Nations Children's Fund (UNICEF), the World Food Programme (WFP), the Intentional Committee of the Red Cross (ICRC), the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN), Save the Children — Sweden-Nairobi, the African Child Policy Forum (ACPF), the Institute for Human Rights and Development in Africa (IHRDA) and the Community Law Centre of the University of the Western Cape.

After the opening ceremony, which involved opening remarks by the AU Commissioner for Social Affairs through Dr Hassen El Hassen of the AU Cairo Office, followed by a statement by the Chairperson of the African Children's Committee, members of the Committee held a closed consultative meeting to discuss some procedural and administrative matters. The issues discussed during the closed session, as reflected in the official meeting report, were the election of the Bureau,[5] the organisation of the Committee Secretariat, and the Committee's operation, which continues to be hindered by a lack of resources.

---

3 For official reports and documents, see http://www.africa-union.org (accessed 31 March 2008).

4 Art 38(3) of the African Children's Charter provides that '[s]even committee members shall form the quorum'.

5 The Bureau, similar to the African Commission, is composed of the Chairperson of the Committee and the Deputy Chairperson.

According to article 38(1) of the African Children's Charter, 'the Committee shall elect its officers for a period of two years'. It was during the 7th meeting of the African Children's Committee, which was held in Addis Ababa, Ethiopia, from 19 to 21 December 2005, that the currently-serving Bureau was elected. These officers of the Children's Committee are elected for a term of two years and are eligible for re-election.[6] After an extensive debate on the matter, it was decided that, since some members of the Children's Committee were not present, the election of the Bureau should be deferred. Therefore, the Committee agreed to extend the mandate of the current Bureau until the next meeting of the Committee. However, for the purposes of continuity, it is advisable that the new Bureau that is planned to be formed does not include the four Committee members whose overall tenure will expire in 2008.[7]

The 10th ordinary session saw the 'official' closure of the recurrent frustration and debate revolving around the appointment of a Secretary[8] to run the Secretariat of the Committee. It was reported that Mrs Mariama Cisse, who is from Niger (and who is bilingual), had been recruited as the Secretary to the Committee and assumed the duty in September 2007. By appointing a Secretary, the AU has complied, albeit very belatedly, with its duty under article 40 of the African Children's Charter, which requires that the 'Secretary-General of the Organisation of African Unity shall appoint a Secretary for the Committee'. After acknowledging that the present appointment of a Secretary would be a great contribution to the running of the Committee's activities, it was underlined that the recruitment of staff to complement the Secretariat, in particular the post of a Senior Policy Officer, must proceed.

Again, as with the 9th ordinary session, the 10th ordinary session lasted only for three days. It is true that neither the African Children's Charter nor the Rules of Procedure of the African Children's Committee prescribes the minimum period that an ordinary session should last. The most relevant rule in this regard, rule 2(1), is not of significant guidance. It only provides that the 'Committee shall normally hold two ordinary sessions annually not exceeding two weeks'. However, rule 1 indicates that the Committee '... shall hold meetings as may be required for the *effective performance* of its functions in accordance with the African Charter on the Rights and Welfare of the Child'.[9] This seems to imply that, though the two week bench mark need not be surpassed, enough time should be allocated to allow the Children's Committee to fulfil its tasks.

Of course, we believe that a number of reasons could be provided either by the AU or the African Children's Committee, or both, to justify

6 Rule 17 of the Rules of Procedure of the Committee.

7 See sec 3 below on terms of office of Committee members for further details.

8 Mezmur(a) (n 2 above) 556-558.

9 Our emphasis.

why the trend seems to be taking root concerning three days per session while there is more work to be done, such as the consideration of state party reports, the consideration of the granting of observer status, and examining communications. However, as a practical matter, a three-day ordinary session twice a year, coupled with the fact that Committee members work part-time, and only full-time when in session, will fall severely short of achieving the potential of the Committee to promote and protect children's rights in Africa. This is bolstered by the fact that the four country reports submitted in 2006 still fall to be scheduled for proper consideration.

3 Term of office

The African Children's Charter provides for an independent 11-member Committee, the members of which are appointed by the Assembly of Heads of State and Government. According to article 37(1) of the African Children's Charter,

> [t]he members of the Committee shall be elected for a term of five years and may not be re-elected. However, the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.

It must be recalled that by operation of this article, following the 6th ordinary session in July 2005, the term of office of six of the Committee members who were elected for a four-year term in July 2001, came to an end.[10] By a similar token, the term of office of four of the incumbent Committee members who were elected for a five-year term will terminate at the end of July 2008. These Committee members are:

Mr Jean-Baptiste Zoungrana	(Burkina Faso)	5 years/July 2008
Dr Assefa Bequele	(Ethiopia)	5 years/July 2008
Ms Nakpa Polo	(Togo)	5 years/July 2008
Prof Peter O Ebigbo	(Nigeria)	5 years/July 2008

Here, one set-back of the election of Committee members is the fact that they are not eligible for re-election after serving one term. This is in stark contrast to other supervisory human rights organs in the AU. Not only are the African Commission on Human and Peoples' Rights (African Commission) members elected for a renewable term, but also for six years, as opposed to the five-year single term members of the African Children's Committee are eligible to serve. It is also to be noted that, under the Protocol Establishing the African Court on Human and Peoples' Rights, article 15(1) provides that '[t]he judges of the Court

[10] The out-going Committee members were the Chairperson of the Committee, Justice Joyce Alouch (Kenya), the 1st Vice-Chairperson, Mr Rodolphe Soh (Cameroon), the 2nd Vice-Chairperson, Prof Lullu Tshiwulu (South Africa), the Rapporteur, Mr Startson Nsanzabaganwa (Rwanda) and Mr Robert Ahnee (Mauritius).

shall be elected for a period of six years' and may be re-elected once. It is not clear why, while members of the sister organisations — the African Commission and African Court — can be re-elected, the same possibility is denied to members of the African Children's Committee.

In this regard, under Decision EX/CL/233(VII) of 2005, paragraph 8, the Executive Council of the AU has requested the AU Commission to study measures to renew the terms of office of Committee members for another term. It is not quite clear what has come out of this request and whether the AU Commission or the African Children's Committee has followed this up, since the issue of term of office is addressed in the African Children's Charter itself and not in the Rules of Procedure:[11]

> The ... Charter may be amended or revised if any state party makes a written request to that effect to the Secretary-General of the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the state parties have been duly notified of it and the Committee has given its opinion on the amendment.

Moreover, such an amendment '... shall be approved by a simple majority of the state parties'.[12] Taking this procedure into account, an amendment of the term of office provision of the African Children's Charter, even if agreed, is unlikely to occur speedily before the expiry of terms of office of the four Committee members mentioned above.

In any case, if there is the need for one single reform of current practice that needs to be amended, it is the practice of electing Committee members only for a single term of office. All things being equal, in the interest of continuity, time and progress, it would be advisable for it to be possible to extend the term of office of Committee members at least once.

A practical example would help demonstrate this point. During its 10th meeting, the Committee proposed Rapporteurs (three per report) to look at the four country reports in preparation for the pre-session.[13] The report from Mauritius was assigned to Mrs Momembessi Pholo, Prof Peter O Ebigbo, Mr Jean-Baptiste Zoungrana and, unfortunately, the term of office of the last two Committee members will come to an end in July 2008. In the likely event that the Mauritius report does not get considered before the end of July 2008, the departure of Prof Ebigbo and Mr Zoungrana would seriously impact on the work of the Committee achieving one of its main mandates — the consideration of state party reports.

We would venture to suggest that another option, of rather lesser impact, is to extend the five-year term of office to a six-year term of

---

11 Art 48(1) African Children's Charter.

12 Art 48(2) African Children's Charter.

13 Note should be taken of the fact that during the 6th ordinary session in 2006, eg, the appointment of Committee members as Rapporteurs to specific state party reports was undertaken.

office, which would put the African Children's Committee on the same footing with the African Commission as far as the length of a single term of office is concerned.

At this juncture, it is apposite again to reiterate the procedure and criteria for the appointment of new Committee members. Besides, a brief look at the geographical and gender balancing that needs to be taken into account — an issue with no provision in the African Children's Charter governing it — is warranted.

Even though the previous record of the Children's Committee in terms of independence is not as flawed as is that of the African Commission,[14] caution needs to be exercised in the interest of impartiality. In this regard, guidance can be taken from comments made in connection with the African Commission. For instance, in the words of Viljoen:[15]

> ... positions linking Commissioners [read as 'Committee members' in this case] too closely to the incumbent government of a state party are, at a minimum, membership of the executive, holding the position of ambassador as well as the offices of other members of the diplomatic services, and high-ranking civil servants, appointed by the executive and exercising political power, such as the office of Attorney-General. These positions should be regarded as incompatible with membership on the Commission because the Commission's promotional and protective functions are compromised by an appearance of partiality.

The quoted opinion above is not only in accordance with the intent and purpose of articles 33(1) and (2) of the African Children's Charter, but it also bodes well with the emerging trend displayed by the AU Commission which sent a *note verbale* to states indicating that membership of 'a government, a minister or under-secretary of state, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office' renders a candidate ineligible for appointment as member of the African Commission.[16]

Allied to this is the question of gender and geographical representation. Although the gender balancing of the African Children's Committee as it stands now is more or less balanced (six female and five male), three of the four outgoing Committee members are male. Accordingly, it is advisable that the appointment of the new Committee members takes this fact into account.

Turning to the issue of geographical representation, previous comments have deplored that fact that there was no representation on the African Children's Committee from North Africa, despite the fact that Algeria, Egypt and Libya are state parties.[17] It is to be noted that this

---

14 See eg R Murray 'Children's rights in the OAU' in R Murray (ed) *Human rights in Africa* (2004) 168.

15 F Viljoen *International human rights law in Africa* (2007) 312 (insertion by authors).

16 AU Doc BC/OLC/66/Vol XVIII (5 April 2005) as cited in Viljoen (n 15 above) 312.

17 Mezmur(a) (n 2 above) 556.

was addressed when the Committee member from Egypt, Mrs Dawlut Hassan, was elected in 2006. Geographical representation should be reflected in any new appointments.

4 The Day of the African Child

The Day of the African Child (DAC)[18] has been recognised by the Organization of African Unity (OAU) since 1991 and is celebrated every year on 16 June. It serves as an advocacy and awareness-raising tool on the African Children's Charter. The celebration of the DAC also helps keep member states updated about the work of the African Children's Committee, as well as drawing attention to priority issues affecting children in Africa.

As already indicated in the report on the 9th ordinary session,[19] the theme adopted for 2007 was 'Combat child trafficking', which is a timely and topical issue in the African context. However, to the disappointment of the African Children's Committee, although the theme for the June 2007 DAC was communicated to all AU member states requesting them to submit reports on how this day is planned in their respective countries, no such reports were received. The continued reluctance of member states to celebrate the DAC in any meaningful manner and submit a report to the African Children's Committee is a cause for concern, although anecdotal reports indicated indeed that some countries celebrated the DAC. The need for 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 DAC. It was again agreed during the 10th ordinary session that a document on the theme of the DAC should be prepared and sent to member states when communicating the theme to them.

Regarding the 2008 DAC theme, a couple of topics, including the right to education, were proposed, though the African Children's Committee decided to await the outcome of the Second Pan-African Forum before making any proposal on the theme. It is not clear if a theme was selected during or after the Second Pan-African Forum. If selection of a theme was not undertaken, it practically means that it might need to be done during the 11th ordinary session, scheduled for the end of May 2008 (at the time of writing). This would leave states with a very tight schedule to be informed of the theme (by the end of May or early June 2008) and to prepare a meaningful celebration of the DAC which needs to be done on 16 June.

---

18 The Day marks the 1976 march in Soweto, South Africa, when thousands of black school children took to the streets to protect 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.

19 Mezmur(c) (n 2 above) 556.

5 Substantive presentations by non-governmental organisations to the African Children's Committee

In recent times there has been an increase in the number of national institutions and NGOs attending or wanting to participate in the activities of the African Children's Committee. This has subsequently generated a series of discussions on the kind of role to be assigned to them by the Children's Committee, to the extent of its featuring on all the agendas of the ordinary sessions for the Committee in the past few years.

The practice of inviting substantive themed presentations on topics relevant to the work of the African Children's Committee, though initiated in earlier sessions, got off the ground at the 9th meeting, at which UNICEF gave a presentation to the Committee on the participation rights of children.[20] At that meeting, too, it was highlighted by the Children's Committee that there might be areas of the African Children's Charter in respect of which the Committee might benefit from additional guidance. Accordingly, the unique provisions of article 31 of the African Children's Charter (focusing on the duties of the child) were flagged, as was the best interests of the child provided for under article 4 of the African Children's Charter, and the Community Law Centre of the University of the Western Cape was invited to prepare a paper on the former and to present it at the 10th ordinary session.

However, preceding that paper, the Children's Committee afforded an opportunity for a further presentation at the 10th meeting, as an expected input on the Hague Conference on International Private Law and its activities in an African context had to be postponed.[21] Thus,

---

20 Mezmur(c) (n 2 above) 57.

21 The Permanent Bureau of the Hague Conference is responsible for overseeing the implementation of, and providing guidance concerning, two especially important conventions concerning children: the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Intercountry Adoption (ratified by Burkina Faso, Burundi, Kenya, Madagascar, Mauritius and South Africa so far). The Permanent Bureau of the Hague Conference on Private International Law (HCCH) has been a pioneer in developing systems of international co-operation at both administrative and judicial levels. Central Authorities established under the Hague Conventions constitute the core of a global network of inter-state co-operation for the protection of children. Notably in recent times in the African context, the HCCH has embarked on a project, The Hague Project for International Co-operation on the Protection of Children in the Southern and Eastern African Region, which is, amongst other things, aimed at introducing practical legal structures to support co-operation in terms of the Hague Child Protection Conventions. The participants (judges from most Southern and Eastern African countries as well as some from Central Africa) at the Judicial Seminar on the Role of the Hague Child Protection Conventions on the Practical Implementation of the CRC and the African Charter, which was held in The Hague from 3 to 6 September 2006, recommended that the AU should raise and promote awareness among member states of the African Charter of the Hague Child Protection Convention and the CRC. A similar seminar was convened for judicial officers from Western and Central African states in 2007.

the African Child Policy Forum first reviewed the publication they had produced entitled 'In the best interests of the child: Harmonising laws in Eastern and Southern Africa'.[22] This publication reviews 19 countries in the region, examining the extent to which the Convention on the Rights of the Child (CRC) and the African Children's Charter principles are reflected in legal frameworks and in policies in the respective countries. Proceeding from the basis that 'the notion that children have rights is no longer an issue of debate or contention in Africa',[23] the report nevertheless reveals that children's rights tend to lack priority status, although there is momentum building up around harmonisation processes.

The in-depth presentation on article 31[24] of the African Children's Charter by the Community Law Centre commenced with the reflection that the African Children's Charter not only reflects an African normative consensus based on an African conception of human rights, but that it places children's rights within the African cultural context. The fact that duties are provided for in a range of documents at the international level, including the Universal Declaration on Human Rights (Universal Declaration) (in article 29), was highlighted. However, the language of duties is far more central to the African ideology of communitarianism, as can be discerned from the African Charter on Human and Peoples' Rights (African Charter), which includes in articles 27 to 29 both negative and positive duties of the individual. It is against this backdrop that the African Children's Charter provides for the responsibilities of children.

The presenters noted that article 31 contained two internal limitations, namely that the duties of the child are subject to his or her age and ability and, second, that they are subject to the necessary limitations implied through the granting of other Charter rights. The first limitation militates against a view that 'duties' entail a disguised form of harmful or exploitative labour; rather, it supports the idea that involving children in the daily life of a household is a form of child participation that is intended to equip them for adulthood, so that they gradually acquire the capacity to assume adult responsibilities. The second limitation, it was argued, indicates that the normative rights provided for elsewhere in the African Children's Charter trump the duties provided for in article 31.

The presentation proceeded to examine the constituent elements of the discrete duties provided for children under the African Children's

---

22 See African Child Policy Forum 'In the best interests of the child: Harmonising laws in Eastern and Southern Africa' (2007) http://www.africanchildforum.org (accessed 31 March 2006). The publication was launched shortly thereafter at the Second Pan-African Forum, as described further in this article.

23 African Child Policy Forum (n 22 above) 3.

24 See J Sloth-Nielsen & B Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' *Journal of African Law* (forthcoming, 2008).

Charter,[25] and concluded with recommendations for the African Children's Committee to consider in their approach to article 31. First, it was suggested that the primary duty bearers under the African Children's Charter are ratifying state parties, and that in the submission of country reports, states can be requested to provide full details of the measures, programmes and policies they have put in place to assist children to fulfil their duties as contemplated by article 31. Relevant, too, would be education and information campaigns that states have adopted to further the goal that children learn respect for their parents and elders and become familiar with the positive values in their cultural heritage. Second, it was proposed that the African Children's Committee supports the implementation of article 31 in its own practice, such as via encouraging the involvement of children in the DAC, and asking states to provide examples of how children have been assisted at grassroots level to preserve and strengthen social and national solidarity. Third, it was proposed that article 31 could have a bearing at regional and other levels, where children could be exposed to positive social, political and economic values in the achievement of African unity.

In response, Committee members agreed that states should endeavour to capitalise on the positive roles that children could play within their families and communities, and that creating avenues for children to play a role at national levels could encourage them to take up their responsibilities. To this end, activities and training that enhance their capacity to participate effectively should be promoted.

It was thereafter intimated that the presentation on the meaning of the best interests of the child would be prepared for the 11th meeting, to be held in 2008.

6 Preparations for the Second Pan-African Forum on Children

The first Pan-African Forum on the future of children was held in Cairo, Egypt, in 2001. It culminated in a Declaration and Plan of Action for an Africa Fit for Children, not only for implementation at country level, but also to serve as the basis for Africa's common position for the UN General Assembly Special Session on Children held in New York in 2002. At this latter meeting, the document 'A world fit for children'

[25] The article makes substantive provision for the duty of the child to work for the cohesion of the family, to respect parents, superiors and elders at all times, and to assist them in times of need; to serve his national community by placing his physical and intellectual abilities at its service; to preserve and strengthen social and national solidarity; to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society; to preserve and strengthen the independence and the integrity of his country; to contribute to the best of his abilities at all times and at all levels, to the promotion and achievement of African unity.

was adopted. The intention of this mid-term (Cairo Plus 5, as it was colloquially known) review was to convene a high-level plenary meeting to follow up on the outcomes of the Special Session on Children, again to be held in Cairo, during the week following the African Children's Committee meeting (29 to 31 October 2007), itself again a prelude to the follow-up session to be held in New York during December 2007. The planned Second Pan-African Forum meeting provided the reason for convening the African Children's Committee's 10th ordinary session in Cairo in the first place.

The African Children's Committee at the 10th ordinary session resolved, under the session devoted to preparation for the Second Pan-African Forum, to seize the opportunity to profile the Children's Committee and its activities. This was scheduled to take place during an interactive session with the African Children's Committee,[26] and it was agreed that audience participation would be sought after the presentation of a paper. It was agreed that the Chairperson, who had already prepared a report, would make a 30-minute presentation on the evolution of the African Children's Charter, the normative content of the rights pertaining to children elaborated in the Charter, and an overview of the work and achievements of the African Children's Committee thus far. The paper would not neglect to draw attention to difficulties encountered by the Children's Committee and challenges faced by it during its relatively short term of existence. Amendments to the founding document were proposed by other Committee members and a member was nominated to assist in refining the final document.

Since the work of the Second Pan-African Forum was to include panel sessions, members of the African Children's Committee were thereafter nominated to serve as facilitators on the respective panels. Thus, Committee member Prof Peter Ebigbo was nominated to chair the panel on the participation of youth and children, Dr Moussa Sissoko to the panel on child survival and development, Ms Marie Chantal Koffi to head the panel on realisation of the right to education, and Dr Assefa Bequele to that on child protection.

The outcome of the Second Pan-African Forum was a Call for Accelerated Action on the Implementation of the Plan of Action towards Africa Fit For Children 2008-2012, which then fed into the commemorative high-level plenary meeting in December, the outcome of which, in turn, was General Assembly Resolution A/62L31.[27]

---

26 See http://www.africa-union.org/root/au/Conferences/2007/November/sa/Children/doc/en/Agenda% 20of%20Experts-ENG.doc (accessed 2 April 2008).

27 See http://aumission-ny.org/children_issues.htm (accessed 31 March 2008).

7 Preparation of the pre-session for the consideration of state parties' reports

The discussions on the preparation of the pre-session for the consideration of state parties' reports revolved around the procedure to be followed and the composition of the teams. As for the procedure to be followed, the members of the African Children's Committee decided to summon the pre-session before the 11th ordinary session of the Committee, more precisely in February 2008.[28] During this pre-session, four reports were to be examined, namely, those of Egypt, Mauritius, Nigeria and Rwanda; as for the other reports received and not yet translated, these were to be the subject of another pre-session.

It was underscored that the pre-session was to be composed not only of the Committee members, but also of representatives of international and regional organisations interested in the matter, as well as NGOs that are intervening in the field and resource persons chosen by the African Children's Committee. In this respect, the following teams were formed:

- report presented by Mauritius: Mrs Momembessi Pholo, Prof Peter Ebigbo and Mr Jean Baptiste Zoungrana;
- report of Rwanda: Mrs Marie Chantal Koffi, Dr Moussa Sissoko and Mrs Dawlat Hassan;
- report of Egypt: Ms Nakpa Polo, Mrs Seynabou Diakhate and Ms Boipelo Lucia Seitlhamo;
- report of Nigeria: Dr Assefa Bequele and Mrs Martha Koome.

It was agreed that the AU Commission would contact international and regional organisations to request them to nominate their representatives. As for NGOs, Dr Moussa Sissoko, Dr Assefa Bequele and Prof Peter Ebigbo would consult each other speedily to nominate the representatives to the pre-session. As for the number of participants per team, it was decided that each team would be composed of a maximum of nine persons for reasons of efficiency.

8 Conclusion

Much remains to be done to make the African Children's Committee system effective. With the 10th ordinary session now behind it, it would have been an apposite point at which more clear achievements and results could have been profiled. Most notable amongst these would have been the conclusion of the examination of at least the first few reports submitted under the African Children's Charter, so as to enable the beginnings of an African jurisprudence on the regional treaty and

[28] Though this did not happen in February.

its obligations for state parties. As pointed out in this and preceding articles, however, delays and inadequate administrative support have made this goal impossible to achieve. Further, as the terms of office of some members are due to expire within a matter of months and, to the knowledge of these authors, procedures for succession planning and a rapid nominations process have not yet been formalised, it may take some time before the necessary pre-session takes place. A fair concern can be expressed that, if the pre-session does not take place before the July 2008 expiry date of the mentioned members, it may be difficult to complete the consideration of the first four state reports during this year, as the African Children's Committee will be operating without four of its members.

This real possibility indicates the need for the African Children's Committee to develop a clear medium-term plan of activities to see it through to the next round of changes to its membership. Further, the issue of the term of office of the members will have to be aggressively pursued and championed at the level of the AU Commission for effective action to be taken and followed through, in order to avoid the unfortunate turn of events occurring in future that we suggest might happen now.

However, the finalisation of an appointee to the post of Secretary means that there is now a dedicated presence in AU headquarters to take forward the interests of the African Children's Committee on a full-time basis. This does lay the foundation for hope that some of the cyclical problems around membership can be ironed out.

The 10th ordinary session has also highlighted further the value of NGO participation in the work of the African Children's Committee, and it is encouraging that the Committee is continuing to carve out collaborative processes, in which interested and leading African NGOs are prominent partners.

In addition, through various means, such as active participation in the Second Pan-African Forum and regular publications concerning the meeting activities, the work of the Committee is becoming reasonably widely known. This process can be regarded as beneficial for the regional development of children's rights.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Upholding the Rastafari religion in Zimbabwe: *Farai Dzvova v Minister of Education, Sports and Culture and Others*

Mtendeweka Owen Mhango *
Lecturer in Law, University of the Witwatersrand, South Africa

Summary

This discussion deals with a unanimous decision by the Supreme Court of Zimbabwe, ruling that the expulsion of six year-old Farai Dzvova from the Ruvheneko Government Primary School because of his expression of his religious belief through wearing dreadlocks is a contravention of section 19 of the Constitution of Zimbabwe. This contribution argues that the judgment in Farai *is progressive and should be welcomed. It further argues that the reasoning by Cheda J, demonstrating why Rastafari qualifies as a religion under section 19 of the Constitution of Zimbabwe, should be welcomed particularly as progressively realising and promoting religious rights in Zimbabwe, and that it adds to the growing progressive religious jurisprudence in Southern Africa. It is further noted that the decision will likely have the effect of reversing similar rules or regulations which prohibit Rastafari learners from attending public schools on account of their dreadlocks in Southern Africa. The contribution criticises previous decisions by the Zimbabwe Supreme Court and the South African Constitutional Court that recognised Rastafari as a religion without explaining why this was done.*

* BA (Morehead State, USA), LLM (Wayne State, USA), JD (Michigan State, USA); Mtendeweka.Mhango@wits.ac.za. I would like to thank Prof Marius Pieterse and Ms Ntombizozuko Dyani for their useful comments and recommendations on an earlier draft.

1 Introduction

In *Farai Dzvova v Minister of Education, Sports and Culture and Others*,[1] the applicant and father of six year-old Farai Dzvova (Farai), on behalf of Farai successfully challenged the decision of the Ruvheneko Government Primary School (School) to expel Farai from the school on account of his Rastafarian (Rastafari) dreadlocks. He argued that the school's decision to expel Farai from the school on account of his Rastafari dreadlocks violated section 19(1) of the Constitution of Zimbabwe.[2] In a unanimous decision by the Supreme Court of Zimbabwe, Cheda J ruled that the expulsion of Farai from the school because of his expression of his religious belief through wearing dreadlocks is a contravention of section 19 of the Constitution of Zimbabwe. This judgment confirmed the provisional order and decision of the High Court to allow Farai's enrolment into the school.

This note argues that the judgment in *Farai*, in line with a number of cases upholding the Rastafari religion in Southern Africa,[3] is progressive and should be welcomed. It is further argued that the reasoning by Cheda J, which demonstrates why Rastafari beliefs qualify as a religion under section 19(1) of the Constitution of Zimbabwe, should be welcomed particularly as progressively realising and promoting religious rights in Zimbabwe, and that it adds to the growing progressive jurisprudence on religion in Southern Africa. It is further noted

---

1 Judgment SC 26/07 (2007) ZNSC 26, http://www.saflii.org (accessed 31 January 2008). See also L Nkatazo 'Supreme Court lifts ban on dreadlocks' (October 2007) http://www.NewZimbabwe.com (accessed 31 January 2008).

2 Sec 19(1) of the Constitution of Zimbabwe provides that '[e]xcept with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or private, to manifest and propagate his religion or belief through worship, teaching, practice and observance'.

3 *Antonie v Governing Body, Settlers High School & Others* 2002 4 SA 738 TPD (reversing a decision of a school governing body to suspend a Rastafarian student on account of his dreadlocks); *In re Chikweche* 1995 4 BCLR 533 (ZS) (reversing the decision of the High Court to refuse the admission of a Rastafari attorney as a practitioner into the Zimbabwe Law Society); and see *Pillay v MEC for Education, KwaZulu-Natal* CCT 51/06 (2007) (unreported) (where Ms Navaneethum Pillay successfully challenged, on behalf of her daughter Sunali Pillay, the decision of Durban Girls High School to prevent Sunali from wearing a nose stud to school. She argued that the school's refusal to permit Sunali to wear the nose stud at the school was an act of unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Chief Justice Langa, who wrote the majority judgment of the South African Constitutional Court, agreed and ruled that the school's actions amounted to unfair discrimination); see also *Pillay v MEC for Education, KwaZulu-Natal & Others* 2006 6 SA 363 (Eqc); 2006 10 BCLR 1237 (NPD) (where the High Court found in favour of Ms Pillay, the applicant in the case).

that this decision will likely have the effect of reversing similar rules or regulations that prohibit Rastafari learners from attending public schools on account of their dreadlocks in Southern Africa.[4] In light of the Zimbabwe Supreme Court's analysis of what constitutes a religion, this note criticises previous decisions by the same court and the South African Constitutional Court that recognised Rastafari as a religion without explaining their conclusions.

2 The background of the case

The case was an appeal heard by the Zimbabwe Supreme Court following a provisional order by the Zimbabwe High Court. The facts which led to this appeal are the following: In March 2005, Farai was enrolled in Grade O at the school, in line with the new education policy of the Ministry of Education, which requires that pre-schools be attached to primary schools, to allow learners to automatically progress to primary school from the pre-school.

According to his founding affidavit submitted to the Supreme Court, the applicant and his customary wife, Tambudyazi Chimedza, are the Rastafari parents of Farai. They both have been practising the Rastafari religion for almost a decade. He stated that they initially attended Chimanuka Rastafari House in St Mary's, which is the headquarters of the National Rastafari Council. He added that in 2002 they opened a branch of the church in Glen Norah for which he is the Priest. At Glen Norah, church services are held every Saturday and in good weather they begin the preceding Friday evening.

The applicant also stated that it is an integral part of the Rastafari faith that they take certain vows as part of their religion. One of these vows is the Nazarene Vow, which requires that they do not eat refined food, but only eat food in its natural state. Further to this, they are required to refrain from drinking alcohol, and central to this is their vow not to cut their hair; adding that these vows are biblically mandated.[5] Therefore, the applicant stated that Farai, in line with the family's religion, could not cut his hair.

According to the applicant, Farai's hair had never been cut before or during pre-school, in accordance with the family's religious beliefs. Instead, Farai wore dreadlocks until he graduated from pre-school.

---

4 MO Mhango 'The constitutional protection of minority religious rights in Malawi: The case of Rastafari students' (2008) 52 *Journal of African Law* 2 (discussing that in Malawi Rastafari students are prevented from attending public schools on account of their dreadlocks).

5 See King James Version, Numbers Chapter 6:1-6.

Following his graduation, Farai was enrolled in the primary school. His fees were paid up and all the necessary books and stationery were purchased. In January 2006, the applicant was called to the school to discuss the issue of Farai's hair with the headmaster. By this time, Farai was being detained and no longer attended classes with the other children.

On 27 January 2006, the headmaster of the school ordered a letter to be sent to the applicant regarding Farai's hair. It stated as follows:

> You are cordially advised that one of our regulations as a school is that hair has to be kept very short and well combed by all pupils attending Ruvheneko Government Primary School, regardless of sex, age, race or religion. You are therefore being asked to abide by this regulation, failure to which you will be asked to withdraw or transfer your child, Farai Benjamin Dzvova, to any other school. This is to be done with immediate effect.

Following this letter, the applicant discussed the matter with the deputy headmaster and teacher in charge, who maintained that they could not accept Farai's continued enrolment at the school as long as his hair was not cut to an acceptable length. According to the school rules that were at the heart of the dispute, 'all pupils [are required] to have short brush hair regardless of sex, age, religion or race'.[6] The applicant also unsuccessfully discussed the matter with the headmaster and the regional education officer. Following these unsuccessful negotiations with the education authorities, the applicant lodged an application to the High Court and obtained the following provisional order pending the resolution of the matter by the Supreme Court:

(i) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education until the Supreme Court determines the matter.
(ii) The respondents are hereby interdicted from in any way negatively interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:
    (a) separating Farai Benjamin Dzvova from his classmates;
    (b) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults;
    (c) in any other way discriminating against Farai Benjamin Dzvova on the basis of his hairstyle or his religious beliefs pending the determination of the matter by the Supreme Court.

6 Ruvheneko Government Primary School, January 2005 School Rules for All Pupils, cited in *Farai*.

3 The issues and analysis of the Supreme Court

3.1 How does Rastafari qualify as a religion?

The case was referred to the Supreme Court to determine whether the exclusion of Farai was done in accordance with the authority of a law as envisaged in section 19(5) of the Constitution and, if so, whether such a law is reasonably justifiable in a democratic society. Section 19(5) provides as follows:

> Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision —
> (a) in the interests of defence, public safety, public order, public morality or public health;
> (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of persons professing any other religion or belief; or
> (c) with respect to standards or qualifications to be required in relation to places of education, including any instruction, not being religious instruction, given at such places;
> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

However, before addressing this issue, the Supreme Court had to determine whether the application before it fell within the ambit of section 19(1) of the Constitution. In order to address this question, the Supreme Court had to enquire whether Rastafari is a religion for the purposes of section 19(1).

The Supreme Court began its analysis of the inquiry by noting that in 2002 the applicant opened a branch of the Rastafari Church in Glen Norah of which he is the priest. It also noted that services at this church are held every Saturday or Sabbath day. The Supreme Court was convinced that this shows that the Rastafari organisation conducts services for worshipping purposes on weekends, and by the fact that the Rastafari religion is based on the Bible, which it noted was also the basis for many other religions. The Supreme Court also relied on the *New English Dictionary on Historical Principles, VIII* for its definition of religion. According to this definition, religion is:

> 1 a state of life bound by monastic vows;
> 2 a particular monastic or religious order or rule;
> 3 action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or observances implying this;
> 4 a particular system of faith and worship;
> 5 recognition on the part of man of some higher or unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship. The general mental and moral attitude resulting from this belief, with reference to its effect upon the individual or

> the community; personal or general acceptance of the feeling as a standard of spiritual and practical life.
> 6 devotion to some principle, strict fidelity or faithfulness, conscientiousness; pious affection or attachment.

The Supreme Court was further convinced by what was said by the applicant in his affidavit concerning the Rastafari religion, which it concluded fell within the above descriptions. The Supreme Court also referred to the United States cases of *Reed v Faulkner*[7] and *People v Lewis*[8] and the United Kingdom case of *Crown Supplies v Dawkins*,[9] in which it was held that Rastafari is a religion. Therefore, this compelled the Supreme Court to conclude that Rastafari was a religion for purposes of section 19(1). It is submitted that the foregoing aspect of the ruling should be particularly welcomed because it clarifies why Rastafari qualifies as a religion under section 19(1) of the Constitution of Zimbabwe.

3.2 The importance of religious freedom in Zimbabwe

The Supreme Court also put special emphasis on the importance of the protection of the rights of the individual against discrimination on religious grounds in section 19 of the Constitution of Zimbabwe. It noted several decisions that dealt with the nature and content of the right to freedom of religion. Among them is the decision in *In re Munhumenso and Others*,[10] where it was confirmed that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, stipulated in the Constitution. On the importance of the right, the Supreme Court approved of the decision by the South African Constitutional Court in *Christian Education of South Africa v Minister of Education*,[11] which held that the protection of religious right is the cornerstone of human rights. In that case it was remarked that

> religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.

Lastly, the Supreme Court referred to the English case of *The Queen, on application of SB v Head Teacher and Governors of Denbigh High School*,[12] for the proposition that it is important to respect one's genuine religious

---

7 842 F2d 960 (7th Cir 1988).
8 510 NYS 273 (1986).
9 (1993) 1 CR 517 (CA).
10 1994 1 ZLR 49.
11 2000 4 SA 757 (CC).
12 2004 EWHC 1389.

beliefs.[13] In this case, Lord Justice Scott Blake of the Supreme Court of Judicature held as follows:

> Every shade of religious belief, if genuinely held, is entitled to due consideration under article 9. What went wrong in this case was that the school failed to appreciate that by its action it was infringing the claimant's article 9 right to manifest her religion.

While the Supreme Court's acknowledgment of the special importance of freedom of religion is commendable, it should be criticised for two reasons. First, the Supreme Court fails to give any particular reasons to justify the important status of the right to freedom of religion. It simply states in general terms that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual without specifying why freedom of religion was so special. Secondly, while the Supreme Court correctly relied on South African and English case law for the proposition that freedom of religion is important and that genuinely held beliefs should be protected, it failed to apply its mind and demonstrate the important status of freedom of religion in the context of Zimbabwe. A proper analysis of the unique importance of this right by the Supreme Court should have included, among other things, a historical analysis of the failure by previous governments to protect the freedom of religion and perhaps some articulation of the need to specifically protect this freedom in Zimbabwe. Instead, the Supreme Court spoke about the importance of freedom of religion in general and not in terms specific to Zimbabwe.

3.3 Did the school have the authority to make rules and expel Farai?

Following a determination and ruling on the preliminary matters before it, the Supreme Court addressed the main question, namely,

---

[13] The Supreme Court had previously endorsed this view in *In re Chikweche* (n 3 above, 538), where it held that 'the Supreme Court is not concerned with the validity of attraction of the Rastafari faith or beliefs but only their sincerity'; see also *United States v Ballard* 322 US 78 (1944) (explaining that the sincerity of one's belief was a proper subject for judicial scrutiny); D O'Brien & V Carter 'Chant down Babylon: Freedom of religion and the Rastafarian challenge to majoritarianism' (2002) 18 *Journal of Law and Religion* 219 235-238 (discussing the fact that courts in the United States and, in some cases the Caribbean, have been known to screen claims by reference both to the sincerity of the claimant's religious beliefs and to the centrality of the practice for which protection is claimed); MD Evans *Religious liberty and international law in Europe* (1997) 307 (discussing the fact that the jurisprudence of the European Commission on Human Rights focuses upon the degree to which the practice or activity under consideration represents a necessary expression of a religion or belief); *Pillay* case (n 3 above) para 52 (holding that, in order to determine if a practice or belief qualifies as religious, a court should ask only whether the claimant professes a sincere belief); see, however, *Prince v President, Cape Law Society & Others* 2002 2 SA 794 (CC) para 43 (where the Constitutional Court previously decided against inquiring into the sincerity of a claimant's belief and urged that believers should not be put to the proof of their beliefs or faith).

whether the rules made by the school's headmaster were made under the authority of law.

According to the Supreme Court, the rules that were used to expel Farai from the school were made by the headmaster. Therefore, the question before the Supreme Court was whether these rules were made under the authority of law. In addressing this question, the Supreme Court referred to section 4 of the Educational Act,[14] which provides as follows:[15]

> 1 Notwithstanding anything to the contrary contained in any other enactment, but subject to this Act, every child in Zimbabwe shall have the right to school education.
> 2 Subject to section (5), no child in Zimbabwe shall
> (a) be refused admission to any school; or
> (b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school;
> on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender.

In light of the above section, the Supreme Court concluded that the attempt by the school to bar Farai from the school contravenes not only the Constitution, but also the above provision of the Education Act. In interpreting the latter Act, the Supreme Court reasoned that there is nothing in the Education Act which confers powers to the headmaster of a school to make rules or regulations.

The Supreme Court then rejected the argument by the school that its rules were made pursuant to a legal rule. According to the school, the Minister of Education promulgated the Education Disciplinary Powers Regulations (Regulation 362), which was the source of its power to create its rules.[16] In section 2, Regulation 362 provides as follows:[17]

> Every pupil who enrols in a government or non-government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff.

The school conceded that the school rules are not law, but argued that they were made under the authority of a law; in particular, the school argued that the school rules were made under the authority of section 69 of the Education Act. This section confers powers to make regulations on the Minister of Education regarding discipline in schools and other related matters. In addressing this argument, the Supreme Court reasoned that section 69 of the Education Act did not confer any powers to make regulations on the headmaster, and that it did not authorise the Minister to delegate to the headmaster the power to make regulations regarding the conditions of the admission of a pupil to a school or the type of hair to be kept by pupils. The Supreme

---

14 Cap 25:04.

15 As above.

16 Regulation 1998 SI 362.

17 As above.

Court also noted that the Education Act only appointed the Minister, and not the headmaster, to make regulations; that it was also clear that the headmaster of the school was never appointed to the office by the Minister and was never delegated any powers conferred on the Minister. Instead, what was clear, according to the Supreme Court, is that the Minister allowed the school to maintain certain standards at the school, but never authorised the school to make any regulations. Specifically, the Supreme Court noted that section 2 of Regulation 362 clearly specified the powers the headmaster can exercise over a pupil in cases of serious acts of misconduct only.[18]

In rejecting the school's argument above, the Supreme Court further reasoned that the relevant provisions of Regulation 362 deal with discipline in the school and obedience to the school staff; that

> I understand this to refer to the conduct of behaviour of pupils and obedience to the school staff generally. I do not consider that asking a pupil to conform to a standard of discipline would include an aspect that infringes on a pupil's manifestation of his religion.

The Supreme Court also noted that there is no suggestion by the school, nor can it be argued that keeping dreadlocks is an act of ill-discipline or misconduct.[19] Rather, it concluded that Farai's dreadlocks are a manifestation of a religious belief and not related to his conduct at the school. Therefore, the Supreme Court was not convinced that Regulation 362 was relevant to the matter of Farai, and ruled that the submission by the school that its rules were made under the authority of a law cannot be correct. Furthermore, the Supreme Court held that the headmaster could not make rules which constituted a derogation from the constitutional rights of the pupil; that the headmaster exceeded his powers, which are stipulated in Regulations 362, and used powers which were never and could never have been lawfully delegated to him.

Having concluded that the school's rules were not made under a law, the Supreme Court held that it was not necessary to consider the issue of justification raised by the school. Lastly, the Supreme Court ordered that Farai be allowed to enrol at the school for purposes of education, and the school was barred from separating Farai from his classmates or in any way discriminating against Farai on the basis of his dreadlocks or religious beliefs.

4 Other attempts to define religion

One of the highlights of the judgment in *Farai* is its attempt to define

---

18 As above.

19 Similarly, the High Court in South Africa overturned a decision of a school governing body that keeping dreadlocks constituted serious misconduct. See *Antonie* (n 3 above).

religion. Prior to this ruling, courts in Southern Africa were reluctant to indicate why the Rastafari religion qualified as a religion.[20] Under this analysis, the issue will inevitably arise as to the nature of religion. Instead, most courts were willing only to hold that Rastafari is a recognised religion without any analysis to explain their conclusions.[21] For example, in *In re Chikweche,* a case involving a Rastafari lawyer who had been denied admission as a practitioner by the High Court in Zimbabwe where, after referring to foreign case law, the Supreme Court accepted that Rastafari is a religion without demonstrating why it qualified as a religion under section 19(1) of the Constitution of Zimbabwe. It was in fact necessary in this case for the Supreme Court to show this because, in a concurring opinion by McNally JA, he disagreed with this conclusion when he stated:[22]

> I have reservations about the classification of [Rastafari] as a religion. But I have no doubt that it is a genuine philosophical and cultural belief, and as such falls under the protection of section 19(1) of the Constitution.

The case of *Prince v President of the Cape Law Society*, decided by the South African Constitutional Court, involved a Rastafari lawyer named Prince who had been denied admission to the Cape Law Society on the basis that, since he had been previously convicted of possession of marijuana, he was not a fit and proper person under the Attorneys Act 53 of 1979. On the question of whether or not Rastafari is a religion, the Constitutional Court made certain assumptions and simply ruled that 'it is not in dispute that Rastafari is a religion, that it is protected by sections 15 and 31 of the South African Constitution'.[23] Unlike in *In re Chikweche,* the South African Constitutional Court in this case relied on the fact that, since no one had disputed the classification of Rastafari as a religion, it was not necessary to demonstrate how Rastafari qualified as a religion.

Recently, in *Pillay v MEC Education, KwaZulu-Natal,*[24] the South African Constitutional Court made similar assumptions as in *Prince*, and ruled that Hinduism was a religion for purposes of section 15 of the South African Constitution. I have argued elsewhere that, while Hinduism is a recognised religion, it is in the interests of justice for the Constitutional Court to demonstrate why a religion should be recognised as such and receives protection under the Constitution.[25]

---

20 See *Prince* (n 13 above); *In re Chikweche* (n 3 above).

21 See *In re Chikweche* (n 3 above) (accepting that Rastafari is a religion based on a review of US case law); *Prince* (n 14 above) (holding that Rastafari is a religion that is protected by the Constitution).

22 *In re Chikweche* (n 3 above) 541.

23 *Prince* (n 13 above) 804 para 15.

24 *Pillay* (n 3 above).

25 M Mhango & N Dyani 'The protection of religious freedom under the Promotion of Equality and Prevention of Unfair Discrimination Act: *Pillay v MEC for Education, KwaZulu-Natal*' *South African Journal on Human Rights* (forthcoming 2008).

Similarly, the United States Supreme Court has avoided trying to formulate a definition of religion.[26] However, the US Supreme Court has considered the issue in a number of contexts.[27] The most significant and relevant for our purposes was the definition given in cases arising under the Universal Military Selective Services Act,[28] where the US Supreme Court struggled to define religion for purposes of the conscientious objector exemption. The leading cases on this issue are *United States v Seeger*[29] and *Welsh v United States*.[30] Both cases involved persons (Welsh and Seeger) seeking exemption from the draft on religious grounds. Both Welsh and Seeger affirmed in their applications that they held deep conscientious scruples against taking part in wars where people were killed. They both believed that killing was wrong, unethical, and their consciences forbade them to take part in such an evil practice.

In both cases, the US Supreme Court offered no criteria for assessing whether a particular view qualifies as religious. Instead, the US Supreme Court said that the crucial inquiry in determining whether a person's beliefs are religious is whether these beliefs play the role of religion and function as religion in the person's life.[31] In attempting to offer a definition, Black J explained that[32]

> if an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly qualify as religious.

According to Chemerinsky, although *Seeger* and *Welsh* involved the US Supreme Court's interpreting a statutory provision and not the First Amendment to the Constitution, they likely would be the starting point for any cases that required the US Supreme Court to define religion under the Constitution.[33]

The problem with the approach taken by the courts in *In re Chikweche*, *Prince*, *Seeger* and *Welsh* is that it causes the law to be unclear. These cases should be criticised because of the lack of guidance they provide in determining the nature of a religious belief.[34] A judge in a future case has little guidance in deciding what is a belief that is religious or

---

26 E Chemerinsky *Constitutional law* (2001) 1240.

27 Chemerinsky (n 26 above) 1241.

28 Universal Military Selective Service Act of 1967, 50 USCA App § 456(j).

29 380 US 163 (1965).

30 398 US 333 (1970).

31 Chemerinsky (n 26 above) 1242.

32 *Welsh* (n 30 above) 340.

33 Chemerinsky (n 26 above) 1243.

34 However, see Mhango (n 4 above) (where the author, having analysed the decision in *In re Chikweche* and the minority opinion in *Prince,* argues that Zimbabwe and South Africa are progressive in their interpretation of the constitutional right to the freedom of religion).

a movement that qualifies as a religion. Therefore, it is submitted that, regardless of whether none of the parties disputes this issue, courts should address these matters in the interest of justice.[35] An argument could be made that the above analysis should not be supported because it would require courts to deal with abstract or hypothetical issues that are not justiciable.[36] However, such an argument would not succeed in light of recent judicial interpretations of the justiciability doctrines. For example, in the South African case of *Ferreira v Levin NO*, Chaskalson J explained that[37]

> although it is important that the courts should not devote their scarce resources to abstract and hypothetical issues and that they should deal with issues and controversies properly before them, this does not mean that a narrow approach be taken to applying the justiciability doctrines to constitutional cases.

Instead, Chaskalson suggested as follows:[38]

> We should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.

Similarly, in the United States, the US Supreme Court has applied justiciability doctrines in a less strict manner.[39] The benefit of engaging in the analysis suggested above (which seeks to demonstrate how a religion is recognised as such) is that it would provide guidance to a future judge in a case. It is also in the interests of justice for the courts to demonstrate why a belief is recognised as religious under the Constitution, because it allows other unrecognised movements or belief systems to get clarification on the law.

The need to define religion might arise in the context of an individual who is seeking an exemption from a law because of views that he or

---

35 See, eg, *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 33-57 (discussing that a court may address an issue not raised by the parties if it is in the interest of justice and development of common law). See also I Currie *et al The Bill of Rights handbook* (2005) 94-95 (discussing justiciability doctrines).

36 Currie *et al* (n 35 above) 80-82 (discussing the justiciability doctrines).

37 *Ferreira v Levin NO* 1996 1 SA 984 (CC); *Pillay* (n 3 above*) (*where the court took a broad approach on the issue of mootness and ruled that, even if the matter was moot in the sense that the student on whose behalf the case had been brought was no longer a student at the respondent school, it was in the interest of justice to hear the matter because any order which it may make will have some practical effect whether on the parties or others). See also Currie *et al* (n 35 above) 80-82.

38 *Ferreira v Levin NO* (n 37 above) para 165, citing *R v McDonough* (1989) 40 CRR 151 155.

39 Chemerinsky (n 26 above) 72; *United States Parole Commission v Geraghty*, 445 US 388 400; See also E Lee 'Deconstitutionalising justiciability: The example of mootness' (1992) 105 *Harvard Law Review* 605; *Moore v Ogilvie* 394 US 814 (1969); *Roe v Wade* 410 US 113 (1973); and *Defunis v Odegaard* 416 US 312 (1974).

she terms religious.[40] To demonstrate this need, imagine a *sangoma* (a traditional medicine expert) who practises a century-held belief that, if you burn a live monkey's head together with other liquid substances, it has the effect of removing evil spirits in a married couple's home.[41] While this belief might be widely practised in Southern Africa, the practice is not officially recognised. If a conflict were to arise between the beliefs of such a *sangoma* and the South African Animals Protection Act,[42] would the *sangoma* be protected under the religious clause of a constitution such as section 15 of the South African Constitution? After *Farai,* the law provides a judge in a future case with a framework to determine why such a belief could be recognised and protected under the freedom of religion clauses of many constitutions in Southern Africa.

However, this argument might not have the same effect in the context of section 15(1) of the South African Constitution. According to some commentators, the question as to the nature of religion is superfluous in the context of section 15 of the South African Constitution, because this section also protects rights to freedom of conscience, thought, belief and opinion along with the right to freedom of religion.[43] Accordingly, a literal interpretation of section 15(1) is broad and protects an extremely wide range of world views, unlike section 19 of the Constitution of Zimbabwe. The latter section is narrow in its scope, but appears to extend protection to genuinely held religious beliefs and those beliefs which are sincere and based on personal morality, and which extend to conscientiously-held beliefs, whether grounded in religion or secular morality.[44]

As a result, a question as to the nature of religion is most relevant in those countries' constitutions that have a narrow freedom of religion clause, as in the case of Zimbabwe.[45] This might explain the

---

40 Chemerinsky (n 26 above) 1243.

41 See I Khumalo 'Cursed by evil muthi' *Daily Sun* (28 November 2007).

42 Animals Protection Act 71 of 1962.

43 Currie *et al* (n 35 above) 338.

44 *In re Chikweche* (n 3 above) 539.

45 The freedom of religion clause in the Zimbabwe Constitution is identical to the Jamaican constitutional provision found in sec 21, and the courts in both countries have defined religion and concluded that Rastafari is a religion. See United Nations, Economic and Social Council, ESC Conference, 24th session, UN Doc E/C.12/2000/SR.75 (2000) (addressing the important relationship between racism and religion, and citing the Jamaican example of Rastafari. The question of racism arose in that context because of the religion's identification with His Majesty Emperor Haile Sellassie of Ethiopia, believed by Rastafari to be the reincarnated Christ. It noted that Jamaican courts have had to decide whether Rastafari was truly a religion and whether the prohibition of some of its sacraments, such as the smoking of cannabis, flouted the right to exercise one's religion. Like in Zimbabwe, the courts in Jamaica have ruled that Rastafari was indeed a religion, but that it did not necessarily follow that practices which disrupted public order were, of themselves, in conformity with rules relating to religious rights).

assumption-based approach by the Constitutional Court in *Prince* and *Pillay,* and why it has not engaged with the question as to the nature of religion.[46] Yet, as in the Zimbabwean context, the Constitutional Court has confirmed, in relation to the protection of the freedom of religion, that in order to determine if a practice or belief qualifies as religious, a court should ask only whether the claimant professes a sincere belief;[47] that a sincerely held religious belief or practice will receive constitutional protection.[48] Lenta suggests a test for determining whether or not to grant religious exemptions in the South African context. He proposes that several questions be asked, including the following: Is the belief, which seeks to be exempted, genuinely held? Are the beliefs religious?[49] It is submitted that these questions further demonstrate the need to define religion, even in broadly-worded constitutions such as that of South Africa, because they require courts to define religion and to determine the nature of a religious belief. Therefore, there is a slight possibility that the question as to the nature of religion may not be entirely superfluous in the South African (and Malawian) context in light of these countries' broad freedom of religion clauses. Nevertheless,

---

46 One other explanation of the Constitutional Court's reluctance to decide these matters is its commitment to the doctrine of avoidance which forms part of South African constitutional law. This doctrine holds that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'. See *State v Mhlungu* 1995 3 SA 867 (CC) para 59. This doctrine was affirmed in *Zantsi v Council of State, Ciskei & Others* 1995 4 SA 615 (CC) paras 2-8 (where Chaskalson J referred to the salutary rule which is followed in the United States never to anticipate a question of constitutional law in advance of the necessity of deciding it and never to formulate a rule of constitutional law broader than is required by the facts to which it is to be applied). See also Currie *et al* (n 35 above) 75-78 (discussing the reasons for observing the doctrine of avoidance arguing that courts should avoid making pronouncements on the meaning of the Constitution where it is not necessary to do so, so as to leave space for the legislature to reform the law in accordance to its own interpretation of the Constitution); I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138 (discussing political philosophical reasons for the doctrine of avoidance). In the United States, courts have applied a similar principle of avoidance in the adjudication of constitutional matters. See *Abbott Laboratories v Gardner,* 387 US 136, 148-149 (1967) (explaining that the basic rationale of the doctrine of ripeness is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalised and its effects felt in a concrete way by the challenging parties).

47 *Pillay* (n 3 above) paras 52-58 (concluding that since Sunali Pillay held a sincere belief that wearing a nose stud was part of her religion and culture, the practice was considered religious).

48 *Pillay* (n 3 above), citing *Prince* (n 13 above) para 42; *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (SCC) para 43; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 paras 70-71; *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 715-716 (1981); *United States v Ballard* 322 US 78, 86-87 (1944); and *In re Chikweche* (n 3 above).

49 P Lenta 'Religious liberty and cultural accommodation' (2005) 122 *South African Law Journal* 376.

this question remains relevant in countries like Zimbabwe, Malawi[50] and, possibly, Swaziland,[51] where *Farai* is likely to have an impact. Therefore, the decision in *Farai* should be welcomed as an addition to the growing progressive religious jurisprudence in Southern Africa and because it clarifies the law and provides guidance to other believers whose beliefs have not been recognised officially as being religious.

5 Conclusion

In *Prince*,[52] Justice Sandile Ngcobo said that 'the right to freedom of religion is probably one of the most important of all human rights'.[53] In the same case, Justice Albie Sachs reasoned that[54]

> where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the state to walk the extra mile, and not subject believers to a choice between their faith and the law.

In *Prince*, both Ngcobo J and Sachs J were not in the majority, and the issue was not the wearing of dreadlocks in public schools. Rather, the issue was whether or not Rastafari should be accommodated under the criminal law of South Africa, allowing for the use of marijuana for religious purposes.

In the case of *Farai*, the practice that was at issue did not fall within the general legal prohibition, as was the case in *Prince.* Rather, the issue dealt with the practice of Farai's right to freedom of religion and education. It is submitted that in an open and democratic society envisioned

---

50 In Malawi, the relevance of this question is probably not as a result of its constitutional religious clause, which is similar to South Africa's. Instead, it may arise from the absence of any judicial interpretations of sec 33 of the country's constitution.

51 The reference to Swaziland is because in 2000 it was reported that the King of Swaziland disowned several of his nephews for wearing dreadlocks and for subscribing to Rastafari beliefs and practices. See B Matsebula 'Rasta row shakes Swazi royals' 28 May 2002 BBC World Service http://news.bbc.co.uk/1/hi/world/africa/2012793.stm (accessed 25 December 2007); and see Mhango (n 4 above) (briefly discussing Rastafari beliefs, practices and doctrines).

52 n 13 above, 794.

53 *Prince* (n 13 above) 815 para 48.

54 *Prince* (n 13 above) 848 paras 147-149. See also *Prince v South Africa* Communication No 1474/2006, UN Human Rights Committee, views adopted on 31 October 2007, paras 5.5 & 7.5. Prince argues that, if exceptions to the prohibition of the use of cannabis could be made for medical and research purposes and effectively enforced by the state party, similar exceptions could also be made and effectively enforced on religious grounds with no additional burden on the state party; that the failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates his freedom to manifest his religion guaranteed under art 18 of the International Covenant on Civil and Political Rights, and cannot be justified under art 18(3) of the same. Prince also argued that he is the victim of *de facto* discrimination because, unlike others, he has to choose between adherence to his religion and respect for the laws of the land.

under the various international instruments,[55] it should never be justified to prohibit a student from wearing dreadlocks in schools (whether for religious or cultural reasons), because such prohibition manifestly limits the rights of the Rastafari to practise their religion everywhere, and is inimical to human rights and dignity. These kinds of prohibitions, wherever they may be found, stigmatise Rastafari learners and prevent them from enjoying other constitutional rights such as the right to education and the right to be raised by their parents contained in many modern constitutions of Southern Africa[56] and under international law.[57]

Moreover, no evidence from social science research or otherwise has ever been produced that suggests that the wearing of dreadlocks by learners affects their ability to learn and perform in school, or generally affects the standard of education or discipline in schools.[58] On the other hand, one never hears questions on whether an African person who bleaches his or her skin and straightens his or her hair is incapacitated in any way. To adopt the approach advocated by this author, defining religion would permit the courts to challenge mainstream (Christian) assumptions over which practices and beliefs are genuine and acceptable in society. The current interpretation of what are acceptable and genuine practices or beliefs, which interprets dreadlocks as being

---

55 See art 29 of the Universal Declaration of Human Rights, GA Res 217 A(III), UN Doc A/810 71 (1948).

56 Eg, sec 23(3) of the Constitution of Malawi, 1995, provides that '[c]hildren have the right to know, and to be raised by, their parents'; article 15(1) of the Constitution of Namibia, 1992, provides that '[c]hildren shall have the right to know and be cared for by their parents'; art 7(c) of the Constitution of Swaziland, 2005, provides that '[p]arliament shall enact laws necessary to ensure that parents undertake their natural right and obligation of care, maintenance and proper upbringing of their children'; art 27 of the Constitution of Rwanda, 2003, provides that '[b]oth parents have the right and duty to bring up their children'; art 30(1) of the Constitution of Uganda, 1995, provides that '[m]en and women of the age of eighteen years and above have the right to marry and to found a family'; art 16(1) of the Constitution of Tanzania, 1997, provides that '[e]very person is entitled to the privacy of his family and of his matrimonial life'; arts 43 and 46 of the Transitional Constitution of the Democratic Republic of Congo, 2003, provide that '[f]or parents the care and education to be given to children shall constitute a natural right; and the parents shall, by priority, have the right to choose the type of education to be given to their children'; and sec 28(b) of the South African Constitution provides that 'every child has the right ... to parental care'.

57 See arts 11, 19 and 20 of the African Charter on the Rights and Welfare of the Child, OAU Doc CAB LEG/24 9/49 (1990), entered into force 29 November 1999; and arts 5, 14 & 15 of the 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.

58 The US Supreme Court set a precedent for the use of social science research in defining and examining inequity in education. See *Brown v Board of Education* 347 US 497 (1954). See also *Pillay* (n 3 above) para 102 (rejecting the argument that allowing an exemption to wear a nose stud has a demonstrable effect on school discipline or the standard of education); and *Farai* (n 1 above) (holding that the issue of discipline in schools is not related to Farai's right to wear dreadlocks in school).

inconsistent with mainstream Western society (Christian) views, but finds no problem with the bleaching or straightening of a learner's hair in school, is not consistent with the character of an open and tolerant society and should be condemned.[59]

Furthermore, it should be noted that the decision in *Farai* is likely to have an effect in some countries in Southern Africa where government schools have for many years instituted similar prohibitions as in the case of *Farai.* One country where this decision is likely to have the effect of reversing such prohibitions is Malawi. In Malawi, Rastafari learners are prevented from attending public schools on account of their dreadlocks. This prohibition is enforced based on a long-standing tradition, adopted by the Ministry of Education during the period when Malawi was under British colonial rule, that a student must be dressed in a prescribed school uniform and well-groomed.[60] There are several reasons that support my argument that *Farai* is likely to have an effect on future Rastafari litigants in Malawi.

Firstly, section 33 of the Constitution of Malawi, which provides for freedom of 'conscience, religion, belief and thought, and to academic freedom', reads like section 19(1) of the Constitution of Zimbabwe (which has been read to protect the right of a dreadlock-wearing Rastafari to attend a government primary school), and would likely be interpreted in the same way by a Malawian judge in a future case involving a Rastafari student with dreadlocks. Secondly, section 11 of the Constitution of Malawi provides in subsection (2) that[61]

> in interpreting the provisions of the Constitution, a court of law shall promote the values which underlie an open and democratic society and, where applicable, have regard to current norms of international law and comparable case law.

Recently, courts in Malawi have explained that they will rely on foreign case law from countries that have constitutional provisions that have the same effect and wording as the constitutional provisions in Malawi and countries that have similar historical backgrounds.[62] Therefore,

---

59 Lenta has correctly noted that liberal democracies recognise that the demand for uniformity of treatment must often give way to the demands of those who do not share mainstream attitudes and beliefs to be permitted to act in violation of civic norms; Lenta (n 49 above) 354.

60 See Mhango (n 4 above).

61 Secs 11(2)(a) & (b) Constitution of Malawi.

62 See *Francis Kafantayeni v Attorney-General*, Constitutional Case 12 of 2005 (unreported) (where the High Court, in relying on the case of *Reyes v The Queen* (2002) 2 AC 235, ruled that the mandatory death sentencing provision under the Malawi Penal Code was unconstitutional); and *In the Matter of the Question of the Crossing the Floor by Members of the National Assembly* (Presidential Reference Appeal 44 of 2006) [2007] MWSC 1 (15 June 2007), http://www.saflii.org (accessed 12 December 2007) (where the Supreme Court of Appeal justified its reliance on foreign case law in upholding the country's anti-defection clause by explaining that many countries in the region with similar historical backgrounds and legal systems to Malawi have anti-defection clauses).

since Malawi and Zimbabwe share a common historical background and legal system, dating back to 1953 when the Federation Rhodesia and Nyasaland was established under which modern Zimbabwe and Malawi were governed,[63] it is likely that courts in Malawi will find *Farai* relevant in the adjudication of similar matters in Malawi. Additionally, since the constitutional guarantee in section 19(1) of the Constitution of Zimbabwe has a similar wording and effect as section 33 of the Constitution of Malawi, the decision in *Farai* is a valuable and relevant persuasive precedent for courts in Malawi. Lastly, courts in Malawi have not yet been presented with an opportunity to interpret section 33 of the Constitution of Malawi, particularly with reference to the freedom of Rastafari learners to wear dreadlocks in public schools. As a result, they will likely find the decision in *Farai* relevant. Therefore, it is submitted that the Supreme Court decision in *Farai* should be welcomed as a progressive realisation of religious freedom in Southern Africa and for its likely consequences in the protection of religious freedom in neighbouring countries.

63 See J Makawa 'The rise and fall of the Federation of Rhodesia and Nyasaland' unpublished LLM thesis, Michigan State University, 1965; and JRT Wood *The Welensky papers: The history of the Federation of Rhodesia and Nyasaland* (1983).

Recent Publications

F Francioni (ed) *Biotechnologies and international human rights*

Hart Publishing (2007) 401 pages

Pieter Carstens
Professor, Department of Public Law, University of Pretoria, South Africa; Chairperson of the Unit for Medicine and Law, a joint venture between the University of Pretoria and the University of South Africa

At a time when medical science is once again challenged by the emergence of invasive medical research and human experimentation and a renewed interest in biotechnology, genetics, therapeutic and non-therapeutic cloning, nanotechnology, bioethics and environmental health care, the publication of *Biotechnologies and international human rights* is certainly to be welcomed. Although medical research and related medical scientific activities are generally regulated by a number of international instruments (such as the Helsinki Declaration), the question remains to what extent activities in the field of biotechnology can be regulated by the existing human rights principles and standards. What, for instance, is the relevance of the Declaration of the Human Genome (1997) and the Universal Declaration on Bioethics and Human Rights (2005) with respect to traditional concepts of state liability and the functioning of domestic remedies, specifically in the context of the misuse of biotechnologies? Are new regulatory frameworks needed to redefine core principles of human rights and to protect human genetic material/data in context of the human genome and intellectual property rights or considerations? In this regard, it is clear that normative and ethical boundary conditions will be pivotal.

This book follows upon and complements the previous volume *Biotechnology and international law* (Hart 2006) and contains a collection of fascinating (and in many ways groundbreaking) essays, edited by the eminent Professor Francesco Francioni. In essence, all the essays focus primarily on the following issues: What are the core human rights principles that define the boundaries of the legitimate use of

biotechnology? What is the legal status of human genetic material and what are the implications of the definition of the human genome as 'common heritage of humanity' for the purposes of patenting genetic inventions? What is the meaning of, and how can we implement the emerging right to an equitable sharing of the benefits arising from the commercial use of biogenetic resources? What is the role of human rights and, in particular, of the principles of non-discrimination, in preventing a new 'genetic divide' that would increase the already striking disparities between the developed and the developing world?

The book is divided into six parts, which are made up as follows: Part I provides an overview and cross-cutting issues with reference to genetic resources, biotechnology and human rights in the context of the international legal framework and issues with regard to state responsibility; part II deals with bioethics and genetics with reference to ethical pluralism, the consolidation of bio-rights in Europe, UNESCO's standard setting activities on bioethics and an analysis of the 2005 Universal Declaration on Bioethics and Human Rights; part III deals with economic, social and cultural rights with specific reference to agricultural biotechnology and the right to food, the right to environment, health and economic freedom, as well as a discussion of biogenetic resources and the rights of indigenous people; part IV deals with intellectual property rights and trade issues; part V deals with participatory rights and remedies; and part VI deals with international humanitarian law in the context of offensive military applications of biotechnologies. In addition, there is a table of cases with reference to judgments of national courts; a table of European legislation; a table of national legislation and a table of international human rights instruments. At the back of the book a comprehensive word index is provided. The outlay, structure, presentation and editorial care of the book are all of a high standard.

In assessing the contents of the book, one has to observe that the obvious strength and merit of this publication lie in the mapping of an international legal framework for the protection of human rights in the context of the application of biotechnology in its full diversity. The interface between biotechnology and human rights becomes patently clear in the comprehensive and diverse analyses by the various contributors. As a collection of pertinent and revealing essays, the book certainly succeeds and undoubtedly makes a significant contribution to map this emerging field of inquiry. An additional strength of the book is to be found in the comparative approach (albeit mainly in the context of biotechnology in the developed countries with some reference to some developing countries). Too often books of this nature tend to have too narrow a focus on salient issues pertaining to biotechnology, discarding the universality and application thereof. This is not the case with the present publication.

Apart from the academic discussion and analyses, the book also serves as an important compilation and resource manual for international

human rights instruments, directly or indirectly connected to biotechnology. In this regard, it is specifically the International Declaration on Human Genetic Data, the UN Declaration on Human Cloning, the UNESCO Universal Declaration on the Human Genome and Human Rights and the Universal Declaration on Bioethics and Human Rights that are to be noted. These instruments, and the application thereof in the context of the progressive realisation of human rights, are comprehensively dealt with in the book on various levels. As stated in the preface of the book, ultimately the quest is one to legally regulate and map the human genome with all its concomitant implications for human identity as the 'common heritage of humanity'. The essays contained in the book vividly (and often on a perturbing level, if one has regard to the vast field of application) illustrate and portray this quest. Ultimately, human rights have to protect humanity against abuse and exploitation that may emanate from the unwise and opportunistic application of biotechnology. However, unfounded and unscientific *angst* should not be employed to curb the benefits that biotechnology will and can yield for mankind and medical science. It is to be remembered that every benefit brought about by medical science and biotechnology is accompanied by risks. One cannot take the benefits without the risks. Ultimately, in the context of human rights, it is a question of balance and boundary conditions. This publication sets out to explore these balances and boundary conditions, juxtaposed against the harsh realities of, for instance, the protection of intellectual property rights and the concept (or 'myth') of property.

It is difficult to select one specific essay in the book that stands out in comparison to the rest of the collection. This, in my view, would be unfair, as all the essays contained in the book are shining examples of fine academic scholarship in a particularly demanding discipline. However, in the context of the reviewing journal, the *African Human Rights Law Journal*, it is specifically the contribution of Federico Lenzerini entitled 'Biogenetic resources and indigenous peoples' rights' that needs to be mentioned. In a fascinating and groundbreaking essay, he discusses the influence of biotechnology on the human rights of indigenous societies, which are particularly vulnerable groups, specifically in the context of the harvesting of genetic samples and other forms of experimentation. This highly informative and rather controversial analysis is done with reference to the bio-prospecting of indigenous peoples' biogenetic resources, an explanation of the harvesting of genetic samples of indigenous people in the context of bio-imperialism (also with reference to the concept of 'bio-piracy'), and an analysis of the international legal framework for the application of the human rights of indigenous societies in the context of their rights to access their biogenetic material. The strength and value of the contribution lie in the solutions proposed by the author which will, if consensus can be reached (in the context of the TRIPS Agreement, and other instru-

ments/considerations for the protection of intellectual property rights), defuse the tension between different international regimes.

Ultimately, as Francioni correctly states, it has to be noted that the current asymmetry of knowledge and power between the scientific and technological actors, on the one hand, and the traditional institutions of government and of civil society, on the other, cannot be redressed by the concurrent race to the privatisation and propertisation of genes, the human body, plants and everything else. A more rational approach is that which is based on the universally shared value of international human rights. At a time when the entire planet is more at risk than ever before due to environmental threats, fuel and food shortages, ravaging conflicts and disease, it is specifically biotechnology in the context of economic, social and cultural rights that will play a decisive role. Consequently, international human rights as a normative ethically-inspired legal framework will be severely challenged and compromised, and in this regard this publication is an essential guide and resource manual. It is highly recommended.

AFRICAN HUMAN RIGHTS LAW JOURNAL
GUIDE FOR CONTRIBUTORS

Contributions should preferably be e-mailed to
isabeau.demeyer@up.ac.za

but may also be posted to:
The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria
South Africa
0002

All correspondence, books for review and other communications should be sent to the same address.

The editors will consider only material that complies with the following requirements:

The submission must be original.

- The submission should not already have been published or submitted elsewhere.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- If the manuscript is not sent bye-mail, it should be submitted as hard copy and in electronic format (MS Word).
- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, professional qualifications and professional or academic status.
- Authors should supply a summary of their contributions of not more than 300 words.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets. The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them conform with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal* of *International and Comparative Law 625.*
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.

- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; sees. No full stops should be used. Words in a foreign language should be *italicised.* Numbering should be done as follows:
  1
  2
  3.1
  3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used 'Constitution' .
- Official titles are capitalised: eg 'the President of the Constitutional Court' .
- Refer to the *Journal* or www.chr.up.ac.za for additional aspects of house style.

2008 SUBSCRIPTIONS

Subscription enquiries and orders to:
JUTA Client Services, JUTA Law, PO Box 24299, Lansdowne 7779, South Africa Telephone: (021) 763 3600 Fax: (021) 761 5861
E-mail: cserv@juta.co.za

SOUTH AFRICA

R485,00 (14% VAT included) plus R70,00 postage and packaging: R555,00

REST OF THE WORLD

R426,00 plus R170,00 surface postage and packaging: R596,00

THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see www.chr.up.ac.za or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
Fax: (012) 362-5125
chr@up.ac.za

Staff

Kweku Antwi
Project Officer: Good Governance Programme

Lizette Besaans
Manager: Pretoria University Law Press

Yolanda Booyzen
Webmaster

Cherryl-Lee Botterill
Project Manager: Good Governance Programme

Danie Brand
Research Associate; Senior Lecturer in the Faculty of Law

Elize Delport
Advisor to the Gender Unit

Isabeau de Meyer
Publication Manager: *African Human Rights Law Journal*; Administrator: LLM (Human Rights and Democratisation in Africa)

Patrick Eba
Researcher: AIDS and Human Rights Research Unit

Solomon Ebobrah
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Loretta Feris
Research Associate; Associate Professor in the Faculty of Law

Michelo Hansungule
Professor of Human Rights Law; Academic Co-ordinator: LLM (Human Rights and Constitutional Practice)

Gill Jacot Guillarmod
Senior Programme Manager; Liaison Officer

Waruguru Kaguongo
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Magnus Killander
Researcher; Doctoral candidate

Emily Laubscher
Programme Co-ordinator: LLM (International Trade and Investment Law in Africa)

Hye-Young Lim
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Harold Meintjes
Financial Manager

Jérémie Munyabarame
Project Manager: African Human Rights Moot Court Competition; Programme Officer: LLM (Human Rights and Democratisation in Africa)

Tarisai Mutangi
Tutor: LLM (Human Rights and Democratisation in Africa); Doctoral candidate

Martin Nsibirwa
Programme Manager: LLM (Human Rights and Democratisation in Africa)

Sarita Pienaar-Erasmus
Assistant Financial Manager

Charmaine Pillay
Assistant Financial Manager

Karen Stefiszyn
Project Manager: AIDS and Human Rights Research Unit

Norman Taku
Assistant Director

Tau Tawengwa
Researcher

Carole Viljoen
Office Manager

Frans Viljoen
Director

John Wilson
Project Officer: LLM (Human Rights and Democratisation in Africa)

Stu Woolman
Research Associate; Associate Professor in the Faculty of Law

Titi Uliem
Academic Associate

Extraordinary professors

John Dugard
Member, International Law Commission

Johann Kriegler
Retired Justice of the Constitutional Court of South Africa

Edward Kwakwa
Legal Counsel, World Intellectual Property Organisation, Geneva, Switzerland

Mary Robinson
Director, Realizing Rights: Ethical Globalization Initiative, USA

Extraordinary lecturers

Jean Allain
Senior Lecturer in Public International Law, Queen's University of Belfast, Northern Ireland

Cecile Aptel
Legal Advisor to the UN International Independent Investigation Commission, Lebanon

Albert Hoffmann
Judge of the Law of the Sea Tribunal, Hamburg, Germany

Cephas Lumina
Senior Lecturer, Faculty of Law, University of KwaZulu-Natal; Advocate of the High Court of Zambia; Fellow of the Salzburg Seminar

Theunis Roux
Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law

Advisory board

Kader Asmal
Retired Member of Parliament

Christof Heyns
Dean, Faculty of Law, University of Pretoria; Chair

Johann Kriegler
Retired Justice of the Constitutional Court of South Africa

Shirley Mabusela
Former Deputy Chairperson, South African Human Rights Commission

Yvonne Mokgoro
Justice of the Constitutional Court of South Africa

Johann van der Westhuizen
Justice of the Constitutional Court of South Africa

Projects and programmes

- African Human Rights Moot Court Competition
- Master's Programme (LLM) in Human Rights and Constitutional Practice
- Master's Programme (LLM) in Human Rights and Democratisation in Africa
- Master's Programme (LLM) in International Trade and Investment Law in Africa
- Gender Unit
- AIDS and Human Rights Research Unit (with the Centre for the Study of AIDS)
- Good Governance Programme
- Indigenous Peoples' Rights in Africa
- Law of Africa Collection

Regular publications

- *African Human Rights Law Journal*
- *African Human Rights Law Reports* (English and French)
- *Human Rights Law in Africa* (English and French)
- *Constitutional Law of South Africa*

CHART OF RATIFICATIONS : AU HUMAN RIGHTS TREATIES

Position as at 31 December 2007
Compiled by: I de Meyer
Source: http://www.africa-union.org (accessed 31 March 2008)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	
Angola	02/03/90	30/04/81	11/04/92		**30/08/07**
Benin	20/01/86	26/02/73	17/04/97		30/09/05
Botswana	17/07/86	04/05/95	10/07/01		
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06
Burundi	28/07/89	31/10/75	28/06/04	02/04/03	
Cameroon	20/06/89	07/09/85	05/09/97		
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05
Central African Republic	26/04/86	23/07/70			
Chad	09/10/86	12/08/81	30/03/00		
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04
Congo	09/12/82	16/01/71	08/09/06		
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	
Democratic Republic of Congo	20/07/87	14/02/73			
Djibouti	11/11/91				02/02/05
Egypt	20/03/84	12/06/80	09/05/01		
Equatorial Guinea	07/04/86	08/09/80	20/12/02		
Eritrea	14/01/99		22/12/99		
Ethiopia	15/06/98	15/10/73	02/10/02		
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05
Ghana	24/01/89	19/06/75	10/06/05	25/08/04	13/06/07
Guinea	16/02/82	18/10/72	27/05/99		
Guinea-Bissau	04/12/85	27/06/89			
Kenya	23/01/92	23/06/92	25/07/00	04/02/04	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04
Liberia	04/08/82	01/10/71			
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04
Madagascar	09/03/92		30/03/05		
Malawi	17/11/89	04/11/87	16/09/99		20/05/05
Mali	21/12/81	10/10/81	03/06/98	10/05/00	13/01/05
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05
Mauritius	19/06/92		14/02/92	03/03/03	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05
Namibia	30/07/92		23/07/04		11/08/04
Niger	15/07/86	16/09/71	11/12/99	17/05/04	

Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04
Sahrawi Arab Democratic Rep.	02/05/86				
São Tomé and Príncipe	23/05/86				
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04
Seychelles	13/04/92	11/09/80	13/02/92		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	03/03/07
Togo	05/11/82	10/04/70	05/05/98	23/06/03	12/10/05
Tunisia	16/03/83	17/11/89		**21/08/07**	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	
Zambia	10/01/84	30/07/73			02/05/06
Zimbabwe	30/05/86	28/09/85	19/01/95		
TOTAL NUMBER OF STATES	**53**	**45**	**41**	**24**	**23**

* Additional declaration under article 34(6)
Ratifications after 31 July 2007 are indicated in bold